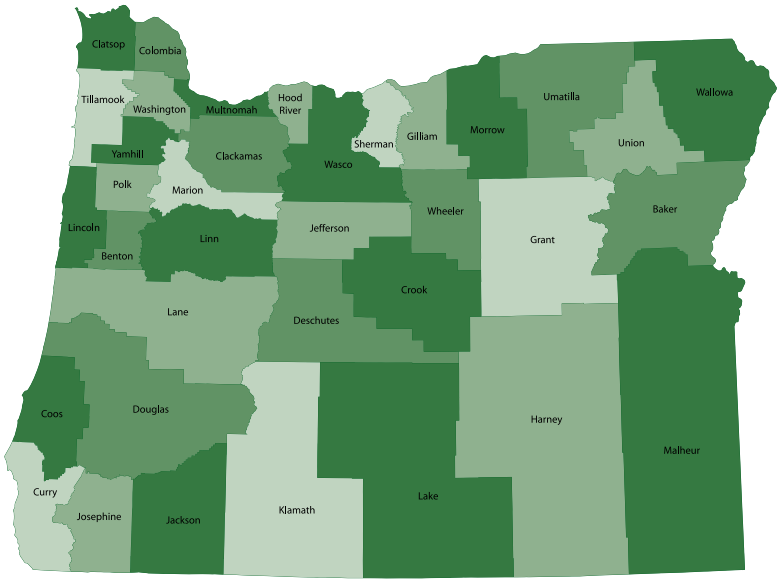
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OSB Admission on Motion (Comity): The CLE Set



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I. Overview

A. Introduction

Discovery is: (1) performance of the lawyer's independent duty to investigate imposed by Oregon's Rules of Professional Conduct, Federal Rules of Civil Procedure 11 and Oregon Rules of Civil Procedure 17 and (2) the use of specific procedural tools to obtain information bearing on the case.

B. Rules and Resources

1. State court. Oregon Rules of Civil Procedure (ORCP), Uniform Trial Court Rules (UTCR), and Supplementary Local Rules (SLR) of each county circuit court

2. Federal court. Federal Rules of Civil Procedure (FRCP), Local Rules (LR) for the District of Oregon. A helpful timetable for lawyers is online at https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/timetable-for-lawyers

3. Oregon State Bar publications. Federal Civil Litigation in Oregon, Civil Litigation Manual, Civil Pleading and Practice (generally not cited)

4. Treatises. Wright & Miller, FEDERAL PRACTICE & PROCEDURE, and Matthew Bender, MOORE'S FEDERAL PRACTICE (regularly cited to in both state and federal courts)

C. Scope of Discovery

1. Under the Oregon rules, the scope of discovery extends to any matter, not privileged, that is relevant to the claim or defense of any party. Material sought need not be admissible if it is reasonably calculated to lead to the discovery of admissible evidence. ORCP 36 B(1).

2. Proportionality. In 2015, the federal rules were amended to impose a proportionality standard. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*." Fed. R. Civ. P. 26(b)(1). In determining whether something is proportional, the court should consider: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* Similar to the Oregon rule, information within that scope of discovery need not be admissible in evidence to be discoverable. *Id. See* David Crump, *Goodbye, "Reasonably Calculated"; You're Replaced by "Proportionality": Deciphering the New Federal Scope of Discovery*, 23 GEO. MASON L. REV. 1093 (2016), for a discussion of the proportionality standard.

3. In similar areas between Oregon rules and the federal rules, state courts will accept federal decisions as guidance. *Matter of Marriage of Boon*, 100 Or App 354, 357 n.2, 786 P2d 215 (1990) (noting father had standing to quash subpoena served by mother on father's

psychologist); *Vaughan v. Taylor*, 79 Or App 359, 363, 718 P2d 1387 (1986) (citing subpoena as method to obtain discovery from non-party); *S. Pac. Co. v. Bryson*, 254 Or 478, 480, 459 P2d 881 (1969) (providing early analysis of Oregon's Rule 34 based on history of Fed. R. Civ. P. 43). When rules are similar, decisions of other states courts also provide "context." *GPL Treatment, Ltd. v. Louisiana-Pac. Corp.*, 323 Or 116, 124, 914 P2d 682 (1996) (using decisions of other states courts to analyze provision of Uniform Commercial Code).

4. Attorney-client privilege is defined by the evidence rules and common law. *See* Oregon Evidence Code ("OEC") 503 (ORS 40.225). In federal court, the federal common law of privilege takes precedence except with respect to claims and defenses governed by state law. Fed. R. Evid. 501. Oregon's rule may be somewhat distinguished by its lengthy definitions of "client" and "representative of the client" to the extent that "representative" may include, without limitation, any principals, officers, and directors of a corporate client. OEC 503(1)(d)(A). In recent cases, the rule is not inviolate. *See City of Portland v. Bartlett*, 304 Or App 580, 585–586, 468 P3d 980 (2020), *aff'd,* 369 Or 606, 509 P3d 99 (2022), *aff'd*, 369 Or 606 (2022) (interpreting Oregon public records statutes to require disclosure of documents more than 25 years old, notwithstanding attorney-client privilege).

5. The work product doctrine protects from disclosure materials prepared in anticipation of litigation. The highest degree of protection is given to the "mental impressions" of litigation counsel, but protection extends to work by or for a party or its representative or by a consultant/expert under the direction of the attorney that falls within the "anticipation of litigation" label. *See Hickman v. Taylor*, 329 US 495, 507, 67 S Ct 385, 91 L Ed 451 (1947) (seminal discussion of "work product"). The reference to work product in the federal and state rules is identical. *See* Fed. R. Civ. P. 26(b)(3); ORCP 36 B(3). For discussions in Oregon common law, see, for example, *State v. Riddle*, 330 Or 471, 8 P3d 980 (2000) (discussion of work product under Oregon cases as applied to communications between expert and attorney); *Brink v. Multnomah Cnty.*, 224 Or 507, 356 P2d 536 (1960) (same); and *United Pac. Ins. Co. v. Trachsel*, 83 Or App 401, 404, *rev den,* 303 Or 332 (1987) (noting court protected work of fire expert hired after litigation appeared likely). Under Oregon law, the work product extends to written materials and work product that has not been reduced to writing. Kirkpatrick, OREGON EVIDENCE § 503.06[2] (2013).

D. Planning and Balancing

1. Know your case, all claims and defenses of the parties before drafting discovery. Jury instructions are very helpful.

2. Just call opposing counsel. Follow default response times or document agreements to the contrary!

3. The Golden Rule will not always be enforced by the courts, but it still lives in Oregon.

E. Timing

1. FRCP 6 and ORCP 10 control the computation of time. The federal rule is more detailed. Both rules instruct that the day the act is done is not counted in the computation of

time. In addition, both rules provide that if the last day of the period falls on a Saturday, Sunday, or legal holiday, the period continues to run until the next business day.

2. Additional time for certain types of service. Under federal law, you add three (3) days to the computation of time if you have served under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to). Fed. R. Civ. P. 6(d). Under Oregon law, you add three (3) days to the computation of time if you have served by any method other than personal delivery. ORCP 10 B. For deadlines under seven (7) days, do not count weekends and recognized holidays. *Id*. **PRACTICE TIP:** Set dockets or ticker reminders in advance to avoid missing a response deadline in state or federal cases.

3. Responses must be timely, or risk waiving the opportunity to object or respond. Specific objections on each request, rather than blanket general objections, is a good practice.

II. Discovery of Parties

A. Requests for Production or Inspection

1. FRCP 34 and ORCP 43 are very nearly identical.

2. Federal requests may be delivered more than 21 days after service of the summons and complaint, at the earliest, and such request is considered to have been served at the first FRCP 26(f) conference. *See* Fed. R. Civ. P. 26(d)(2)(A); LR 26-1. The Oregon rule generally allows requests to be served in conjunction with or after service of the summons. ORCP 43 B.

3. Requests must be in writing; must describe material sought by item or by category and with reasonable particularity; and must specify a reasonable time, place, and manner for production and related acts. "Reasonably particular" is determined by the facts and circumstances of the case. *See, e.g.,* 8B Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2211 (3d ed.).

4. Do not file requests for production or responses in either state or federal court unless and until a request is in dispute. LR 34-1; ORCP 9 D.

5. The only reliable way to preserve objections is to make them in a written form, typically by a formal captioned document matching each request to the objections it raises. The Oregon rule does not impose a particular requirement for a writing, but the practice is to follow the federal-rule format – restating each request followed by appropriate objections. *See* LR 34-2.

6. The Oregon rule requires a response within 30 days of service of a request, except that a defendant cannot be required to respond earlier than 45 days after service of summons unless the court specifies a shorter term. ORCP 43 B(2). The parties may also agree in writing, or the court may order, a different response time.

7. FRCP 34(b)(2) requires a written response, within 30 days after the service of the request, or within 30 days after the parties' first Rule 26(f) conference, if the request was served early pursuant to Rule 26(d)(2).

8. The Oregon rule provides that "a party shall serve a response that includes . . . a statement that, except as specifically objected to, any requested item within the party's possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request[.]" ORCP 43 B(2); *but see Citizens' Util. Bd. of Oregon v. Oregon Pub. Util. Comm'n*, 128 Or App 650, 657–58, 877 P2d 116 (1994) ("[W]e agree . . . that ORCP 43 B does not require the conclusion that [the responding party] waived the right to seek protection . . . by failing to seek protection sooner."). The local federal rule is clearer and stricter: failure to object within the time fixed by the rules, or within the time the parties have agreed, constitutes a waiver of any objection. LR 26-5(a).

9. FRCP 26(e) imposes some duty to supplement responses. The Oregon rule indicates that "[a] party . . . is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to which comes into the party's possession, custody, or control." ORCP 43 B(4).

B. Requests for Admission

1. Governed by Fed. R. Civ. P. 36 and ORCP 45.

2. Distinctions between federal and Oregon rule:

a) In federal action, do not file requests or responses, though they may be used as exhibits at trial. LR 36-1. In state court, requests *and* responses must be filed with court (by exclusion from ORCP 9 D).

b) ORCP 45 F limits the number of requests to 30 without court order except for a reasonable number of additional requests for admission to establish the authenticity and admissibility of documents under the business documents exception of OEC 803(6). The federal rule imposes no such limit.

c) ORCP 45 A mandates specific language in the request warning of the import of failure to make a timely response.

d) In both federal and state practice, each matter on which an admission is requested must be separately set forth. ORCP 45 E provides the request must leave sufficient space for a response, and it is customary to follow this same format in federal court, although there is no analogous provision.

3. Requests for Admission can be useful, particularly in state court, to establish foundation for summary judgment and potential trial exhibits. Such documents must be attached to the requests for admission unless they have been or are otherwise furnished or made available for inspection and copying. Fed. R. Civ. P. 36(a)(2); ORCP 45 A.

4. ORCP 45 B follows Fed. R. Civ. P. 36(a)(3) in requiring that a written response be served within 30 days after service of the request unless the court shortens or extends the time. Failure to respond in a timely fashion results in an automatic admission of the matters contained in the request.

5. Requirements for substantive responses are the same in state and federal court. The answering party may admit, deny, or object to the request or may state that the matter is neither admitted nor denied. The party is further required to qualify an admission or denial if good faith so requires. In lieu of a response, a party may object to a requested admission, but objections based upon ambiguous, unintelligible, or argumentative requests may be tested in court and are not favored.

6. If the court determines that an answer is insufficient, the court may impose money sanction, order the party to amend its answer, or order that the matter is deemed admitted. *See* Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1245 (9th Cir. 1981) (holding matter deemed admitted for insufficient answer).

7. Both federal and Oregon rules provide that if a party fails to admit the genuineness of a document or the truth of a matter, and the party making the request later establishes the genuineness or truth of the matter, the court may order the offending party to pay for the reasonable expenses, including attorney fees, of making that proof. *See, e.g. Elliot v. Progressive Halcyon Ins. Co.*, 222 Or App 586, 590 (2008) (upholding attorney fees award).

8. The subject matter of admissions under Fed. R. Civ. P. 36 and ORCP 45 are conclusively established for trial. A denial has been determined by the Oregon courts to have no evidentiary weight or effect. *See* Bowers v. Winitzki, 83 OrOr App 169, 173, n. 5, 730 P2d 1253 (1986).

C. Interrogatories (federal court only)

1. Interrogatories are not authorized in state courts. However, they are widely used in federal cases. They may be used to identify trial witnesses, including expert witnesses. Fed. R. Civ. P. 26(a)(2). In certain circumstances, the facts known to or opinions held by an expert who has been retained but is not expected to testify may also be discovered. Fed. R. Civ. P. 26(b)(4)(B). Unless otherwise stipulated or ordered by the court, each party may only serve another party with 25 interrogatories, including discrete subparts. Fed. R. Civ. P. 33(a)(1).

2. Interrogatories, answers, and objections are not filed with the court unless the court directs a party to do so, or they become the subject of a motion. LR 33-1.

3. Local rules discourage lengthy boilerplate preambles and encourage conciseness and clarity. Broad, general interrogatories are not permitted. An opposing party may not be asked to "state all facts on which a contingency is based" or to generally "apply law to facts." *See* LR 33-1(c) and (d).

4. Answers and objections must be served within 30 days after service of the interrogatories. Each question must be set forth in full before each answer or objection. Each objection must be followed by a statement of reasons. The answers must be made under oath and must be signed by the person giving the answers. Objections are to be signed by the attorney. Fed. R. Civ. P. 33(b); LR 33-2(a).

5. Interrogatories may be used as exhibits or evidence in support of a motion and, subject to the rules of evidence, may be introduced at trial. LR 33-1(b). Answers to interrogatories frequently play a key role in motions for summary judgment.

III. Discovery of Nonparties

A. Subpoenas for documents or things

1. In federal and state cases, a subpoena is the method for obtaining discovery from a nonparty. A subpoena can be used to compel a nonparty to attend a deposition and/or to produce documents or tangible things. Fed. R. Civ. P. 45(a)(1)(C); ORCP 55 F(2), (3).

2. Service by mail of a subpoena is effective if the target consents in advance, but effective service always requires delivery of the appropriate witness fee with the subpoena. Fed. R. Civ. P. 45(b)(1); ORCP 55 D(1), (3)

3. For subpoenas seeking production of documents only (without attendance at a deposition), the Oregon rule requires service of the civil subpoena on each party at least seven (7) days before the subpoena is served on the target. ORCP 55 D(1). The target shall be given no less than 14 days to respond, in order to allow time for preserving objections and obtaining court assistance such as a motion to quash, if appropriate.

4. Both federal and Oregon rules require notice to all parties of discovery subpoenas, usually accomplished by service of a copy of the subpoena. Oregon rules require seven (7) days advance notice for subpoenas for production of documents only. Other parties are entitled to copies of production obtained, just as they would be entitled to attend a deposition.

5. Note that state rule has special provisions for discovery of health information at ORCP 55 H.

B. Interstate Discovery

1. Federal rule allows for service of a subpoena any place within the United States. Fed. R. Civ. P. 45(b). 28 USC 1783 governs services directed at a United States national or resident who is in a foreign country.

2. Practice in state actions pending in Oregon depends on the requirement of the state in which the discovery will occur. The state court will issue a commission or letters rogatory for discovery from a nonresident upon a proper motion, supported by an affidavit substantiating the need for the discovery. *See* ORCP 38 B and 55. Do not forget that Oregon rules authorizes service of subpoenas by mail so long as the target of service assents to service by that method. ORCP 55 D(3) and (4). Be sure to confirm that agreement for service in writing.

C. Public Records Requests

1. For requests directed to public bodies, *see* ORS 192.311-192.338. An attorney litigating against a public body may need to serve a copy of a records request on that public body. *See* ORS 192.314. Many government agencies take requests online.

2. The *Attorney General's Public Records and Meetings Manual*, available at **http://www.doj.state.or.us/pdf/public_records_and_meetings_manual.pdf**, is a useful resource.

3. The procedural pathway governing requests and review of denials depends on the public body to which the request is directed. *See* ORS 192.411-192.431.

4. Federal documents may be requested under the Federal Freedom of Information Act (5 USC §552), with reference to specific agency records and inspection provisions set forth in the CFRs and agency guidelines.

