

# United States Department of Labor

## Wage and Hour Division

### Wage and Hour Division (WHD)

#### Davis-Bacon and Related Acts Frequently Asked Questions

##### IV. Davis-Bacon Wage Surveys

##### Quick Links

**In responding to a Davis-Bacon prevailing wage survey, what can we count as fringe benefits?**

**Fringe benefits are:**

- Contributions irrevocably made to a trustee or third party pursuant to a **bona fide fringe** benefit fund plan or program.
- The rate of costs incurred in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated to the employees in writing.

**Examples:**

- Life insurance
- Health insurance
- Pension
- Vacation
- Holidays
- Sick leave
- Other "bona fide" fringe benefits

However, payments required by federal, state or local law are **not** fringe benefit contributions. Such payments required to fund Social Security, unemployment compensation and workers' compensation programs, as required by law, do not count as fringe benefits.

Any question concerning what type of fringe benefits is "bona fide" should be referred to the Wage and Hour Division.

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## Prevailing Wage

Department

### Computing Benefit Contributions

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### Appendix A

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#### Computing the Allowable Hourly Credit for Fringe Benefit Contributions

[Prevailing Wage Rates](#)

Oregon's PWR law and the federal Davis-Bacon Act are similar regarding fringe benefits. To qualify for any credit, the fringe benefit plan must meet all of the following requirements:

- Contributions must be made regularly and at least on a quarterly basis.
- Contributions made for prevailing wage work may not be used to fund the plan or program for periods of non-prevailing wage rate work.
- Contributions must not be required by law (such as taxes, workers' compensation, etc.)
- Contributions must be irrevocable and for the employee's benefit.

[Prevailing Wage Publications](#)

[Definitions of Covered Occupations](#)

#### Hourly Contributions

If a contractor or subcontractor makes contributions on a per hour basis for all hours worked, including both PWR and non-PWR hours, credit may be taken for the amount contributed to the plan each hour for each employee. For example, a contractor paying \$2.78 per employee hour into a qualifying health plan may credit \$2.78 per hour towards the hourly fringe benefit requirements.

[Prevailing Wage Rate Laws](#)

[PWR Complaint Form](#)

#### Weekly, Monthly or Quarterly Contributions

If a contractor or subcontractor makes a flat weekly, monthly or quarterly contribution to a qualifying plan for an employee, the allowable hourly credit is calculated by dividing the contribution amount by the total number of hours, both PWR and non-PWR hours, the employee worked during the contribution period. For example, if the employer contribution one month was \$250, and if the employee worked 170 hours that month, the credit would be \$1.47 per hour (\$250 per month / 170 hours worked = \$1.47 per hour credit).

[Formulario de Queja](#)

[Coverage Determinations](#)

[Ineligible Contractors](#)

[Occupational Wage Survey](#)

The general formula to use is as follows:

$$\begin{aligned} & \text{Amount of contribution paid on behalf of the employee} \\ + & \text{ All hours worked by the employee during the contribution time period (including non-PWR hours)} \\ = & \text{ Allowable hourly equivalent fringe benefit credit.} \end{aligned}$$

[PWR Advisory Committee](#)

[Oregon Revised Statutes](#)

#### Calculate Credits Separately for Each Employee

The allowable hourly credit must be determined and tracked separately for each employee because the credit is based on figures that will vary from person to person, depending on the benefit contribution amount for each particular employee and the number of hours that the employee worked during the contribution period.

[Administrative Rules](#)

#### Employer's Contribution

Only the employer's contribution toward a benefit plan may be used to calculate the allowable hourly credit. If an employee contributes toward a benefit plan, the amount of the employee's contribution may not be used in calculating the credit.

#### Eligibility Requirements

Eligibility requirements for a plan, such as a waiting period, are permissible. However, during the period in which an employee is ineligible to participate in the plan, no credit may be taken against the hourly fringe benefit amount due that employee. Pension plans with vesting provisions are eligible if they meet the requirements of the ERISA. (See [Appendix B](#) for contact information about ERISA.)

