



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

July 24, 2020

Senator Brian Boquist
900 Court Street NE S311
Salem OR 97301

Re: Review of Legislative Branch Personnel Rules—Rule 4: Compensation

Dear Senator Boquist:

You requested that we review changes to the Legislative Branch Personnel Rules (LBPR) that were proposed in January 2020 and were slated for deliberation at a January 15, 2020, Legislative Administration Committee (LAC) hearing. That hearing was canceled.¹ Subsequent to that request and on your behalf, Senate Republican Office Interim Chief of Staff Branden Pursinger sought our review of two iterations of LBPR 4, addressing compensation, that were drafted by Employee Services and circulated in early July. Copies of those drafts are attached as Option 1 and Option 2. We understand that these options serve as a substitute for the version of Rule 4 submitted to LAC for consideration in January 2020. This opinion will address whether Options 1 and 2 comply with existing laws, in particular with Oregon's pay equity laws.² In reviewing the proposed changes to LBPR 4, where relevant we also consider LBPR proposed changes that were up for consideration at the canceled January 15, 2020, LAC hearing. In a separate opinion, still in process, we will review the changes to the other personnel rules that were scheduled to be presented at the January 15, 2020, LAC hearing. We hope to get that opinion to you as soon as possible. In your original opinion request you also raised concerns about conflicts of interest. In separate correspondence, we will address those concerns.

This opinion will first provide background information on the LBPRs and how those rules are adopted. Next, the opinion will provide a review of the rule changes being proposed. Finally, we will provide answers to specific questions you have. At the outset, however, we note that the basic question you ask—whether the proposed rules are legally sufficient—presents a circularity problem when it is the Legislative Assembly that is asking the question, as it is the Legislative Assembly that determines the legal standards through rule and statute. In other words, there may be multiple different ways for personnel rules to address human resource and personnel matters that naturally arise during the conduct of legislative operations. We conclude that the proposed changes to Rule 4 are legally sufficient but generally represent one way to address the branch's human resource and personnel needs—not necessarily the only way to address those needs.

¹ The proposed changes in question are posted in OLIS under "Meeting Materials" for the 1-15-2020 scheduled LAC hearing and consist of changes to LBPR 1, 2, 4, 6, 7 (posted, but no changes proposed), 8, 14, 16, 17, 28, 29 and 30. As noted in the body of this opinion, we are substituting review of Options 1 and 2 for the changes to Rule 4 proposed at the LAC hearing.

² See ORS 652.210 to 652.235.

Background

Article IV, section 11, of the Oregon Constitution, requires each legislative chamber to adopt its own rules of proceeding. Both chambers do so during each odd-numbered year organizational session, when members elect officers, take the oath of office and credential members. So adopted, the rules may be amended at any time but remain in effect only for the two-year duration of each particular Legislative Assembly, and they must be adopted anew when the succeeding Legislative Assembly again convenes in the next odd-numbered year organizational session. The rules each chamber adopts include provisions that adopt by reference the LBPRs as most recently adopted by LAC.³ As provided in chamber rule, the LBPRs currently in effect are the rules adopted on January 14, 2019, and amended on June 29, 2019. Historically, changes to LBPRs are initially debated and drafted in a workgroup of agency heads, parliamentarians and leadership and caucus office staff. Legislative Counsel (LC) attorneys have usually done the drafting, though there is no rule or statutory requirement that LC be the only entity to do so. The current set of proposed changes to the LBPRs were drafted by Employee Services and were discussed in workgroup settings involving similar personnel and involving members. Also, proposed changes to LBPRs are formally discussed and adopted by LAC before being adopted by reference in chamber rule. Recently, changes to the LBPRs have been debated and adopted by the Joint Committee on Capitol Culture before being approved by both chambers.

Generally, courts defer to legislative determinations and refrain from examining internal legislative operations on separation of powers grounds and because legislative rules of proceeding actually have higher precedential value than that granted to statutes.⁴ It is unknown, however, whether personnel rules would be granted greater weight than conflicting statutes. No Oregon court has answered that question, and it is certainly arguable that personnel rules are outside the scope of Article IV, section 11, of the Oregon Constitution (“[e]ach house when assembled, shall . . . determine its own rules of proceeding”), as the personnel rules in substance aren’t rules of legislative proceedings, and only rules within the scope of Article IV, section 11, are entitled to greater precedential weight than statutes. Existing LBPR 1 (5)(a) provides that:

The Legislative Branch Personnel Rules constitute rules of proceedings of the Legislative Assembly and take precedence over conflicting provisions of state law to the extent that the rules expressly provide for such precedence. Section 4, *Mason’s Manual of Legislative Procedure* (2010 ed.).

However, the proposed changes to LBPR 1 posted for the January 15, 2020, LAC meeting further complicate the question of whether LBPRs are granted greater precedential value than statutes by amending LBPR 1 (5)(a) to read, in relevant part, “[t]he Legislative Branch Personnel Rules constitute rules of proceedings of the Legislative Assembly and **may** take precedence over conflicting provisions of state law” (Emphasis added.) The proposed change would make it less clear whether an LBPR would control over a conflicting state statute. For purposes of this analysis, we will assume that the proposed changes to LBPR 4 are intended to comply with applicable statutes and not modify those statutes.

³ Senate Rule 18.01 and House Rule 2.03.

⁴ See section 4 (2), *Mason’s Manual of Legislative Procedure* (2010). *Masons Manual* itself is adopted by reference in chamber rules. Senate Rule 2.01 and House Rule 2.01.

Pay Equity Laws

Oregon's pay equity laws make it an unlawful employment practice for an employer to pay wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character.⁵ "Work of comparable character" is defined as "work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work."⁶ Also relevant to our review are the definitions of "employer" and "employee." An employer, in relevant part, is "any person employing one or more employees, including the State of Oregon or any political subdivision thereof"⁷ An employee is defined in relevant part as "any individual who . . . renders personal services wholly or partly in this state to an employer who pays or agrees to pay [the] individual at a fixed rate."⁸

As of January 1, 2019, it is an unlawful employment practice for an employer to:

- In any manner discriminate between employees on the basis of a protected class in the payment of compensation.
- Pay an employee compensation at a rate greater than that at which the employer pays compensation to employees of a protected class for work of comparable character.
- Screen applicants or determine compensation based on current or past compensation.⁹

However, an employer may pay an employee a different rate of pay for work of comparable character if all of the difference in compensation level is based on a bona fide factor that is related to the position in question and that is based on the following:

- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production, including piece-rate work
- Workplace locations
- Travel, if travel is necessary and regular for the employee
- Education
- Training
- Experience
- Any combination of the listed factors, if the combination of factors accounts for the entire compensation differential.¹⁰

Finally, as relevant to our review, the pay equity law prohibits an employer from reducing the compensation level of an employee to comply with the provisions of ORS 652.220. The pay equity law also establishes rights of action before the Bureau of Labor and Industries (BOLI) or in court, but these provisions do not have bearing on the proposed changes to LBPR 4.

⁵ ORS 652.220.

⁶ ORS 652.210 (13).

⁷ ORS 652.210 (3).

⁸ ORS 652.210 (2).

⁹ ORS 652.220 (1).

¹⁰ ORS 652.220 (2).

Wage and hour laws

The federal Fair Labor Standards Act (FLSA)¹¹ generally establishes overtime requirements in the United States but does not apply to legislative branch employees except for legislative librarians.¹² State wage and hour laws generally exclude from minimum wage and overtime requirements, among others, individuals engaged in administrative, executive or professional work who (a) perform predominantly intellectual, managerial or creative tasks; (b) exercise discretion and independent judgment; and (c) earn a salary and are paid on a salary basis.¹³ BOLI has adopted numerous administrative rules that flesh out and give further meaning to what constitutes administrative, executive or professional work.¹⁴

LBPR 4—Option 2

We begin with the Option 2 iteration of proposed amendments to LBPR 4 because Option 2 appears to be the more comprehensive version. Because copies of both options are attached, we omit citations and only briefly highlight rule provisions. Specifically, Option 2:

- Requires preparation of a legislative branch compensation plan that is based on market data.
- Authorizes the presiding officers to modify, approve or deny recommended compensation plan changes, provided the changes also comply with LBPR 4 and applicable state and federal laws, expressly including pay equity laws.
- Prohibits a prospective employee from being asked about current or past salary history.
- Requires an equal pay analysis for each prospective employee and prohibits making an offer of employment until an equal pay analysis is performed.
- Permits a lump sum hiring bonus to be offered to a prospective employee, but only after an equal pay analysis is performed.

It is worth noting that the rule does not specify who may offer the hiring bonus, though bonuses are within the meaning of “compensation” under the pay equity law.¹⁵ A hiring bonus is not one of the bona fide factors that may justify different compensation for work of comparable character. Unstated in the rule is whether a hiring bonus that is not supported by an equal pay analysis may nevertheless be offered. We conclude that the hiring bonus portion of the rule complies with the pay equity law on its face but, as applied under the right circumstances, could result in a violation of the pay equity law.

For existing employees, option 2:

- Retains the existing six-month introductory period and annual merit one-step increase structure.
- Requires an appointing authority to provide performance feedback to an employee prior to denying any step increase.
- Alters a promotional one-step increase from one an appointing authority may grant to one a promoted employee “normally” receives, unless the new classification or equal pay analysis warrants a higher rate of pay.

¹¹ 29 U.S.C. 201 et seq.

¹² 29 U.S.C. 203(e)(2)(C)(i) and (ii)(V).

¹³ ORS 653.020 (3).

¹⁴ OAR 839-020-0005.

¹⁵ ORS 652.210 (1).

- Establishes a lump sum merit bonus that an appointing authority, with the approval of Employee Services, may grant for performance that exceeds expectations, if one or more of seven criteria are satisfied.¹⁶
- Retains an appointing authority's ability to grant a one-step special salary adjustment for "truly exemplary performance," but requires Employee Services to perform an equal pay analysis before the special salary adjustment is granted.

The merit bonus and one-step salary adjustment raise similar concerns to the hiring bonus concerns described above. The merit bonus criteria loosely line up with the factors justifying compensation differences under ORS 652.220 but, as applied under particular facts and circumstances, could result in a violation of the pay equity laws. Also, similar to the hiring bonus, the special salary adjustment rule requires an equal pay analysis to be performed but is silent on whether a special salary adjustment unsupported by the equal pay analysis may still be offered.