IV. Review of Major Distinctions Between Federal and State Court Practice

A. Initial disclosures

While federal rule anticipates formal initial disclosures, the District of Oregon has a tradition of waiving this requirement. LR 26-2 allows the parties to waive the disclosures, and there is a form on the court's website for documenting waiver. US DISTRICT COURT: DISTRICT OF OREGON, Fed. R. Civ. P. 26(a) Discovery Agreement, available at https://ord.uscourts.gov/index.php/filing-and-forms/forms/civil-forms.

Except in certain actions, such as for a dissolution of marriage, there is no equivalent to initial disclosures for state actions. *See e.g.*, ORS 107.089.

B. Interrogatories

As noted earlier, this is an important tool in federal litigation that is not available in state actions.

C. Time limits on the conduct of discovery

In state court, as a general rule, once discovery commences, the only time limit on completing it is the reasonableness of the time left for a response. Local practice is evolving at the county level—even among individual judges and, particularly, for more complex cases— to call for work on a scheduling order. (Be sure to check each circuit court's website for current local rules regarding scheduling orders, pretrial and trial judge assignments, and trial settings. A list of circuit court local rules is at: (https://www.courts.oregon.gov/rules/Pages/slr.aspx).

By contrast, the practice in federal court is to follow formal scheduling orders with default deadlines cutting off general discovery, dispositive motions, a subsequent cut-off for a period of expert discovery, joint alternative dispute resolution and staged pretrial submissions. Discovery requests must be propounded in time for the response to be due before the cut-off. PRACTICE TIP: Those deadlines can only be changed by court order pursuant to timely motions filed in advance of the deadline – NOT on the day of or day after the deadline.

D. Experts

Pre-trial discovery of experts is generally allowed in federal actions; rarely in state actions absent agreement among the parties. Oregon courts repeatedly prohibit discovery of experts in the absence of such agreement. *See Stevens v. Czerniak*, 336 Or 392, 400–05, 84 P3d 140 (2004); *Nielsen v. Brown*, 232 Or 426, 374 P2d 896 (1962); *Brink*, 224 Or 507 (discussing seminal discussions of work product and expert discovery). This is colloquially referred to in Oregon as "trial by ambush." *Hinchman v. UC Mkt., LLC*, 270 OrOr App 561, 569, 348 P3d 328 (2015). However, recent cases continue to erode the prohibition against expert discovery. *See Ransom v. Radiology Specialists of NW.*, 363 Or 552, 567, 425 P3d 412 (2018) (regarding a plaintiff's former treating radiologist's deposition, "under ORCP 36B, a participating expert can be asked any questions relevant to his or her direct involvement in the events at issue[,]" including present opinions of x-rays when radiologists were not asked to provide information regarding the content of any attorney-client privileged communications and evidentiary rules on attorney-client privilege did not apply); *Gwin v. Lynn*, 344 Or 65, 75, 176 P3d 1249 (2008) (allowing a party to depose a witness who is serving as an expert witness and a fact witness).

An issue may arise when a party seeks a pretrial (OEC 104) hearing on the admissibility of an opponent's expert testimony. Oregon appellate courts have not yet ruled on "the propriety of a motion for a Rule 104 hearing as a means of ascertaining expert testimony that otherwise is not discoverable under the Oregon Rules of Civil Procedure." *McFarlane v. Pony Exp. Courier Corp.*, 184 OrOr App 461, 60 P3d 543 (2002).

During the time set aside by the scheduling order, FRCP 26(a)(2) anticipates that the discovery of experts will be initiated by an exchange of reports. The format of the report is determined by FRCP 26(a)(2)(B). Exchanges of records and depositions usually follow, but not always.

V. Getting Court Assistance

A. Requirement to confer

The parties to a discovery dispute have an obligation to confer before filing discovery motions in both state and federal courts. LR 7-1(a); UTCR 5.010(2)-(3). Motions will be rejected as a matter of course unless the first paragraph is a certificate of compliance with those rules. Failure to perform the duty may serve as a basis for outright denial of the motion, irrespective of its other merits.

B. Protecting confidential or privileged materials

1. Material confidential but not privileged

Commercially sensitive and confidential information that is within the scope of discovery and does not fall within a recognized privilege cannot be withheld from production, but it may be entitled to protection limiting its dissemination. To that end, stipulated protective orders are routinely entered in state court. Even contested motions for protective orders are generally granted unless the restriction proposed is likely to impair the opposing party's use in some unfair fashion.

The local federal court, however, has a heightened bar for such orders. Entry of a protective order that restricts public access to such information will only be allowed on a detailed, particularized showing of need. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F3d 1122, (9th Cir 2003) (holding that presumption favoring public access requires a particularized showing for confidentiality).

2. Material withheld on basis of privilege or work product

To protect privileged material, specific written objections need to be served on a timely basis.

In most cases, preparation of a log of items withheld will be required. The description needs to be sufficiently detailed to allow the challenging party to evaluate the claims of privilege. Be prepared for the court, either federal or state, to order *in camera* review for close calls. Unsubstantiated claims of privilege may draw sanctions in both federal and state courts.

It is always the burden of the party claiming privilege to establish the circumstances justifying the claim. This rule stands in contrast to the burden on motions to invade work product, where the moving party must show substantial need.

C. Motions to Compel

The moving party has the burden of establishing that the information being sought falls within the scope of discovery. *See e.g.*, *Kahn v. Pony Express Courier Corp.*, 173 OrOr App 127, 133, 20 P3d 837 (2001); *Frease v. Glazer*, 330 Or 364, 371, 4 P3d 56 (2000) (moving party must show that exception to privilege applies to opposing party's material). *But see Jane Doe 130 v. Archdiocese of Portland in Oregon*, 717 F Supp 2d 1120 (D Or 2010) (stating federal court position that burden on opposing/objecting party to show request beyond scope). Format of motions is essentially the same at both levels: the motion, memorandum, and supporting affidavits which lay out the sequence of discovery, describes efforts at resolution, and identify key supporting documents.

D. Sanctions

Authority exists in rules and case law for a wide range of sanctions in cases involving discovery abuse. Awards of expenses for motions to compel are very infrequent, but outright dismissals or judgment are not unheard of in cases where the record reflects prolonged failure to participate in discovery. *See e.g., Asato v. Dunn*, 206 OrOr App 753, 759, 138 P3d 914 (2006) (affirming outright dismissal as discovery sanction). Remember that specific findings from the trial court are necessary to resolve factual disputes, preserve issues and justify sanctions imposed. *Peeples v. Lampert*, 345 Or 209, 216, 191 P3d 637 (2008).

VI. Discovery in Criminal Cases

A. Governing statutes

The primary statutes governing discovery in criminal cases are ORS 135.805 through ORS 135.873. The discovery statutes now specifically encompass *Brady*/*Giglio* materials. *See*

ORS 135.815(g). This should leave no doubt that the State must disclose any/all evidence that might be exculpatory regardless of if the Defense specifically requests it. But there is no reason why the Defense shouldn't make a broad request for discovery (see sample Discovery Request). The State can bill/charge for the discovery as can the defense for any costs related to discovery the State requests.

Certain information must be redacted before a defense attorney provides discovery materials to a defendant. *See* ORS 135.815(5)-(6).

B. **Is It Discoverable?**

As stated above, all exculpatory evidence must be disclosed by the State to the Defense. Any written witness statements unless privileged (such as attorney client) are discoverable by either side if that witness is going to be called at trial. Any witness must be disclosed by their name and address/contact information. *See ORS* 135.835. The nature of the testimony does not need to be disclosed. *See State v. Clarke*, 106 Or App 204, 808 P2d 92 (1991). The defense must disclose a DMV recording at least seven (7) days before the first trial setting if it is to be used at trial. ORS 813.324.

Certain things must be redacted such as victim contact information should not be sent to Defendant from Defense counsel's discovery. In a sex abuse case, a protective Order needs to be filed to receive alleged victim statements. *See* ORS 418.794.

Certain defenses and psychological reports must be disclosed under ORS 161.315.

C. Victims' rights provisions

Oregon law provides that:

> If contacted by the defense or any agent of the defense, the victim must be clearly informed by the defense or other contacting agent, either in person or in writing, of the identity and capacity of the person contacting the victim, that the victim does not have to talk to the defendant's attorney, or other agents of the defendant, or provide other discovery unless the victim wishes, and that the victim may have a district attorney, assistant attorney general or other attorney or advocate present during any interview or other contact.

ORS 135.970(2). For purposes of this rule, "victim" is defined broadly as "the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime against the person or a third person." ORS 135.970(5). There are other aspects of this definition that apply to particular types of cases, so any attorney handling a criminal case in Oregon should review this section carefully.

D. Subpoenas

Subpoenas in criminal cases are primarily governed by ORS 136.555-136.603. A subpoena may not be used for discovery, except by court order. Where materials are sought, the

default procedure is to subpoena the materials directly to the trial or hearing at which the subpoenaing party seeks to use them in evidence. If the attorney needs access to the materials ahead of time in order to be able to use them effectively, an order directing early production and copying may be sought. *See* ORS 136.580(2).

In *State v. Cartwright*, 173 OrOr App 59, 20 P3d 223 (2001), *rev'd*, 336 Or 408, 85 P3d 305 (2004), the Oregon Court of Appeals set forth an analysis to govern motions for early production. This analysis largely tracked the federal standard as set forth in *United States v. Nixon. Nixon*, 418 US 683, 94 S Ct 309041 L Ed 2d 1039 (1974). The Oregon Supreme Court reversed the intermediate court, but this reversal was on separate procedural grounds. *See Cartwright*, 336 Or 408. Some Oregon trial courts continue to follow the framework set forth by the Court of Appeals, so attorneys should be familiar with that court's analysis.

Subpoena for Medical Records under ORS 136.583 can be a good tool to send medical records under seal to the court rather than having a live witness authenticate/lay a foundation for the records. *Compare* ORCP 55 D (outlining civil procedure for subpoena of confidential health information).

E. Remedies

Most likely a discovery violation will result in a continuance or allow more time for the attorney to view the evidence if it does not prejudice the party. To justify exclusion, the Court noted that it must find the discovery violation was prejudicial and can't be cured by a continuance or jury instruction. *State v. Johanesen*, 110 OrOr App 348, 822 P2d 154 (1991) The Defense can ask for a mistrial. Jeopardy may attach if a mistrial is the only remedy possible, the official knew the conduct was improper and the prosecution was indifferent to a resulting mistrial/reversal under *State v. Kennedy*, 295 Or 260, 666 P2d 1316 (1983). Limited exclusion may be available if the State inadvertently destroys the evidence. *See State v. Zinsli*, 156 OrOr App 245, 966 P2d 1200 (1998).

Oregon Pleadings and Parties: Tips to Consider and Traps to Avoid

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I. INTRODUCTION

These materials are intended to provide you with basic resources regarding Oregon's state court procedures for pleadings and parties. However, be forewarned: each county may also have local practices—some written and some not—that can trip you up. In addition to consulting the Oregon Rules of Civil Procedure ("ORCP") and Uniform Trial Court Rules ("UTCR"), the wise lawyer will also check the Supplemental Local Rules ("SLR") for the county in which they plan to appear. Most rules can be accessed online through the Oregon Judicial Department at https://www.courts.oregon.gov/rules/Pages/default.aspx. Many counties, such as Clackamas, Multnomah, and Washington, provide guidelines for civil motions on their website. Multnomah County Circuit Court also posts its Attorney Reference Manual as an aid.[2]

Check with the local bar organizations for local practice aides. For example, Clackamas County Bar Association has a "Lawyer Survival Guide" which provides detailed information about filing and practices in that county or the Multnomah Bar Association which has judicial profiles and county practice materials.

II. DIFFERENCES—THE OREGON PLAINTIFF

While many states have adopted civil procedures that mirror those used by federal courts, Oregon has a long history of carefully preserving its own method of doing things. One of the areas where Oregon has withstood federalization is in its pleadings. The careful plaintiff will consider those differences before preparing and filing their complaint in Oregon.

A. One Form of Action

ORCP 2 provides that there is only one form of action in Oregon, known as a civil action. Except as specifically identified in the rules, statutes, or Constitution, procedural distinctions between actions at law and suits in equity have been abolished in Oregon.

B. Code Pleading Versus Notice Pleading

Oregon state courts require "code" or fact pleading that must contain a plain and concise statement of "ultimate facts" constituting a claim for relief without unnecessary repetition. ORCP 18A. As a result, claims or defenses must state ultimate facts to support the elements of each

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[2] https://www.courts.oregon.gov/courts/multnomah/go/Documents/ARM.pdf is the link to the 2024 version.

particular claim or defense. *Davis v. Tyee Industries, Inc.,* 295 Or 467, 476, 668 P2d 1186 (1983). With Oregon's system, mechanisms are in place to frame, narrow, or broaden the ultimate facts alleged and to narrow the issues for discovery and trial. *See* ORCP 21D and E. It is the allegations contained in the pleadings that are used to measure relevance of particular evidence at trial. Thus, in the absence of amendment, evidence outside the scope of the issues pleaded may be excluded through the doctrine of variance. *Compare Smith v. Fred Meyer, Inc.,* 70 Or App 30, 687 P2d 1128 (1984). It has become common practice for judges in Oregon to summarize the pleadings rather than read them to the jury.

By contrast, federal and other courts require "notice" pleading, which merely includes a short and plain statement showing that a pleader is entitled to relief. FRCP 8(a)(a). Since federal pleadings are designed to place a party on "notice" of a particular claim or defense, they can consist of a general summary of the position stated. Any further narrowing is more typically achieved through discovery and other procedural mechanisms.

The careful pleading of ultimate facts is best done through a simple detailed recitation of facts, which will withstand a motion attacking the complaint as redundant or frivolous. Conversely, it also requires more than mere notice of the claims being alleged to withstand a motion to make more definite and certain. Thus, there is a certain element of art to a properly alleged complaint that walks the fine line between both ends of the spectrum.

C. Standards for Pleadings and Documents

1. Pleadings Allowed. ORCP 13 provides that the pleadings are the written statements by the parties of the facts constituting their respective claims and defenses. The only permissible pleadings include the complaint, answer, third-party complaint, and reply. An answer may also include a counterclaim against a plaintiff or a cross-claim against a defendant. Answers are necessary in response to cross-claims and third-party complaints. Replies are necessary to respond to counterclaims and to assert an affirmative defense to defenses asserted in an answer. ORCP 13B. Demurrers and pleas are not used. ORCP 13C.

2. Substantive Requirements. ORCP 16 contains several substantive requirements for pleadings filed in Oregon state court. The complaint must have a caption containing the title of the action, the name of the court, the case number, and a pleading designation in accordance with ORCP 13B. In the complaint, the title must include the names of all the parties. However, subsequent pleadings may abbreviate the title by stating the name of the first party on each side, "with an appropriate indication of other parties." ORCP 16A. The case number, which is assigned when the complaint is filed, should be placed on all pleadings.

The pleading must consist of plain and concise statements in paragraphs that are consecutively numbered in Arabic numerals (i.e., 1, 2, 3, etc.). The contents of each paragraph, where possible, should be limited to stating a single set of circumstances. A paragraph number may then be referred to by number in all subsequent pleadings and may be adopted by reference in a different part of the same pleading. ORCP 16B and D.

Each separate claim or defense must be separately stated. Alternative theories of recovery are allowed as separate counts under the same claim. Even when a party is in doubt as to which of

two factual statements is true, they may be pleaded in the alternative, so long as they can be verified in good faith as being consistent with ORCP 17, discussed below. ORCP 16C.

Any pleading that contains a claim for relief shall state the ultimate facts constituting that claim, without unnecessary repetition, and must include a demand for the relief called the *prayer.* The *prayer* for relief is the request for the relief to which plaintiff thinks it is entitled. The purpose of the prayer is to advise defendant of the precise nature of the demand, in order that the party may be prepared to meet it. *Kerschner v. Smith,* 121 Or 469, 473, 236 P 272 (1925), 121 Or 469, 256 P 195 (1927). The prayer is not part of the claim, although it may explain or qualify other parts of the pleading. *Finch v. Miller,* 271 Or 271, 275, 531 P2d 892 (1975); *Green v. Cox,* 44 Or App 183, 186, 605 P2d 1198 (1980). If recovery of money or damages is sought, the amount thereof must be stated in the pleading. ORCP 18. However, the amount of a claim for noneconomic damages does not need to be specifically stated, inconsistent with the rule. *McKenzie v. Pacific Health & Life Ins. Co.,* 118 Or App 377, 382, 847 P2d 879 (1993), *rev dismissed*, 318 Or 476 (1994). Since 2020,

If attorney fees are being sought, the party must allege the basis for the award of fees, whether statutory or contractual in the pleading. ORCP 68 C(2)(a). If the statutory provision is not alleged, the allegation of a right to fees may still be considered sufficient if facts are alleged that would provide "a basis for an award of fees, the parties have fairly been alerted that attorney fees would be sought and no prejudice would result." *Marc Nelson Oil Prods., Inc. v. Grim Logging Co., Inc*., 199 Or App 73, 85, 110 P3d 120, *adh'd to as modified on recons*, 200 Or App 239 (2005) (internal citations omitted).