#### Pension Plans

In addition to the general contribution requirements listed previously, contributions to a pension plan *must* be made to a trustee or to a third person. The "third person" must not be affiliated with the contractor or subcontractor, and the trust or fund must be set up in such a way that in no event will the contractor or subcontractor be able to recapture any of the contributions paid into the plan, or in any way divert the funds to his or her own use or benefit.

#### Unequal Contributions

If a defined contribution pension plan provides for a higher hourly rate of contribution on PWR-covered work than for non-covered work, the higher rate paid for PWR work may be fully credited only if the plan provides for immediate participation by employees and 100 percent vesting after an employee works no more than 500 hours.

For example, if an employer contributes \$1.00 per hour to a pension plan for each PWR hour worked, and contributes \$.25 per hour for each non-PWR hour worked, the employer may only take the full credit of \$1.00 per hour if the pension plan allows for immediate participation and vesting as outlined above.

If unequal contributions are made to a defined contribution pension plan, and the plan does not provide for immediate participation and vesting as outlined above, the allowable credit is based on the average contribution the employer made over the previous fiscal year. The total pension benefit contributions made during this twelve-month period should be divided by the total number of hours worked (including non-PWR hours) during that period. The result is an average hourly contribution the employer may claim.

As an example, an employer contributes \$1.00 per hour to a pension plan for each PWR hour worked, and contributes \$.25 per hour for each non-PWR hour worked. During the previous year, the employee worked 1,500 PWR hours and 500 non-PWR hours. The total contribution for this year would be \$1,625 ((1,500 PWR hours x \$1.00 per hour) + (500 non-PWR hours x \$.25 per hour) = \$1,625). The total yearly contribution of \$1,625 would then be divided by 2,000 hours, which is the total

*Grandit ?*

<b>SUBJECT:</b> Sick Leave with Pay	<b>NUMBER:</b> 60.000.01
<b>DIVISION:</b> Chief Human Resources Office	<b>EFFECTIVE DATE:</b> 01/01/16
<b>APPROVED:</b> Signature on file with the Chief Human Resources Office	

**POLICY**

**STATEMENT:** Sick leave with pay is granted to eligible employees to provide time off from work to tend to the employee's or a family member's illness or injury.

**AUTHORITY:** ORS 173.005; 236.610; 240.145(3); 240.551; 326.113, 659a.150 – 659a; SB 454, 2015 Leg. Session; OAR 839-007-0000 through 839-007-0120

**APPLICABILITY:** All employees subject to ORS 240, State Personnel Relations Law, except when in conflict with a collective bargaining agreement.

**ATTACHMENTS:** Required posting:  
BOLI poster: Requirements of Oregon's Sick Time Law

**DEFINITIONS:**

- (1) Employee: A person holding a permanent, limited duration or seasonal position in state service.
- (2) Immediate Household: All persons residing in an employee's primary residence who are not paying the employee for room and board.
- (3) Temporary Employee: Person hired to a temporary non-status appointment (see Temporary Appointments Policy 40.025.01)
- (4) Consecutive Scheduled Workdays: Days during which the employee is expected to work, excluding weekends, holidays and other scheduled days off.

See State HR Policy 10.000.01 Definitions, and OAR 105-010-0000

**POLICY**

- (1) Employee Accrual Rate
  - (a) Full-time employees accrue eight hours per month or no more than 96 hours of sick leave per year.
  - (b) A part-time employee or a full-time employee on leave without pay accrues sick leave on a pro rata basis. When determining the pro rata accrual of sick leave each month, the agency counts actual time worked and all leave with pay.
- (2) Employee Eligibility: An employee may use accrued sick leave with pay on or after the first of the month following the month in which it is accrued.

(3) Employee Transfer of Sick Leave Hours

- (a) When an employee laterally transfers, demotes or promotes to another agency or university with an independent governing board with whom the agency has an intergovernmental agreement, the employee's unused sick leave hours transfer to the gaining agency. (see Movement of Employee Into the Executive Branch matrix)
- (b) When an employee of a school district or an education service district leaves the district to become employed by the Department of Education (ODE), the ODE may accept unused sick leave, according to ORS 326.113. The employee may use the transferred sick leave according to this policy.