Option 2 includes the following general provisions worth noting:

- Clarifies that a red-circled employee does not receive a cost-of-living adjustment (COLA) and expressly notes that a red-circled salary for which a COLA is omitted is not considered to have received a reduction in the employee's level of compensation in order to comply with ORS 652.220.¹⁷
- Requires, beginning in 2023, a branch-wide market salary study to be performed comparing branch salaries against the current market.
- Expands the amount of actual moving expenses allowed for a newly hired employee from \$5,000 to \$20,000.
- Establishes an equal pay analysis reconsideration process.
- Provides a short session pay differential for employees hired only to staff short session.

While we conclude that the bullets listed in the preceding paragraph comply with Oregon's pay equity laws, we note two anomalies. First, the rule is silent on how the market salary review the rule requires to be performed every three years is to assist in informing the outcome of equal pay analyses.¹⁸ Second, the equal pay analysis reconsideration procedure casts Employee Services as the entity that performs the reconsideration, even though Employee Services performed the original equal pay analysis as well. If the rule tasked someone else with performing the reconsideration, objectivity in making equal pay analysis determinations could be enhanced.

Option 2 modifies the rule's provisions regarding overtime, as follows:

- Expressly notes that Employee Services is to determine overtime eligibility under either U.S. Department of Labor or BOLI criteria. The version of LBPR 4 currently in effect is silent on who determines overtime eligibility and on criteria to be applied.

¹⁶ The seven criteria consist of "payment by results," longevity, special assignment, achieved special job-related skills, training or education, extensive hours or extensive travel.

¹⁷ LBPR 2, as proposed in the 1-15-2020 LAC hearing, defines "red-circled" as meaning "when a position is allocated to a lower classification, retention of the employee's salary rate at the higher classification if the salary rate is above the maximum of the new, lower classification, or when an equal pay analysis finds that an employee's salary is inequitable to the employee's favor and is frozen until equity is established by work of a comparable character. A red-circled salary does not receive cost of living increases." (Proposed text underlined). Omitting COLAs for red-circled salaries is also consistent with BOLI rules. See OAR 839-008-0025.

¹⁸ The copy of Option 2 that we have been provided includes the text "Equal pay analysis completed by Employee Services will be based on this review" but then indicates that this text is to be deleted.

- Provides that overtime eligible employees are to be paid time and a half for overtime “when budget allows,” but overtime is to accrue as compensation time at a rate of time and a half “if budget does not allow.”
- Correctly notes that legislative branch employees, other than legislative librarians, are exempt from the FLSA and goes on to note that the State of Oregon’s wage and hour laws apply to positions in the legislative branch that are identified by Employee Services as overtime eligible.
- Retains the existing cap of a maximum of 240 hours of compensatory time as compensation for overtime; overtime eligible employees with more than 240 hours of accrued compensatory time must receive cash overtime payments.

We conclude that these provisions of the proposed rule are consistent with federal and state wage and hour laws. We note that the rule appears internally inconsistent by requiring overtime eligible employees to receive compensatory time if the budget does not allow for overtime cash payments, but then caps the maximum amount of compensatory time at 240 hours. Finally, we note that the proposed rules spell out with greater specificity than existing rules the overtime eligibility criteria to be used and who makes that determination: Employee Services. While such an outcome is the most legally prudent one, flexibility in addressing the overtime eligibility of positions that are not entirely clear is reduced.

LBPR 4—Option 1

Although there are minor wording and organizational changes, Option 1 contains much of the substance of Option 2, except that:

- A merit bonus consisting of a one-time-per-year lump sum payment is not authorized under Option 1. Hiring bonuses and one-step special salary adjustments similar to those provided in Option 2 are also present in Option 1.
- Option 1 does not require a market salary review to be performed every three years.¹⁹
- Option 1 requires Employee Services to perform equal pay analyses but does not provide any process for reconsideration of the equal pay analyses.
- Option 1 omits a short session differential for employees hired to only staff short session duties.

We conclude that Option 1 is, like Option 2, legally sufficient, except that Option 1 does not apply to legislator personal staff, caucus staff or leadership office staff. While such an omission is not per se a violation of pay equity law, there is great potential for personal staff or other partisan staff compensation to not be in compliance with pay equity requirements and therefore expose the State Treasury to liability. Oregon’s pay equity law establishes a safe harbor against certain kinds of damages for employers that conduct an equal pay analysis that meets certain standards.²⁰ Option 1, by not requiring a market salary review every three years, allows for the possibility that the legislative branch would be unable to take advantage of the safe harbor established by law, though nothing in Option 1 would preclude a market salary review from actually occurring. Similarly, by omitting an equal pay analysis reconsideration process, Option 1 increases the risk

¹⁹ We note that the definition of “equal pay analysis” proposed in the changes to LBPR 2 (15) currently pending before LAC purports to require a branch-wide equal pay analysis every three years; however, it is not sound legal practice to set forth a substantive direction or requirement in a definitional section whose purpose is only to state what something means.

²⁰ ORS 652.235 (1).

that equal pay analyses performed by Employee Services will contain an error leading to successful challenges in court.

In summary, both options are legally sufficient, but neither option precludes decisions being made under the rule that, as applied, would amount to a violation of state or federal employment law. It is probably not possible to design a rule that eliminates all risk of successful “as applied” challenges. Finally, as noted above, while both of these options are legally sufficient, these options are likely not the exclusive ways to provide rules governing compensation for the legislative branch.

Answers to your specific questions regarding LBPR 4 proposals²¹

Question: Who does Rule 4 apply to?

Answer: Under Option 2, the rule does not apply to members of the Legislative Assembly in their capacity as persons entitled to receive compensation. The rule does apply to members in their capacity as appointing authorities. In other words, a member who is an appointing authority to their staff must use the procedures outlined in whichever is adopted of Option 1 or Option 2 to determine new hire salaries and to determine increases in compensation that exceed annual one-step increases awarded on salary eligibility dates. The rule also applies to all legislative employees other than temporary status employees. “Temporary status” means “a noncompetitive employment status established to cope with short-term or unexpected workload demands when the establishment of a permanently funded position is inappropriate or unfeasible.”²²

Under Option 1, the rule does not apply to member personal staff or partisan office staff. The pay equity law itself, however, applies to all employees and employers in Oregon, including the State of Oregon.²³ While Option 1 need not be the only method to ensure compliance with pay equity laws, there must be some process to do so to ensure equal pay for work of comparable character.

Question: How is the requirement in LBPR 4 (2)(c) that employees not be paid less than minimum wage implemented?

Answer: The term “employee” excludes members of the Legislative Assembly.²⁴ While not addressed in rule, each legislative employee has an identifiable location at which the employee reports to work. That location may change depending on whether the Legislative Assembly is in session or not, but it would be the location used to determine an applicable minimum wage rate. Rule 4 (2)(c) simply ensures that the wage paid to an employee will not be less than the minimum wage at the location where the employee works. We conclude that this is legally sufficient.

Question: May an appointing authority withhold a salary increase due to budgetary reasons?

²¹ Some of your questions have been reworded for clarity and brevity. We also note that some of your questions apply only to Option 2, which is the more detailed of the two versions. We reference Option 1 or Option 2 only if the answers are different.

²² LBPR 2.

²³ ORS 652.210 and 652.220.

²⁴ LBPR 2.

Answer: No. The rule expressly prohibits withholding a salary increase on grounds that the appointing authority's budget cannot afford the increase. The rule provides an exception to this if a branch-wide salary freeze is in effect. Rule 4 itself does not provide authority or procedures for establishing branch-wide salary freezes.²⁵

Question: What statutory authority does Employee Services have to overrule an appointing authority's decision on annual merit bonuses? Is there a statutory requirement that an employee must be employed for six months?

Answer: Employee Services is an office within LAC. ORS 173.720 (1)(f) directs the Legislative Administrator to study and make recommendations on legislative compensation. ORS 292.956 provides that LAC shall, by rule, analyze the state's classification and compensation system to assess progress in achieving compensation policies specified in ORS 240.190 (comparability of value of work) and for the purpose of determining undervalued jobs in need of wage adjustments. The proposed changes to Rule 4 are exercises of that statutory authority. The proposed changes establish Employee Services' authority to perform equal pay analyses. The rules are silent on whether compensation increases not supported by an equal pay analysis move forward. Similarly, the rules establish six-month introductory periods of employment. A six-month introductory period is not a statutory requirement. The pay equity law, however, exposes the branch, and ultimately the State Treasury, to liability for compensation decisions made in the legislative branch that do not comply with pay equity law requirements. The proposed rules are designed to ensure compliance with pay equity requirements. As noted above, there are likely other alternative approaches that also could satisfy pay equity requirements.

Question: Do the rule provisions that treat any obligation to work that is less than 40 hours as part-time employment conflict with insurance requirements?

Answer: No. ORS 243.105 to 243.285 require employees employed at half-time or greater basis to receive the insurance benefits granted to full-time employees. The rule does not affect or alter statutory provisions regarding the provision of insurance benefits to public employees.

Question: Are there conflicts between provisions in the rule prohibiting hiring based on past salary and provisions governing transfer that state that a transferring employee's base rate of salary remains the same?

Answer: No. The rule and ORS 652.220 both prohibit an employer from asking a potential hire about past or current salary. Actually offering a new hire a salary that equals the new hire's prior salary is not prohibited; the law and rule prohibit the employer's inquiring about past or current salary and using that information to make a salary offer.

Under the rule, a transfer within the legislative branch or from the executive or judicial branch is not treated as a new hire. If the transfer is into the same classification or a "comparable" classification, no equal pay analysis is done and the transferee's compensation is unchanged. Under the rule and under comparable rules in the other branches, everyone within the same job classification is performing work of comparable character; differences in compensation for performing work of comparable character after January 1, 2019, must be supported by the presence of one or more of the bona fide factors listed in ORS 652.220 (2). In other words, an

²⁵ If other proposed LBPRs address branch-wide salary freezes, those rules will be addressed in subsequent correspondence.

equal pay analysis is unnecessary for a transfer within state government to the same job classification because such an analysis would have already been done. Because the rule does not provide guidance on what is meant by a “comparable” job classification, it is possible that the rule could be applied in a way that violates pay equity law, but such a result would turn on specific facts and circumstances.