Prejudgment interest must be specifically pleaded, along with a factual basis for an award of prejudgment interest. *Emmert v. No Problem Harry, Inc*., 222 Or App 151, 158, 192 P3d 844 (2008).

Keep in mind that pleadings are to be liberally construed, so as to disregard any error or defect that does not affect the substantive rights of the adverse party. ORCP 12. *Stringer v. Car Data Systems, Inc.,* 314 Or 576, 841 P2d 1183 (1992); *Guzek v. Fhuere*, 342 Or App 682, 705 (2025) (courts consider whether the party understands the other party's position and includes facts that alert and support the claims or defenses).

3. Technical Requirements. UTCR 2.010 contains detailed instructions for compliance with the technical requirements for pleadings in Oregon. Below is only a brief summary of some of the requirements. Lawyers and legal assistants should familiarize themselves with all provisions. Failure to comply with the requirements could result in a court clerk rejecting a pleading and returning it to the lawyer as unfiled or it being stricken. UTCR 1.090 (Sanctions). Such a result would be disastrous if the pleading was filed on the last day of a statute of limitations ("SOL") or other deadline. Be familiar with electronic filing and look to UTCR Chapter 21 (electronic filing, including filing fees).

However, Oregon law provides some safe harbor for such rejections. If a pleading is rejected by the e-filing system for a curable defect, such as the of failing to pay the filing fee, the filer has a three-day grace period to resubmit the corrected document. If the filer includes a cover letter that explains the reason for the resubmission and properly requests relation back, the filing

date will relate back to the date of the original, timely submission. *Otnes v. PCC Structurals, Inc.*, 367 Or 787, 799-800, 484 P3d 1049 (2021). This procedure, governed by UTCR 21.080(5), is a crucial tool for avoiding a missed deadline due to a minor technical error.

a. ***Title or Caption*****.** The title, or caption, is treated as a formal matter. Its purpose is to identify the parties with the claim and the court. *State ex rel. Brookfield Co. v. Mart,* 135 Or 603, 609, 283 P 23, 295 P 459 (1931). The caption should indicate the type of claim, such as "personal injury," "breach of contract," "injunctive relief," etc. UTCR 2.010(11)(b).

The caption of the pleading must contain a statement of whether it is subject to mandatory arbitration. UTCR 13.060(3).

b. ***Size and Appearance.*** Except where designated by the court, all pleadings must be printed or typed on 8.5×11-inch paper that contains numbered lines on the left side. No font is specified, though Times New Roman, Arial, or Courier are common. Blanks in preprinted forms may be completed in handwriting, as may notations by the trial court administrator or a judge.

Printing should be double-spaced and with two to four inches left blank at the top of the first page. Subsequent pages must have a one-inch margin. The name of the document and page number, expressed in Arabic numerals, must appear at the bottom left side of each page, and the attorney or firm name and information, including facsimile and email (if any), must also appear within the document, frequently in the bottom right margin along with the attorney's bar number. Exhibits must be marked as such at the bottom right side with an Arabic numeral identifying the exhibit, as well as its page number. UTCR 2.010(2)–(10). The courts are required to accept documents printed on both sides of each sheet and encourage printing on recycled paper. ORS 7.250.

Check the Oregon Rules of Appellate Procedure for formatting rules for Oregon's appellate practice.

c. ***Subscription and Verification.*** Pleadings must be signed by at least one attorney of record who is an active member of the Oregon State Bar or, if a party is not represented by an attorney, by the party. ORCP 17A. The name of the party or attorney signing any pleading or motion must be typed or printed immediately below the signature, and the signatures must be dated. UTCR 2.010(6). While verifications of pleadings have generally been eliminated, there are some unique exceptions for specific statutory claims. The wise practitioner will consult the Oregon Revised Statutes for the type of claim being asserted.

d. ***Paragraphs.*** Claims and defenses must be made in paragraphs that are numbered consecutively in the center of the page with Arabic numerals and lowercase letters for any subparagraphs.

4. **Special Pleading Rules.** Oregon law provides numerous special pleading rules, some of which may be intuitive and some not. Likewise, some are matters of substance, and some procedural. The following is a brief summary of the highlights.

a. ***Conditions Precedent.*** In pleading the performance or occurrence of all conditions precedent, it is sufficient to generally allege that all conditions precedent have been performed or

occurred. A denial of such occurrence, however, must be made specifically and with particularity, forcing the adverse party to establish the proof of such performance at trial. ORCP 20A.

b. ***Designation of Type of Claim*****.** Although UTCR 2.010(11) requires the pleader to designate the type of claim, failure to correctly designate it may not be fatal. *Windle v. Flinn,* 196 Or 654, 664, 251 P2d 136 (1952); *Laird v. Frick,* 142 Or 639, 644, 18 P2d 1029 (1933).

c. ***Presumptions*****.** Facts presumed by law need not be alleged. For example, it is unnecessary to allege that a contract within the statute of frauds is in writing when the making of the contract is alleged. *See, e.g., Ingerslev v. Goodman,* 116 Or 210, 216, 240 P 877 (1925); *Smith v. Jackson,* 97 Or 479, 482, 192 P 412 (1920). Similarly, where a corporation is a plaintiff, it is not necessary to allege the corporate existence or that the corporation has the capacity to sue; both are presumed. Rossman, *Plain and Concise Language,* 6 Or L Rev 293, 297 (1927). Presumptions can be a powerful ally in trial and are frequently overlooked. An extensive list of evidentiary presumptions is contained in ORS 40.135, Oregon Evidence Code ("OEC") 311.

d. ***Judicial Notice*****.** Facts judicially noticed need not be alleged. *Peters v. McKay,* 195 Or 412, 421, 238 P2d 225 (1951), *reh'g denied* 195 Or 412, 246 P2d 585 (1952); *Cameron v. Goree,* 182 Or 581, 599, 189 P2d 596 (1948) (courts take judicial notice of facts that form part of the common knowledge of people who possess average intelligence). However, the careful lawyer will allege facts over which there may be any doubt. Some examples of facts that may be judicially noticed include corporate existence of cities and counties, the existence of ordinances, comprehensive plans, or enactment, incorporation of a city or county, or a private right derived by statute where the title and date of passage are alleged. ORCP 20D; ORCP 20C.

e. ***Matters of Record/Written Instruments.*** Oregon allows a party to allege something involving a document in one of three ways. They may: (i) summarize the material parts of the document in the body of the pleading; (ii) copy the material parts of the document into the pleading; or (iii) attach a copy of the document to the pleading as an exhibit and incorporate it by reference in the allegations. *Vaughn v. Spence,* 170 Or 440, 448–49, 133 P2d 242 (1943).

Oregon has "consistently adhered" to the above method of pleading. *Vaughn, supra,* 170 Or at 449. However, an exhibit cannot supply ultimate facts to establish a claim; those allegations must still be made in the complaint. Where a written instrument is relied upon as the foundation of a claim and it is set forth in full in the complaint or incorporated by reference, the written instrument prevails over the pleading for its purported legal effect. *Kelley v. Mallory,* 202 Or 690, 697, 277 P2d 767 (1954).

f. ***Compliance with the Statute of Limitations.*** It is not usually necessary for the plaintiff to allege facts showing compliance with any applicable SOL. Nevertheless, specific facts showing why the SOL is tolled or avoided must be pleaded if it would otherwise appear that the SOL had run. *Hewitt v. Thomas,* 210 Or 273, 276, 310 P2d 313 (1957); *Huycke v. Latourette,* 215 Or 173, 176, 332 P2d 606 (1958). In cases where the statute begins to run upon discovery, discovery must be pleaded. *Frohs v. Greene,* 253 Or 1, 7, 452 P2d 564 (1969).

Keep in mind if the statute of ultimate repose applies to any claim. Unlike the statute of limitations, there is no authority allowing tolling of the statute of ultimate repose, and such statute will bar claims regardless of whether the statute of limitations on the claim has even run.

g. ***Judgment or Other Determination of Court or Officer.*** In pleading a judgment or other determination of a court or officer with special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish at trial the facts conferring jurisdiction. ORCP 20B.

h. ***Agency.*** Oregon does not require specific pleading of agency where a known agent executes a contract on behalf of the agent's principal. It is sufficient to plead execution of the contract by the principal, allowing proof to be introduced at trial that the agent executed the contract. *Masters v. Walker,* 89 Or 526, 530, 174 P 1164 (1918). Similarly, ratification of a contract does not have to be alleged. *Scandinavian-American Bank v. Wentworth Lumber Co.,* 101 Or 151, 157, 199 P 624 (1921). Alleging that a principal executed the contract permits proof of execution of an agreement by an unauthorized agent and subsequent ratification by the principal. *Phillips v. Colfax Co.,* 195 Or 285, 292, 243 P2d 276, *reh'g denied* 195 Or 285, 245 P2d 898 (1952); *Levy v. Nevada-California-Oregon Ry.,* 81 Or 673, 675, 160 P 808 (1916). *See also Downs v. National Share Corp.,* 152 Or 546, 552, 55 P2d 27 (1936), regarding alternative methods for alleging agency. Likewise, agency need not be pleaded in a tort action against a corporation, as an allegation that the corporation committed the tort is proper. *Scibor v. Oregon-Washington R. & Nav. Co.,* 70 Or 116, 120, 140 P 629 (1914).

i. ***Libel, Slander, and Fraud.*** In an action for libel or slander, it is not necessary to allege extrinsic facts to show application to the plaintiff. It is sufficient to say that the same was spoken or published about the plaintiff. If controverted, the plaintiff must establish at trial that it was published or spoken. ORCP 20E.

Certain causes of action, such as fraud must be alleged with greater particularity. The elements of actionable fraud consist of: (i) a representation; (ii) its falsity; (iii) its materiality; (iv) the speaker's knowledge of its falsity of ignorance of its truth; (v) their intent that it should be acted on by the person and in the manner reasonably contemplated; (vi) the hearer's ignorance of its falsity; (vii) their reliance on its truth; (viii) their right to rely thereon; and (ix) their consequent and proximate injury. To state a good cause of action, it is necessary that each and every one of the essential elements of fraud be alleged. *Musgrave v. Lucas,* 193 Or 401, 410, 238 P2d 780 (1951).

j. ***Time and Place.*** Only material aspects of time and place are necessary. When matters of quality and quantity are unimportant to a case, they do not need to be alleged as material facts. Within the bounds of ORCP 17, it is sufficient to allege that a certain event occurred "on or about" a certain date when the exact date is unknown.

k. ***Statutory Duty of Damages.*** Where a case rests on a statutory duty imposed on a class of persons, the complaint must contain facts bringing the defendant within the statutory class. *State Forester v. Obrist,* 237 Or 63, 390 P2d 333 (1964). Violation of a statutory duty may be alleged in general terms without pleading the exact language of the statute. *Moe v. Alsop,* 189 Or

59, 66, 216 P2d 686 (1950), *overruled in part in other grounds, Bay Creek Lumber & Mfg. Co. v. Cesla,* 213 Or 316, 320, 322 P2d 925, *reh'g denied* 213 Or 316, 324 P2d 244 (1958). Where aggravated damages are claimed under a statute, the statute should be recited in the complaint or the claim should be stated as being made under the terms of the statute. *Springer v. Jenkins,* 47 Or 502, 507, 84 P 479 (1906).

l. ***Punitive Damages*.** Oregon has special requirements for the pleading and recovery of punitive damages contained in ORS 31.725 et seq. Plaintiffs may not include a claim for punitive damages in their initial complaint. ORS 31.725(1) and (2). Instead, at any time after the pleading is filed, a party may move the court to allow amendment of the pleading in order to assert a claim for punitive damages. Both the moving and nonmoving parties may submit affidavits and documentation supporting or opposing a punitive damages claim. ORS 31.725(2).

Upon receipt of a motion to amend to add punitive damages, the court will conduct a hearing to determine if there are specific facts, supported by admissible evidence, to allow the punitive damages claim. The court decides the motion based upon a directed-verdict standard. ORS 31.725(3).

The party seeking punitive damages must prove "by clear and convincing evidence" that the party against whom punitive damages are sought "has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730(1). The court must issue its decision on the motion to amend a pleading to assert a claim for punitive damages within ten days after the hearing. If the court does not issue a decision within ten days, the motion is deemed denied. ORS 31.725(5). Discovery of evidence of a defendant's ability to pay is not allowed unless and until a motion to amend is allowed. ORS 31.725(6).

The distribution of a punitive damages award may affect whether it is worth alleging. The Department of Justice Criminal Injuries Compensation Account receives 60% of the award, while the prevailing party receives only 30%, no more than 20% of which may be paid to the prevailing party's attorney. 10% is payable is payable to the Attorney General for deposit in the State Court Facilities and Security Account. ORS 31.735. Specific notification and payment procedures apply, not the least of which is a requirement that the prevailing party provide notice in writing of the judgment to the Department of Justice Crime Victims' Assistance Section in Salem, Oregon, within five days after the entry of the verdict or judgment. ORS 31.735(3).

m. ***Information and Belief.*** If a party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party may allege so, which will have the same effect as a denial. ORCP 19A.

n. ***Recitals and Negative Pregnants*.** No allegation in a pleading is held insufficient merely because it is pled by way of a recital rather than alleged directly. Likewise, no denial is treated as an admission because it contains a negative pregnant. ORCP 20G. Nevertheless, allegations by way of recital rather than direct allegations are not encouraged. The most common example of a recital is an allegation introduced by a "whereas" or an allegation introduced with "by reasons of." *See Graham v. Corvallis & Eastern R. Co.,* 71 Or 477, 142 P 774 (1914).

o. ***Fictitious Parties and Unknown Persons*****.** When you do not know the name of an opposing party, it may be designated by any name, with the pleadings amended to substitute the true name once it is known. ORCP 20H. However, a pleading should explain why an unknown "Jane Doe" party cannot be specifically identified. When heirs of a deceased are unknown, they may be designated as "unknown heirs." ORCP 20I. *See also* ORCP 20J regarding unknown persons when trying to determine an adverse claim, estate, lien, or interest in property. Be wary when the SOL is close, as notice must be received by the proper party.

D. Prerequisites for Certain Claims

A thorough discussion of statutes of limitations and service requirements is beyond the scope of this presentation. Nevertheless, close attention should be paid to the SOL applicable to the type of claims and relief requested. Although based on the same transaction or occurrence, different claims or theories may be subject to different statutes of limitation. A lawyer's characterization of the claim does not necessarily determine which SOL will apply. *Securities-Intermountain, Inc. v. Sunset Fuel Co.,* 289 Or 243, 611 P2d 1158 (1980).

More importantly, certain types of claims may contain additional demand or notice requirements. A few examples are included below.

1. Oregon Tort Claims. No action may be maintained arising out of any act or omission of a public body or its agents unless notice of the claim is given as required by ORS 30.275. When a person injured is a minor, incompetent, or otherwise unable to give the notice, the deadline for the notice is tolled up to a *maximum of only 90 days* (basically a 270–days' notice period). Otherwise, notice must be given within 180 days after the alleged loss or injury, or within one year if the claim is for wrongful death. See ORS 30.275(8) for additional nuances.

The "discovery rule" applies to the OTCA's notice requirement, such that the 180–day period does not begin until "a plaintiff knows, or in the exercise of reasonable care should know, that he or she has been injured and that there is a substantial possibility that the injury was caused by an identified person's tortious conduct." *Johnson v. Multnomah Cnty. Dep't of Cmty. Justice*, 344 Or 111, 122-123, 178 P.3d 210 (2008).

