

# House Bill 4139

Sponsored by Representatives MCLANE, WITT, Senators EDWARDS, THOMSEN; Representatives BARKER, DAVIS, JOHNSON, LIVELY, MCKEOWN, OLSON, Senators BEYER, HANSELL (Presession filed.)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Allows sick leave to be counted as fringe benefit for purpose of prevailing wage. Defines employer location as location of headquarters. Limits requirements for substantial equivalency. Excludes joint employers from joint and several liability. Broadens multiemployer exception to include employers offering any benefit from joint multiemployer-employee trust or benefit plan. Delays enforcement, civil and administrative actions until January 1, 2017.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to sick leave; creating new provisions; amending ORS 653.601, 653.606, 653.611, 653.621,  
3 653.626, 653.641, 653.646, 653.651 and 653.656 and section 22, chapter 537, Oregon Laws 2015; and  
4 declaring an emergency.

5 **Be It Enacted by the People of the State of Oregon:**

6 **SECTION 1.** ORS 653.601 is amended to read:

7 653.601. As used in ORS 653.601 to 653.661:

8 (1)(a) "Employee" means an individual who renders personal services at a fixed rate to an em-  
9 ployer if the employer either pays or agrees to pay for personal services or permits the individual  
10 to perform personal services.

11 (b) "Employee" includes, but is not limited to:

12 (A) An individual who is paid on a piece-rate basis or the basis of the number of operations  
13 accomplished or quantity produced or handled;

14 (B) Individuals paid on an hourly, salary or commission basis;

15 (C) Individuals for whom withholding is required under ORS 316.162 to 316.221; and

16 (D) Home care workers as defined in ORS 410.600.

17 (c) "Employee" does not include:

18 (A) An employee who receives paid sick time under federal law;

19 (B) An independent contractor;

20 (C) A participant in a work training program administered under a state or federal assistance  
21 program;

22 (D) A participant in a work-study program that provides students in secondary or post-secondary  
23 educational institutions with employment opportunities for financial or vocational training;

24 (E) A railroad worker exempted under the federal Railroad Unemployment Insurance Act; and

25 (F) An individual employed by that individual's parent, spouse or child.

26 (2)(a) "Employer" means any person that employs one or more employees working anywhere in  
27 this state, a political subdivision of the state and any county, city, district, authority, public corpo-  
28 ration or entity, and any instrumentality of a county, city, district, authority, public corporation or

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 entity, organized and existing under law or charter.

2 (b) "Employer" includes an employer located in a city with a population exceeding 500,000.

3 (c) "Employer" does not include the federal government.

4 (3) "Employer located in a city with a population exceeding 500,000" [*includes, but is not limited*  
5 *to, an employer that maintains any office, store, restaurant or establishment in that city*] **means any**  
6 **employer that maintains a headquarters within the city limits of a city with a population**  
7 **exceeding 500,000.**

8 (4) "Family member" has the meaning given that term in ORS 659A.150.

9 (5)(a) "Front-load," except as provided in paragraph (b) of this subsection, means to assign and  
10 make available a certain number of hours of sick time to an employee as soon as the employee be-  
11 comes eligible to use sick time and on the first day of the immediately subsequent year without re-  
12 gard to an accrual rate.

13 (b) For employees employed by an employer for less than a full year, "front-load" means to as-  
14 sign and make available to an employee as soon as the employee becomes eligible to use sick time  
15 a number of hours of sick time that is the pro rata percentage of the hours the employee would be  
16 entitled to for an entire year [*based on the number of hours the employee was actually employed by*  
17 *the employer for the year*].

18 (6) "Headquarters" means the location of an employer's principal office in this state, an  
19 employer's primary place of business in this state or the location that an employer refers  
20 to as its headquarters in this state.

21 (7) "Joint employer" means any situation in which an employee may be employed by more  
22 than one employer, including but not limited to staffing agencies, employers who use labor  
23 contractors, temporary employment agencies, parent corporations, franchisors, leasing  
24 companies, contract payroll companies, labor organizations, professional employment organ-  
25 izations or payroll or benefit administrators.

26 [(6)] (8) "Paid sick time" means time off:

27 (a) That is provided to an employee by an employer that employs 10 or more employees;

28 (b) That may be used for the purposes specified in ORS 653.616; and

29 (c) That is compensated at the regular rate of pay and without reductions in benefits, including  
30 but not limited to health care benefits, that the employee earns from the employer at the time the  
31 employee uses the paid sick time.