Question: In the case of an upward reclassification, the rule permits an appointing authority, in consultation with Employee Services, to grant an additional step increase, “[u]nder unusual circumstances, as documented through an internal equal pay analysis” Does this rule require Employee Services’ consent before the additional step increase is granted?

Answer: The rule is silent on whether Employee Services must consent. We conclude that the rule’s silence is a significant ambiguity in the rule.

Question: Is the rule’s provision regarding red-circled employees correct?

Answer: Yes. The rule provides that the base salary of an employee whose salary is red-circled may not be increased, including cost-of-living increases. This is a policy choice made in the rule. The rule further provides that an employee whose salary is red-circled is not considered to have received a reduction in the employee’s level of compensation for purposes of complying with the equal pay law. This result is consistent with BOLI rules implementing the pay equity law.²⁶

Question: What is the status of the existing Segal Waters market salary review?

Answer: We understand that the Segal Waters review is ongoing and has not been completed. As amended in Option 2, the branch will not be required to perform a market salary review until 2023. As drafted, however, the rule would not prohibit using Segal Waters data for years prior to 2023.

Question: What is the appeal process proposed in Option 2 of the rule?

Answer: In Option 2, there is an equal pay analysis reconsideration process that is somewhat akin to an appeals process. An affected employee must provide a written request to the employee’s appointing authority within 15 days of receipt of any equal pay analysis or market salary review determination. The written request must identify the factors outlined in ORS 652.220 (2) that the employee believes were not properly considered. The appointing authority shall respond to the employee within 30 days. If the appointing authority disagrees with the employee, the reconsideration ceases. If the appointing authority agrees with the employee, the appointing authority shall provide all documentation to Employee Services, which makes a final determination. A conventional appeals process would have someone other than the entity that made the initial determination make the final determination.

Question: Is the proposed rule change for moving expenses consistent with the Internal Revenue Code?

Answer: This rule is unrelated to the Internal Revenue Code deduction for moving expenses. This rule authorizes a legislative branch employer to reimburse a newly hired employee for up to \$20,000 in moving expenses and requires the employee to provide receipts for

²⁶ OAR 839-008-0025 (2).

reimbursement requests above \$5,000. The rule provides that the moving expenses reimbursement is reported [as income] on the employee's W-2 form. The Internal Revenue Code deduction for moving expenses governs how a taxpayer deducts moving costs from income when reporting and paying their income taxes.

Question: What changes to overtime wage determinations are proposed by the rule?

Answer: The changes are discussed on pages 5 and 6 of this opinion. Prior iterations of LBPR 4 did not supply the detail concerning overtime that both Option 1 and Option 2 supply. The proposed changes to Rule 4 adopt by reference federal and state overtime eligibility standards. The state standards are generally set forth in ORS chapter 653 and BOLI administrative rules adopted thereunder. Significantly, ORS 653.020 (3) provides that an individual employee is exempt from overtime requirements if engaged in administrative, executive or professional work and:

- (a) Performs predominantly intellectual, managerial or creative tasks;
- (b) Exercises discretion and independent judgment; and
- (c) Earns a salary and is paid on a salary basis.

Many legislative branch employees meet these standards. The proposed rule also provides that an overtime-eligible employee is subject to discipline if the employee works overtime without authorization from the employee's supervisor. This requirement is permissible and simply means that an overtime eligible employee must get their supervisor's approval before working overtime. The overtime must be paid, regardless of whether the overtime was authorized or not, but the employee may be subject to discipline in performing unauthorized overtime. Finally, the rule prohibits an overtime-eligible employee from performing volunteer work for that employer. This restriction is permissible and also very limited. The rule does not purport to prohibit all volunteering, only volunteering to perform work the employee otherwise gets paid to do.

Question: Are legislative branch employees exempt from the FLSA?

Answer: Generally, yes, as discussed on pages 3 and 4 of this opinion.

Question: Why is the rule's provision on separation of powers requirements being deleted?

Answer: It is being moved to a different rule: Rule 1—General Provisions.²⁷

Question: What changes are being made governing differentials?

Answer: Option 1 rewrites the rules applicable to work out of class but does not change the substance of the rule. Option 1 does not make any other changes.

Both options change how certain differentials are described, from "one-step" to "five percent" and "two steps" to "10 percent." This is not a substantive change.

Option 2 creates a new short session differential for employees who are hired to staff short session duties. We believe this differential is intended to be given to employees who are not

²⁷ As set forth in the meeting materials for the 1-15-2020 LAC meeting.

ongoing employees, but rather who are hired for the short session but then do not continue in employment. The rule should probably so state, if that is what is intended.

Finally, Option 2 simply restates the existing authority of the presiding officers to establish additional differentials.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dexter A. Johnson", with a long horizontal flourish extending to the right.

Dexter A. Johnson
Legislative Counsel

Encls.

State of Oregon
LEGISLATIVE BRANCH PERSONNEL RULES

Legislative Branch Personnel Rule 4: Compensation and Salary Administration

APPLICABILITY: This rule applies to all employees of legislative agencies and parliamentary offices, except that:

- (a) Subsections (3)(e) and (12) of this rule apply to all Legislative Branch employees who are not members of the Legislative Assembly;
- (b) Subsection (15) of this rule applies to members of the Legislative Assembly and all Legislative Branch employees; and
- (c) Subsections (1) to (14) and (16) of this rule do not apply to temporary status employees.

(1) **Purpose.** The purpose of the compensation plan is to provide a uniform system for establishing and assigning salary levels and administering pay to recruit and retain a high-quality workforce.

(2) **Preparation of compensation plan.** For each class of work, a minimum and maximum pay rate, and intermediate rates as necessary, shall be established. The rates assigned to each class must reflect the differences in the duties, authorities and responsibilities of the class. Data considered as part of compensation analysis may include, but need not be limited to, rates paid by other public and private employers for comparable work, Legislative Branch policies and financial conditions, unusual recruitment and retention circumstances and other relevant salary and economic data.

(3) **Salary administration.**

(a) **New Hire.**

(A) An employee may not be hired at less than the current Oregon minimum wage.

(B) A prospective employee shall not be asked about current or past salary history at any time during the hiring process.

(C) A prospective employee may not be initially offered compensation based on current or past compensation. An employee shall be appointed at a rate that complies with the equal pay requirements of ORS 652.220 and 659A.357.

(D) An offer including salary shall not be extended until the pay analysis is complete.

(b) **Part-time employees.**

(A) Any employee hired to work less than full time (40 hours per week) is a part-time employee. A part-time employee may be scheduled to work any percentage of full-time work if the percentage is a whole percent and does not total more than 100 percent.

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<#>An appointing authority may hire an applicant at up to the top step in the salary range for a class if: ¶
<#>The applicant's current or most recent relevant salary and benefits are higher than the Legislative Branch's first step; ¶
<#>The applicant brings education or experience to the job that will substantially enhance the employee's immediate contribution; or ¶
<#>Unusual or difficult recruitment conditions exist. ¶
<#>The appointing authority shall document and retain the reasons for hiring above the bottom half of the applicable class. ¶

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OPTION ONE

(i)

(c) Hiring bonus. With the approval of the agency head or parliamentarian, a lump sum payment may be given to an employee at the time of hiring, promotion or lateral transfer when there is a difficult recruitment situation and the payment is needed in order to fill the position. Documentation of the specifics of the payment must be retained in the recruitment file or, if hired, in the employee's personnel record.

(d) Moving expenses. An appointing authority may reimburse actual moving expenses for a newly hired employee, not to exceed a total of \$5,000. A condition of moving expense reimbursement is agreement to repay any moving expense reimbursement in an amount equal to the amount of moving expenses reimbursed multiplied by the percentage of the 24-month commitment not served by the employee. The employee is not responsible for repayment of moving expense reimbursement if the employee is terminated at the discretion of the appointing authority under terms of at-will employment.

(4) Legislative compensation plan. The presiding officers have the authority to review, amend, approve or deny any recommended compensation plan changes, as long as any changes comply with this rule, all state and federal laws and the necessary resources are available to implement the plan.

(a) Introductory period.

(A) During an introductory period, an employee is trained and oriented to the employee's position in the Legislative Branch. In general, an employee is not eligible for a raise or promotion during an introductory period. An introductory period lasts for six months but may be extended by the appointing authority.

(B) After completion of an introductory period, an employee normally receives a one-step salary increase as long as the increase does not exceed the maximum rate in the range. The increase becomes effective on the first day of the month following successful completion of the introductory period. The salary eligibility date is one year after the employee's most recent increase.

(C) If an appointing authority extends an introductory period due to performance issues, the employee may not receive a step increase unless and until the employee's performance is satisfactory.

(D) An appointing authority must provide the employee with performance feedback prior to denying any step increase and document the feedback in the employee's personnel record.

(E) An appointing authority shall not withhold a salary increase due to budgetary reasons unless a branch-wide salary freeze is in effect.

(b) Annual merit increase.

(A) A limited duration status employee or an employee in a continuing status position normally receives an annual one-step merit increase on the employee's salary eligibility date when the employee's base rate of pay does not equal or exceed the maximum rate for the employee's salary range.

(B) If an appointing authority postpones or denies a merit step increase, the appointing authority must provide the employee with performance feedback

Deleted: <#>A part-time employee may not be hired at less than the current Oregon minimum wage. ¶
<#>Any employee hired to work less than full time (40 hours per week) is a part-time employee. A part-time employee may be scheduled to work for only one of the following percentages of full-time work: ¶
<#>20 percent; ¶
<#>25 percent; ¶
<#>40 percent; ¶
<#>50 percent; ¶
<#>60 percent; ¶
<#>75 percent; ¶
<#>80 percent; ¶
<#>90 percent; or (ix) 95 percent.