(4) Disposition of Sick Leave Accrual Upon Employee Separation or Retirement

- (a) An employee receives no compensation for unused sick leave upon separation except as provided in ORS 238.350.
- (b) Upon retirement, agencies reports all of the employee's unused sick leave hours to the Public Employees Retirement System (PERS). As of the effective date of retirement, all sick leave will be considered "used" under the full formula and formula plus annuity calculations.
- (c) Sick leave hours are not restored to a PERS retiree who subsequently returns to work except as noted below in (11).

(5) Restoration of Sick Leave Upon Employee Rehire

- (a) Except for PERS retirees, all unused sick leave hours are restored to an employee returning to state service within two years of separation.
- (b) Unused sick leave hours accrued in an exempt position (other than legislative) in a manner comparable to this policy, may be restored upon appointment to a classified unrepresented, management service, or unclassified position if the appointment occurs within two years of separation from the exempt position.
- (c) Unused sick leave hours accrued in an exempt position in the legislative branch are restored according to ORS 173.005.

(6) An employee on leave and receiving short-term disability payments may reserve 60 hours of sick leave. If an employee receives disability payments while on Family and Medical leave refer to State HR Policy 60.000.15 Family and Medical Leave regarding use of paid leave.

(7) Temporary Employee Accrual Rate

- (a) A Temporary employee accrues up to 6.14 hours of sick leave per month.
- (b) Temporary part-time employees or temporary full-time employees on leave without pay accrues sick leave on a pro rata basis. When determining the pro rata accrual of sick leave each month, the agency counts actual time worked and all leave with pay.

(8) Temporary Employee Eligibility

- (a) A temporary employee may use accrued sick leave with pay beginning on the 91<sup>st</sup> day of employment.
- (b) A temporary employee may use up to 40 hours of sick leave within the calendar year.

- (9) Temporary Employee Transfer of Sick Leave Hours: When a temporary employee transfers to another agency, the temporary employee's unused sick leave hours transfer to the gaining agency
- (10) Temporary Employee Disposition of Sick Leave Upon Separation: A temporary employee receives no compensation of unused sick leave upon separation.
- (11) Temporary Employee Restoration of Sick Leave Upon Rehire: Except for PERS full formula and formula plus annuity retirees, unused sick leave hours are restored to temporary employees returning to state service within 180 days of separation.
- (12) Permissible Use of Sick Leave
- (a) Eligible employees may use paid sick leave for any of the following:
- (A) For an employee's mental or physical illness, injury or health condition; need for medical diagnosis, care or treatment of a mental for or physical illness, injury or health condition; or need for preventive medical care.
  - (B) For care of a family member with a mental or physical illness, injury or health condition; care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; or care of a family member who needs preventive medical care.
  - (C) Any period of absence qualifying as a serious health condition under State HR Policy 60.000.15 Family and Medical Leave.
  - (D) For purposes specified in ORS 659A.159. See Family & Medical Leave Policy 60.000.15.
  - (E) For purposes specified in ORS 659A.272. See Statutorily Required Leaves With and Without Pay Policy 60.000.12.
  - (F) For emergency repair of personal assistive devices that are medically necessary for the employee to perform assigned duties; or
  - (G) Dental care
- (b) Family member includes the employee's spouse or domestic partner, and the following for the employee and his or her spouse or domestic partner:
- (A) Parent (includes one who stood in *loco parentis* (in place of a parent) when the employee was a child)
  - (B) Child (and spouse) (includes a child for whom the employee stood in *loco parentis*)
  - (C) Sibling (and spouse)
  - (D) Grandparent
  - (E) Grandchild
  - (F) The above include step, adoptive and foster
  - (G) Members of the immediate household

