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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

FILED

01/09/2025 10:46 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends rule to allow contractors on public works to take credit for certain benefit contributions.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 02/21/2025 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

These rules are necessary to describe the method by which contractors on public works projects may take a credit towards the prevailing wage for the payment of certain fringe benefits. Contractors on public works projects may comply with the law relating to the prevailing wage by paying wages in cash, by making irrevocable contributions to a trustee or third person under a fringe benefit plan, fund or program, by assuming an enforceable commitment to bear the costs of bona fide fringe benefits, or by a combination of these cash payments, contributions, and assumptions of costs. When, however, employees perform work on both prevailing wage projects and non-prevailing wage projects, it is necessary to identify the proportion of payments to a fringe benefit plan that is attributable to prevailing wage projects and the proportion that is attributable to non-prevailing wage projects. This principle, described as "annualization" under federal law, ensures that a disproportionate amount of the fringe benefit is not paid out of wages earned on prevailing wage projects. These rule amendments are necessary to describe the method by which regular contributions can be converted to an hourly cash equivalent, in order to accurately identify the proportion of those fringe benefits that are attributable to prevailing wage projects.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

The federal regulation applicable to federal projects is available at 29 CFR 5.25: <https://www.ecfr.gov/current/title-29/subtitle-A/part-5/subpart-B/section-5.25>.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The purpose of these rule amendments is to provide guidance to contractors who make regular contributions to fringe benefit plans, in order to ensure that employees are paid what the law requires on public works projects. To the extent that these employees are persons of color who, because of these rule amendments, are paid what the law requires, these rule amendments will have a positive impact on racial equity.

FISCAL AND ECONOMIC IMPACT:

For contractors on public works projects who make regular contributions to fringe benefit plans and who seek to include the costs of those benefits as credit toward the payment of the prevailing wage, these rule amendments may require mathematical calculations for each impacted employee.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

These rules apply to state agencies, units of local governments and members of the public who are involved in the construction of public works projects. Contractors who seek to take credit against the prevailing wage, and employees who seek to confirm they are being paid what the law requires, may be required to perform mathematical calculations in accordance with the rule amendments. Similarly, state agencies and units of local government who enter into contracts requiring the payment of prevailing wage and who seek to ensure compliance with those contracts may be required to perform mathematical calculations in accordance with the rule amendments.

According to the U.S. Small Business Administration, there are nearly 400,000 small businesses operating in Oregon, approximately 13,000 of which are in the construction industry and have between 1-19 employees. The Bureau therefor estimates that approximately 15,000 construction-related businesses with 50 or fewer employees, are potentially subject to these rules, if they choose to bid on and are awarded contracts to perform work on public works projects.

Contractors on public works projects are required to maintain detailed payroll records under current law. These current obligations include maintaining certified payroll records that include the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages each worker earned on a public works project during each week. Contractors who seek to take credit against the prevailing wage for regular fringe benefit contributions made by the contractor, will also need to maintain records that attribute those contributions in accordance with these rules.

For those contractors who choose to avail themselves of the credit against wages owed, this increased labor will be relatively minimal when compared to existing recordkeeping requirements. It may be that existing software can be utilized to perform these calculations. If performed manually, the Bureau estimates that performing the mathematical calculation will require approximate 2 minutes, which at \$30.00 per hour, would amount to \$1 per worker, each time the contractor performs the calculation in accordance with the rule.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

These rules were developed in conjunction with the Rulemaking Subcommittee of the Prevailing Wage Advisory Committee described in ORS 279C.820. A representative of small and large businesses was included on the Subcommittee. In addition, small businesses and members of the public are invited to comment on these rules. The Bureau will also post notice of this rulemaking on its webpage and in the Oregon Bulletin, while also disseminating this notice to the Bureau's mailing list.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

AMEND: 839-025-0040

RULE SUMMARY: Amends rule to describe method of including certain fringe benefits in calculation of prevailing wage.

CHANGES TO RULE:

839-025-0040

Payment of Fringe Benefits ¶

(1) Each contractor and subcontractor required to pay workers the prevailing rate of wage must pay no less than the hourly rate of pay and fringe benefits as determined by the Commissioner and described in ORS 279C.800(4).¶

(2) The rate of pay for fringe benefits paid to apprentices and trainees shall be not less than such rate paid to the majority of such apprentices and trainees in the same trade or occupation as determined by the commissioner. If there is no majority in the same trade or occupation, as determined by the commissioner, apprentices and trainees shall be paid the full amount of the fringe benefits.¶

(3) The fringe benefit requirements of section (1) of this rule ~~are~~ met when the amount of the fringe benefit or benefits is paid to the worker, in cash, in lieu of a third party administering a fringe benefit or benefits program.¶

(4)(a) Except as provided in this section, a contractor who wishes to take a credit towards the prevailing rate of wage described in section 1 of this rule must "annualize" the employer contributions made to a benefit plan, fund or program described in ORS 279C.800(1) and must annualize the costs of unfunded benefits such as vacation and holiday pay to determine the proper hourly equivalent that may be taken as credit against the fringe benefit obligation.¶

(b) To "annualize" the cost of providing a benefit, a contractor must divide the total employer contribution amount paid to a benefit plan, fund or program, or the cost of the unfunded benefit, by the total number of hours worked on both non-prevailing wage work and work covered by applicable Prevailing Wage Rate Laws during the time period to which the cost is attributable, provided that the period is not less than monthly, to determine the rate of contribution per hour. The credit must be determined separately for each worker.¶

(c) Contributions to a bona fide fringe benefit plan may be excepted from the annualization requirement and the contractor may take full credit for those contributions if the contributions are made to a defined contribution pension plan that provides for immediate participation and immediate vesting.¶

(5) When a contractor or subcontractor pays an hourly rate of pay which exceeds that which is determined by the Commissioner, the amount by which the rate is exceeded may be credited toward payment of the amount of fringe benefits determined by the Commissioner for the trade or occupation.¶

(5) When a contractor or subcontractor pays a rate for any one fringe benefit which exceeds that which is determined for the fringe benefit, the amount by which the rate is exceeded may be credited toward payment of the amount to be paid for all fringe benefits as determined by the Commissioner for the trade or occupation.¶

(6) When a contractor or subcontractor pays an amount for fringe benefits which exceeds that which is determined by the Commissioner, the amount by which it exceeds the determination may be credited toward payment of the hourly rate of pay as determined by the Commissioner.

Statutory/Other Authority: ~~ORS 279.651C.808,~~ ORS 651.060

Statutes/Other Implemented: ORS 279.350