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Commented [KJ1]: The prior drafts made changes to reflect actual practices and increase the amount to 20K

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Deleted: <#>may, at such times as the presiding officers deem appropriate and subject to the availability of resources, adjust the compensation plan. Adjustments may be made in each step of each salary range and may not result in employee movement from one step to another. All employees who are on step are eligible for adjustment of steps. Employees that are off step will receive a salary adjustment only at the request of the appointing authority via personnel action. ¶

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Deleted: <#>After completion of an introductory period, an appointing authority shall review the performance of an employee and may authorize a minimum one-step salary increase within the employee's salary range if the increase would not cause the employee's salary to exceed the maximum rate for the range. Any step increase awarded upon the completion of an employee's introductory period is entirely at the discretion of the appointing authority. If granted, the increase becomes effective on the first day of the month following successful completion of the introductory period. The salary eligibility date is one year after the employee's most recent increase. ¶

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prior to postponing or denying any step increase and document the feedback in the employee's personnel record.

(C) At any time during the year following the postponement or denial of an annual merit increase, the appointing authority may grant the increase. Postponing or denying an annual merit increase does not change an employee's salary eligibility date.

Salary Eligibility Date. For each period of leave without pay that is in excess of 15 consecutive calendar days, the employee's recognized service date shall be permanently adjusted by adding to the salary eligibility date the number of calendar days absent, thereby making the eligibility date later than it would have been if leave without pay had not been taken. This subsection does not apply to unpaid leave authorized under LBPR 15.

(c) **Promotional increases.**

(A) Upon promotion, an employee normally receives an increase in pay equivalent to one step, unless additional steps are required to compensate the employee at the first step of the new classification or an equal pay analysis indicates a higher rate of pay not to exceed the maximum rate of pay. All equal pay analysis documentation shall be retained in the employee's personnel record for the established rate of pay.

(B) An employee who is promoted may receive a step increase six months following the effective date of the promotion. The salary eligibility date for the annual merit increase is one year after the promotional increase.

(d) **Transfer.** When an employee transfers from one position to another position from the Legislative, Judicial or Executive Branch in the same or comparable classification or a classification having the same or comparable salary range, the employee's base rate of pay remains the same. Employee Services will help determine the comparable salary range when an employee transfers from another branch. The employee's status and salary eligibility date are not affected unless the employee serves an introductory period. If the employee serves an introductory period and is granted a step increase at the end of the introductory period, the employee's salary eligibility date is set one year thereafter.

Reclassification.

(A) Upward.

(i) Except as described below, when an employee's position is reclassified to a higher classification, the employee may receive an increase from the employee's base rate of pay to a rate in the salary range to which the employee is reclassified. The employee's status is not affected. The employee's salary eligibility date is not affected by the reclassification.

(ii) Under unusual circumstances, as documented through an internal equal pay analysis, an appointing authority may, in consultation with Employee Services, grant an additional step upon upward reclassification. Unusual circumstances include, but are not limited to, an employee's scheduled salary eligibility date closely following the effective date of the upward reclassification, or the employee having received a differential for a substantial duration that will no longer continue after the upward reclassification. Such an increase may not cause the employee's new base rate of pay to exceed the maximum rate of the higher-level classification.

Deleted: <#>The appointing authority of a limited duration status employee or an employee in a continuing status position may grant, postpone or deny an annual merit increase to the employee on the employee's salary eligibility date if the employee's base rate of pay does not equal or exceed the maximum rate for the employee's salary range. If awarded, an annual merit increase is one step. ¶ <#>At any time during the year following the postponement or denial of an annual merit increase, the appointing authority may grant the increase. Withholding of an annual merit increase does not change an employee's salary eligibility date. ¶

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Deleted: <#>Upon promotion, an employee may receive an increase in pay equivalent to one step, unless additional steps are required to compensate the employee at the first step of the classification to which the employee is promoted. ¶ <#>Under unusual circumstances and after consultation with the Human Resources Director, an employee may be offered an increase in pay beyond the first step of the new range. Unusual circumstances include, but are not limited to, the employee's education or experience that will substantially enhance the employee's immediate contribution, and the existence of documented unusual or difficult recruitment conditions. Such an increase may not cause the employee's new base rate of pay, excluding differentials, to exceed the maximum rate of pay for the higher-level classification. The appointing authority shall inform the Human Resources Director of the increase and document and retain the reasons for granting the increase. ¶ <#>An employee who is promoted may receive a step increase following the promotional introductory period. The salary eligibility date is one year after the increase. ¶

Deleted: <#>When an employee transfers from one position to another position in the same classification or a classification having the same salary range, the employee's base rate of pay remains the same. The employee's status and salary eligibility date are not affected. ¶

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Necessary justification documentation must be maintained in the employee's personnel record.

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- (B) Downward. When an employee's position is reclassified to a lower classification, the employee's base rate of pay and status are not affected. If the employee's base rate of pay is higher than the maximum rate of pay for the class to which the employee is reclassified, the employee shall be red-circled. If the employee's base rate of pay is lower than the maximum rate for the class to which the employee is reclassified, the employee's salary eligibility date is not affected.

(e) **Demotion.**

(A) Voluntary demotion.

- (i) When a regular status employee or a limited duration status employee requests and is granted demotion to a classification having a lower salary range, the employee's base rate of pay shall be decreased to a rate within the salary range of the lower classification. The employee's salary eligibility date shall not be affected. However, if the employee's base rate of pay is above the maximum rate for the lower salary range, the employee's base rate of pay shall be decreased to the maximum rate of the lower salary range, and the month and day of the employee's salary eligibility date shall be maintained. The employee's status is not affected.
- (ii) When an employee who has been promoted and is on a promotional introductory period requests and is granted demotion back to the employee's prior classification, the appointing authority shall reduce the employee's base rate of pay to the step in the salary range that the employee was at prior to promotion. The month and day of the employee's prior salary eligibility date shall be restored and the employee shall receive the annual increase the employee would have otherwise received, if any, but for the promotion. The employee's status returns to what it was prior to promotion.
- (iii) When an employee in an initial introductory period, or a limited duration status employee who has been employed for less than one year, requests demotion to a classification having a lower salary range, the appointing authority shall adjust the employee's base rate of pay, not including differentials, to the lower salary range and may adjust the employee's base rate of pay to any rate of pay within that salary range that is equal to or lower than the employee's base rate of pay prior to demotion. The employee's salary eligibility date is not affected, provided the employee's base rate of pay does not equal the maximum rate of the lower salary range. The employee's status is not affected.

- (B) Involuntary demotion. When an employee is involuntarily demoted, the appointing authority shall adjust the employee's salary range to the salary range for the position to which the employee is demoted and may adjust the employee's base rate of pay to any step within that salary range. The employee's status is not affected. The employee's salary eligibility date is not affected provided the employee's base rate of pay does not equal the maximum rate within the lower salary range.

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(C) Employee Services must complete an equal pay analysis which may warrant a higher pay rate within the range. Equal pay analysis documentation must be retained in the employee's personnel record.

(f) (L) Red-circled employees.

(g) The base rate of pay of an employee who becomes red-circled may not be increased, including cost of living increases, until the salary amount being paid is within the salary range established for the position. An employee whose salary is red-circled is not considered to have received a reduction in the employee's level of compensation for the purposes of complying with the equal pay provisions under ORS 652.220.

Rehire. Upon rehire, an employee's base rate of pay, not including differentials, shall be determined by the appointing authority in accordance with this subsection.

(m) **Special salary adjustments.**

(A) (A)

(B) An appointing authority may grant a one-step special salary adjustment, up to the salary range maximum, to any employee who is not in a temporary position, who has completed six months of employment and, if applicable, who has completed six months of the current introductory period. An equal pay analysis must be completed by Employee Services prior to granting the special salary adjustment.

(C) A special salary adjustment is to be reserved for truly exemplary performance or for uniquely compelling circumstances. An appointing authority who wishes to grant a special salary adjustment to an employee must submit, for inclusion in the employee's personnel record, written justification that clearly demonstrates how this expenditure is equitable and in the best interest of the Legislative Branch.

(D) An employee may receive no more than one special salary adjustment in any 12-month period. Such an adjustment does not affect an employee's salary eligibility date.

(5) **Compensation plan changes.** Changes in the compensation plan are effective on the date specified by the presiding officers. All compensation plan changes are subject to availability of funding.

(6) **Partial pay period.** If an employee works less than a full calendar month in a pay period due to hire, termination or leave without pay, the employee's pay for that month shall be computed on a prorated basis using the number of available work hours, based on the employee's schedule, in that month.

(7) **Partial day absences.** An employee who is not eligible for overtime must use accrued leave for partial day absences. If the employee does not have sufficient appropriate paid leave accrued to cover the absence, the appointing authority may not reduce the employee's salary for that portion of the partial day absence not covered by paid leave.

(8) **Overtime.**

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An agency head or parliamentarian may grant a one-step special salary adjustment, up to the salary range maximum, to any employee who is not in a temporary or limited duration status position, who has completed six months of employment and, if applicable, who has completed six months of the current introductory period. ¶
A special salary adjustment is to be reserved for truly exemplary ¶
performance or for uniquely compelling circumstances. An agency head or parliamentarian who wishes to grant a special salary adjustment to an employee must submit, for inclusion in the employee's official personnel file, written justification that clearly demonstrates how this expenditure is in the best interest of the Legislative Branch. ¶
An employee may receive no more than one recognition adjustment in any 12-month period. Such an adjustment does not affect an employee's salary eligibility date. ¶
An agency head or parliamentarian may grant a special recognition bonus for truly exemplary performance or under uniquely compelling circumstances. An employee may receive only one special recognition bonus in any 12-month period and may not receive a special recognition bonus in the same 12-month period in which the employee received a special salary adjustment under this rule. ¶
- - (B) Retention. ¶
An appointing authority may grant a special salary adjustment up to the maximum of the employee's salary range to retain any employee who is not in a temporary or limited duration status position and who holds a mission-critical position. The employee must present to the appointing authority a bona fide employment offer that does not originate from the Legislative Branch. The employee may be required by the agency head or parliamentarian to sign a legally binding agreement not to resign from the Legislative Branch for up to one year from the date of the adjustment. ¶
The appointing authority must produce a report with written justification defining the terms of the employee's external employment offer and demonstrating the missioncritical nature of the position held by the employee for whom a special salary adjustment is to be granted. This report, along with the signed agreement to remain, if any, shall be placed in the employee's official personnel file. ¶
An employee may receive no more than one retention adjustment in any salary range. An adjustment does not affect an employee's salary eligibility date. ¶

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(a) Employee Services shall determine the overtime eligibility for each position based on either the United States Department of Labor or the Bureau of Labor and Industries' criteria, where applicable.