(13) Requesting Sick Leave

- (a) Agencies may require employees and temporary employees to comply with the agency's usual and customary notice and procedural requirements for requesting sick leave
  - (b) If the need to use sick leave is foreseeable, the employee or temporary employee shall make a request to the agency at least 10 days in advance.
  - (c) If the need to use sick leave is unforeseeable, the employee or temporary employee shall provide notice to the agency as soon as practicable.
  - (d) Employees and temporary employees shall make reasonable efforts to schedule the use of sick leave so as not to unduly disrupt agency operations.
  - (e) Agencies may require medical certification by the employee's or family member's medical provider verifying the need for sick leave. In addition, see State HR Policy 60.000.15 Family and Medical Leave and statutes governing Workers' Compensation for requiring medical certification in those situations.
- (14) Verification: Except for the reasons under section 12(a) (F) and (G), employees who use sick leave for more than three consecutive scheduled workdays for a purpose provided in this policy may be required to provide verification from a health care provider.
- (15) Coordination with Workers' Compensation: An employee may choose to use sick leave to equal the difference between the Workers' Compensation for lost time and the employee's regular salary rate. In such instances, the agency prorates charges against the employee's accrued sick leave. An employee who exhausts sick leave may choose to use other accrued leave to equal the difference between Workers' Compensation for lost time and the employee's regular salary rate. In such instances the agency prorates charges against the accrued leave. Using leave while receiving time loss benefits is not required



## State of Oregon Employee Benefits

Medical, Dental and Optical Insurance  
Life Insurance  
Short- and Long-Term Disability Plans  
Long Term Care

A variety of plans to choose from with a State-paid contribution toward the monthly premium.

### Vacation Accrual

<u>Years of Service</u>	<u>Classified Represented and Classified Unrepresented</u>	<u>Management Service and Executive Service</u>
1 - 5 years (First through 60 <sup>th</sup> month)	8 hrs/month	10 hrs/month
6 - 10 years (60 <sup>th</sup> through 120 <sup>th</sup> month)	10 hrs/month	11.34 hrs/month
11 - 15 years (121 <sup>st</sup> through 180 <sup>th</sup> month)	12 hrs/month	13.34 hrs/month
16 - 20 years (180 <sup>th</sup> through 240 <sup>th</sup> month)	14 hrs/month	15.34 hrs/month
After 20 years (After 240 <sup>th</sup> month)	16 hrs/month	17.34 hrs/month
After 25 years (after 301 <sup>st</sup> month)	18 hrs/month	19.34 hrs/month

### Use of Vacation/Sick Leave

For SEIU-OPEU represented and unrepresented employees, AFSCME-represented employees and Management and Executive Service employees new to State service, accrued vacation can be used after completion of 6 full-calendar months of State service.

Sick leave is accrued at 8 hours per month and may be used immediately upon accrual.

### Personal Business Leave

SEIU-OPEU represented employees and Management and Executive Service employees are eligible for personal business leave (24 hours leave per fiscal year) after six full months of State service. AFSCME-represented employees are eligible for personal business leave after completion of trial service.

### Public Employees Retirement System (PERS)

Upon completion of six full calendar months of State service, the employee is enrolled into the Oregon Public Service Retirement Plan (OPSRP), administered by PERS. The State contributes to the employee's retirement account the equivalent of 6% of the employee's gross salary. See the PERS web site at <http://oregon.gov/PERS/> for detailed information about retirement plans.

### Oregon Savings Growth Plan

The Oregon Savings Growth Plan is a 457 deferred compensation plan that provides you with a convenient way to save for your retirement. It allows you to contribute a portion of your salary from the state on a pre-tax basis. Your contributions plus earnings continue to grow on a tax-deferred basis until you receive a distribution.

# PWR Handbook

On public works projects that are subject to the Davis-Bacon Act, pits, batch plants, tool-yards and other locations will only be considered “dedicated” to the project if they are adjacent or virtually adjacent to the project site, as determined by the U.S. Department of Labor. ORS 279C.838(2)

## **Truck Drivers**

Truck drivers, parts runners and other delivery personnel working for contractors and subcontractors are generally not due the prevailing rate of wage for delivery to and from the site of work. However, if driving takes place on the site of work, or if these workers are engaged in performing other manual work at the work site, the applicable prevailing wage rate must be paid to the workers for time spent on site. For enforcement purposes, truck drivers performing delivery for a construction contractor or subcontractor must be paid prevailing wages if they perform 15 minutes or more of driving or other work at the work site. OAR 839-025-0004(32); OAR 839-025-0035(7)

Truck drivers performing delivery for a commercial supplier are not generally due prevailing wages for incidental work performed on the project site. These workers are due prevailing wages only if they spend more than 20 percent of their time during a workweek engaged in work on the project site. OAR 839-025-0035(6)

A commercial supplier who enters into a construction contract on a PWR project is a construction contractor for purposes of the law and must comply with the law as it applies to construction contractors.

