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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

ED 5-2020

CHAPTER 471

EMPLOYMENT DEPARTMENT

FILED

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Use of Accrued Leave in Work Share - Temporary Rule

EFFECTIVE DATE: 08/02/2020 THROUGH 12/26/2020

AGENCY APPROVED DATE: 07/29/2020

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NEED FOR THE RULE(S):

Work Share employers cannot currently approve the use of accrued leave as requested by their employees when they are sick or taking care of someone who is sick and still be eligible for unemployment benefits under Work Share.

JUSTIFICATION OF TEMPORARY FILING:

This temporary rule is needed to alleviate the impact of COVID-19 on Work Share employers and their employees. Once COVID-19 is no longer an issue the rule and law on the topic of a missed work opportunity can remain in place.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

None

AMEND: 471-030-0036

RULE TITLE: Eligibility Factors

RULE SUMMARY: 471-030-0036 (3)f(A) Eligibility Factors - this rule is being amended to allow for Work Share participants to receive benefits outside of the normal OAR due to the current COVID-19 pandemic.

RULE TEXT:

(1) In considering suitable work factors under ORS 657.190 and for purposes of determining eligibility under 657.155(1)(c), the Director may require an individual to actively seek the type of work the individual is most capable of performing due to prior job experience and training except that:

(a) If an individual is unable to secure the individual's customary type of work after contacting the potential employers in the labor market where benefits are being claimed, the Director may require the individual to seek less desirable but similar work or work of another type which the individual is capable of performing by virtue of experience and training.

(b) If the type of work an individual is most capable of performing does not exist in the labor market where the individual is claiming benefits, the Director may require the individual to seek any work that exists in the labor market for which the individual is suited by virtue of experience and training.

(c) After the individual has contacted the potential employers in the labor market where benefits are being claimed and

is still unable to obtain work as described in (1)(a) and (b) of this section, the Director may require the individual to further expand work-seeking activities.

(2) For the purposes of ORS 657.155(1)(c), an individual shall be considered able to work in a particular week only if physically and mentally capable of performing the work he or she actually is seeking during all of the week except:

(a) An occasional and temporary disability for less than half of the week shall not result in a finding that the individual is unable to work for that week; and

(b) An individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unable to work solely on that basis so long as the individual remains available for some work.

(3) For the purposes of ORS 657.155(1)(c), an individual shall be considered available for work if, at a minimum, he or she is:

(a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and

(d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week, unless:

(A) The individual is actively seeking work outside his or her normal labor market area; or

(B) The individual is infrequently absent from the normal labor market area for reasons unrelated to work search, for less than half of the week, and no opportunity to work or referral to work was missed by such absence.

(e) However, an individual with a permanent or long-term physical or mental impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work.

(f) For the purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if:

(A) The individual has an opportunity to perform suitable work during the week and fails to accept or report for such work due to illness, injury or other temporary physical or mental incapacity.

For the weeks of August 02, 2020 through December 26, 2020, and notwithstanding OAR 471-030-0079(4), for purposes of determining whether an employee can receive Work Share benefits in a week, if the employee uses approved, accrued leave during a week, those leave hours count as hours worked during the week. This does not apply to leave taken for vacation purposes. It does apply to leave taken for other reasons, including because the employee is sick, is caring for someone else who is sick, is on jury duty, or because of COVID-19 related reasons.

(B) During the week, the individual is incarcerated during any days or hours customary for the type of work the individual is seeking.

(i) "Incarcerated" means in custody at a city, county, state, or federal law enforcement or correctional facility to include any "arrest" as defined in ORS 133.005 or a similar law in another state or jurisdiction.

(ii) When an individual is in an alternative sentencing facility operated pursuant to a community corrections plan that individual will not be considered unavailable for work solely because of their non-traditional custody. Alternative sentencing is defined by the jurisdiction responsible for supervision of the suspect or offender.

(iii) "Incarcerated" does not include a "stop" as authorized under ORS 131.605 to 131.625.

(iv) "Incarcerated" does not mean being involved in questioning by peace officers as part of an investigation where the individual is free to leave and not charged with a crime.

(g) An individual will be considered not available for work if he or she fails or refuses to seek the type of work required by the Director pursuant to section (1) of this rule.

(h) Providing the individual is otherwise eligible for benefits pursuant to OAR 471-030-0036(3)(a) through (g), a person

who has been found to be qualified for benefits under the provisions of ORS 657.176(2)(f) or (g) or 657.176(9)(b)(A) shall be considered available for work only during weeks in which the individual is enrolled in and participating in a recognized drug or alcohol treatment program if such participation was a condition in the determination to allow benefits. This provision does not apply if the individual has satisfactorily completed the course of treatment in accordance with the terms and conditions of the recognized treatment program.

