

November 22, 2016

Senator Ted Ferrioli
900 Court St. NE, S-323
Salem, OR 97301

Representative Mike McLane
900 Court St. NE, H-395
Salem, OR 97301

Dear Senator Ferrioli and Representative McLane,

Thank you for your letter of October 21, 2016 regarding proposed revisions to BOLI's administrative rules implementing Oregon's sick time law. I would like to provide some additional background information in response to the matters addressed in your letter.

Employees Paid on a Commission or Piece-Rate Basis

Your letter addresses the question of how "regular" rates of pay relate to employees paid on a commission or piece-rate basis. For employees paid on a commission or piece-rate basis, the agreed upon commission or piece-rate *is* their regular rate of pay.

The language adopted by the legislature in the sick time law specifically requires that employees paid on a commission or piece-rate basis be paid for sick time at their "regular" rates of pay. The plain language of ORS 653.606(5)(c)(B) reads as follows:

For an employee employed on a commission or piece-rate basis by an employer that employs 10 or more employees working anywhere in this state, the employer shall pay the employee for accrued sick time used at the employee's regular rate of pay. If the employee is paid on a commission or piece-rate basis and does not have a previously established regular rate of pay, the employer shall pay the employee at a rate equal to at least the minimum wage specified in ORS 653.025.

Under long-standing wage and hour law, both commissions and piece-rates are included as regular rates of pay. ORS 652.210 defines wage “rate” as follows:

“Rate” with reference to wages means the basis of compensation for services by an employee for an employer and includes compensation based on the time spent in the performance of the services, **on the number of operations accomplished or on the quantity produced or handled**(emphasis added).

The plain language of the statute, the context of existing law, and the intent behind the passage of SB 454 – that employees should be able to take sick time when needed without fear of a loss of job security, benefits or pay – all require that employees employed on a commission or piece-rate basis be paid their *regular* rate of pay when they take sick time unless they have no previously established regular rate of pay, in which case they must be paid no less than the minimum wage.

Family Exception in Employee Definition

With regard to the exception from the definition of “employee” for individuals employed by their parent, spouse or child, again, it is the plain text and context of the language of the legislation that are relevant.

Where the employer is a corporation rather than a sole proprietor, it is the *entity* that is the employer, not the individuals who make up that corporation. The employee definition exception for individuals employed by their parent, spouse or child in ORS 653.601(1)(c)(F) is narrowly written: An individual is not an “employee” for the purposes of the sick time law if the individual is employed by the *individual’s* parent, spouse or child.

A corporation or LLC cannot be the parent, spouse or child of an individual. Only where an employer is an individual or sole proprietor (not a corporate entity or LLC) can the parent, spouse or child exception be applied. Simply put, the plain language of the statute is clear.

Even if the plain language was not clear, taken in context with existing statutory language and long-standing interpretations of similar laws, the meaning of the language in the employee exception is clear. The language adopted in ORS 653.601 is nearly identical to language that has been in ORS 659A.001 (pertaining to unlawful discrimination in employment) for over a decade. The agency has always interpreted this language to be limited to sole proprietorships because a corporation cannot be a parent, spouse or child of an individual. BOLI cannot expand the plain language in the statute to adopt an interpretation that is not supported by the text, context or legislative history.

Regarding the issue of BOLI's statutory authority, the commissioner has general rulemaking authority under ORS 651, which requires the commissioner to enforce all laws regulating the employment of adults and minors; laws established for the protection of the health, lives and limbs of persons employed in workshops, factories, mills and other places; all laws enacted for the protections of employees and other workplace protections. ORS 651.050. The commissioner also has the authority to "adopt such reasonable rules as may be necessary to administer and enforce any statutes over which the commissioner or the bureau has jurisdiction."

In addition, the commissioner also has specific rulemaking authority relating to sick time. ORS 653.656 provides that the Commissioner of the Bureau of Labor and Industries:

- (1) Shall enforce the provisions of ORS 653.601 to 653.661; and
- (2) May adopt rules necessary for the implementation and enforcement of ORS 653.601 to 653.661.

In conclusion, BOLI believes that the existing statutory language in ORS 653.601 to 653.661 and related administrative rules adopted in 2015 provide sufficient clarity to guide the agency in enforcement of the law. If the legislature wishes to revise the wording of the law as enacted in these statutes, BOLI stands ready to provide any technical assistance as requested.

Sincerely,

Paloma Sparks

Legislative Director
Bureau of Labor and Industries