(b) Overtime-eligible employees are eligible for overtime when:

- (A) Time worked is in excess of 40 hours in one workweek; or
- (B) Time worked in a single workday exceeds 12 hours. In such a case, overtime is calculated and paid only for the time worked in excess of 12 hours in any one workday or in excess of 40 hours worked in one workweek.

(c) Overtime eligible employees who work overtime are eligible, when budget allows, for pay at one and one-half of the employee's rate. If budget does not allow, overtime will accrue as compensatory time at the rate of one and one-half of the employee's rate.

(d) Unauthorized overtime. An overtime-eligible employee who performs overtime work without authorization from the employee's supervisor may be subject to discipline. Even if the time worked is unauthorized, an overtime-eligible employee will be compensated for any overtime worked in the manner outlined in paragraph (b) of this subsection.

(e) Volunteering. An appointing authority may not allow an employee who is overtime-eligible and who has worked 40 hours in a workweek to perform work that is the same or similar to the employee's regularly assigned duties on a volunteer basis. Such voluntary work performed by an overtime-eligible employee during a workweek in which the employee has worked 40 hours is considered time worked for purposes of computing overtime.

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(9) Eligibility. All employees of the Legislative Branch, other than legislative librarian positions, are exempt from the Fair Labor Standards Act (FLSA). The State of Oregon's wage and hour laws are applicable to positions in the Legislative Branch entitled to the payment of overtime as determined by Employee Services and as outlined in subsection (8) of this rule.

(10) Recording and compensation.

(a) In the case of overtime-eligible employees, all time worked must be recorded on the employee's timesheet. Overtime is compensated at the rate of one and one-half times the employee's regular hourly rate of pay, as defined by the Bureau of Labor and Industries, at the time the overtime is worked. For the purpose of calculating overtime, accrued paid leave that is used is not considered as time worked, but a paid holiday that is taken off is considered as time worked.

(b) An agency head or parliamentarian may elect to compensate overtime-eligible employees by cash payment or by compensatory time. An employee may accrue a maximum of 240 hours of compensatory time. An employee who has accrued 240 hours of compensatory time and who works overtime must receive cash payment for the overtime worked in excess of 240 hours.

Deleted: All legislative agencies and parliamentary offices, other than legislative librarian positions, are exempt from the Fair Labor Standards Act (FLSA). Some positions are treated under these rules as overtime eligible, as determined using FLSA criteria. The employees in these positions are eligible for overtime. ¶

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(11) Use of compensatory time.

(a) In the case of overtime-eligible employees, compensatory time is available for use any time following the workday in which it is earned. The use of compensatory time may be requested by the employee or may be required by the appointing authority.

(b) The use of compensatory time must be scheduled in advance.

OPTION ONE

- (c) A supervisor shall grant an overtime-eligible employee's request to use accrued compensatory time unless doing so would unduly disrupt business operations.
 - (d) Compensatory time must be used within 18 months. After 18 months, unused compensatory time will be paid to the employee at the employee's current rate of pay.
- (12) **Compensation and compensatory time at termination.** In the case of overtime-eligible employees, an employee who terminates employment shall be paid for accrued compensatory time at the employee's regular hourly rate at termination.
- (13) **Compensation and compensatory time upon transfer or promotion.**
- (a) When an overtime-eligible employee transfers or is promoted to a different position in the Legislative Branch, the appointing authority for the position being vacated shall pay the employee for all accrued compensatory time earned prior to the effective date of transfer or promotion at the regular hourly pay rate the employee was receiving on the workday prior to transfer or promotion.
 - (b) The appointing authority for the position being filled may, prior to the effective date of the transfer or promotion, agree in writing to allow the employee to retain some or all of the employee's accrued compensatory time, which then becomes the liability of the legislative unit or agency to which the employee is transferring or being promoted.
- (14) **Compensation and compensatory time before termination.** An appointing authority may elect at any time to pay an overtime-eligible employee in cash for all or a portion of compensatory time after such time has been accrued. If an employee is paid for accrued compensatory time before termination, payment shall be made at the employee's regular hourly pay rate at the time of payment.
- (15) **Second jobs.** When an employee applies for a second job within the Legislative Branch: (a) If the employee is working full-time for the first legislative agency or parliamentary office and if the second Legislative Branch position has the same or similar job duties, the second legislative agency or parliamentary office shall be responsible for any overtime pay liability. However, the second agency or office may refuse to hire the employee because of potential overtime pay liability.
- (b) If the employee is working part time for the first legislative agency or parliamentary office and if the second legislative agency or parliamentary office job has the same or similar duties, the two entities shall mutually agree on the employee's overtime eligibility status and any overtime pay obligation. Unless both entities agree otherwise, the legislative agency or parliamentary office employing the employee at the time the employee exceeds 40 hours in one workweek shall pay any overtime for which the employee is eligible.
 - (c) If the second legislative job is in a different capacity than the employee's regular job and is occasional or sporadic, the second legislative agency or parliamentary office may hire the employee without overtime pay liability. As used in this paragraph:
 - (A) "Different capacity" means employment involving duties that do not fall within the same general occupational category as the employee's regularly assigned duties.

OPTION ONE

- (B) "Occasional or sporadic" means infrequent, irregular or occurring in scattered instances.

(16) **Differentials.**

(a) Shift differential.

- (A) Shift differential applies to any employee who is in an overtime-eligible position and whose regularly scheduled workday falls entirely or partially within the hours of 6:00 p.m. and 6:00 a.m. or on Saturday or Sunday.
- (B) The amount of shift differential must be consistent with differentials paid in other branches of state government. Shift differential is applied to the actual time worked between the hours of 6:00 p.m. and 6:00 a.m., or on Saturday or Sunday, and is considered in the calculation of overtime pay.
- (C) Shift differential may not be computed at the rate of one and one-half the employee's regular rate of pay for a shift occurring on a holiday.
- (D) Shift differential is not applied to base pay rates for computation of pay during leave with pay.
- (E) An appointing authority and employee may mutually agree, in advance and in writing, to waive the payment of shift differential. A waiver is possible only when an employee requests to work a schedule that would otherwise qualify for payment and the approval is based on the employee's personal preference rather than business need.

(b) Work out of class.

(A) Eligibility and rate. Except as described below, an employee assigned in writing to perform duties of an existing, higher-level classification for a period of 10 or more consecutive work days must be compensated for the performance of such duties. The rate of pay for temporary duties at a higher classification is either:

- (i) Five percent of the employee's base rate of pay; or
- (ii) The difference between the employee's base rate of pay and the first step of the higher (WOC) classification's salary range, whichever is greater. The pay rate may not exceed the top step of the higher level of classification.

(B) Duration. Work out of class duties may be assigned for a specified period not to exceed one year. An appointing authority may extend a work out of class assignment beyond one year under unusual circumstances.

(C) Waiver. When an employee is assigned higher-level duties that would otherwise qualify for work out of class, the employee and appointing authority may mutually agree to waive the work out of class when the purpose of the assignment is to give the employee the opportunity to learn a higher-level job skill.

(c) Lead differential.

- (A) An employee may receive a one-step lead differential when an appointing authority assigns lead work or team leader duties to that employee for a period of 10 or more consecutive work days. The appointing authority shall consult with the Human Resources Director prior to authorizing such payment.

Commented [KJ4]: A short session differential had been proposed in the other versions.

Deleted: ~~Separation of powers.~~

~~Unlike the United States Constitution, which establishes separation of powers only by implication, the Oregon Constitution contains a specific requirement dividing state government into three separate branches: the Legislative, the Executive and the Judicial. The Oregon Constitution further provides that no person charged with official duties under one of these branches shall exercise any of the functions of another, except as otherwise expressly provided in the Constitution. See Article III, section 1, Oregon Constitution.~~
~~Article III, section 1, prohibits:~~
~~Employees of one branch from undertaking a duty or function that belongs in another branch;~~
~~Employees of one branch, in performing a duty appropriate to that branch, from doing so in a way that unduly interferes with the operation of another branch's function; and~~
~~The same person from simultaneously performing duties as an affiliate of more than one branch.~~
~~Due to Article III, section 1, employees may not work for more than one branch of government simultaneously.~~

Deleted: ~~Eligibility and rate. Except as described below, an employee assigned in~~

~~writing to perform duties of an existing, higher-level classification for a period of 10 or more consecutive work days must be compensated for the performance of such duties. Compensation is generally a temporary one-step salary increase for the period during which the duties are performed. Under unusual circumstances, such as when the employee assumes the full responsibility of a higher level class and a one-step increase is not sufficient to compensate the employee at the minimum rate of the higher level class, and after consultation with the Human Resources Director, an appointing authority may grant more than a one-step increase. The appointing authority shall document and retain the reasons for granting more than a one-step increase. The pay rate of an employee receiving work out of class may not exceed the top step of the higher level classification.~~
~~Duration. Work out of class duties may be assigned for a specified period not to exceed one year. An appointing authority may extend a work out of class assignment beyond one year under unusual circumstances.~~
~~Waiver. When an employee is assigned higher-level duties that would otherwise qualify for work out of class, the employee and appointing authority may mutually agree to waive the work out of class when the purpose of the assignment is to give the employee the opportunity to learn a higher-level job skill.~~

OPTION ONE

- (B) Lead differential does not apply to employees whose classifications normally include lead work or team leader duties, or to voluntary training or developmental assignments.
 - (C) Payment of a lead differential must be designated for a specific lead work or team leader assignment, project or time period as determined by the appointing authority. The employee must be paid for the full period during which the duties are assigned.
 - (D) When an employee who is receiving a lead differential is temporarily assigned to perform work that qualifies for a work out of class differential, the appointing authority may continue the lead differential for the duration of the work out of class assignment for up to one year.
 - (E) While this differential is normally one step, the appointing authority may determine that two steps are warranted when the lead work assignment is significantly larger as a result of factors including, but not limited to:
 - (i) The number of employees led.
 - (ii) The number of work units led.
 - (iii) The complexity of, or differences between, the work unit or units led.
 - (iv) The number of geographic locations in which the employee is leading staff.
 - (F) The appointing authority shall document and retain the reasons for granting a two-step lead differential.
 - (G) As used in this paragraph, "lead work or team leader duties" includes duties where, on a recurring or daily basis, the employee has been assigned the responsibility to perform substantially all of the following functions:
 - (i) Training or orienting new employees.
 - (ii) Assigning and reassigning tasks to other employees.
 - (iii) Giving direction to other employees concerning day-to-day work procedures.
 - (iv) Communicating established standards of performance to affected employees.
 - (v) Reviewing the work of other employees to ensure conformance to established standards.
 - (vi) Providing informal assessment of employees' performance to the supervisor.
- (d) On-call differential.
- (A) When an overtime-eligible employee is required to work times other than the employee's regular, flexible or irregular work schedule in order to perform work before the employee's next regularly scheduled work day, the employee must be compensated with an on-call duty differential.
 - (B) An overtime-eligible employee who is on-call and available for work need not be subject to restrictions that prevent the employee from using on-call time for the employee's own purposes, but must be available, within 60 minutes of being requested, to consult by telephone or to report promptly for work. On-call duty differential pay may not be applied to base pay rates for computation of pay during leave with pay.