On public works projects that are subject to the Davis-Bacon Act, delivery personnel are not due prevailing wages unless they spend more than an incidental amount of time engaged in work on the project site. For enforcement purposes, an incidental amount of time is generally considered to be more than 20 percent of the workweek. ORS 279C.838(3)

The PWR law does not apply to “owner-operators” of trucks. Drivers who own and operate their own trucks and who are independent contractors do not need to be paid prevailing wages for the time spent driving their own trucks. Operators of other equipment or motor vehicles are not exempt.

## **Fringe Benefits**

Employers may claim credit for bona fide fringe benefits they provide to their employees. The employer’s contribution must be made for the benefit of the employee, **must not be required by law**, and must be made on a regular basis (at least quarterly). Plans that provide for delayed vesting or have eligibility requirements are “bona fide” if they meet the other requirements. Safety training, drug testing, state industry council contributions, trade promotion funds, equipment costs, travel pay, per diem payments and workers’ compensation insurance do not qualify as fringe benefits. ORS 279C.800(1); OAR 839-025-0004(8)

## **Examples of Bona Fide Fringe Benefits**

- Health and welfare plans
- Vacation plans
- Pension plans, in some cases
- Apprenticeship training

See Appendix A for more information on fringe benefits and their required qualifications, and for instructions on how to calculate the amount that may be credited for payments into fringe benefit programs.

When reporting fringe benefit credits on certified payroll reports, these must be listed separately for each employee, by plan name, showing the hourly credit taken for each plan.



# OAR Chapter 839 Div. 25

## 839-025-0004 Definitions

- (2) "The Basic Hourly Rate of Pay" or "Hourly Rate" means the rate of hourly wage, excluding fringe benefits, paid to the worker.
- (3) "Bureau" means the Bureau of Labor and Industries.
- (4) "Commissioner" means the Commissioner of the Bureau of Labor and Industries, or designee.
- (5) "Construction" means the initial construction of buildings and other structures, or additions thereto, and of highways and roads. "Construction" does not include the transportation of material or supplies to or from the public works project by employees of a construction contractor or construction subcontractor.
- (6) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.
- (7) "Employ" includes to suffer or permit to work.
- (8) "Fringe benefits" means the amount of:
- (a) The rate of contribution irrevocably made on a "regular basis" and "not less often than quarterly," as those terms are defined in OAR 839-025-0043, by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program; and
- (b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits. Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses, nor contributions to industry advancement funds (CIAF for example).
- (9)(a) "Funds of a public agency" includes any funds of a public agency that are directly or indirectly used, as described below.
- (A) "Directly used funds of a public agency" means revenue, money, or that which can be valued in money collected for a public agency or derived from a public agency's immediate custody and control, and, except as provided in ORS 279C.810(1)(a)(H) and (J) and subsection (b) of this section, includes but is not limited to any money loaned by a public agency, including the loan of proceeds from the sale of conduit or pass-through revenue bonds for the specific purpose of financing a project, and public property or other assets used as payment for all or part of a project.
- (B) "Indirectly used funds of a public agency" means, except as provided in subsection (b) of this section, that a public agency ultimately bears the cost of all or part of the project, even if a public agency is not paying for the project directly or completing payment at the time it occurs or shortly thereafter. A public agency does not indirectly use funds of a public agency when it elects not to collect land rent that is due. Examples of when an agency "ultimately bears the cost" of all or part of a project include but are not limited to:
- (i) Amortizing the costs of construction over the life of a lease and paying these costs with funds of a public agency during the course of the lease;
- (ii) A public agency subsidizing the costs of construction that would normally be borne by the contractor;
- (iii) Using insurance proceeds that belong to a public agency to pay for construction. Insurance proceeds represent "money collected for the custody and control of a public agency" and therefore are funds of a public agency, whether the contractor obtains payment directly from the insurance company or the public agency; or
- (iv) Using or creating a private entity as a conduit for funding a project when the private entity is in fact an alter ego of the public agency.
- (b) "Funds of a public agency" does not include:
- (A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;
- (B) Building and development permit fees paid or waived by the public agency;
- (C) Tax credits or tax abatements;
- (D) Land that a public agency sells to a private entity at fair market value;
- (E) The difference between:
- (i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and
- (ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;
- (F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;
- (G) Staff resources of the public agency used to design or inspect one or more components of a project;
- (H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;
- (I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or
- (J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS Chapter 289 or 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.
- (10) "Housing" has the meaning given that term in ORS 456.055.
- (11) "Major renovation" means the remodeling or alteration of buildings and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds \$50,000.