32 [(7)] (9) "Sick time" means time during which an employee is permitted to be absent from work  
33 for a reason authorized under ORS 653.616 without a reduction in benefits, including but not limited  
34 to health care benefits, that the employee earns from the employer.

35 [(8)] (10) "Year" includes any consecutive 12-month period, such as a calendar year, a tax year,  
36 a fiscal year, a contract year or the 12-month period beginning on the anniversary of the date of  
37 employment of the employee.

38 **SECTION 2.** ORS 653.606 is amended to read:

39 653.606. (1)(a) Employers that employ at least 10 employees working anywhere in this state shall  
40 implement a sick time policy that allows an employee to earn and use up to 40 hours of paid sick  
41 time per year. Paid sick time shall accrue at the rate of at least one hour of paid sick time for every  
42 30 hours the employee works or 1-1/3 hours for every 40 hours the employee works.

43 (b) Employers that employ fewer than 10 employees working anywhere in this state shall im-  
44 plement a sick time policy that allows an employee to earn and use up to 40 hours of unpaid sick  
45 time per year. Unpaid sick time shall accrue at the rate of at least one hour of unpaid sick time for

1 every 30 hours the employee works or 1-1/3 hours for every 40 hours the employee works.

2 (c) Employers that employ at least 10 employees working anywhere in this state and front-load  
 3 for employees at least 40 hours, **or a pro rata percentage of the hours the employee would be**  
 4 **entitled to for the year**, of paid sick time or paid time off at the beginning of each year used to  
 5 calculate the accrual and usage of sick time or time off need not comply with subsections (1)(a) and  
 6 (3) of this section.

7 (d) Employers that employ fewer than 10 employees working anywhere in this state and front-  
 8 load for employees at least 40 hours, **or a pro rata percentage of the hours the employee would**  
 9 **be entitled to for the year**, of unpaid sick time or unpaid time off at the beginning of each year  
 10 used to calculate the accrual and usage of sick time or time off need not comply with subsections  
 11 (1)(b) and (3) of this section.

12 (2)(a) The number of employees employed by an employer shall be ascertained by determining  
 13 that the per-day average number of employees is 10 or greater for each of 20 workweeks in the  
 14 calendar year or the fiscal year of the employer immediately preceding the year in which the leave  
 15 is to be taken.

16 (b) If the business of the employer was not in existence for the entire year preceding the de-  
 17 termination made under paragraph (a) of this subsection, the number of employees shall be based  
 18 on any 20 workweeks preceding the request for sick time, which may include workweeks in the  
 19 current year, the preceding year or a combination of workweeks in the current year and the pre-  
 20 ceding year.

21 (3) An employee shall begin to earn and accrue sick time on the first day of employment with  
 22 an employer. The employee may carry over up to 40 hours of unused sick time from one year to a  
 23 subsequent year. However, an employer may adopt a policy that limits:

24 (a) An employee to accruing no more than 80 hours of sick time; or

25 (b) An employee to using no more than 40 hours of sick time in a year.

26 (4)(a) An employer is not required to carry over unused sick time if, by mutual consent, the  
 27 employer and an employee agree that:

28 (A) If the employer has 10 or more employees working anywhere in this state, the employee will  
 29 be paid for all unused paid sick time at the end of the year in which the sick time is accrued and  
 30 the employer will credit the employee with an amount of paid sick time that meets the requirements  
 31 of this section on the first day of the immediately subsequent year; or

32 (B) If the employer has fewer than 10 employees working anywhere in this state, the employer  
 33 will credit the employee with an amount of sick time that meets the requirements of this section  
 34 on the first day of the immediately subsequent year.

35 (b) The Commissioner of the Bureau of Labor and Industries shall adopt rules for the determi-  
 36 nation of the number of employees employed by an employer.

37 (5)(a) An employee is eligible to use sick time beginning on the 91st calendar day of employment  
 38 with the employer and may use sick time as it is accrued.

39 (b) An employer may authorize an employee to use accrued sick time prior to the 91st calendar  
 40 day of employment.

41 (c)(A) An employer that employs 10 or more employees working anywhere in this state shall pay  
 42 an employee for accrued sick time used at the regular rate of pay of the employee.

