



OREGON BUREAU OF
**LABOR &
INDUSTRIES**



Wage and Hour Laws

For Adult Care Home Providers

Multnomah County Adult Care Home Conference

September 25, 2023



Employer Assistance

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Agenda

- Legal Hiring Basics
- Oregon Minimum Wage and Overtime (Credit for Room and Board?)
- Exemptions to Minimum Wage and Overtime
- Compensation Systems and worker classification:
 - salary/hourly/stipends/volunteers/family members/independent contractors
- Rest and Meal Periods Requirements
- Paid/Unpaid Time and Tracking
- Permissible Payroll Deductions
- Final Paychecks
- Enforcement Risks
- Free and Low-cost Resources are available!



Legal hiring basics

All Oregon employers must:

- Determine each employee's identity and authorization to work in the US (form I-9 and M-274)
- Complete a New Hire Reporting form: https://www.doj.state.or.us/wp-content/uploads/2017/06/Oregon_New_Hire_Reporting_Form.pdf

All Oregon employers should:

- Have applicants fill out an application form
- Have new employees review Employee Handbook and sign an acknowledgement
- Consider purchasing our Legal Hiring Guidelines and Wage and Hour Laws handbooks: <https://www.oregon.gov/boli/employers/Pages/purchase-employment-law-handbooks.aspx>



Oregon's minimum wage

The rate depends on where you work.

\$14.20 per hour
Standard

Benton, Clatsop, Columbia, Deschutes, Hood River, Jackson, Josephine, Lane, Lincoln, Linn, Marion, Polk, Tillamook, Wasco, Yamhill, parts of
* Clackamas, Multnomah, & Washington



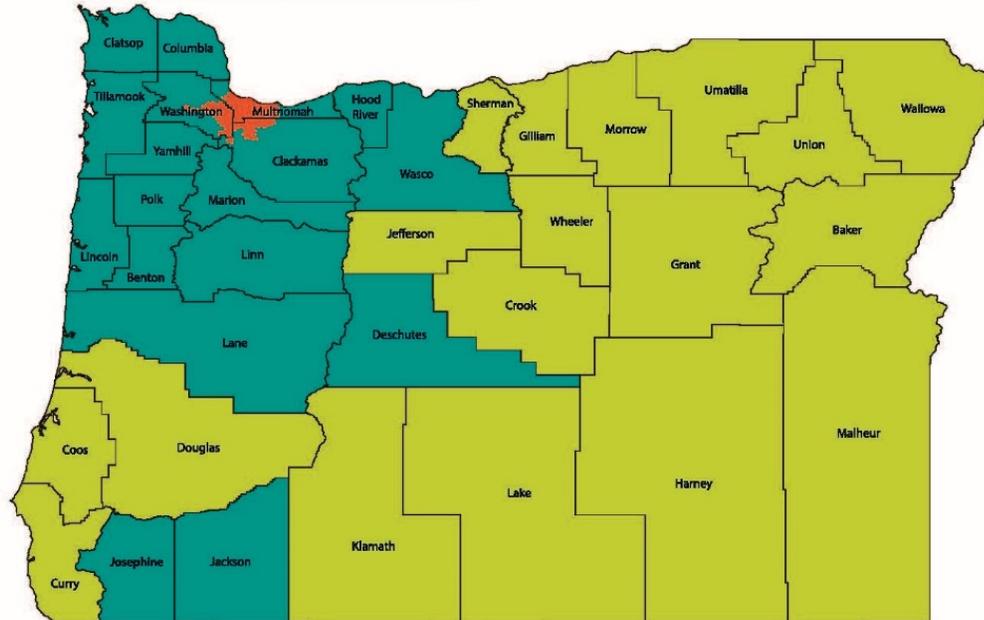
* The minimum wage you should get depends on your employer's exact address. If you work **INSIDE** the urban growth boundary, you should make at least **\$15.45**. If you work **OUTSIDE** the urban growth boundary, you should make at least **\$14.20**. Look up your work address here: bit.ly/metroboundary

\$15.45 per hour
Portland Metro Area

* Clackamas, Multnomah, & Washington

\$13.20 per hour
Nonurban Counties

Baker, Coos, Crook, Curry, Douglas, Gilliam, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, Wheeler



July 1, 2023

Standard rate: \$14.20
Portland Metro: \$15.45
Rural counties: \$13.20



Credit against MW for Room and Board?

- An employer may only offset the fair market value of meals, lodging or other facilities or services against the obligation to pay minimum wage if they are provided for the employee's "private benefit".
- Room and board are not for the private benefit of the employee if they are required, coerced or necessary to maintain an adequate workforce at such times and locations as the employer needs them.