(A) An individual is participating when engaged in a course of treatment through a recognized drug or alcohol rehabilitation program;

(B) A recognized drug or alcohol rehabilitation program is a program authorized and licensed under the provisions of OAR chapter 415.

An individual is not available for work in any week claimed under ORS 657.155 if the individual resides or spends the major portion of the week:

(C) In Canada unless the individual is authorized to work in Canada;

(D) In a country not included in the Compact of Free Association with the United States of America; or

(E) outside of the United States, District of Columbia or any territory or political division that is directly overseen by the United States federal government; except,

(i) If the individual is the spouse or domestic partner of an individual stationed at a military base or embassy located outside the United States;

(ii) Job opportunities exist on the military base or embassy for family members of those stationed there;

(iii) The individual lives within a reasonable commuting distance to job opportunities at the military base or embassy; and

(iv) The individual is willing to accept the conditions and terms of the available employment provided they are not inconsistent with ORS 657.195.

(4) Notwithstanding the provisions of OAR 471-030-0036(3), an individual who is the parent, step-parent, guardian or other court/legally-appointed caretaker of a child under 13 years of age or of a child with special needs under the age of 18 who requires a level of care over and above the norm for his or her age, who is not willing to or capable of working a particular shift because of a lack of care for that child acceptable to the individual shall be considered available for work if:

(a) The work the individual is seeking is customarily performed during other shifts in the individual's normal labor market area as defined by OAR 471-030-0036(6); and

(b) The individual is willing to and capable of working during such shift(s).

(5) This section addresses the requirements for actively seeking work, as required under ORS 657.155(1)(c):

(a) Unless the individual is temporarily unemployed, as described in section (b), or a member of a union, as described in section (c), or otherwise directed by the director or an authorized representative of the Employment Department, they must conduct at least five work seeking activities per week. Two of the five work seeking activities must be a direct contact with an employer who might hire the individual.

(A) Work seeking activities include but are not limited to registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer.

(B) Direct contact with an employer means making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer.

(b) For an individual who is temporarily unemployed:

(A) They are considered to be actively seeking work when they remain in contact with their regular employer and are capable of accepting and reporting for any suitable work with that employer;

(B) There is a reasonable expectation that they will be returning to work for their regular employer. The work the individual is returning to must be full time or pay an amount that equals or exceeds their weekly benefit amount;

(C) The department will not consider the individual to be temporarily unemployed if they were separated from their

employer for reasons other than a lack of work, the work the individual is returning to is not with their most recent employer, or the length the individual is unemployed is longer than the period described in subsection (D) of this section; and

(D) The department will consider that the period for which an individual is temporarily unemployed:

(i) Begins the last date the individual performed services for the employer. In the case of an individual still working for the employer, it is the last date worked during the week in which the individual had earnings less than their weekly benefit amount; and

(ii) Cannot be greater than four weeks between the week the individual became temporarily unemployed and the week the individual returns to work as described in subsection (B) of this section.

(c) For an individual who is a member in good standing of a union that does not allow members to seek non-union work, such individual is actively seeking work by remaining in contact with that union and being capable of accepting and reporting for work when dispatched by that union.

(d) For an individual who is filing a continued claim for the first week of an initial or additional claim:

(A) If the individual worked less than full time and remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount, each day the individual worked for the employer shall be considered a direct employer contact.

(B) An individual does not meet the requirements of this subsection if the individual performed no work for an employer during the first week of an initial or additional claim; therefore the individual must seek work consistent with subsection (a) of this section.

(e) In determining whether to modify the requirements in this section for an individual the Employment Department may consider among other factors, length of unemployment, economic conditions in the individual's labor market and prospective job openings, weather conditions affecting occupations or industries, seasonal aspects of the individual's regular occupation, expected date of return to work in regular occupation, seniority status of individual, registration with a union hiring hall and normal practices for obtaining the type of work which the individual is seeking pursuant to section (1) of this rule. The department shall provide a written copy of the work search requirements to the individual if the individual's work search requirements are modified.

(6)(a) An individual's normal labor market shall be that geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage. The geographic area shall be defined by employees of the adjudicating Employment Department office, based on criteria set forth in this section;

(b) When an individual seeks work through a union hiring hall, the individual's normal labor market area for the work sought is the normal referral jurisdiction of the union, as indicated by the applicable contract.

(7) Nothing in this rule shall prohibit an individual who is a citizen, permanent legal resident, or otherwise legally authorized to work in the United States from seeking work in other labor market areas in any state or country.

STATUTORY/OTHER AUTHORITY: ORS 657.610

STATUTES/OTHER IMPLEMENTED: ORS 657.155, ORS 657.100(3)