2. Insurance Policies—Proof of Claim. Most insurance policies require notice from the insured of any loss or claim in order to activate the insurer's responsibilities under the policy. *See* ORS 742.061 (proof of claim required to start claim for attorney fees); *American Star Ins. Co. v. Allstate Ins. Co.,* 12 Or App 553, 558, 508 P2d 244 (1973) (notice over 2.5 years after the accident did not satisfy notice requirement).

3. Conversion. In order to state a claim for conversion in certain circumstances, the party claiming rightful ownership must demand the return of the property and have been refused. *See Daniels v. Foster & Kleiser,* 95 Or 502, 507, 187 P 627 (1920).

4. Shareholder's Derivative Action. In most cases, a shareholder may not pursue an action on behalf of the corporation unless the corporate officers and directors have refused to take the action in response to the shareholder's demand. *See Browning v. C & C Plywood Corp.,* 248 Or 574, 434 P2d 339 (1967).

5. Attorney Fees. Certain claims for personal injury under ORS 20.080, and breach of contract under ORS 20.082, where the prayer is for less than $10,000 may substantively qualify for recovery of attorney fees, but only where a demand is sent to the defendant at least 30 days before commencement of the tort action and 20 days before commencement of the contract action, along with other statutory requirements. This can also apply to counterclaims.

6. Complaint against Certain Professionals. For any claim asserted against a design professional that arises out of the provision of services within the course and scope of the registered/licensed activities (usually in the construction defect context), the filing attorney must certify that the attorney has consulted a design professional with similar credentials who is qualified, available, and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the design professional. ORS 31.300. Similarly, for any claim of professional negligence against a real estate licensee within the course and scope of the registered/licensed activities, the claimant's attorney must certify that the attorney has consulted a real estate licensee who is qualified, available, and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the real estate licensee when filing. ORS 31.350.

E. Choosing the Correct Parties

1. Capacity.

a. ***Governmental Units.*** The United States, the State of Oregon, municipal corporations, counties, and certain specified public agencies, commissions, boards, departments, and corporations may commence proceedings in Oregon courts.

b. ***Corporations.*** Foreign corporations may sue in Oregon, but where a foreign corporation is "transacting business" in Oregon and has not obtained a certificate of authority, it cannot maintain an action. ORS 60.704(1). However, even where a foreign corporation has not obtained the necessary certification, it can still be sued. ORS 60.704(5).

Where a corporation is dissolved, it still may have an action prosecuted in its corporate name; a dissolved domestic corporation may be sued on a cause of action arising prior to dissolution if the action is commenced within five years. ORS 60.644(2)(c). Whether a dissolved foreign corporation is subject to suit depends upon the laws of its domicile.

c. ***Partnerships and Unincorporated Associations.*** A limited partnership may sue or be sued as an entity. Any partnership or unincorporated association may sue in any name that it has assumed and be sued by any name that it has assumed or by which it is known. ORCP 26B.

d. ***Minors and Incapacitated Persons.*** ORCP 27 places restrictions on when a party who is a minor or incapacitated may appear. Minors who are a party to an action must appear by a conservator or guardian. If they do not have one, the court will, under some conditions, appoint one. ORCP 27A. Incapacitated persons must also appear by or through a conservator or guardian. If they do not have one, the court will, under some conditions, appoint one. ORCP 27B.

Note. it is required that the state or a party that is not a natural person (such as a corporation) appear by an attorney unless otherwise specifically provided by law. ORS 9.320.

2. Permissive Joinder. ORCP 28 provides the conditions under which parties may be joined in an action. All persons may join as plaintiffs in an action if they assert any right to relief jointly, severally or in the alternative in respect to or arising out of the same transaction or occurrence and if a common question of fact or law will arise in the action. A party need not be interested in obtaining or defending against all the relief demanded. ORCP 28A. Separate trials may also be sought where justice so requires. ORCP 28B. Judgment may be entered for one or more of the parties according to their respective rights to relief or to their liabilities. ORCP 28A.

3. Compulsory Joinder. ORCP 29 applies to compulsory joinder. When a party is needed for just adjudication and is subject to service of process, it is to be joined if feasible under the standards identified in ORCP 29A. When a necessary party cannot be made a party, the court must determine whether the action can equitably continue or should be dismissed under the standards identified in ORCP 29B.

A person who is subject to service must be joined as a party if: (a) in that person's absence, complete relief cannot be accorded among those already parties; or (b) that person claims an interest relating to the subject of the action and is so situated that the disposition in the person's absence may: (i) as a practical matter, impair or impede the person's ability to protect that interest; or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. ORCP 29A. Where a necessary party has not been joined and can be joined, the court shall order that the person be made a party. Where the person should join the action as a plaintiff but refuses to do so, that person must be made a defendant, the reason being stated in the complaint.

4. Misjoinder or Nonjoinder of Parties. ORCP 30 provides that parties may be dropped or added by order of the court on motion of any party or on the court's own initiative at any stage of the proceeding and on such terms as are just. The rule further provides that any claim may be severed and proceeded with separately. Misjoinder of parties is not grounds for dismissal of an action.

5. Substitution of Parties. ORCP 34 provides the procedure for substitution of parties, whether resulting from death, disability, or some other issue relating to a party. Substitution will allow the action to proceed with the substitute party. The rules provide that an action may be continued upon death of a plaintiff, if the claim survives, by substituting the personal representative or successor in interest upon motion to the court within one year. ORCP 34D. On motion, the court may also substitute a guardian, conservator, or successor in interest within one year after disability of a party. ORCP 34C. Additional time and procedural limitations apply to other substitutions.

6. Real Party in Interest. ORCP 26A requires that every action be prosecuted in the name of the real party in interest. The real party in interest is the person or entity that has the right to enforce the claim. The rule is designed to protect the defendant from being harassed later for the same claim for relief. *Verret v. Leagjeld,* 263 Or 112, 501 P2d 780 (1972). Certain persons and entities, such as executors, administrators, bailees, or trustees, may sue in another party's name without that other party being joined. ORCP 26A. Insurers frequently are allowed to sue in the name of their insured through use of a loan receipt that maintains the insured's interest in the matter. Failure to join a real party in interest will not result in immediate dismissal of the action.

Instead, the real party in interest is given a reasonable time to ratify, join, or substitute into the action. ORCP 26A.

Use of pseudonym. If a party wishes to commence and litigate a case under a name other than their true name, a motion seeking leave to proceed under a pseudonym is appropriate. ORCP 16B. It will be the litigant's responsibility to establish a basis to be granted leave to proceed using a pseudonym.

F. Choosing Where to File

1. State Versus Federal Court. While this presentation is focused on state court procedures, the wise lawyer will not overlook whether to file his or her action in federal court if all other things are equal. Obviously, some actions involving federal questions may only be maintained in federal court. Conversely, some actions, due to the amount in controversy or the absence of diversity, must be pursued in state court. When either court would have jurisdiction, considerations should be given to a number of factors that could have a dramatic effect on the ultimate result.

a. ***Federal Court Pros.*** Federal judges have law clerks and cases are immediately assigned to a judge. The rules and court practices are more specified. Many attorneys believe summary judgment is more likely to be granted by federal judges who have more resources to review briefs and write opinions. Judges are used to seeing attorneys from all over the state. There is no "trial by ambush."

b. ***Federal Court Cons.*** Some practitioners complain that federal court interferes with lawyers "trying their cases." Rules and procedures control most aspects of a case, including disclosures, pretrial conferences, scheduling orders, time limitations for depositions, and evidence. While those procedures can force parties to look at their case more quickly, they also tend to significantly increase litigation costs. And there is no "trial by ambush."

c. ***State Court Pros.*** State court is typically less expensive, and there tends to be more flexibility in how cases are prepared and tried. Depending on the county, some courts virtually leave the parties alone until just before trial. Some cases are subject to nonbinding arbitration. Some courts implement and enforce a fast-track system in which trials go within 12 months from filing; other counties do not. No disclosure or deposition of expert witnesses; no interrogatories, i.e., "trial by ambush."

Note, to obtain some of the above benefits of federal court, a case may be able to be designated as a complex case under UTCR 7.030. By doing so, the case will be assigned to a judge to oversee, and the parties generally have more flexibility on the trial date.

d. ***State Court Cons.*** Judges tend to have less time to spend on a particular matter. Budgetary restrictions can impede availability of judges for trial of civil matters. Some cases are subject to nonbinding arbitration. Some counties will not set over trial dates due to fast-track rule. There is no disclosure of or deposition of experts so you are faced with "trial by ambush."

On that related note, depending on the legal issue, a party opposing summary judgment may avoid summary judgment by providing "an affidavit or a declaration of the party's attorney

stating that an unnamed, qualified expert has been retained who is available and willing to testify to admissible facts or opinions" and, by doing so, create "a question of fact…sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion." ORCP 47 E.

2. Venue. Once the decision is made to file in state court, a plaintiff must then determine the appropriate venue. If a contract is involved, the choice may already have been specified in the document. Depending on the type of case, venue may exist in several different counties. *See* ORS 14.030 et seq. With many exceptions, venue generally exists in the county where the cause of action arose or at least one of the defendants resides. Corporations are typically deemed to be a resident of any county where they conduct regular, sustained business.

If a choice is available, consideration should then be given to strategic factors such as distance for the client and lawyers, local customs and procedures, and the relative nature of typical jurors in each county.

G. Commencing the Action

ORCP 3 provides that, "other than for purposes of statutes of limitations," an action is commenced by filing a complaint with the clerk of the court.

1. Commencement Within the SOL. ORS 12.010 and 12.020 generally regulate commencement for the purposes of determining whether an action was commenced before expiration of a particular SOL. For those purposes, commencement does not occur until the complaint is filed *and* the summons and complaint are served on a particular defendant.

2. Relation Back. Oregon subscribes to a unique "relation back" system for determining commencement that allows for additional time to serve a defendant. Pursuant to ORS 12.020(2), if the complaint is filed within the time allowed by the applicable SOL, service of the summons and complaint within 60 days of the filing date allows the service to "relate back" to the date of filing. Thus, the action is deemed to have been commenced on the date of filing. *Beware:* The relation back only applies within 60 days of the filing date, not the SOL. Many attorneys have filed well before the SOL expired but failed to serve within 60 days thereafter and before the SOL expired. As a result, the action was not deemed commenced.

3. Time. Except as governed by ORS 174.120, ORCP 10 provides important information on how time periods are calculated in Oregon. Specifically, the date of the act, event, or default from which the period of time begins to run is not included, but the last day is included unless it falls on a Saturday, Sunday, or legal holiday. In that event, the time period runs until the next day that is not a Saturday, Sunday, or legal holiday. *See also* ORS 187.010 and 187.020 for a list of legal holidays.

When the period of time prescribed or allowed is less than seven days, then intermediate Saturdays, Sundays, and legal holidays are not included in the computation of time. When the time is more than seven days, all days within the period are counted. ORCP 10A.

Except with regard to service of summons, additional time may be allowed when a party is served with documents by mail, e-mail, fax, or electronic service. If the party served is required to do some act within a prescribed period after service of a notice or other paper on that party, then three days are added to the response period when service is made by mail, e-mail, fax, or electronic service. ORCP 10C. However, this 3-day "mailbox rule" does not apply to all situations, only where the clock starts by service of a document. *See, e.g., Moody v. Dept. of Human Servs*., 318 Or App 16, 19–20, 507 P3d 749, 751 (2022) (60-day statutory period to file a petition for judicial review under ORS 183.484 begins on the date the agency's order is mailed, meaning exactly 60 days). As another example, for attorney fee petitions under ORCP 68, the clock ticks from the entry of judgment, not service.

4. **Filing fee.** Be sure to pay the filing fee under ORS 21.160(1), which is based on a graduated scale of claimed damages. ORS 21.100.

III. DIFFERENCES—THE OREGON DEFENDANT

Many of the rules and procedures discussed with regard to the Oregon plaintiff also apply to the Oregon defendant. To avoid undue repetition, only the differences are highlighted. An answer or responsive pleading is due with 30 days after service of the summons. If service is by publication, then the answer or responsive pleading is due within 30 days from the date of first publication. ORCP 7C.

A. General Considerations

1. Tender of Defense. The process of tendering the defense of a matter is a procedure through which a party gives notice of a pending action to another party from whom indemnity may be sought. The party tendering the defense typically demands defense of, or participation in, the action. Tenders of defense are based upon principles of collateral estoppel and the law of indemnity.

Where a claim is covered under an indemnity agreement, or the allegations of the complaint, without amendment, state a claim within the terms of the indemnity agreement, the indemnitor has a duty to defend the indemnitee. *St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc.,* 256 Or 576, 475 P2d 69 (1970). The tender of defense may be based upon express indemnity agreements, such as insurance policies, contracts, and warranties, or through implied indemnity, such as that arising out of a relationship between the parties.

An indemnitor's duty to defend is determined by the "four corners" rule. The court looks to two documents: the allegations within the four corners of the complaint and the language within the four corners of the indemnity agreement or insurance policy. The indemnitor has a duty to defend if the complaint, on its face and without amendment, alleges facts that could potentially impose liability for conduct covered by the policy or agreement. *Ledford v. Gutoski*, 319 Or 397, 399-400, 877 P2d 80 (1994).

The duty to defend is significantly broader than the duty to indemnify. If any claim alleged in the complaint provides a basis for which the indemnitor provides coverage, the duty to defend the entire action arises, even if other claims are alleged that fall outside of coverage. *Id.* at 400. An insurer or indemnitor must resolve any ambiguity in the complaint in favor of the insured.

Before tendering the defense of the matter, thought should be given to several strategic considerations, specifically:

a. Is indemnitor able to respond to a judgment?

b. What is the caliber of the defense that the indemnitor would provide?

c. Is the indemnitor obliged to defend all claims or just some of the claims asserted?

d. Would acceptance of the defense with reservation of rights as to ultimate responsibility for a judgment be acceptable?

e. What are the implications for control over litigation strategy and settlement decisions?

The tender of defense must be given within a "reasonable time." This is to allow a fair opportunity for the indemnitor to investigate and defend. Notice immediately before trial is generally not sufficient. An unreasonable delay in tendering may prejudice the indemnitor and could result in a waiver of the right to a defense.

2. Extensions of Time. Local custom and practice is to grant defendants an extension of time upon request. Where defense counsel has insufficient time to prepare an appropriate response to a claim, it is common practice to ask opposing counsel for an extension of time in which to appear or respond. Professional courtesy dictates that a reasonable extension be given whenever possible. However, any agreement concerning the extension of time to respond to a claim should be memorialized in writing. Where the SOL is expired, or rapidly approaching, it is also common practice for a plaintiff to request confirmation that there are no service or SOL defenses that will be raised. In that manner, it is less likely that a plaintiff will be prejudiced by the extension.

Most lawyers will automatically write to plaintiff's counsel informing them of their representation of a particular defendant, stating that they intend to appear and requesting that they be given at least 10 days' notice of any intent to apply for default. Doing so requires that defense counsel receive notice before a motion for default is filed. ORCP 69 B(2).

3. Removal to Federal Court. Immediately upon receipt of the complaint, counsel should determine whether the case is removable to federal court pursuant to 28 USC §1441(a) (diversity of citizenship) or 28 USC §1441(b) (federal question). Petition for removal of a civil action must be filed within 30 days after the defendant receives a copy of the initial pleading or a service of summons. 28 USC §1446(b).

There are a number of procedural "snafus" associated with removal, and considerable care should be taken in analyzing these issues, particularly in multiple-party cases. For example, a removal petition filed 29 days after the moving defendant was served but 42 days after the first defendant was served was held not to be timely filed. *See Balestrieri v. Bell Asbestos Mines, Ltd.,* 544 F Supp 528 (ED Pa 1982).

Moreover, where a jury trial is requested before removal, or if the procedure of the court in which the case was originally filed does not require express demand for jury trial (like Oregon), demand is not required after removal unless specifically directed by the court. Otherwise, the petitioner has 14 days after filing the petition for removal in which to demand a jury trial; a nonpetitioner has 14 days after being served with notice of removal. FRCP 81(c).

B. Motions to Consider

Generally, motions against a complaint must be filed within the time allowed for a party to appear and defend under ORCP 7C. If a motion is filed, it may not file its answer until the issues raised in the motion are resolved. ORCP 21A.

Several motions are available under ORCP 21, including motions to dismiss a particular claim or the entire complaint for various reasons, motions to strike sham, frivolous, or irrelevant pleadings, motions to strike a complaint containing more than one claim not separately stated, or motions to make the allegations more definite and certain.