OAR 939-020-0025



Time tracking

Basic obligation

An employer must record the hours worked each day and work week for each employee subject to the minimum wage, even if the employee is not subject to overtime

An employer may use any method of timekeeping (including a time clock, timekeeper or the worker's own record) provided it is complete and accurate

OAR 839-020-0080 & 29 C.F.R. § 516.2

Workers who provide care in a family home are entitled to at least 24 consecutive hours off each work week, and for each year in which they average at least 30 hours worked per week, they are entitled to three paid personal days off (in addition to Oregon sick time)



Overtime

General rule:

- An overtime premium (of 1.5 times the “regular rate”) must be paid for **all hours worked after 40 hours** in a “workweek”

29 U.S.C. § 207(a), ORS 653.261





Minimum Wage and Overtime Exemptions

Exemptions for Adult Care Homes

Resident Managers of Adult Foster Homes

A resident manager of an adult foster home licensed pursuant to ORS 443.705 to 443.825 and who is domiciled (i.e., has his or her permanent residence) at the adult foster home is exempt from state minimum wage and overtime. ORS 653.020(17); OAR 839-020-0004(14).

NOTE: Federal law does not provide a similar exemption. A resident manager may qualify for exemption as a salaried executive or perhaps administrative employee. Absent exemption under another provision of federal law, any employer subject to the FLSA will need to ensure employees receive at least federal minimum wage (\$7.25) and overtime due for all hours worked over 40.



Exemptions, continued

In-home companions to the elderly or infirm

- Individuals employed in domestic service in a family home to provide companionship services need not be paid minimum wage or overtime. ORS 653.020(14); 29 U.S.C. § 213(a)(15).
- “Companionship services” are now very narrowly defined, limited to fellowship and protection for an elderly person or person with an illness, injury or disability who requires assistance in caring for the person
- Also includes “care” if provided in conjunction with and attendant to providing fellowship and protection if limited to 20% of total hours worked per person and per work week.



Definitions of “fellowship” and “protection”

- Fellowship means:
 - engaging the person in social, physical and mental activities
- Protection means:
 - being present with the person in the home or outside the home to monitor the person’s safety and wellbeing
- Examples may include:
 - Conversation, reading, games, crafts, taking the person on walks or to run errands or to appointments or social events



Definition of “care services”

Care Services are limited to 20% of weekly hours worked, meaning:

- assistance with activities of daily living, including dressing, grooming, feeding, bathing, toileting, and transferring
- and instrumental activities of daily living (tasks which enable the person to live independently at home), including meal preparation, driving, light housework, managing finances, assistance with physically taking medications and arranging medical care
- household work must be limited to directly benefitting the elderly person or person with an illness, injury or disability
- **Prohibited:** meal preparation or laundry for other members of the household
Result: loss of the MW/OT exemption for that work week



Third-party Employers

Effective 1/1/15, home care staffing agencies and other employers of direct care workers **are not permitted to claim the exemption from minimum wage and overtime** for companionship services, even when the worker is jointly employed by the agency and the family or individual or household using the services. The individual, family or household using the services may claim the exemption, however.



Want more?

See US Department of Labor Fact Sheets for further information:

- Fact Sheet #25 Home Health Care and the Companionship Services Exemption under the FLSA
- Fact Sheet #79A Companionship Services under the FLSA
- Fact Sheet #79B Live-in Domestic Service Employment under the FLSA



Calculating overtime

Defining the “**regular rate**”:

- A regular hourly rate (not less than minimum wage)
- Determined by dividing total remuneration for a given workweek by the total hours worked in that work week.

OAR 839-020-0030(2)(b)



Calculating overtime

Regular rate computation includes ***all compensation***, unless excluded by statute

- **Wages and salary**
- **Lump sum payments**
- **Non-discretionary bonuses**
- **On-call pay**

See 29 C.F.R. § 778.109, OAR 839-020-0030(2)(b)



Calculating overtime

Regardless of the method of compensation, all non-exempt employees must be paid overtime.

Methods of compensation could include:

- Hourly
- Salary
- Piece-rate
- Commission
- Job-rate
- Day-rate



Calculating overtime

Under 29 C.F.R. § 778.200, employers may exclude from the regular rate:

- Discretionary bonuses
- Gifts
- Expense reimbursements
- Pay for vacation, sick leave or holidays
- Bona fide profit sharing
- Bona fide benefits paid to third parties (e.g., insurance, retirement, etc.)

29 C.F.R. § 778.109, OAR 839-020-0030(2)(b)



Calculating overtime: Salaried employees

If the salary represents a work week:

1. Determine the **number of hours** represented by the salary
2. **Divide the salary** by the **number of hours** covered to obtain the regular rate
3. Compensate overtime hours at **1.5 times the regular rate**



What about stipends, volunteers and family?