given that term in ORS 662.010. [2003 c.794 §160]

**279C.655 Extension and compensation when work suspended.** If a public contract is not terminated but work under the contract is suspended by an order of a contracting agency for any reason considered to be in the public interest other than a labor dispute or any third-party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute, the contractor is entitled to a reasonable extension of the contract time and reasonable compensation for all costs resulting from the suspension plus a reasonable allowance for overhead with respect to such costs. [2003 c.794 §161]

**279C.660 Compensation when contract terminated due to public interest.** When a public contract is terminated by mutual agreement, provision shall be made for the payment of compensation to the contractor. In addition to a reasonable amount of compensation for preparatory work and for all costs and expenses arising out of termination, the amount to be paid to the contractor:

- (1) Shall be determined on the basis of the contract price in the case of any fully completed separate item or portion of the work for which there is a separate or unit contract price; and
- (2) May, with respect to any other work, be a percent of the contract price equal to the percentage of the work completed. [2003 c.794 §162]

**279C.665 Contractual provisions for compensation when contract terminated due to public interest.** A contracting agency may provide in a public improvement contract detailed provisions under which the contractor shall be entitled, as a matter of right, to compensation upon termination of the contract on account of any reason considered to be in the public interest. [2003 c.794 §163]

**279C.670 Application of ORS 279C.650 to 279C.670.** ORS 279C.650 to 279C.670 do not apply to suspension of the work or termination of the contract that occurs as a result of the contractor's violation of federal, state or local statutes, ordinances, rules or regulations in existence at the time the contract was executed or as a result of violations of the terms of the contract. [2003 c.794 §164]

## PREVAILING WAGE RATE

**279C.800 Definitions for ORS 279C.800 to 279C.870.** As used in ORS 279C.800 to 279C.870:

(1) "Fringe benefits" means:

- (a) Contributions that a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program; and
- (b) Costs that a contractor or subcontractor may reasonably be anticipated to incur in providing the following items, **except for items that federal, state or local law requires the contractor or subcontractor to provide:**
  - (A) Benefits to workers pursuant to an enforceable written commitment to the workers to carry out a financially responsible plan or program for:
    - (i) **Medical or hospital care;**
    - (ii) Pensions on retirement or death; or
    - (iii) Compensation for injuries or illness that result from occupational activity;
  - (B) **Insurance to provide the benefits described in subparagraph (A) of this paragraph;**
  - (C) Unemployment benefits;
  - (D) Life insurance;
  - (E) Disability and sickness insurance or accident insurance;
  - (F) Vacation and holiday pay;
  - (G) Costs of apprenticeship or other similar programs; or
  - (H) Other bona fide fringe benefits.

(2) "Housing" has the meaning given that term in ORS 456.055.

(3) "Locality" means the following district in which the public works, or the major portion of the public works, is to be performed:

- (a) District 1, composed of Clatsop, Columbia and Tillamook Counties;
- (b) District 2, composed of Clackamas, Multnomah and Washington Counties;
- (c) District 3, composed of Marion, Polk and Yamhill Counties;
- (d) District 4, composed of Benton, Lincoln and Linn Counties;



## Employer, Employee & Wages

Definitions as they pertain to Oregon Employment Department Law.

### Employer

An employer is subject to unemployment insurance taxes when the employer pays wages of \$1,000 or more in a calendar quarter, or employs one or more individuals in any part of 18 separate weeks during any calendar year.

The above does not apply to agricultural and domestic employers. For more details, please refer to the Employment Department informational flyers - Agricultural Employers (UI PUB 210) and Domestic Employers (UI PUB 207).