In the past, a great deal of money was spent by lawyers filing and responding to Rule 21 motions. A wise defendant will carefully consider whether it is strategically better to file motions to clean up a complaint or to simply allow the allegations to stand as pleaded. In addition to the economic considerations, filing such motions frequently serve to educate the plaintiff and improve the claims. Many experienced litigators feel that the use of pretrial motions only educates the opponent as to the opponent's weaknesses. Others take the "first door out" approach and are of the view that the use of pretrial motions encourages settlements and the early disposition of cases. The expense associated with pretrial motion practice should be discussed with the client, and the ultimate decision should be that of the client.

Keep in mind the deadlines imposed under UTCR 5.030, which generally allows an opposing party to file a written memorandum in response to any motion (besides motions for summary judgment) not later than 14 days from the date of service or the date of filing of the motion, whichever is later. A reply memorandum, if any, must be filed within 7 days of the service or filing of the responding memorandum, whichever is later.

C. Defenses That Must Be Raised or Waived

Certain defenses may be raised either by motion or by answer. ORCP 21G(1) provides that defenses of lack of jurisdiction over a person, another action pending, insufficiency of summons or process, or insufficiency of service are waived if not included in an ORCP motion or a responsive pleading. No amendment is allowed to raise those defenses.

ORCP 21G(2) provides that other defenses may be raised by amendment if leave of court is obtained and the party did not know, and could not have reasonably known, that the defense existed. Those defenses include legal capacity to sue, real party in interest, and that the action was not commenced within the time allowed by statute.

Under ORCP 21G(3), defenses for failure to state ultimate facts constituting a claim, failure to join an indispensable party, or an objection of failure to state a legal defense to a claim may be made in a pleading permitted under ORCP 13B, in a motion for judgment on the pleadings, or at

trial on the merits. However, the wise practitioner will not wait until that time to pursue such a motion. Finally, a defense that the court lacks jurisdiction over the subject matter may be made at any time.

For cases subject to mandatory arbitration, check UTCR 19 for any limitations.

D. Filing the Answer

1. Admissions. ORCP 19A requires a defendant to admit or deny the allegations upon which the adverse party relies. Where a defendant admits a fact in the answer, that admission relieves the plaintiff from proving that allegation at trial. *Owen v. Bradley,* 231 Or 94, 100, 371 P2d 966 (1962). However, an admission may be waived where the case is tried as if the admitted fact were still at issue. ORCP 23B. An admission in the pleadings of one defendant is not admissible against a codefendant, especially when the interests of the defendants are adverse to one another. *Hyatt v. Johnson,* 204 Or 469, 477, 284 P2d 358 (1955).

2. Denials. ORCP 19A also requires a party to state in short and plain terms the party's defenses to each claim asserted. If a party lacks sufficient knowledge or information sufficient to form a belief as to the truth of the matter alleged, then it must so state, and doing so will have the effect of a denial. Denials must fairly meet the substance of the allegations denied. The pleader must admit as much of an allegation as is true and deny the remainder. Thus, an entire allegation may not be denied simply because part of it is not true. That portion that is true must be admitted. ORCP 19A.

A general denial is permissible only when the pleader intends in good faith to controvert every allegation of the pleading. Allegations to which a response is required, other than the amount of damages, are deemed admitted if not denied. If no responsive pleading is required, the allegations will be treated as denied or avoided. ORCP 19C. Other issues sometimes arise as to certain types of denials, as follows.

a. ***The Negative Pregnant.*** A denial that does not completely respond to an allegation and therefore implies that the allegation may be partly true is known as a "negative pregnant." ORCP 20G provides that no denial shall be treated as an admission on the ground that it contains a negative pregnant.

b. ***Evasive Denial.*** A denial must "fairly" meet the substance of the allegations denied. ORCP 19A. A refusal to admit or deny allegations may result in the allegations being admitted. ORCP 19C.

c. ***Argumentative Denial.*** An argumentative denial is an allegation by the responding party that could not be true if the plaintiff's allegations were true. Under the traditional rule, an argumentative denial was regarded as not denying anything and therefore admitting the allegation in the plaintiff's complaint. *See Loveland v. Warner,* 103 Or 638, 204 P 622, *reh'g denied* 103 Or 638, 206 P 298 (1922) (the insertion of a clause pretending to admit a fact not pleaded in the complaint is not proper, raises no issue, is not capable of being denied, and should not be tolerated).

3. Defenses. All defenses must be stated separately. ORCP 16B. Alternative and inconsistent defenses are permissible and often tactically wise, though it may also be more

effective to decide on a single defense before the time of trial. One should plead partial as well as complete defenses. Mitigation of damages is an example of a partial defense that, to be relied upon, generally must be pleaded. *Kirby v. Snow,* 252 Or 592, 595, 451 P2d 866 (1969). Partial defenses should be pleaded as such, or one risks having them treated as a complete defense.

4. Affirmative Defenses. In responding to a preceding pleading, a party shall set forth any matter constituting an avoidance or affirmative defense. ORCP 19B. Any fact that does not directly controvert a fact necessary to be established by the claimant is a new matter and must be pleaded as an affirmative defense. *Hubbard v. Olsen-Roe Transfer Co.,* 110 Or 618, 626, 224 P 636 (1924). If doubt exists as to the admissibility of evidence of any defensive matter under a denial, it is appropriate to set it forth as an affirmative defense. However, the party asserting an affirmative defense will generally bear the burden of proof on that issue.

Certain matters must be set forth affirmatively, including accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, laches, payment, release, res judicata, statute of frauds, statute of limitation, unconstitutionality, and waiver. A nonexhaustive list of other affirmative defenses not listed in the rules include mistake, adhesion, impossibility, incompetency, failure to mitigate, and setoff or recoupment.

Ordinarily, the party alleging the defense must prove it. While the burden of proof shifts to the plaintiff when a defendant raises a matter as an affirmative defense that could equally be proven under a denial, a defendant cannot take advantage of that rule where it assumes the burden of proof on an issue. Thus, when affirmatively controverting an issue that may be part of the plaintiff's burden of proof, the defendant should specifically deny that, by so pleading, it is admitting that it is assuming the burden of proof. That position should be clearly stated in the pleading so that a trial or an appellate court cannot cite reliance on the pleadings as a rationale for imposing the burden of proof on the defendant.

a. ***Effect of Failure to Plead Affirmative Defense.*** Failure to plead an affirmative defense in the first responsive pleading may result in a waiver, and the party failing to plead the defense may not be permitted to introduce evidence in support of the defense. ORCP 23B.

b. ***Joinder of Affirmative Defense.*** A party is permitted to assert as many affirmative defenses as it may have. ORCP 19B, 21A. If more than one affirmative defense is pleaded, each must be set forth separately. ORCP 16B. Defenses may also be inconsistent. ORCP 16C. When one is in doubt as to which of several statements of fact is true, statements may be alleged in the alternative. However, inconsistent statements of fact within the pleader's knowledge are improper. *See* ORCP 17C.

E. Counterclaims, Cross-Claims, and Third-Party Claims

1. Counterclaims. A counterclaim is a claim by the defendant against the plaintiff that is asserted in the answer. ORCP 13B. A defendant may assert as many counterclaims, both legal and equitable, that the defendant may have against the plaintiff. ORCP 22A(1). Oregon generally does not require compulsory counterclaims. *Burlington Northern Inc. v. Lester,* 48 Or App 579, 583, 617 P2d 906 (1980). However, when a counterclaim is based upon facts common

with any affirmative defenses asserted by the defendant, or where only part of the counterclaim is asserted, the doctrine of res judicata or collateral estoppel might preclude subsequent litigation in a separate proceeding. Thus, some counterclaims may be compulsory even though Oregon's counterclaim rule only mentions permissive counterclaims.

Note that if there is a basis to recover attorney fees, it has been the practice to assert a right to attorney fees as a counterclaim instead of an affirmative defense.

2. Cross-Claims. When an action is against two or more defendants, any defendant may allege in its answer a cross-claim against any other defendant. A cross-claim must: (a) arise out of the transaction or occurrence that is the subject matter of the complaint; or (b) relate to any property that is the subject matter of the original action. ORCP 22B(1). A cross-claim may include a claim for indemnity or contribution. ORCP 22B(2).

Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the joinder rules. ORCP 22D(1). The joinder rules should not be confused with the rules allowing third-party complaints. *Compare* ORCP 22C. Oregon rules contain a special joinder provision relating to counterclaims that is not found in the federal rules. ORCP 22D(2) provides that a defendant in an action on a contract brought by an assignee may join all or any as persons liable for attorney fees under ORS 20.097 (maker and plaintiff/assignee both liable to defendant for attorney fees if the defendant prevails in contract action and contract provides for recovery of such fees). The Oregon rules provide that a party joined under ORCP 22D is to be treated as a defendant for purposes of service of summons and time to answer under ORCP 7. ORCP 22D(3). If a cross-claim seeks relief against another defendant, it must be served on that defendant, even though that party is in default for the party's failure to appear and defend. ORCP 22 B(3).

The deadline to answer a cross-claim or any motion directed against a cross-claim is 30 days from the date of service. ORCP 15A.

3. Third-Party Complaint. After the commencement of an action, a defending party, as a third-party plaintiff, may file and serve a complaint against a person not then a party to the action as a third-party defendant, alleging that the person is or may be liable to the defending party for all or part of the plaintiff's claim against it. The third-party defendant, in turn, can then raise defenses, counterclaims, or cross-claims just like any other party. ORCP 22C. Where a counterclaim is asserted against a plaintiff, the plaintiff also may cause a third party to be brought into the action. ORCP 22C(2).

ORCP 22C(1) requires that a defending party, as a third-party plaintiff, must commence a third-party action not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise, it must obtain agreement of parties who have appeared and leave of court. Although some circuit court judges have ruled that the court has the power to grant leave to file third-party actions without regard to whether the other parties to the action agree, this appears to be contrary to the express language of ORCP 22C(1). The careful lawyer will decide whether to file a third-party claim as soon as possible after the complaint is served.

IV. GENERAL CONSIDERATIONS

A. Amended and Supplemental Pleadings

1. Amendment as a Matter of Course. ORCP 23A allows a party to amend its pleading once as a matter of course at any time before a responsive pleading is served, or, if no response is permitted, the amendment must be filed within 20 days after the pleading to be amended is served.

2. Amendment by Leave of Court Before Trial. Where a party cannot amend as a matter of course, it must obtain leave of court or written consent of the adverse party before it can amend its pleading. "[L]eave to amend shall be freely given when justice so requires." ORCP 23A. Review of a trial court's decision to deny leave to amend is for abuse of discretion. *Quillen v. Roseburg Forest Products, Inc.,* 159 Or App 6, 10, 976 P2d 91 (1999). Thus, beware of last-minute motions to amend filed by the opposing party. Note that some defenses ordinarily waived if not raised can be raised by amended pleading under certain limited circumstances. ORCP 21G(2).

An order granting leave to amend should be obtained prior to filing and serving the amended pleading. Once the order is entered, the pleading can be filed. The pleading should be filed and served after the order is entered. A proposed pleading should be filed with a motion to amend. However, the proposed pleading does not become an "official" pleading unless so ordered by the court.

3. Amendments After Motion. After a motion to dismiss, a motion to strike an entire pleading, or a motion for judgment on the pleadings has been granted, the court may, upon such terms as may be proper, allow a party to amend its pleading. ORCP 25A. Where a court orders that part of the pleading be stricken or where the pleading, or a part of it, is to be made more definite and certain, the pleading must be amended pursuant to ORCP 23D. *See* ORCP 25A.

4. Amendments After Commencement of Trial. Where issues not raised by the pleadings are not objected to at trial, they will be treated in all respects as if they had been raised in the pleadings. On motion of any party at any time, even after judgment, the pleadings may be amended to conform to the evidence and to raise such issues. However, failure to amend does not affect the outcome of the trial on those issues. If evidence is objected to as not being within the scope of the pleadings, the court may allow the pleadings to be amended if the merits of the action will be advanced and the objecting party cannot demonstrate prejudice. ORCP 23B. In some circumstances, a court may grant a continuance to enable the objecting party to meet the new evidence. ORCP 23B.

5. Relation Back of Amendments. Whenever a claim or defense asserted in an amended pleading arises out of the conduct, transactions, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. ORCP 23C.

An amendment changing the party against whom a claim is asserted relates back if the conditions described above are satisfied and, within the statute of limitations, the new party: (1) had notice of the action so it will not be prejudiced in its defense; and (2) knew, or should have

known, that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party. ORCP 23C.

If the error was simply a misnomer (an error in stating what the correct party is called) rather than misidentification, the Court of Appeals held in *Vergara v Patel*, 305 Or App 288, 295, 471 P3d 141 (2020), that the plaintiff only needed to demonstrate that the amended pleading arises from the same conduct, transaction, or occurrence as the original pleading.

6. Procedure for Amendments. Under ORCP 23D, where a pleading is amended before trial, a new "amended" pleading is filed, labeled as such. Occasionally, an amendment may be made by deletions or interlineation in the original pleading. ORCP 23D. An amended pleading must be complete in itself, without reference to the preceding pleading or amendments by the party. ORCP 23D. Once an original pleading has been amended, the original pleading no longer is operative for the action. Nevertheless, it may still serve as evidence or an admission. Whenever an amended pleading is filed, it must be served on all parties who are not in default. A default judgment may be entered in accordance with the original pleading served upon any party who is in default or against whom a default has already been entered. However, the amended pleading need not be served on such parties in default unless that pleading asks for additional relief against them. ORCP 23A.

7. Response to Amendments. Unless the court orders otherwise, a party must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amendment, whichever is longer. ORCP 15C.

B. Interpleader

ORCP 31A provides that persons having claims against the plaintiff may be joined as defendants and be required to interplead when their claims are such that the plaintiff is or may be exposed to multiple liability. A defendant exposed to similar liability may obtain such interpleader by way of a cross-claim or counterclaim. It is not grounds for objection that the claims do not have a common origin or that they are adverse to and independent of one another. It is also not grounds for objection that the plaintiff alleges that it is not liable in whole or in part to any or all of the claimants.

ORCP 31B provides that any property or amount involved as to which the plaintiff admits liability may, upon order of the court, be deposited with the court "or otherwise preserved, or secured by bond in an amount sufficient to assure payment of the liability admitted." Once that is done, the court may enjoin all the parties before it from pursuing any other action regarding the subject matter of the interpleader action. Following a hearing, the court may order the plaintiff discharged from liability "as to the property deposited or secured" before determining the rights of the claimants.

Interpleader is often considered as a possibility when an insurer is faced with multiple claims against an insured that exceed the amount of a liability policy. In theory, interpleading the policy limits would allow the insurer to avoid incurring defense costs on the claims. However, in practice, doing so without first obtaining a release for an insured could expose the insurer to allegations of bad faith in leaving its insured unprotected.

C. Ethical Considerations—ORCP 17

In form, ORCP 17 is similar to its federal counterpart, FRCP 11. In practice, however, it is infrequently necessary or imposed by Oregon judges. Fortunately, Oregon's collegiality has avoided a flood of Rule 17 sanction motions except when they are well-deserved.

1. Sanctions for Improper Pleading/Certification to the Court. ORCP 17 is somewhat similar to FRCP 11 in requiring certain certifications to the court by signing pleadings, motions, and other papers. Sanctions are available for violations of these rules. An attorney or party signing a pleading certifies that:

a. The statements are based upon reasonable knowledge, information, or belief, formed after making reasonable inquiry under the circumstances;

b. The pleading is not made for an improper purpose, such as delay or a needless increase in the cost of litigation;

c. The legal positions taken are "warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law" and

d. The allegations or denials are supported by the evidence.

Any allegations or denials that the party or attorney does not wish to certify as supported by the evidence must be "specifically identified." The party or attorney's signature constitutes a reasonable belief that an allegation so identified will be supported by the evidence after further investigation and a denial so identified is reasonably based upon a lack of information or belief. ORCP 17C.

ORCP 17(D) also provides that, in the event a pleading or motion is signed in violation of the rule, the court may, upon motion or its own initiative, impose sanctions on the party or the attorney. Sanctions under ORCP 17 are limited to amounts sufficient to reimburse the moving party for attorney fees, including fees for bringing the motion. ORCP 17(D)(4). ORCP 17 sanctions may also include amounts sufficient to deter future false certifications. ORCP 17(D)(4). However, sanctions sufficient to deter future false certification must be based "upon clear and convincing evidence of wanton misconduct." ORCP 17(D)(4).