43 (B) For an employee employed on a commission or piece-rate basis by an employer that employs  
 44 10 or more employees working anywhere in this state, the employer shall pay the employee for ac-  
 45 crued sick time used at *[the employee's regular rate of pay. If the employee is paid on a commission*

1 *or piece-rate basis and does not have a previously established regular rate of pay, the employer shall*  
 2 *pay the employee at] a rate equal to at least the minimum wage specified in ORS 653.025.*

3 (6) An employee who is exempt from overtime requirements under 29 U.S.C. 213(a)(1) of the  
 4 federal Fair Labor Standards Act of 1938 is presumed to work 40 hours in each workweek for the  
 5 purpose of accrual of sick time unless the actual workweek of the employee is less than 40 hours,  
 6 in which case sick time accrues based on the actual workweek of the employee.

7 (7) Nothing in ORS 653.601 to 653.661 requires an employer to compensate an employee for ac-  
 8 crued unused sick time upon the employee's termination, resignation, retirement or other separation  
 9 from employment.

10 (8) An employer may not require an employee to:

11 (a) Search for or find a replacement worker as a condition of the employee's use of accrued sick  
 12 time; or

13 (b) Work an alternate shift to make up for the use of sick time.

14 (9) Upon mutual consent by the employee and the employer, an employee may work additional  
 15 hours or shifts to compensate for hours or shifts during which the employee was absent from work  
 16 without using accrued sick time for the hours or shifts missed. However, the employer may not  
 17 require the employee to work additional hours or shifts authorized by this subsection. If the em-  
 18 ployee works additional hours or shifts, the employer must comply with any applicable federal, state  
 19 or local laws regarding overtime pay.

20 (10) An employee retains accrued sick time if the employer sells, transfers or otherwise assigns  
 21 the business or an interest in the business to another employer.

22 (11)(a) An employer shall restore previously accrued unused sick time to an employee who is  
 23 reemployed by that employer within 180 days of separation from employment with the employer.

24 (b) If an employee leaves employment with an employer before the 91st day of employment and  
 25 subsequently is reemployed by that employer within 180 days of separation from employment, the  
 26 employer shall restore the accrued sick time balance the employee had when the employee left the  
 27 employment of the employer and the employee may use accrued sick time after the combined total  
 28 of days of employment with the employer exceeds 90 calendar days.

29 (12) If an employee is transferred to a separate division, entity or location of the employer but  
 30 remains employed by that same employer, the employee is entitled to use all sick time accrued while  
 31 working at the former division, entity or location of the employer and is entitled to retain or use  
 32 all sick time as provided by ORS 653.601 to 653.661.

33 (13) Employers located in a city with a population exceeding 500,000 shall comply with ORS  
 34 653.601 to 653.661, except that:

35 (a) If an employer located in a city with a population exceeding 500,000 employs at least six  
 36 employees working anywhere in this state, the employer shall implement a policy consistent with  
 37 this section as it applies to employers with at least 10 employees working anywhere in this state.

38 (b) If an employer located in a city with a population exceeding 500,000 employs fewer than six  
 39 employees working anywhere in this state, the employer shall implement a policy consistent with  
 40 this section as it applies to employers with fewer than 10 employees working anywhere in this state.

41 **(14) Notwithstanding ORS 279C.800 (1), the provision of sick leave under ORS 653.601 to**  
 42 **653.661 may be considered a fringe benefit for the purposes of ORS chapter 279C.**

43 **SECTION 3. If an employer following ORS 653.606 (1)(c) and (d) does not follow a calendar**  
 44 **year, the employer may front-load a pro rata percentage of the hours the employee would**  
 45 **be entitled to for the year on January 1, 2016, provided that the employer front-loads for the**

1 **employee the remaining portion of the hours the employee would be entitled to for the year**  
 2 **at the beginning of the employer's fiscal or other year in 2016.**

3 **SECTION 4.** ORS 653.611 is amended to read:

4 653.611. (1) An employer with a sick leave policy, paid vacation policy, paid personal time off  
 5 policy or other paid time off program that is substantially equivalent to or more generous to the  
 6 employee than the minimum requirements of [ORS 653.601 to 653.661] **ORS 653.606 and 653.616** shall  
 7 be deemed to be in compliance with the requirements of ORS 653.601 to 653.661.

8 (2) If an employee of an employer that has a policy for paid sick time, paid vacation leave, paid  
 9 personal time off or other paid time off programs has exhausted all paid and unpaid leave available  
 10 to the employee, the employer is not obligated to provide additional leave for paid or unpaid sick  
 11 time as required by ORS 653.601 to 653.661. However, the employer may be obligated to provide paid  
 12 or unpaid sick time by federal or state law that provides for paid or unpaid leave for similar pur-  
 13 poses.