- Stipends are not wages and may not be substituted for the payment of wages. These may be provided to non-employees such as volunteers and interns, but only in a nominal amount or as reimbursement for actual expenses incurred.
- **But**, only religious, charitable, public, community service or similar nonprofit organizations may use the services of volunteers. And there are strict criteria for unpaid interns likely not present here. Your workers are probably not properly classified as independent contractors, either.
- **Is a family member** willing to work for you in your care home for free? They are considered employees under wage and hour law and entitled to minimum wage for all hours worked.



Sleep Time

- If the duty is less than 24-hours, no wage reduction for sleep is allowable OAR 839-020-0042(1)
- If the duty is 24 hours or more, the employer and employee may agree to exclude compensation for bona fide meal periods and up to eight hours of sleep time (but must get at least 5 hours uninterrupted sleep time) 29 C.F.R. §785.20, OAR 839-020-0042(2)
- If residing on the employer's premises, any reasonable agreement between the employer and employee regarding number of hours worked that takes all pertinent facts into consideration will be accepted





Working conditions: Meal and rest breaks

Rest breaks

- Federal law says rest breaks are given **with pay** and count as work time. 29 C.F.R. § 785.18
- State law says adults get **10 continuous minutes of paid break time for every 4 hours**, or major portion thereof, worked in each work period during which the employee is relieved of all duty ORS 653.261, (15 minutes for minors) OAR 839-020-0050(6)(a)
- Failure to provide adequate meal or rest periods carries a maximum penalty of **\$1,000 per violation** – OAR 839-020-1010,1020



Rest breaks: Timing

- Rest period should fall in the middle of each segment of four hours
- Rest breaks are given in addition to meal periods; employer shouldn't let employees add rest periods to a meal period or stack them at end of the employee's shift
- The employer has the burden to show they provided appropriate rest periods



Rest breaks

“**Work period**” is the period between the time the employee begins work and the time the employee ends work *and* **Includes rest periods** (meal periods excluded).

Collective Bargaining Agreement: Meal periods and rest periods may be modified by a CBA.

Exception for adult worker in a retail/service establishment working alone in a shift of 5 or fewer hours in a 16-hour period. Must be allowed to use the restroom when necessary.



Rest breaks

Length of work period	Number of rest breaks required
2 hrs or less	0
2 hrs 1 min - 5 hrs 59 min	1
6 hrs	1
6 hrs 1 min - 10 hrs	2
10 hrs 1 min - 13 hrs 59 min	3
14 hrs	3
14 hrs 1 min - 18 hrs	4
18 hrs 1 min - 21 hrs 59 min	5
22 hrs	5
22 hrs 1 min - 24 hrs	6



Meal periods

Federal law stipulates *bona fide* meal periods are not work time and are given without pay provided:

- The employee is (must be) completely relieved of all duty, and
- The meal period is **30 minutes or more in duration**
- Employer need not allow employee to leave premises

Oregon exceptions: Undue hardship (signed notice required), Rare and unanticipated circumstances, and collective bargaining agreements that provide for meal periods.

More information: <https://www.oregon.gov/boli/workers/Pages/meals-and-breaks.aspx>



Meal periods: Timing

State law allows/requires uninterrupted meal periods of 30 minutes or more without pay

- Not required on shifts less than 6 hours
- 6- to 7-hour shifts meals should be taken between 2nd & 5th hours
- Shifts of 7+ hours meals should be taken between 3rd & 6th hours
- **Clarifying rule:** after conclusion of the 2nd/3rd hour and prior to the commencement of the 5th/6th hour

ORS 653.261, OAR 839-020-0050(1)(c)



Meal periods: Timing

Length of work period	Number of meal periods required
2 hrs or less	0
2 hrs 1 min - 5 hrs 59 min	0
6 hrs	1
6 hrs 1 min - 10 hrs	1
10 hrs 1 min - 13 hrs 59 min	1
14 hrs	2
14 hrs 1 min - 18 hrs	2
18 hrs 1 min - 21 hrs 59 min	2
22 hrs	3
22 hrs 1 min - 24 hrs	3



Expression of breast milk

Effective January 1, 2020, the legislature expanded protections for employees looking to express breast milk at work.

Basics of the law include:

- Employer shall provide the employee with a **reasonable rest period** to express breast milk **each time** the employee has a need (this moves past the previous 30 min requirement)
- **All employers covered**, not just those with 25 or more
- **When possible**, the employee shall provide reasonable notice that the employee intends to express breast milk
- Employer **may not discipline** an employee for failure to provide notice
- **Only employers with 10 or fewer employees** are eligible for an **undue hardship defense**
- Salaried exempt employees get these, too (but not regular rest/meal periods)



Undue hardship (only for ER with 10 or fewer)

What represents an undue hardship?