2. Asserting a Claim in Bad Faith. ORS 20.105 provides for an award of attorney fees for disobeying a court order or other misconduct. It requires a court to award reasonable attorney fees to a party against whom a claim, defense, or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense, or ground, upon a finding by the court that the party willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim, defense, or ground for appeal.

These rules and statutes impose a definite moral and professional obligation upon the attorney. An attorney should not rely solely on information provided by the client if the attorney can obtain or verify the facts through other sources with reasonable diligence. Thus, whenever possible, an attorney should investigate the merits of a client's case before filing. If the attorney

decides that an action lacks merit, the attorney should advise the client promptly before filing. If the case has already been filed, the attorney should get the client's consent to dismiss or seek leave to withdraw. Counsel should always be mindful of potential personal liability for improperly bringing or continuing an action.

DEPOSITIONS IN OREGON

OREGON STATE BAR, PRACTICING LAW IN OREGON WEBCAST CLE

September 22, 2025

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Anthony Kuchulis
Dunn Carney, LLP

Almost 20 Yrs in Litigation Practice

Hundreds of Depositions



2

WHY SHOULD YOU CARE?



3

BIG PICTURE

- One of Most Important Discovery Tools
- Turns a Case into a Winner or Loser
- Lots of Room for Creativity
- Impeachment at Trial
- Plus – A LOT OF FUN!



4

BASICS

What

Why do

When not

"Types" (ORCP 37-41) (UTCR 5.130, 5.140) (FRCP 27-32, LR 27-30)

- Discovery Deposition.
- Corporate.
- Perpetuation.

See State ex rel. Grimm v. Ashmanskas, 298 Or 206, 211–12, 690 P2d 1063 (1984).

- Written Questions.
- Foreign Deposition.

5

MULTNOMAH COUNTY JUDGES CIVIL MOTION CONSENSUS STATEMENT

MAY 2023

MULTNOMAH COUNTY DEPOSITION GUIDELINES

Presented by the Multnomah Bar Association Court Liaison Committee

Welcome to the next level of the BarBooks™ online library.

The interface is new, but the award-winning library you are familiar with is the same. A generous grant from the Professional Liability Fund made this upgrade possible. For help navigating go here. To see what's new go here. Have questions not answered at these links? Email support@osbar.org.

6

Oregon Rules

- Any relevant non-privileged matter
- Must be "reasonably likely" to lead to admissible evidence
- No "unreasonable" or bad faith tactics

Federal Rules

- Presumptive "Limits" – 10 depos total, 7 hrs per
- Easier out of state procedures
- Quicker to sanction abusive tactics

7

HOW RELATES TO OTHER DISCOVERY TOOLS?

- Requests for Production
- Requests for Admission
- Interrogatories (Federal Only)
- Pleadings (Answer / Complaint)
- Interviews

8

TAKING A DEPOSITION

- When in case to schedule
- How to Schedule

(What if won't confer?)

- Notice / Subpoena
- Length of time needed?

(Shorter = better)

- How to Prep



9

WHEN YOU ARE TAKING

- Outline
- Topics
- Legal claims / Defenses
- Chronology – KEY
- Flexibility – key phycology about narratives…



10

make more concise

more concise

Here's the most stripped-down version you can reasonably use while still covering the essentials:

Deposition Ground Rules – Oregon

> You're under oath, so answer truthfully. Speak out loud, not with gestures. Wait until I finish before answering. If you don't understand, ask. If you don't know, say so. Finish a question before taking a break. If there's an objection, answer unless your lawyer tells you not to. You'll be able to review the transcript later.
>
> Do you understand? Any questions?

11

TYPES OF QUESTIONS

- Background
- Summarizing
- Open Questions
- Closed / Leading



12

KEY FOR GETTING ANSWERS

ABSOLUTES

Never Happened

I DON'T RECALL

What do remember?

Can be ok –

Variations "I don't recall specifics"

I'D BE GUESSING

No guessing – estimating ok

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14

DEFENDING A DEPOSITION

- Explain Procedure
- What to wear
- Not conversation
- Not memory contest
- Not how you "win" a case
- Review keys of case
- Practice questions (repetition)



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PREP EXAMPLE

Tell the Truth. Always be truthful. Avoid guessing or trying to fill in blanks. "I don't recall" or "I'm not sure" are perfectly acceptable answers if accurate.

Breaks. You can ask for a break at any time, but not while a question is pending. Use breaks to regroup or speak with your attorney.

No Guessing or Speculating. Only answer what you personally saw, heard, or know. Do not speak for others or guess about motivations or thoughts.

Listen Carefully. Questions may be phrased to confuse or mislead. Listen carefully. You can always ask for the question to be repeated or clarified.

Beware of Summary or Rephrased Questions. If the attorney tries to restate your testimony, do not agree unless it is completely accurate. If in doubt, correct or reject the summary.

Never Feel Forced to Answer "Yes" or "No" Only. You can rephrase your answer.

Example:
Q: "Did you cancel the meeting, yes or no?"
A: "I told John that if he didn't attend, the meeting wouldn't happen."

Memory and Documents
You are only required to give your best recollection "as of today." If you do not remember, say so. If asked about a document, take time to review it before commenting. If you don't recognize it, say so.

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OBJECTIONS – STILL HAVE TO ANSWER

- **Vague**
  The question is unclear or too broad.
  Example: "Did anything happen that day?"
  – Ask: "Can you clarify what you mean by 'anything'?"

- **Speculation**
  You're being asked to guess about facts or another person's thoughts.
  Example: "Why do you think your manager wrote you up?"
  – Respond: "I don't know what they were thinking."

- **Lacks Foundation**
  There's no context for the question; the attorney hasn't established the necessary background.
  Example: "Was the policy being enforced that day?"
  – You may answer: "I don't know, I wasn't told about any policy."

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- **Legal Conclusion**
  The question uses legal terms you're not qualified to interpret.
  Example: "Would you agree that was discrimination?"
  – Respond with facts, not labels: "I can describe what happened, but I'm not sure if that's discrimination."

- **Assumes Facts Not in Evidence**
  The question includes facts that haven't been established or are incorrect.
  Example: "When did you start violating the safety rule?"
  – Respond: "I don't believe I violated any safety rule."

- **Misstates Prior Testimony**
  The attorney misquotes your earlier answers.
  Example: "You said earlier you never warned her, right?"
  – Respond: "No, I said I don't recall giving a formal warning."

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- **Asked and Answered**
  The same question is repeated.
  Example: "Are you sure you didn't hear the alarm?" after you've already said no.
  – Respond: "I've already answered that—I have nothing to add."

- **Harassing or Argumentative**
  The question is aggressive or disrespectful.
  Example: "Why are you lying about what you saw?"
  – Remain calm. Your attorney may instruct you not to answer.

- **Compound**
  Two questions are asked at once.
  Example: "Did you check the equipment and report it?"
  – Ask for clarification: "Would you like me to answer the part about checking or the part about reporting first?"

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- **Privilege**
  You're asked about attorney-client communications.
  – Do not answer. Wait for your attorney's instruction.

- **Document Speaks for Itself**
  You're asked to interpret a document that clearly states its terms.
  Example: "Doesn't this email say you refused the assignment?"
  – Respond: "The document speaks for itself."

20

Bad Evasive Answers



21

Objection – Argumentative



22

WHEN CANNOT AGREE -

- Confer off the record
- Take a break and speak with client
- Calling the judge –
  - What to expect
  - Bad for all – often
  - Delay and additional cost



23

THANK YOU!

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OREGON LEGAL ETHICS FOR LATERAL ADMITTEES

Mark Turner – Adjudicator, Disciplinary Board

Alexis Preskar – Assistant Disciplinary Counsel

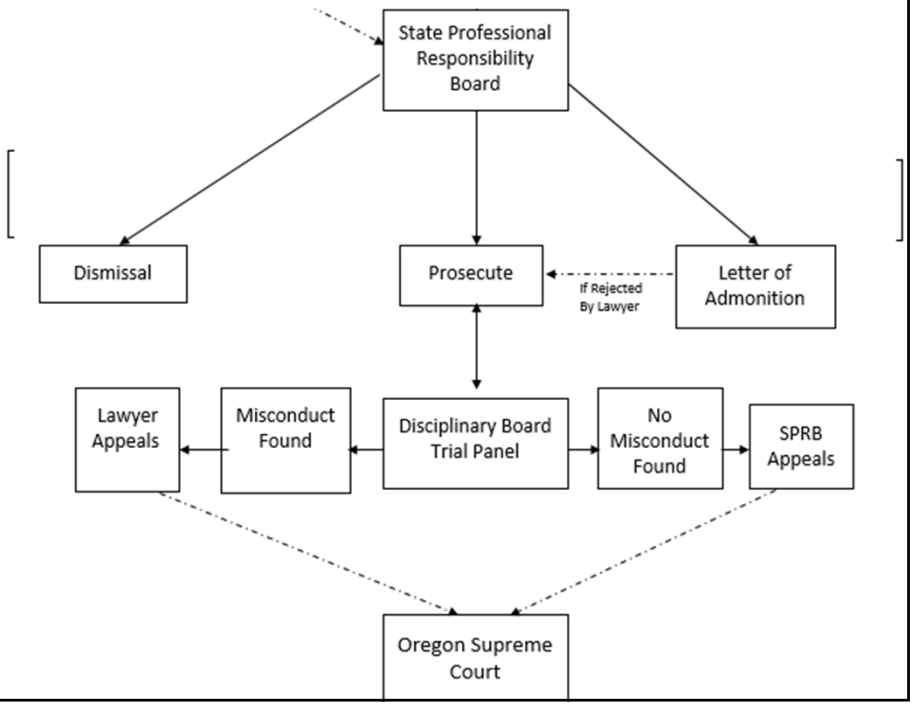
Linn Davis – Asst General Counsel/CAO Manager

1

STRUCTURE OF THE OREGON DISCIPLINARY SYSTEM

2

DISCIPLINARY PROCESS



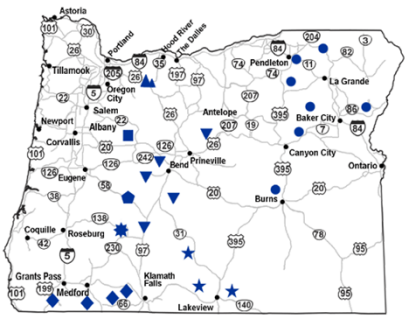
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WHEN DO THE OREGON SUPREME COURT AND OSB HAVE REGULATORY AUTHORITY?

4

4

WHEN DOES OREGON HAVE REGULATORY AUTHORITY?





5

5

WHEN DOES OREGON HAVE REGULATORY AUTHORITY?

RULE 8.5 DISCIPLINARY AUTHORITY

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

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WHAT RULES APPLY?

RULE 8.5 DISCIPLINARY AUTHORITY

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

7

7



WHERE ARE THE RULES OF CONDUCT FOR OREGON LAW PRACTITIONERS?

OSBAR.ORG/_DOCS/RULESREGS/ORPC.PDF

OSBAR.ORG/_DOCS/RULESREGS/ORPC-LP.PDF

8

OTHER RULES GOVERNING OREGON LAW PRACTITIONERS?

OSBAR.ORG/_DOCS/RULESREGS/RULESOFPROCEDURE.PDF

OSBAR.ORG/_DOCS/RULESREGS/RULESOFLICENSURE.PDF

9

KEEP YOUR CONTACT INFORMATION CURRENT!

2.4 Register of Members

The Bar is required to maintain and publish a register of all members name, Bar number, and current licensure status.

The register must also include designation of a principal office address where the member can accept service and telephone number AND a designated e-mail address for receipt of Bar regulatory notices.

Promptly notify the Bar in writing when any change in their contact information or e-mail address occurs.

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FORMAL OPINION NO 2022-200: Remote Work and UPL

Facts: Lawyer A is actively licensed in another state but not in Oregon. Lawyer A moves to Oregon and becomes Oregon resident BUT continues to practice law exclusively in the other state from Oregon through technology such as email, mobile telephone, and video conferencing. Lawyer A does no work for Oregon clients, does not solicit Oregon clients, and does not otherwise hold themself out to the public as available to practice law in Oregon.

Lawyer A does not practice solely in federal forums. Lawyer A has not applied for admission to the practice of law in Oregon.

Question: Is Lawyer A engaged in the unauthorized practice of law in Oregon?

FORMAL OPINION NO 2022-200: Remote Work and UPL

Answer: As long as Lawyer A practices exclusively the law of jurisdictions in which Lawyer A is licensed or otherwise authorized to practice law on behalf of non-Oregon residents and Lawyer A does not hold themself out as being authorized and available to handle matters in Oregon,7 Lawyer A has not engaged in the unauthorized practice of law in Oregon under Oregon RPC 5.5.

FORMAL OPINION NO 2022-200: Remote Work and UPL

Facts: Lawyer B is actively licensed in Oregon but not in Other State. Lawyer B moves to Other State and becomes a resident of Other State. However, Lawyer B continues to practice law in Oregon from a location in Other State through technology such as email, mobile telephone, and video conferencing. Lawyer B does not do work for Other State clients, does not solicit Other State clients, and does not otherwise hold themself out to the public as admitted and available to practice law in Other State. Lawyer B is not practicing solely in a federal forum and has not applied for admission in Other State.

Question: Is Lawyer B engaged in the unauthorized practice of law in Oregon?

FORMAL OPINION NO 2022-200: Remote Work and UPL

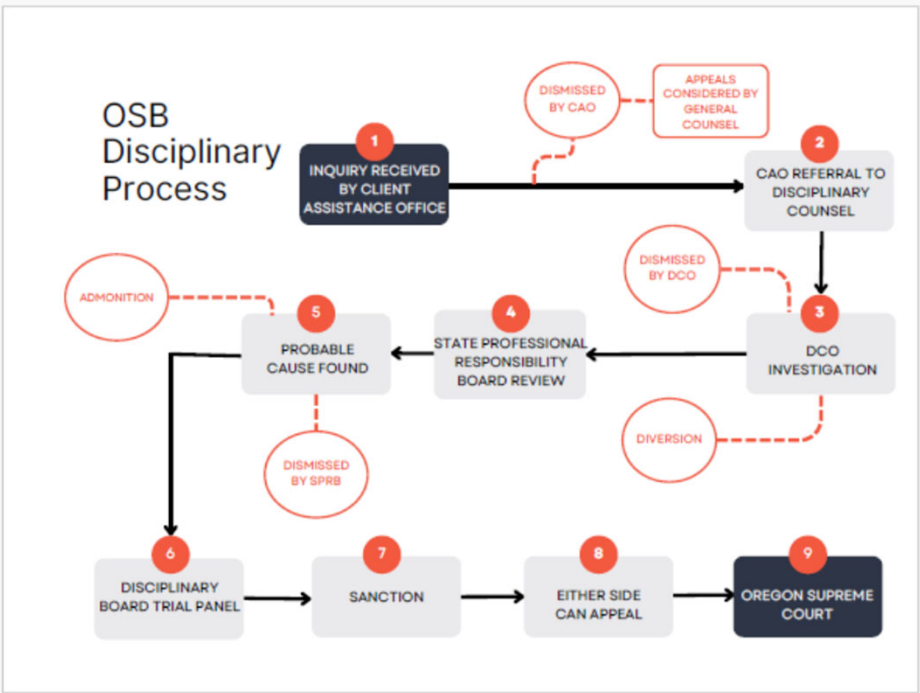
Answer: Whether Lawyer B has engaged in the unauthorized practice of law in Other State is determined by the law of Other State and not Oregon.


INITIAL
STAGES OF
A BAR
COMPLAINT
.