OPTION ONE

- (C) An on-call employee who returns to work when requested shall be paid the on-call differential for a minimum of two hours at the rate of time and one-half. Additional time worked is paid on an hourly basis for each hour or major portion of an hour worked at the rate of time and one-half. As used in this subparagraph, "major portion of an hour" means 30 minutes or more.
- (D) On-call duty differential does not apply to employees working in overtime situations or whose flexible or irregular work schedule falls between 5 p.m. and 8 a.m. or on weekends.
- (e) The presiding officers may establish any other differential, in addition to those listed above, determined by the presiding officers to be necessary.

(17) Call back.

- (a) An overtime-eligible employee who has been released from duty and who must return to the work site to perform work before the employee's next regularly scheduled work day shall be compensated for a minimum of two hours of work. The work may be performed:
 - (A) At the employee's work site.
 - (B) At a work site other than the employee's official work site.
- (b) Time worked that is a continuation of or immediately preceding an overtime-eligible employee's normal work schedule, that is scheduled in advance or that does not require the employee to physically travel to a work site does not constitute call back. An employee may be called back only by the appointing authority or by the employee's immediate supervisor.
- (c) A full-time overtime-eligible employee shall be compensated for call back time in excess of 40 hours in a work week in accordance with subsections (7) to (9) of this rule. A part-time overtime-eligible employee shall be compensated for call back time at straight time and shall be paid at the hourly rate equivalent to the employee's current salary. If a part-time employee's call back time, when combined with the employee's regular hours worked in a work week, exceeds 40 hours, the work in excess of 40 hours shall be compensated in accordance with subsections (7) to (9) of this rule.

Approved: 1-16-2016

OPTION TWO

State of Oregon
LEGISLATIVE BRANCH PERSONNEL RULES

Legislative Branch Personnel Rule 4: Compensation and Salary Administration

APPLICABILITY: This rule applies to all employees of the Legislative Branch and does not apply to members of the Legislative Assembly, unless noted otherwise. Subsections XXXX of this rule apply to temporary status employees.

(1) **Purpose.** The purpose of this rule is to provide an equitable compensation system for establishing and assigning salary levels and administering pay to recruit and retain a high-quality workforce. If an employee feels a salary based decision is inequitable, the employee may request reconsideration as outlined in subsection XXX of this rule.

(2) **Preparation of the Legislative Branch Compensation Plan.**

(a) Each compensation plan shall comply with the equal pay and salary history requirements of ORS 652.220 and 659A.357.

(b) For each class of work, a minimum and maximum pay range shall be established reflecting the differences in the duties, authorities and responsibilities of the class.

(c) The compensation plan must be based on market data, to the extent the data is available. Data considered as part of compensation analysis may include, but need not be limited to, rates paid by other public and private employers for comparable work. An employee may not be paid less than minimum wage.

(3) **Legislative Branch Compensation Plan Changes.** The Presiding Officers have the authority to review, amend, approve or deny any recommended compensation plan changes, as long as any changes comply with this rule, all state and federal laws and the necessary resources are available to implement the plan.

(4) **Salary Administration - General.**

(a) **New Hire,**

(A) A prospective employee shall not be asked about current or past salary history at any time during the hiring process.

(B) A prospective employee may not be initially offered compensation based on current or past compensation. An employee shall be appointed at a rate that complies with the equal pay requirements of ORS 652.220 and 659A.357.

(C) Employee Services shall complete an equal pay analysis within two business days after a request is received.

(D) An offer including salary shall not be extended until the pay analysis is complete.

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Subsections (3)(e) and (12) of this rule apply to all Legislative Branch employees who are not

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Subsection (15) of this rule applies to members of the Legislative Assembly and all ¶
Legislative Branch employees; and ¶
Subsections (1) to (14) and (16) of this rule do not apply to temporary status employees.

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OPTION TWO

(b) Hiring Bonus. A lump sum payment may be given to an employee at the time of hire, promotion or lateral transfer when there is a difficult recruitment situation and the payment is necessary to fill the position only after Employee Services completes an equal pay analysis. Documentation must be retained in the recruitment file or, if hired, in the employee's personnel record.

(c) Introductory Period.

(A) During an introductory period, an employee is trained and oriented to the employee's position in the Legislative Branch. In general, an employee is not eligible for a raise during an introductory period. An introductory period lasts for six months but may be extended by the appointing authority.

(B) After completion of an introductory period, an employee normally receives a one-step salary increase as long as the increase does not exceed the maximum rate in the range. The increase becomes effective on the first day of the month following successful completion of the introductory period. The salary eligibility date is one year after the employee's most recent increase.

(C) If an appointing authority extends an introductory period due to performance issues, the employee may not receive a step increase unless and until the employee's performance is satisfactory.

(D) An appointing authority must provide the employee with performance feedback prior to denying any step increase and document the feedback in the employee's personnel record.

(E) An appointing authority shall not withhold a salary increase due to budgetary reasons unless a branch-wide salary freeze is in effect.

(d) Annual Merit Increase.

(A) A limited duration status employee or an employee in a continuing status position normally receives an annual one-step merit increase on the employee's salary eligibility date when the employee's base rate of pay does not equal or exceed the maximum rate for the employee's salary range.

(B) If an appointing authority postpones or denies a merit step increase, the appointing authority must provide the employee with performance feedback prior to postponing or denying any step increase and document the feedback in the employee's personnel record.

(C) At any time during the year following the postponement or denial of an annual merit increase, the appointing authority may grant the increase. Postponing or denying an annual merit increase does not change an employee's salary eligibility date.

(e) Promotional increases.

(A) Upon promotion, an employee normally receives an increase in pay equivalent to one step, unless additional steps are required to compensate the employee at the first step of the new classification or an equal pay analysis indicates a higher rate of pay not to exceed the maximum rate of pay. All equal pay analysis documentation shall be retained in the employee's personnel record for the established rate of pay.

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<#>An appointing authority may hire an applicant at up to the top step in the salary range for a class if: ¶
<#>The applicant's current or most recent relevant salary and benefits are higher than the Legislative Branch's first step; ¶
<#>The applicant brings education or experience to the job that will substantially enhance the employee's immediate contribution; or ¶
<#>Unusual or difficult recruitment conditions exist. ¶
<#>The appointing authority shall document and retain the reasons for hiring above the bottom half of the applicable class. ¶

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OPTION TWO

(B) An employee who is promoted may receive a step increase six months following the effective date of the promotion. The salary eligibility date for the annual merit increase is one year after the promotional increase.

(f) Merit Bonus.

(A) With the approval of the appointing authority and Employee Services, a lump sum payment or the equivalent amount of leave may be given to a current, eligible employee when the employee's performance rating exceeds expectations and meets the following criteria:

- (i) Payment by results;
- (ii) Longevity;
- (iii) Special assignment;
- (iv) Achieved special job-related skills;
- (v) Training or education;
- (vi) Extensive hours; or
- (vii) Extensive travel.

(B) Lump sum payments or equivalent administrative leave may only be given one time in a calendar year beginning January 1 and going through December 31. The employee must be employed for at least six calendar months or employed through a long session (February through June) to be eligible. The amount shall not exceed one month of an eligible employee's gross monthly salary or equivalent amount of administrative leave. Necessary justification documentation is maintained in the employee's record.

(g) Special Salary Adjustments.

(A) An appointing authority may grant a one-step special salary adjustment, up to the salary range maximum, to any employee who is not in a temporary position, who has completed six months of employment and, if applicable, who has completed six months of the current introductory period. An equal pay analysis must be completed by Employee Services prior to granting the special salary adjustment.

(B) A special salary adjustment is to be reserved for truly exemplary performance or for uniquely compelling circumstances. An appointing authority who wishes to grant a special salary adjustment to an employee must submit, for inclusion in the employee's personnel record, written justification that clearly demonstrates how this expenditure is equitable and in the best interest of the Legislative Branch.

(C) An employee may receive no more than one special salary adjustment in any 12-month period. Such an adjustment does not affect an employee's salary eligibility date.

(h) Salary Eligibility Date. For each period of leave without pay that is in excess of 15 consecutive calendar days, the employee's recognized service date shall be permanently adjusted by adding to the salary eligibility date the number of calendar days absent, thereby making the eligibility date later than it would have been if leave without pay had not been taken. This subsection does not apply to statutorily protected leave.

(5) Salary Administration – Misc.

Deleted: <#>Under unusual circumstances and after consultation with the Human Resources Director, an employee may be offered an increase in pay beyond the first step of the new range. Unusual circumstances include, but are not limited to, the employee's education or experience that will substantially enhance the employee's immediate contribution, and the existence of documented unusual or difficult recruitment conditions. Such an increase may not cause the employee's new base rate of pay, excluding differentials, to exceed the maximum rate of pay for the higher-level classification. The appointing authority shall inform the Human Resources Director of the increase and document and retain the reasons for granting the increase. ¶

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Deleted: <#>An agency head or parliamentarian may grant a special recognition bonus for truly exemplary performance or under uniquely compelling circumstances. An employee may receive only one special recognition bonus in any 12-month period and may not receive a special recognition bonus in the same 12-month period in which the employee received a special salary adjustment under this rule. ¶

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(a) **Part-Time Employees.** Any employee hired to work less than full time (40 hours per week) is a part-time employee. A part-time employee may be scheduled to work any percentage of full-time work if the percentage is a whole percent and does not total more than 100 percent.