### Employee

An employee is any individual, including an alien or a minor, who is employed for any compensation or under any contract of hire by an employer. This includes contract, casual, temporary labor and cottage industry homeworkers. Corporate officers are considered employees of the corporation, even if they "own" the corporation.

### Wages

Wages are payments made to an individual for personal services and the cash value of all compensation to that individual in any medium other than cash. Unless specifically excluded in ORS Chapter 657, wages include, but are not limited to, the following: salaries, hourly pay, piece rate, payments by the job, vacation, sick, holiday, disability, guaranteed wage payments, commissions, dividends, distributions, bonuses, gifts, fees, prizes, and tips.

Examples of payments that should be reported as wages:\*

- Dismissal and Separation allowances – regardless of whether the allowance is paid in a lump sum or in installments
- Corporate Officer and Shareholder pay - draws dividends, and distributions are wages to the extent that they are reasonable compensation for services provided to the corporation
- Sickness and accident disability payments
- Compensation other than cash - value or the prevailing value in the community of meals

and lodging (including utilities) provided by the employer

- Fringe Benefits provided or paid for by the employer on behalf of employees and their dependents such as:
  - » Company vehicles used by the employee to commute to and from work or for personal use
  - » Company paid parking
  - » Sick pay by third party payers (e.g., insurance companies)
  - » Dependent care assistance
- Commissions including:
  - » Property Management
  - » Mobile home sales where land is not included, such as in a mobile home park

### Excluded by Statute

Individuals who meet the statutory definition of employee but who perform certain types of services are designated as not performing covered employment. The result is their wages are not subject and therefore not taxable.

Examples of wages that should not be reported:\*

- Commissions paid on the following specific services:
  - » Newspaper advertising salesperson
  - » Real estate broker or principal real estate broker
  - » Insurance solicitor or producer
  - » Securities agent or salesperson
  - » Individuals soliciting contracts for home improvements
  - » Door-to-door sales of consumer goods in the home
- Individuals who provide services related to ski activities on a volunteer basis, and receive no other remuneration than a ski pass worth \$50 or less

There also are certain types of payments that are not subject and therefore not taxable.

Examples of payments that should not be reported:\*

- Sickness and accident disability payments made under workers' compensation law, those paid from employee funded plans, or those

paid after six months from the date the employee last worked for the employer

- Dependent care assistance program which meets the requirements of the Internal Revenue Code sections 129(b) and 129(d)
- Fees paid to directors of a corporation for serving on the Board of Directors

## Service By Family Members

Based on the type of employing entity and family relationship listed below, some family members' wages are not subject and therefore their wages are not taxable.

**Sole Proprietorship** - The owner's parents, spouse, and children under the age of 18 wages are not subject.

**Partnership** - The partners' wages are not subject. All other employees' wages are subject.

**Limited Liability Company** - The LLC members' wages are not subject. All other employees' wages are subject.

**Corporation (C and S)** - Individuals who perform services for a corporation, including corporate officers and their family members, are employees of the corporation and their wages are subject.

## Closely Held Family Corporations

Corporations may elect to not pay unemployment taxes on corporate officers who are directors, have a substantial ownership interest, and are members of the same family.

Those eligible for the exclusion must represent two or more members of the same family and who each bear one of the following relationships to one of the others: parents, step-parents, grandparents, spouses, registered domestic partners, sons-in-law, daughters-in-law, brothers, sisters, children, step-children, adopted children or grandchildren.

The election request must be in writing and, if approved, will be effective the first day of the current calendar quarter or of the calendar quarter preceding the calendar quarter in which the request was submitted. Notification in writing will be sent to the employer whether the election is approved or denied.

The Family Corporate Officer Exclusion Request can be found at the Oregon Employment Department Website on the Unemployment Tax home page.

Note: Excluded family corporate officers are still subject to the Federal Unemployment Tax Act (FUTA) and higher FUTA tax rates may be required on those individuals. All other employees remain subject.

For more details, please refer to the Employment Department informational flyer on Corporations and Limited Liability Companies (UI PUB 208).