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SCREENING BY INTAKE
AND CLIENT
ASSISTANCE OFFICE

16

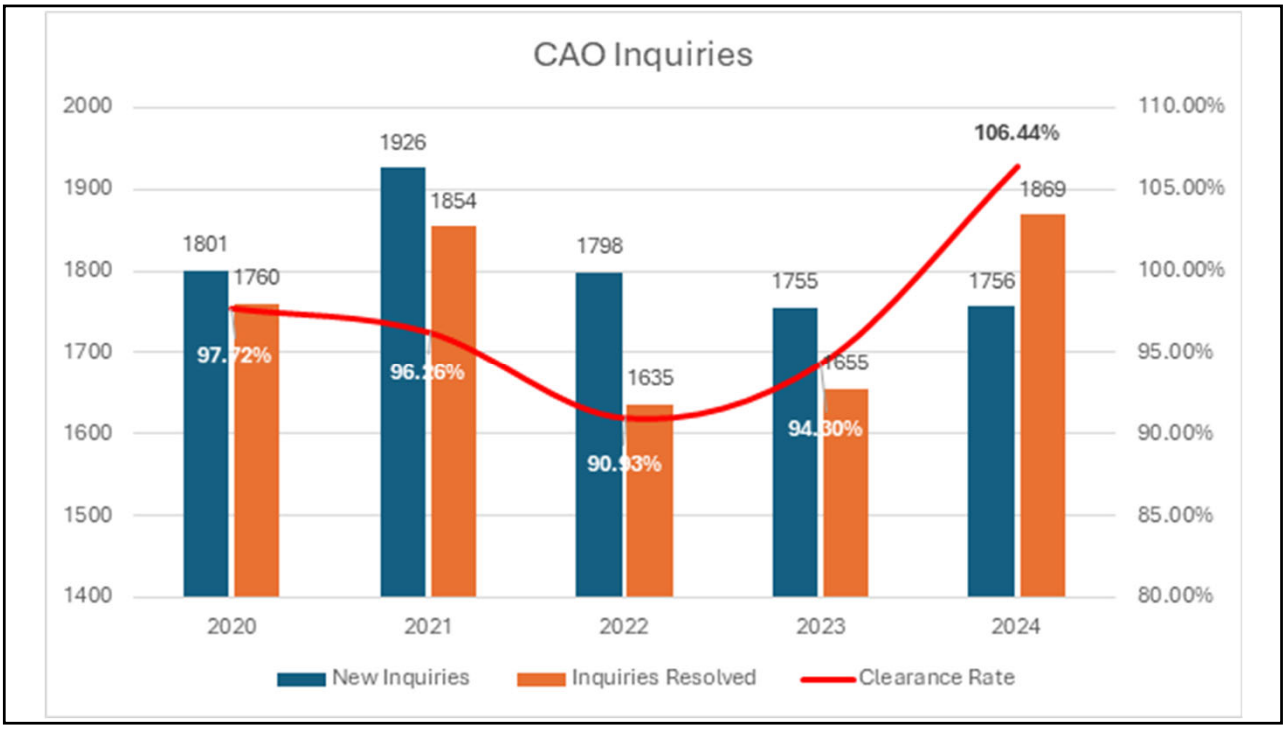


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BR 2.5 INTAKE AND REVIEW OF INQUIRIES AND COMPLAINTS BY THE INTAKE OFFICE

1) Intake Office. The Bar shall maintain an Intake Office, separate from that of Disciplinary Counsel. The Intake Office shall, to the extent possible and resources permitting, receive, review, and respond to all inquiries received by the Bar concerning the conduct of attorneys and LPs. The Intake Office will determine the manner and extent of review required for the appropriate disposition of any inquiry, and may refer inquiries to other resources as it deems appropriate.

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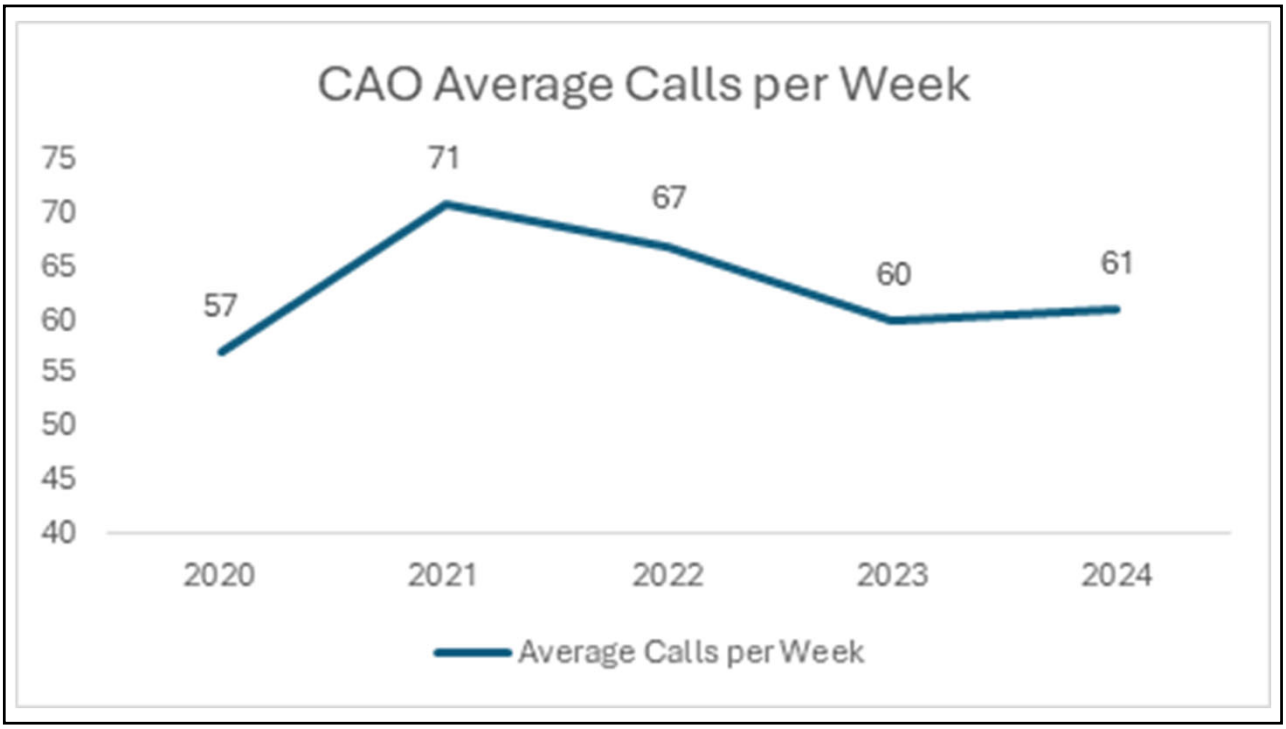
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BR 2.5 INTAKE AND REVIEW OF INQUIRIES AND COMPLAINTS BY THE INTAKE OFFICE

2)

c) The Intake Office may, as it deems appropriate, contact the involved attorney or LP and attempt to assist the parties in resolving the complainant's concerns upon receipt of an inquiry. The provision of such assistance does not preclude a referral of a grievance to Disciplinary Counsel.

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BR 2.5 INTAKE AND REVIEW OF INQUIRIES AND COMPLAINTS BY THE INTAKE OFFICE

2) Disposition by Intake Office.

a) If the Intake Office determines that, even if true, an inquiry does not allege misconduct, it shall dismiss the inquiry with written notice to the complainant and to the attorney or LP named in the inquiry.

b) If the Intake Office determines, after reviewing the inquiry and any other information deemed relevant, that there is sufficient evidence to support a reasonable belief that misconduct may have occurred, the inquiry shall be referred to Disciplinary Counsel as a grievance. Otherwise, the inquiry shall be dismissed with written notice to the complainant and the attorney or LP.

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BR 2.5 INTAKE AND REVIEW OF INQUIRIES AND COMPLAINTS BY THE INTAKE OFFICE

3) Review by General Counsel. Any dismissed inquiry may be reviewed by the General Counsel upon written request of the complainant. General Counsel may request additional information from the complainant or the attorney or LP and, after review, shall either affirm the dismissal or refer the inquiry to Disciplinary Counsel as a grievance. General Counsel may affirm the dismissal by adopting the reasoning of the Intake Office without additional discussion. The decision of General Counsel is final.

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Type of Matter	Number	Percent
Criminal	498	34.6%
Domestic Relations	216	15.0%
Unknown	140	9.7%
Civil Dispute	116	8.0%
Litigation	80	5.6%
Probate	56	3.9%
Other	53	3.7%
Personal Injury	37	2.6%
Landlord/Tenant	36	2.5%
Estate Planning	35	2.4%

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24

Potential Concern of Inquiry	Number	Percent
Communication	115	6.83%
Conduct Prejudicial to Justice	104	6.18%
Dishonesty or Misrepresentation	98	5.82%
Neglect of Legal Matter	89	5.29%
Conduct Outside of Legal Bounds	87	5.17%
Failure to Return Client File	85	5.05%
Competence or Diligence	78	4.63%
Fee Dispute, Excessive or Illegal Fees	59	3.51%
Improper Conduct by Criminal Prosecutor	51	3.03%
Client Conflict – Current	35	2.08%

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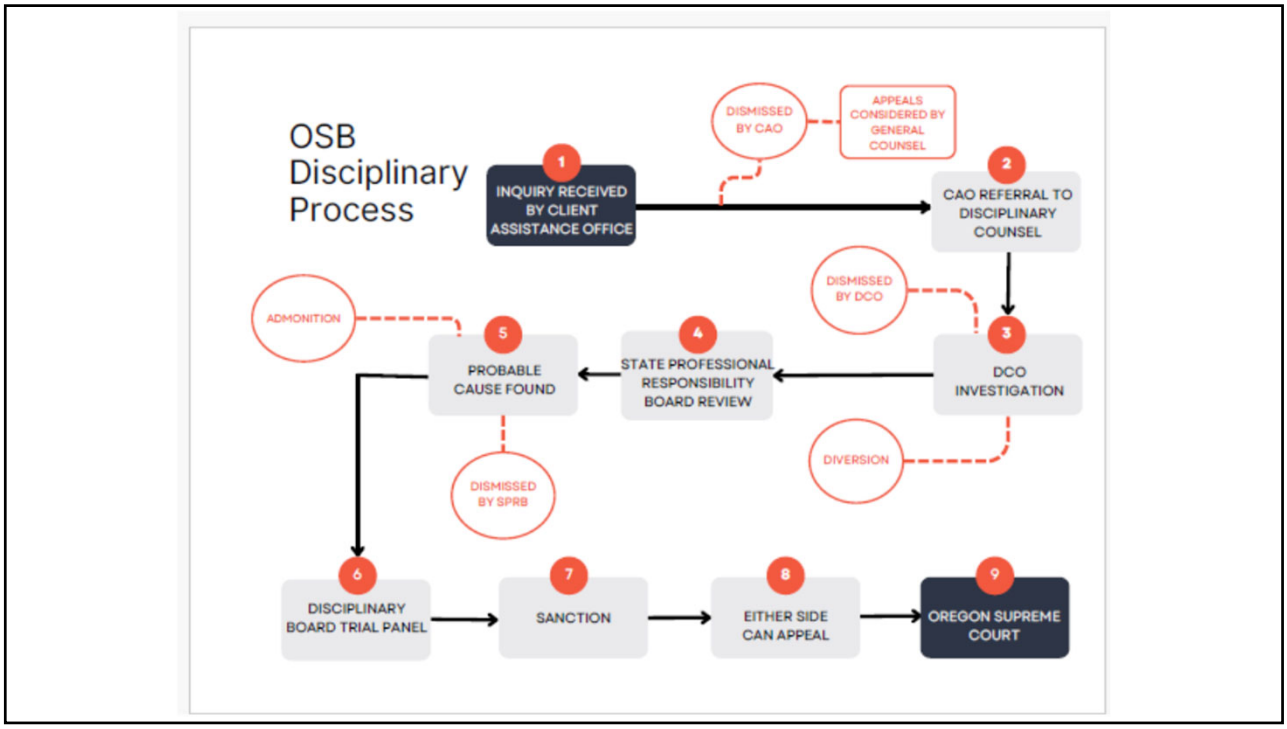
Disposition	Number	Percent
Dismissed	1159	63.0%
Referred to Disciplinary Counsel	257	14.0%
Information Provided	186	10.1%
Resolved by CAO	130	7.1%
Refer to Other	45	2.5%
Referred to OSB Lawyer Referral Service	23	1.3%
Advised to submit a Written Inquiry	10	0.5%
Referred to Fee Arbitration	8	0.4%
Referred to OSB Public Records Coordinator	7	0.4%
Referred to Unlawful Practice of Law	6	0.3%
Referred to PLF	4	0.2%
Referred to Client Security Fund	3	0.2%
Referred to Legal Aid	1	0.1%
Referred to OPDC	1	0.1%

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REVIEW OF GRIEVANCES BY DISCIPLINARY COUNSEL

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OSB Disciplinary Process
1
INQUIRY RECEIVED BY CLIENT ASSISTANCE OFFICE
DISMISSED BY CAO
APPEALS CONSIDERED BY GENERAL COUNSEL
2
CAO REFERRAL TO DISCIPLINARY COUNSEL
DISMISSED BY DCO
3
DCO INVESTIGATION
DIVERSION
4
STATE PROFESSIONAL RESPONSIBILITY BOARD REVIEW
5
PROBABLE CAUSE FOUND
ADMONITION
DISMISSED BY SPRB
6
DISCIPLINARY BOARD TRIAL PANEL
7
SANCTION
8
EITHER SIDE CAN APPEAL
9
OREGON SUPREME COURT

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REVIEW OF GRIEVANCES BY DISCIPLINARY COUNSEL

- DCO receives most grievances from CAO. DCO, on its own accord, may open additional grievances based on trust accounting overdraft notices or, if warranted, based on information received regarding potential misconduct.
- In 2024, DCO opened 317 grievances. CAO referred 256 grievances to DCO and DCO opened 43 other grievances based on trust account overdraft notices and 18 on its own initiative. The total number of matters open in 2024 increased in comparison to 2023 —by 16 grievances.

BR 2.6 INVESTIGATIONS
1) REVIEW OF GRIEVANCE BY DISCIPLINARY COUNSEL

a) Demand for response with extension of time to respond for good cause. Or if further information is not necessary, notifies respondent.

b) DCO is permitted to file a petition for an administrative suspension if the respondent fails to respond. The petition is filed with the DB and is cleared by responding.

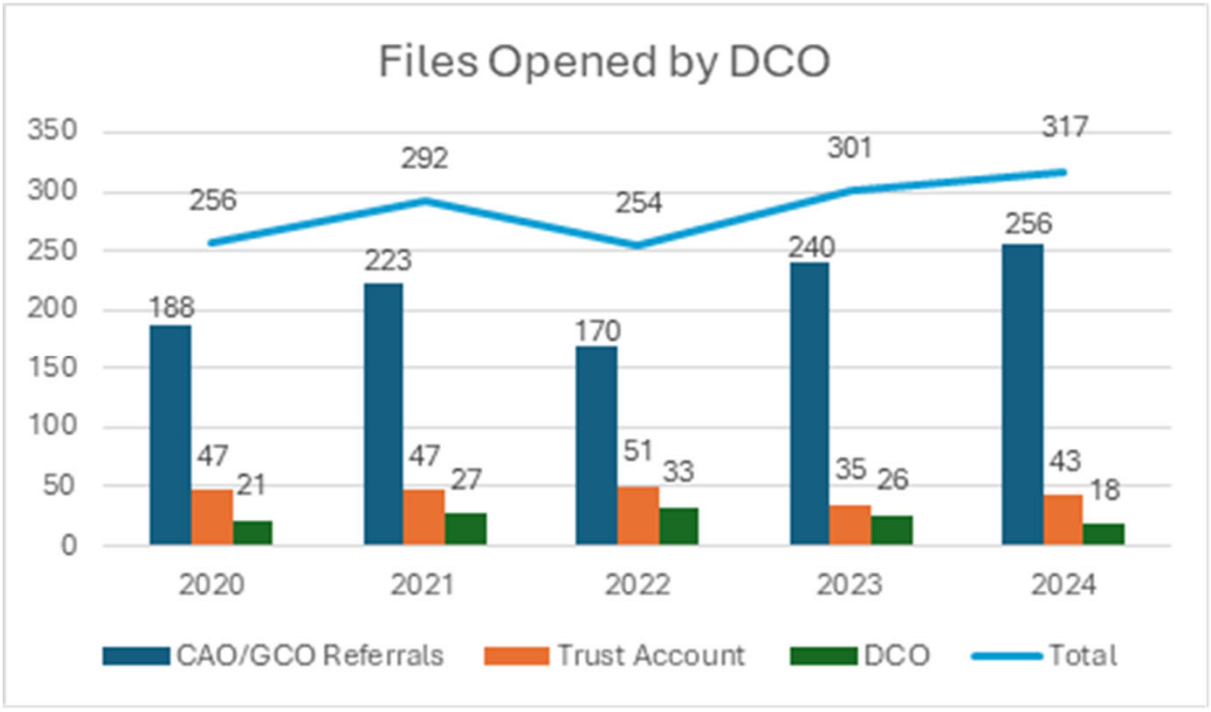
c) DCO is permitted to offer diversion and a remedial program when misconduct does not involve dishonest or criminal conduct and the misconduct is the result of a treatable condition (e.g. inadequate law office management, lack of training, chemical dependency, health conditions – see BR 2.10.)