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(b) **Transfer.** When an employee transfers from one position to another position from the Legislative, Judicial or Executive Branch in the same or comparable classification or a classification having the same or comparable salary range, the employee's base rate of pay remains the same. Employee Services will help determine the comparable salary range when an employee transfers from another branch. The employee's status and salary eligibility date are not affected unless the employee serves an introductory period. If the employee serves an introductory period and is granted a step increase at the end of the introductory period, the employee's salary eligibility date is set one year thereafter.

Deleted: <#>A part-time employee may not be hired at less than the current Oregon minimum wage. ¶
<#>Any employee hired to work less than full time (40 hours per week) is a part-time employee. A part-time employee may be scheduled to work for only one of the following percentages of full-time work: ¶
<#>20 percent; ¶
<#>25 percent; ¶
<#>40 percent; ¶
<#>50 percent; ¶
<#>60 percent; ¶
<#>75 percent; ¶
<#>80 percent; ¶
<#>90 percent; or (ix) 95 percent. ¶

(c) **Reclassification.**

(A) Upward.

(i) Except as described below, when an employee's position is reclassified to a higher classification, the employee may receive an increase from the employee's base rate of pay to a rate in the salary range to which the employee is reclassified. The employee's salary eligibility date is not affected by the reclassification.

Deleted: The employee's status is not affected.

(ii) Under unusual circumstances, as documented through an internal equal pay analysis, an appointing authority may, in consultation with Employee Services, grant an additional step upon upward reclassification. Unusual circumstances include, but are not limited to, an employee's scheduled salary eligibility date closely follows the effective date of the upward reclassification, or the employee having received a differential for a substantial duration that will no longer continue after the upward reclassification. Such an increase may not cause the employee's new base rate of pay to exceed the maximum rate of the higher-level classification. Necessary justification documentation must be maintained in the employee's personnel record.

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(B) Downward. When an employee's position is reclassified to a lower classification, the employee's base rate of pay is not affected. If the employee's base rate of pay is higher than the maximum rate of pay for the class to which the employee is reclassified, the employee shall be red-circled. If the employee's base rate of pay is lower than the maximum rate for the class to which the employee is reclassified, the employee's salary eligibility date is not affected.

(d) **Demotion.**

(A) Voluntary demotion.

(i) When a regular status or a limited duration status employee requests and is granted demotion to a classification having a lower salary range, the employee's base rate of pay shall be decreased to a rate within the salary range of the lower classification. The employee's salary eligibility date shall not be affected. However, if the employee's base rate of pay is above the maximum rate for the lower salary range, the employee's base rate of

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OPTION TWO

pay shall be decreased to the maximum rate of the lower salary range, and the month and day of the employee's salary eligibility date shall be maintained. The employee's status is not affected.

- (ii) When an employee who has been promoted and is on a promotional introductory period requests and is granted demotion back to the employee's prior classification, the appointing authority shall reduce the employee's base rate of pay to the step in the salary range that the employee was at prior to promotion. The month and day of the employee's prior salary eligibility date shall be restored and the employee shall receive the annual increase the employee would have otherwise received, if any, but for the promotion. The employee's status returns to what it was prior to promotion.
- (iii) When an employee in an initial introductory period, or a limited duration status employee who has been employed for less than one year, requests and is granted a demotion to a classification having a lower salary range, the appointing authority shall adjust the employee's base rate of pay, not including differentials, to the lower salary range and may adjust the employee's base rate of pay to any rate of pay within that salary range that is equitable and equal to or lower than the employee's base rate of pay prior to demotion. The employee's salary eligibility date is not affected, provided the employee's base rate of pay does not equal the maximum rate of the lower salary range. The employee's status is not affected.

(B) Involuntary demotion. When an employee is involuntarily demoted, the appointing authority shall adjust the employee's salary range for the position to which the employee is demoted and adjust the employee's base rate of pay to an equitable step within that salary range. The employee's eligibility date is not affected.

(C) Employee Services must complete an equal pay analysis which may warrant a higher pay rate within the range. Equal pay analysis documentation must be retained in the employee's personnel record.

(e) Rehire. Upon rehire, an employee's base rate of pay, not including differentials, shall be determined after an equal pay analysis is completed by Employee Services. Equal pay analysis documentation is retained in the employee's personnel record.

(f) Red-circled employees. The base rate of pay of an employee who becomes red-circled may not be increased, including cost of living increases, until the salary amount being paid is within the salary range established for the position. An employee whose salary is red-circled is not considered to have received a reduction in the employee's level of compensation for the purposes of complying with the equal pay provisions under ORS 652.220.

(6) Market salary review.

(A) Every three years, beginning in 2023, a branch-wide market study will be done comparing the branch salaries against the current market.

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OPTION TWO

- (B) After review of the results by Employee Services and the appointing authorities, recommendations shall be presented to the Presiding Officers for an implementation decision.
- (C) An employee's salary may not be reduced as a result of the review.

(7) Equal Pay Analysis Reconsideration.

- (a) An employee may request a reconsideration of an equal pay analysis or market salary review determination when the employee believes there is an inequity as follows:
 - (A) Employee provides a written request for reconsideration to the employee's appointing authority within fifteen days of receipt of any equal pay analysis or market salary review determination. The employee's request for reconsideration shall identify all the factors outlined in ORS 652.220(2) the employee believes were not properly considered and include all supporting documentation.
 - (B) The appointing authority shall respond in writing to the employee within 30 calendar days of the request for reconsideration. If the appointing authority agrees the employee's request is valid, the appointing authority provides all documentation to Employee Services for a final determination.
 - (C) Employee Services will provide a written final determination to the appointing authority and employee within 30 days of receipt of the documentation from the appointing authority.
 - (D) The parties may agree to an extension of time from the process outlined in this section upon written mutual consent.
 - (E) All documentation must be retained with the employee's personnel record.
 - (F) Any salary adjustments shall be effective on the first day of the month following the determination.
- (b) A request for reconsideration shall only relate to the employee's own salary.
- (c) No part of this reconsideration process precludes and employee from submitting a claim to the Bureau of Labor & Industries (BOLI) in accordance with BOLI's administrative rules or pursuing any other legal recourse.

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(8) **Moving expenses.** An appointing authority may reimburse actual moving expenses for a newly hired employee, not to exceed a total of \$20,000. The appointing authority shall require receipts for any reimbursement request exceeding \$5,000. A condition of moving expense reimbursement is agreement to repay any moving expense reimbursement in an amount equal to the amount of moving expenses reimbursed multiplied by the percentage of the 24-month commitment not served by the employee. The employee is not responsible for repayment of moving expense reimbursement if the employee is terminated at the discretion of the appointing authority under terms of at-will employment. The employee shall be notified that all or part of any moving expenses may be considered taxable income by the Internal Revenue Service. Legislative Administration shall report the reimbursements on the employee's Form W-2. Employees are encouraged to consult a tax professional on advice on their own tax liabilities and allowable tax deductions.

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(9) **Partial pay period.** If an employee works less than a full calendar month in a pay period due to hire, termination or leave without pay, the employee's pay for that month shall be computed on

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a prorated basis using the number of available work hours, based on the employee's schedule, in that month.

(10) **Partial day absence.** An employee shall request the use of appropriate accrued leave for a partial day absence. If the employee does not have sufficient appropriate accrued paid leave to cover the absence, the appointing authority authorize leave without pay.

(11) **Overtime.**

- (a) Employee Services shall determine the overtime eligibility for each position based on either the United States Department of Labor or the Bureau of Labor and Industries' criteria, where applicable.
- (b) Employees are eligible for overtime when:
 - (A) Time worked is in excess of 40 hours in one workweek; or
 - (B) Time worked in a single workday exceeds 12 hours. In such a case, overtime is calculated and paid only for the time worked in excess of 12 hours in any one workday or in excess of 40 hours worked in one workweek.
- (c) Overtime eligible employees who work overtime are eligible, when budget allows, for pay at one and one-half of the employee's rate. If budget does not allow, overtime will accrue as compensatory time at the rate of one and one-half of the employee's rate.
- (d) An overtime-eligible employee who performs overtime work without authorization from the employee's supervisor may be subject to discipline. Even if the time worked is unauthorized, an overtime-eligible employee will be compensated for any overtime worked in the manner outlined in paragraph (b) of this subsection.
- (e) Volunteering. An appointing authority may not allow an employee who is overtime eligible and who has worked 40 hours in a workweek to perform work that is the same or similar to the employee's regularly assigned duties on a volunteer basis. Work performed by an overtime-eligible employee during a workweek in which the employee has worked 40 hours is considered time worked for purposes of computing overtime.

(12) **Eligibility.** All employees of the Legislative Branch, other than legislative librarian positions, are exempt from the Fair Labor Standards Act (FLSA). The State of Oregon's wage and hour laws are applicable to positions in the Legislative Branch entitled to the payment of overtime as determined by Employee Services and as outlined in subsection (11) of this rule.

(13) **Recording and compensation.**

- (a) In the case of overtime-eligible employees, all time worked must be recorded on the employee's timesheet. Overtime is compensated at the rate of one and one-half times the employee's regular hourly rate of pay, as defined by the Bureau of Labor and Industries, at the time the overtime is worked. For the purpose of calculating overtime, accrued paid leave that is used is not considered as time worked, but a paid holiday that is taken off is considered as time worked.
- (b) An appointing authority may elect to compensate overtime-eligible employees by cash payment or by compensatory time. An employee may accrue a maximum of 240 hours of compensatory time. An employee who has accrued 240 hours of compensatory time and

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<#>Time worked is in excess of 40 hours in one workweek; or ¶
<#>Time worked in a single workday exceeds 12 hours. In such a case, overtime is calculated and paid only for the time worked in excess of 12 hours in any one workday or in excess of 40 hours worked in one workweek. ¶
<#>Unauthorized overtime. An overtime-eligible employee who performs overtime work without authorization from the employee's supervisor may be subject to discipline. ¶
<#>Volunteering. An appointing authority may not allow an employee who is overtime-eligible and who has worked 40 hours in a workweek to perform work that is the same or similar to the employee's regularly assigned duties on a volunteer basis. Such voluntary work performed by an overtime-eligible employee during a workweek in which the employee has worked 40 hours is considered time worked for purposes of computing overtime. ¶

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OPTION TWO

who works overtime must receive cash payment for the overtime worked in excess of 240 hours.