Factors to consider include:

- Nature and the **cost of the accommodation**
- The overall **financial resources** of the employer:
- **Size** of the business
- Number of **locations**
- Type of **operations**
- **Composition, structure and functions** of the workforce
- **Geographic** separateness

[See **ORS 659A.121 (2)**]





Deductions

Deductions from wages

No employer may withhold, deduct or divert any portion of an employee's wages unless:

- Employer is **required to do so by law** (taxes, social security, garnishment);
- Deductions are **authorized in writing by employee**, are for the **employee's benefit** and are recorded in employer's books (additional restrictions on final paycheck: the lesser of 25% of disposable earnings or amounts in excess of \$254 per week as of Jan. 1, 2020 ;

(continued)



Deductions from wages

No employer may withhold, deduct or divert any portion of an employee's wages unless (continued):

- Employee voluntarily signed authorization for deduction for any other item, provided ultimate recipient of money is not the employer and deduction is recorded in employer books (i.e., charitable contributions);
- Deduction is authorized by collective bargaining agreement (i.e., union dues); or
- Deduction is authorized under ORS 18.736 (garnishments), plus \$2.00 processing fee per week.



Paycheck deductions: Required

- State and Federal Income Taxes
- Social Security
- Garnishment Order
- Assigned Wage Order



Deductions from wages

- An employer may deduct for the cost of meals and lodging or other goods or services as long as:
 - They are for the private benefit of the employee; and
 - The employee signs a written authorization.

OAR 839-020-0025



Deductions for employee loans

- ORS 18.385 exempts 75% of the individual's "disposable earnings" from garnishment, AND
- Under no circumstance must the employee be left with less than the following amounts:
 - **\$254** for any period of one week or less;
 - **\$509** for any two-week period;
 - **\$545** for any half-month period;
 - **\$1,090** for any one-month period
- **These requirements also apply to deductions from final wages for the repayment of a loan.**





Final paychecks

Final pay: Deadlines

- Employment terminates:
Due by close of next business day
- Employee quits with less than 48 hours' notice:
Five days or next payday, whichever comes first
- Employee gives at least 48 hours' notice:
Final day of employment. If the final day falls on a Sat., Sun. or holiday, must be end of next business day



Final pay deductions: Loans

Repayment of a loan made by the employer to the employee is allowed if the following criteria are met:

- Employee voluntarily signs agreement;
- Paid to employee in cash or by check (ORS 652.110);
- Loan solely for employee's benefit;
- Not connected to employee's employment;
- Deduction does not exceed amount permitted by garnishment (ORS 18.385)
- Deduction is recorded in employer's books.

ORS 652.610



Final pay

- State: 6 years for minimum wage and agreed rates of pay/benefits/2 years for overtime violations
- Federal: Two years for minimum wage and overtime violations
- **Exception:** Claims filed for alleged “willful” violations extended to 3 years



Final pay: Penalties

Wages continue from due date at same hourly rate for 8 hours per day
Until paid or a lawsuit is filed up to a maximum of 30 days (Plus potential 1K
in civil penalties for willful violation and penalties doubled if MW/OT involved)

Except:

- When employer pays estimated wages timely as long as employer pays all wages earned and unpaid within 5 days after employee submits time records
- If employee provides written notice of nonpayment, penalty may not exceed 100% of unpaid wages unless the employer fails to pay the full amount owed within 12 days of notice
- When employer can show financial inability to pay the wages when due



Enforcement Risks



What happens if an employee has a complaint about wage and hour violations?

- If it is just a complaint to BOLI, you caught a break: you'll probably just get a warning letter with our telephone number unless there are multiple complaints.
- Wage claims are another matter: they could be filed in court or with our Wage and Hour Division. Both carry substantial financial risks for employers who violate the law, such as exposure to damages, civil penalties, attorneys' fees, interest and costs.
- If you get an internal complaint, call us for guidance (not legal advice) or counsel (yes, for legal advice). Often you can resolve the matter informally and amicably. If there's a problem, do what you can to fix the problem before you get sued!



Free and low-cost resources

- You can call or email us for free guidance and assistance!
- You can sign up for our free listserv with monthly updates:
<https://omls.oregon.gov/mailman/listinfo/boli-ta>
- You can purchase our handbooks on Wage and Hour Law, Leave Laws, Legal Hiring Practices, Policy writing, and more:
<https://www.oregon.gov/boli/employers/Pages/purchase-employment-law-handbooks.aspx>
- You can register for training:
<https://www.oregon.gov/boli/employers/Pages/employer-training-seminar-schedule.aspx>





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