14 **SECTION 5.** ORS 653.621 is amended to read:

15 653.621. (1)(a) Upon request of an employee with accrued sick time available, an employer must  
 16 allow the employee to use sick time. If possible, the employee shall include the anticipated duration  
 17 of the sick time requested in the request.

18 (b) Sick time earned under ORS 653.606 shall be taken in hourly increments unless[:]

19 [(A) *To do so would impose an undue hardship on the employer; and*]

20 [(B)] The employer has a policy or combination of policies that allows an employee to use at  
 21 least 56 hours of paid leave per year that may be taken in minimum increments of four hours and  
 22 may be used for the purposes specified in ORS 653.616.

23 (c) The Commissioner of the Bureau of Labor and Industries shall adopt rules for the imple-  
 24 mentation and administration of this subsection. The rules adopted shall include, but need not be  
 25 limited to, criteria for establishment of undue hardship under this section that are based on the  
 26 difficulty of securing a replacement worker while allowing the employer to apply a consistent policy  
 27 to all employees.

28 (2) An employer may require the employee to comply with the employer's usual and customary  
 29 notice and procedural requirements for absences or for requesting time off if those requirements do  
 30 not interfere with the ability of the employee to use sick time.

31 (3) If the need to use sick time is foreseeable:

32 (a) The employer may require reasonable advance notice of the employee's intention to use sick  
 33 time, not to exceed 10 days prior to the date the sick time is to begin or as soon as otherwise  
 34 practicable; and

35 (b) The employee shall make a reasonable attempt to schedule the use of sick time in a manner  
 36 that does not unduly disrupt the operations of the employer.

37 (4) If the need to use sick time is unforeseeable, the employee shall provide notice to the em-  
 38 ployer as soon as practicable and must comply generally with the employer's notice or procedural  
 39 requirements for requesting or reporting other time off if those requirements do not interfere with  
 40 the ability of the employee to use sick time.

41 **SECTION 6.** ORS 653.656 is amended to read:

42 653.656. The Commissioner of the Bureau of Labor and Industries:

43 (1) Shall enforce the provisions of ORS 653.601 to 653.661; and

44 (2) May adopt rules necessary for the implementation and enforcement of ORS 653.601 to 653.661  
 45 **that are consistent with subsection (3) of this section.**

1       **(3) Notwithstanding joint and several liability of joint employers as otherwise provided**  
 2 **by state law, rule or regulation, joint and several liability under ORS 653.601 to 653.661 shall**  
 3 **not apply to joint employers.**

4       **SECTION 7.** ORS 653.626 is amended to read:

5       653.626. (1)(a) If an employee takes more than three consecutive scheduled workdays of sick time  
 6 for a purpose described in ORS 653.616 (1) to (4), an employer may require the employee to provide  
 7 verification from a health care provider of the need for the sick time, or certification of the need  
 8 for leave for purposes of ORS 659A.272 as provided in ORS 659A.280.

9       (b) If the need for sick time is foreseeable and is projected to last more than three scheduled  
 10 workdays and an employee is required to provide notice under ORS 653.621, the employer may re-  
 11 quire that verification or certification be provided before the sick time commences or as soon as  
 12 otherwise practicable.

13       (c) If the employee commences sick time without providing prior notice required by the employer  
 14 under ORS 653.621:

15       (A) Medical verification shall be provided to the employer within 15 calendar days after the  
 16 employer requests the verification; or

17       (B) Certification provided as specified in ORS 659A.280 shall be provided to the employer within  
 18 a reasonable time after the employee receives the request for certification.

19       (2) **Except for legal fees or costs**, the employer shall pay any reasonable costs for providing  
 20 medical verification or certification required under this section, including lost wages, that are not  
 21 paid under a health benefit plan in which the employee is enrolled.

22       (3)(a) An employer may not require that the verification or certification required under this  
 23 section explain the nature of the illness or details related to the domestic violence, sexual assault,  
 24 harassment, or stalking that necessitates the use of sick time.

25       (b) If an employer suspects that an employee is abusing sick time, including engaging in a pat-  
 26 tern of abuse, the employer may require verification from a health care provider of the need of the  
 27 employee to use sick time, regardless of whether the employee has used sick time for more than  
 28 three consecutive days. As used in this paragraph, “pattern of abuse” includes, but is not limited to,  
 29 repeated use of unscheduled sick time on or adjacent to weekends, holidays, vacation days or pay-  
 30 days.