(14) Use of compensatory time.

- (a) In the case of overtime-eligible employees, compensatory time is available for use any time following the workday in which it is earned. The use of compensatory time may be requested by the employee or may be required by the appointing authority.
- (b) The use of compensatory time must be scheduled in advance.
- (c) A supervisor shall grant an overtime-eligible employee's request to use accrued compensatory time unless doing so would unduly disrupt business operations.
- (d) Compensatory time must be used within 18 months of its accrual. After 18 months, unused compensatory time will be paid to the employee at the employee's current rate of pay.

(15) Compensation and compensatory time at termination. Upon termination of employment, an overtime-eligible employee's unused compensatory time shall be paid at the average regular rate of compensation received by the employee during the last three years of the employee's employment or at the employee's final regular rate of compensation, whatever is higher.

Deleted: In the case of overtime-eligible employees, an employee who terminates employment shall be paid for accrued compensatory time at the employee's regular hourly rate at termination.

(16) Compensation and compensatory time upon transfer or promotion.

- (a) When an overtime-eligible employee transfers or is promoted to a different position in the Legislative Branch, the appointing authority for the position being vacated shall pay all accrued compensatory time earned prior to the effective date of transfer or promotion at the regular hourly pay rate the employee was receiving on the workday prior to transfer or promotion.
- (b) The appointing authority for the position being filled may, prior to the effective date of the transfer or promotion, agree in writing to allow the employee to retain some or all of the employee's accrued compensatory time, which then becomes the liability of the legislative unit or agency to which the employee is transferring or being promoted.

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(17) Compensation and compensatory time before termination. An appointing authority may elect at any time to pay an overtime-eligible employee in cash for all or a portion of compensatory time after such time has been accrued. If an employee is paid for accrued compensatory time before termination, payment shall be made at the employee's regular hourly pay rate at the time of payment.

(18) Second jobs. When an employee applies for a second job within the Legislative Branch:

- (a) If the employee is working full-time for the first legislative agency or parliamentary office and if the second Legislative Branch position has the same or similar job duties, the second legislative agency or parliamentary office shall be responsible for any overtime pay liability. However, the second agency or office may refuse to hire the employee because of potential overtime pay liability.
- (b) If the employee is working part time for the first legislative agency or parliamentary office and if the second legislative agency or parliamentary office job has the same or similar duties, the two entities shall consult with Employee Services to determine if the entities

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mutually agree on the employee’s overtime eligibility status and any overtime pay obligation. Unless both entities agree otherwise, the legislative agency or parliamentary office employing the employee at the time the employee exceeds 40 hours in one workweek shall pay any overtime for which the employee is eligible.

(c) If the second legislative job is unrelated, has different duties or is occasional or sporadic, the second legislative agency or parliamentary office may, depending on the duties, hire the employee without overtime pay liability.

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Deleted: <#>As used in this paragraph: ¶ <#>“Different capacity” means employment involving duties that do not fall within the same general occupational category as the employee’s regularly assigned duties. ¶ <#>“Occasional or sporadic” means infrequent, irregular or occurring in scattered instances. ¶ <#>

(19) Differentials.

(a) Shift differential.

(A) Shift differential applies to any employee who is in an overtime-eligible position and whose regularly scheduled workday falls entirely or partially within the hours of 6:00 p.m. and 6:00 a.m. or on Saturday or Sunday. The differential is \$1.00 per hour.

(B) An appointing authority and employee may mutually agree, in advance and in writing, to waive the payment of shift differential. A waiver is permitted only when an employee requests to work a schedule that would otherwise qualify for payment and the approval is based on the employee’s personal preference rather than business need.

(b) Work out of class.

(A) Eligibility and rate. Except as described below, an employee assigned in writing to perform duties of an existing, higher-level classification for a period of 10 or more consecutive work days must be compensated for the performance of such duties. The rate of pay for temporary duties at a higher classification is either:

- (i) Five percent of the employee’s base rate of pay; or
- (ii) The difference between the employee’s base rate of pay and the first step of the higher (WOC) classification’s salary range, whichever is greater. The pay rate may not exceed the top step of the higher level of classification.

(B) Duration. Work out of class duties may be assigned for a specified period not to exceed one year. An appointing authority may extend a work out of class assignment beyond one year under unusual circumstances.

(C) Waiver. When an employee is assigned higher-level duties that would otherwise qualify for work out of class, the employee and appointing authority may mutually agree to waive the work out of class when the purpose of the assignment is to give the employee the opportunity to learn a higher-level job skill.

(c) Lead differential.

(A) An employee may receive a five percent lead differential when an appointing authority assigns lead work or team leader duties to that employee for a period of 10 or more consecutive work days. The appointing authority shall consult with the Employee Services prior to authorizing such payment.

(B) Lead differential does not apply to employees whose classifications normally include lead work or team leader duties, or to voluntary training or developmental assignments.

Deleted: <#>Separation of powers. ¶ <#>Unlike the United States Constitution, which establishes separation of powers only by implication, the Oregon Constitution contains a specific requirement dividing state government into three separate branches: the Legislative, the Executive and the Judicial. The Oregon Constitution further provides that no person charged with official duties under one of these branches shall exercise any of the functions of another, except as otherwise expressly provided in the Constitution. See Article III, section 1, Oregon Constitution. ¶ <#>Article III, section 1, prohibits: ¶ <#>Employees of one branch from undertaking a duty or function that belongs in another branch; ¶ <#>Employees of one branch, in performing a duty appropriate to that branch, from doing so in a way that unduly interferes with the operation of another branch’s function; and ¶ <#>The same person from simultaneously performing duties as an affiliate of more than one branch. ¶ <#>Due to Article III, section 1, employees may not work for more than one branch of government simultaneously. ¶ <#>

Deleted: <#>The amount of shift differential must be consistent with differentials paid in other branches of state government. Shift differential is applied to the actual time worked between the hours of 6:00 p.m. and 6:00 a.m., or on Saturday or Sunday, and is considered in the calculation of overtime pay. ¶ <#>Shift differential may not be computed at the rate of one and one-half the employee’s regular rate of pay for a shift occurring on a holiday. ¶ <#>Shift differential is not applied to base pay rates for computation of pay during leave with pay. ¶

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OPTION TWO

- (C) Payment of a lead differential must be designated for a specific lead work or team leader assignment, project or time period as determined by the appointing authority. The employee must be paid for the full period during which the duties are assigned.
 - (D) When an employee who is receiving a lead differential is temporarily assigned to perform work that qualifies for a work out of class differential, the appointing authority may continue the lead differential for the duration of the work out of class assignment for up to one year.
 - (E) While this differential is normally five percent, the appointing authority, after consulting with Employee Services, may determine that ten percent is warranted when the lead work assignment is significantly larger as a result of factors including, but not limited to:
 - (i) The number of employees led.
 - (ii) The number of work units led.
 - (iii) The complexity of, or differences between, the work unit or units led.
 - (iv) The number of geographic locations in which the employee is leading staff.
 - (F) Necessary justification documentation must be maintained in the employee's personnel record for granting a ten percent lead differential.
 - (G) As used in this paragraph, "lead work or team leader duties" includes duties where, on a recurring or daily basis, the employee has been assigned the responsibility to perform substantially all of the following functions:
 - (i) Training or orienting new employees.
 - (ii) Assigning and reassigning tasks to other employees.
 - (iii) Giving direction to other employees concerning day-to-day work procedures.
 - (iv) Communicating established standards of performance to affected employees.
 - (v) Reviewing the work of other employees to ensure conformance to established standards.
 - (vi) Providing informal assessment of employees' performance to the supervisor.
- (d) On-call differential.
- (A) When an overtime-eligible employee is required to work times other than the employee's regular, flexible or irregular work schedule in order to perform work before the employee's next regularly scheduled work day, the employee must be compensated with an on-call duty differential.
 - (B) An overtime-eligible employee who is on-call and available for work need not be subject to restrictions that prevent the employee from using on-call time for the employee's own purposes, but must be available, within 60 minutes of being requested, to consult by telephone or to report promptly for work. On-call duty differential pay may not be applied to base pay rates for computation of pay during leave with pay.
 - (C) An on-call employee who returns to work when requested shall be paid the on-call differential for a minimum of two hours at the rate of time and one-half.

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OPTION TWO

Additional time worked is paid on an hourly basis for each hour or major portion of an hour worked at the rate of time and one-half. As used in this subparagraph, "major portion of an hour" means 30 minutes or more.

- (D) On-call duty differential does not apply to employees working in overtime situations or whose flexible or irregular work schedule falls between 5 p.m. and 8 a.m. or on weekends.

(e) Short session differential.

(A) Employees hired to staff short session duties are eligible for a five or ten percent differential.

(B) Short session employees are not eligible for any benefits other than those required by law.

(C) The differential is only available December through April for sessions occurring in even numbered years.

- (f) The Presiding Officers may establish any other differential, in addition to those listed in this subsection.

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(20) Call back.

- (a) An overtime-eligible employee who has been released from duty and who must return to the work site to perform work before the employee's next regularly scheduled work day shall be compensated for a minimum of two hours of work. The work may be performed:

(A) At the employee's work site.

(B) At a work site other than the employee's official work site.

- (b) Time worked that is a continuation of or immediately preceding an overtime-eligible employee's normal work schedule, that is scheduled in advance or that does not require the employee to physically travel to a work site does not constitute call back. An employee may be called back only by the appointing authority or by the employee's immediate supervisor.

- (c) A full-time overtime-eligible employee shall be compensated for call back time in excess of 40 hours in a work week in accordance with subsections (11) to (13) of this rule. A part-time overtime-eligible employee shall be compensated for call back time at straight time and shall be paid at the hourly rate equivalent to the employee's current salary. If a part-time employee's call back time, when combined with the employee's regular hours worked in a work week, exceeds 40 hours, the work in excess of 40 hours shall be compensated in accordance with subsections (11) to (13) of this rule.

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