## When To Report Wages

For Oregon unemployment tax purposes, wages, including draws, are reported in the quarter paid, or in the quarter the individual received any remuneration other than cash. The hours worked are reported in the quarter that they are actually worked.

## Employer Payroll Records

The Employment Department requires that every employing unit shall maintain payroll records of individuals performing service for it for a minimum of three calendar years. The records must include the total payroll by calendar quarter and by individual, the name, social security number, the number of hours worked, and the pay for each pay period. Records must be available to the Employment Department upon request.

\*Examples are not all inclusive. See ORS 657 for additional information.

## Questions

If you have questions or need additional information, please contact the Employment Department tax representative in your area or call 503-947-1488. To find your tax representative, view the web page at [www.oregon.gov/EMPLOY/TAX/TaxOffices.shtml](http://www.oregon.gov/EMPLOY/TAX/TaxOffices.shtml). TDD/Nonvoice Users 711 or by email at [taxinfo@emp.state.or.us](mailto:taxinfo@emp.state.or.us). You may also visit our web site at [www.oregon.gov/EMPLOY/TAX/](http://www.oregon.gov/EMPLOY/TAX/).

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Fringe benefits for employees may include forms of compensation such as vacation pay, sick leave, holiday pay, personal time off, bonuses, severance pay, and pensions. While there is no legal requirement that employers offer such benefits, once promised, they may not be arbitrarily withheld. Wage claims and other legal actions frequently arise because employers and employees understand benefits policies differently. In order to avoid such disputes, employers are advised to create clear and precise policies.

**Q. An employee I terminated claims I have to pay him for his accrued vacation time along with his final wages. Is that true?**

A. The answer depends on your written policies, any agreements you have made with the employee, and your past practices with other departing workers. ORS 652.140 states that "all wages earned and unpaid" are due at termination, and this includes compensation for benefits earned under your policies. If your vacation policy is ambiguous, or if your past practice was to cash out leave accruals, you should include the vacation pay in your employee's final paycheck. If an employee has a reasonable expectation of receiving unused vacation pay based on your representations and policies, a court would likely grant the employee's claim for unpaid wages and penalties.

**Q. My vacation policy says only that vacation is earned "after one year." What if my employee quits or is fired before the year is up?**

A. The answer again depends on your policies and practices. To avoid disputes and wage claims, adopt a vacation policy that specifically addresses the question of whether vacation pay will be prorated when an employee leaves in midyear. Your policy should also specify, for example, whether vacation earnings will accrue indefinitely from year to year, or whether there is a maximum cap on accruals.

**Q. My written policy states that an employee who has not used accrued vacation time is not entitled to it upon leaving employment. Despite that language, I opted to pay the last three departing employees their vacation time. Am I now legally obligated to cash out the accrued balances for other departing employees?**

A. Probably. As an Oregon employer, you can legally adopt a "use it or lose it" policy for vacation time, under which departing employees are not entitled to pay for accrued leave balances. But if you routinely disregard such a policy and set a precedent of compensating employees for accrued vacation, a court may find that your practice overrides the written language in your policy.

**Q. Am I required to cash out accrued sick leave when my employee terminates?**

A. Generally, sick leave is not regarded as a benefit that must be cashed out at termination. To avoid disputes in this area, clearly communicate your sick leave policy to employees.

**Q. Do I have to pay benefits while an employee is out on family leave?**

A. Employees on family leave under the Oregon Family Leave Act (OFLA) and the federal Family and Medical Leave Act (FMLA) are entitled to use any accrued paid leave, including vacation leave, sick leave or paid time off during their qualifying absences. Sick leave may be used during OFLA or FMLA absences, even if the employee is not sick (i.e., to care for a family member with a serious health condition), even if the employer's policy ordinarily limits its use to when the employee is actually sick. If an employee is eligible to use both vacation and sick leave during a family leave, you may choose (or specify in your policy) the order in which those accruals are to be used. You may also require that it be used during family leave, so that the employee taking 12 weeks (or more) of leave doesn't take additional paid leave on return. When an employee uses FMLA leave, you must also continue any group health plan coverage during the leave. During an OFLA-only leave, insurance coverage need not be continued, but all benefits must be reinstated at prior levels immediately upon the employee's return.