31       (4) As used in this section, “health care provider” has the meaning given that term in ORS  
 32 659A.150.

33       **SECTION 8.** ORS 653.641 is amended to read:

34       653.641. (1) It is an unlawful practice for an employer or any other person to:

35       [(1)] (a) Deny, interfere with, restrain or fail to pay for sick time to which an employee is enti-  
 36 tled under ORS 653.601 to 653.661;

37       [(2)] (b) Retaliate or in any way discriminate against an employee with respect to any term or  
 38 condition of employment because the employee has inquired about the provisions of ORS 653.601 to  
 39 653.661, submitted a request for sick time, taken sick time, participated in any manner in an inves-  
 40 tigation, proceeding or hearing related to ORS 653.601 to 653.661[,] or invoked any provision of ORS  
 41 653.601 to 653.661; or

42       [(3)] (c) Apply an absence control policy that includes sick time absences covered under ORS  
 43 653.601 to 653.661 as an absence that may lead to or result in an adverse employment action against  
 44 the employee.

45       **(2) This section does not apply to employee incentive plans to encourage attendance or**

1 **employer policies regarding holiday pay.**

2 **SECTION 9.** ORS 653.646 is amended to read:

3 653.646. (1) The requirements of ORS 653.601 to 653.661 do not apply to an employee:

4 (a) Whose terms and conditions of employment are covered by a collective bargaining agree-  
5 ment;

6 (b) Who is employed through a hiring hall or similar referral system operated by the labor or-  
7 ganization or a third party; and

8 (c) [*Whose*] **Who receives an** employment-related [*benefits are provided by*] **benefit from** a joint  
9 multiemployer-employee trust or benefit plan.

10 (2)(a) The Home Care Commission created under ORS 410.602 shall establish a paid sick time  
11 policy for consumer employed home care workers.

12 (b) A policy for paid sick time for consumer employed home care workers implemented by the  
13 Home Care Commission that allows an eligible home care worker to accrue and use up to 40 hours  
14 of paid time off a year, including but not limited to sick time, is deemed to meet the requirements  
15 of ORS 653.601 to 653.661 and is exempt from the provisions of ORS 653.601 [(6)] (8), 653.606 (5),  
16 653.611, 653.621, 653.626 and 653.631.

17 (3) As used in this section, “consumer employed home care worker” has the meaning given the  
18 term “home care worker” in ORS 410.600.

19 **SECTION 10.** Section 22, chapter 537, Oregon Laws 2015, is amended to read:

20 **Sec. 22.** [*Except for penalties assessed for a violation of section 11 (2) or (3) of this 2015 Act,*] The  
21 Bureau of Labor and Industries may assess civil penalties against an employer only for violations  
22 of [*sections 2 to 16 of this 2015 Act*] **ORS 653.601 to 653.661** occurring on or after January 1, 2017.

23 **SECTION 11.** (1) **Notwithstanding ORS 659A.885, a person may file a civil action in court**  
24 **alleging a violation of ORS 653.601 to 653.661 on or after January 1, 2017, only for alleged vi-**  
25 **olations occurring on or after January 1, 2017.**

26 (2) **An administrative action commenced with or by the Bureau of Labor and Industries**  
27 **prior to the effective date of this 2016 Act for a violation of ORS 653.641 (1)(b) or (c) is ter-**  
28 **minated on the effective date of this 2016 Act.**

29 (3) **A civil action commenced in court prior to the effective date of this 2016 Act alleging**  
30 **a violation of ORS 653.601 to 653.661 is terminated on the effective date of this 2016 Act.**

31 **SECTION 12.** ORS 653.651 is amended to read:

32 653.651. (1) An employee asserting a violation of ORS 653.641 [(2) or (3)] (1)(a) or (b) may file  
33 a complaint with the Commissioner of the Bureau of Labor and Industries under ORS 659A.820 or  
34 a civil action as provided in ORS 659A.885.

35 (2) The commissioner has the same enforcement powers with respect to the rights established  
36 under ORS 653.601 to 653.661 as are established in ORS chapters 652 and 653.

37 **SECTION 13.** **This 2016 Act being necessary for the immediate preservation of the public**  
38 **peace, health and safety, an emergency is declared to exist, and this 2016 Act takes effect**  
39 **on its passage.**

40