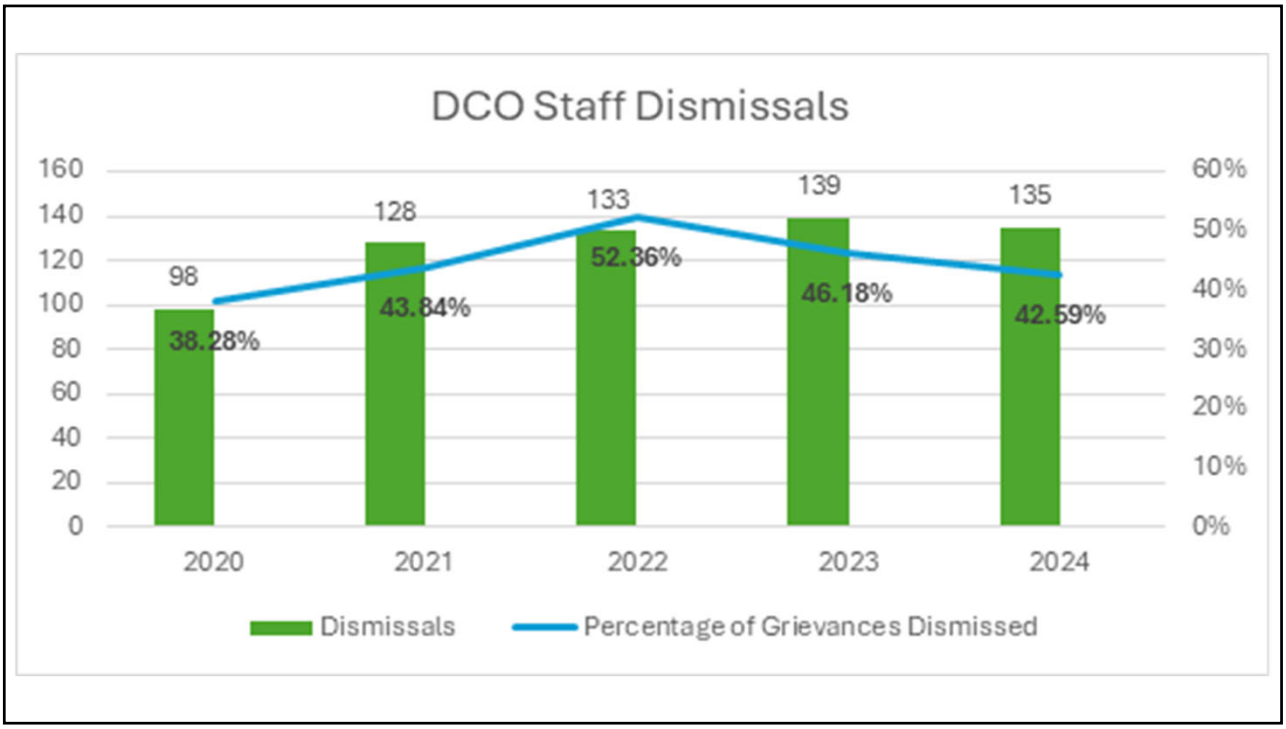
BR 2.6 INVESTIGATIONS
2) DISMISSAL OF GRIEVANCE BY DISCIPLINARY COUNSEL

If, after considering a grievance, the response of the attorney or LP, and any additional information deemed relevant, DCO determines that probable cause does not exist to believe misconduct has occurred, dismisses the grievance.

Disciplinary Counsel notifies the complainant and the attorney or LP of the dismissal in writing. A complainant may contest the dismissal in which case DCO submits a report on the grievance to the SPRB for their consideration.

If Disciplinary Counsel believes there is probable cause of misconduct, submits file to SPRB for their consideration.

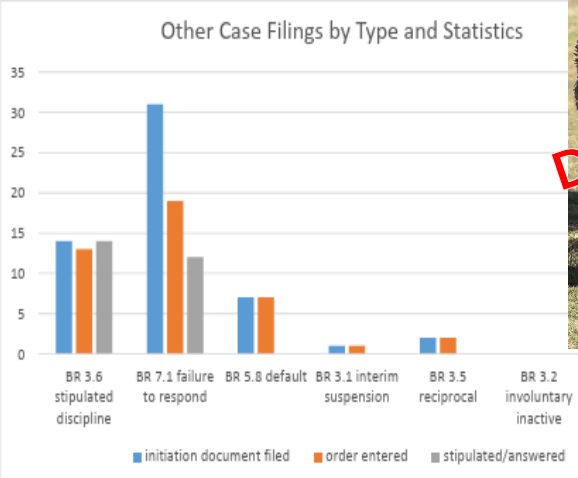




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RESPOND TO BAR INQUIRIES

Number of attorneys disciplined because they didn't respond to Bar inquiries:





2023 Disciplinary Board Report

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PRACTICAL TIPS

- Respond within a reasonable time to the request or explain why unable to immediately comply with request.
- Reach out! Consider whether it makes sense to hire counsel.
- Update your OSB contact information. Add osb.org and osbplf.org to safe sender list in your email!!



STATE PROFESSIONAL RESPONSIBILITY BOARD (SPRB)

- Volunteer board composed of eight lawyers, representing all regions, and two public non-lawyer members, all appointed by the Court for four-year terms. Convenes approximately every six weeks to review completed investigation files and assess whether there is probable cause to believe that the respondent committed misconduct.

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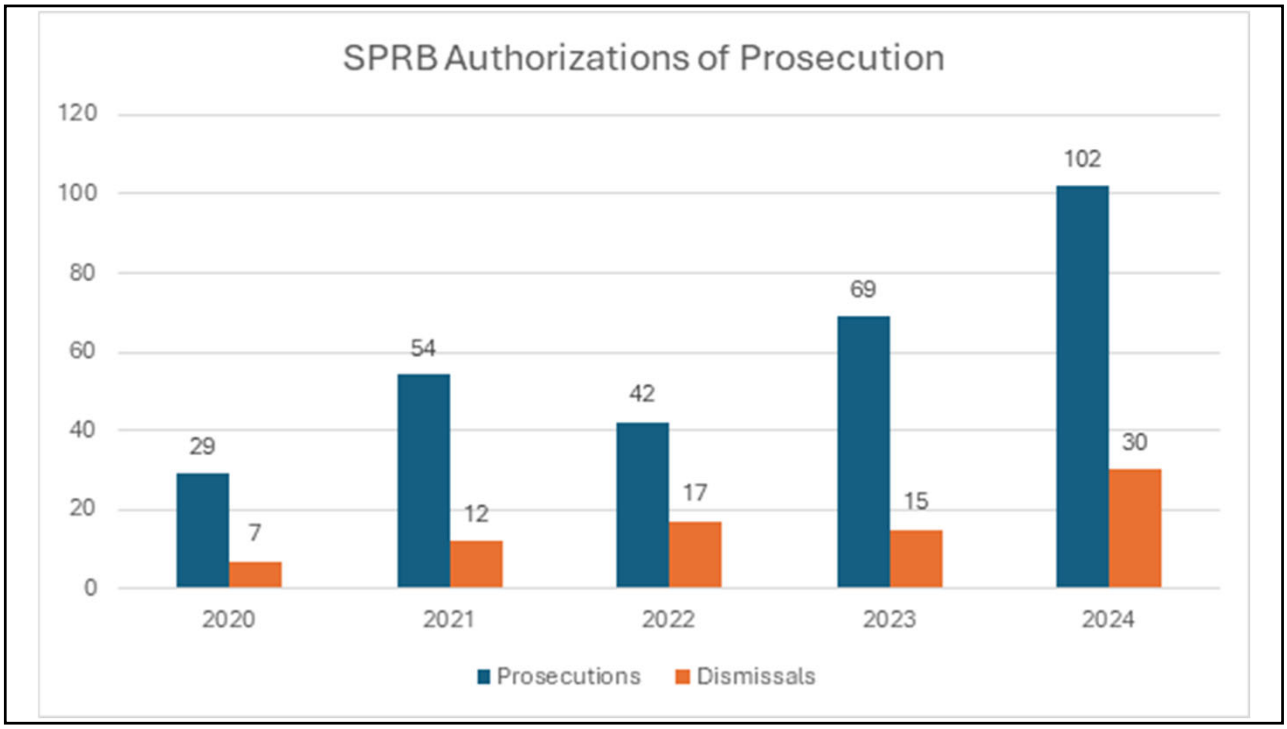
STATE PROFESSIONAL RESPONSIBILITY BOARD (SPRB)

BR 2.6(3)

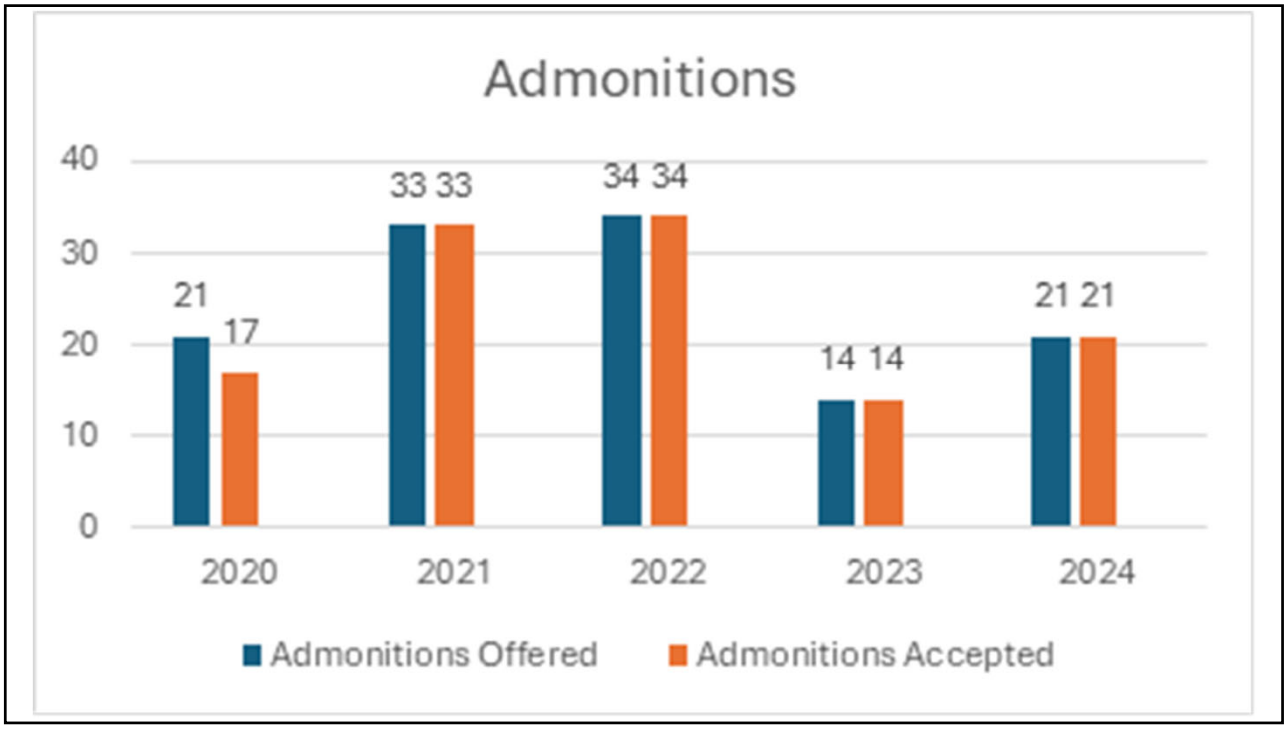
- Options available to the SPRB include directing DCO to dismiss a case if there is no probable cause of misconduct; referring a matter back to DCO for additional investigation; directing DCO to issue a letter of admonition; directing DCO to dismiss a case in the interest of justice; or directing DCO to file a formal complaint under which allegations of professional misconduct will be litigated before the Disciplinary Board.
- The SPRB is the sole source of settlement authority in disciplinary proceedings.

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SPRB Authorizations of Prosecution
120
100
80
60
40
20
0
29
7
54
12
42
17
69
15
102
30
2020
2021
2022
2023
2024
Prosecutions
Dismissals

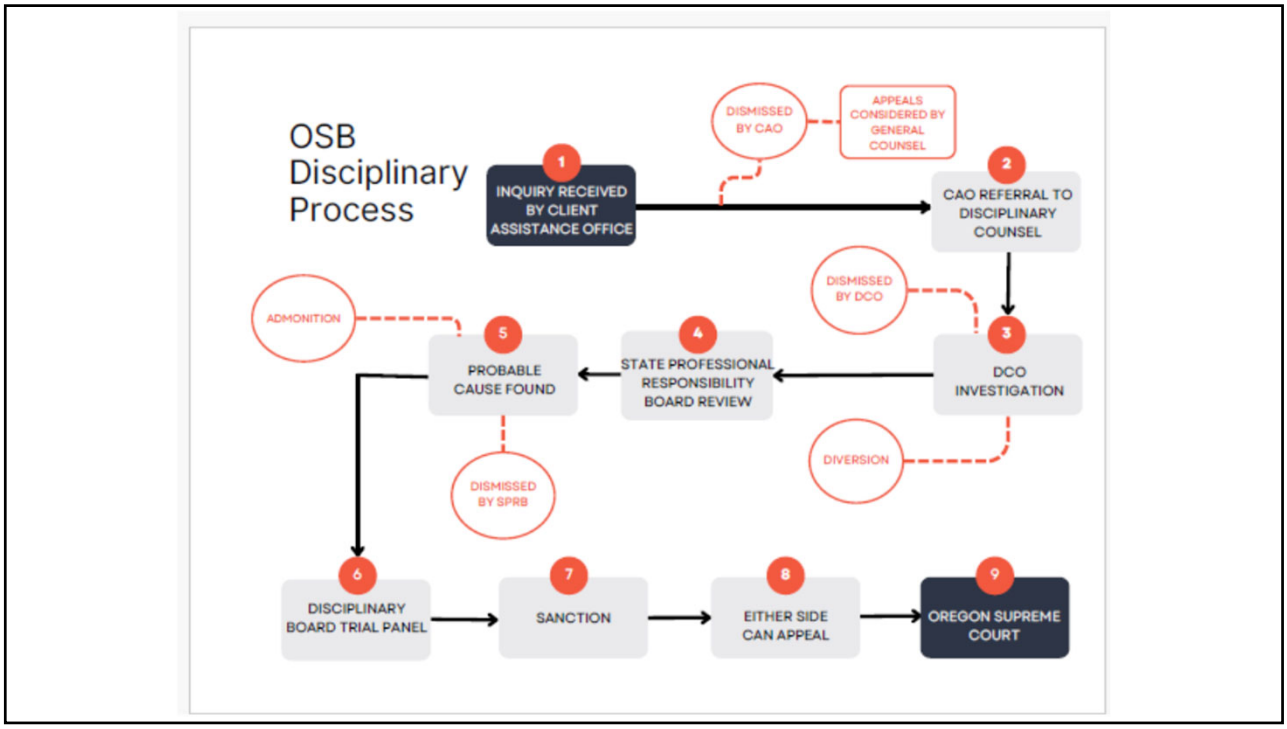
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Admonitions
40
30
20
10
0
21
17
33 33
34 34
14 14
21 21
2020
2021
2022
2023
2024
Admonitions Offered
Admonitions Accepted

40


DISCIPLINARY BOARD

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OSB
Disciplinary
Process
1
INQUIRY RECEIVED BY CLIENT ASSISTANCE OFFICE
DISMISSED BY CAO
APPEALS CONSIDERED BY GENERAL COUNSEL
2
CAO REFERRAL TO DISCIPLINARY COUNSEL
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EITHER SIDE CAN APPEAL
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OREGON SUPREME COURT

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OPERATION OF THE DISCIPLINARY BOARD

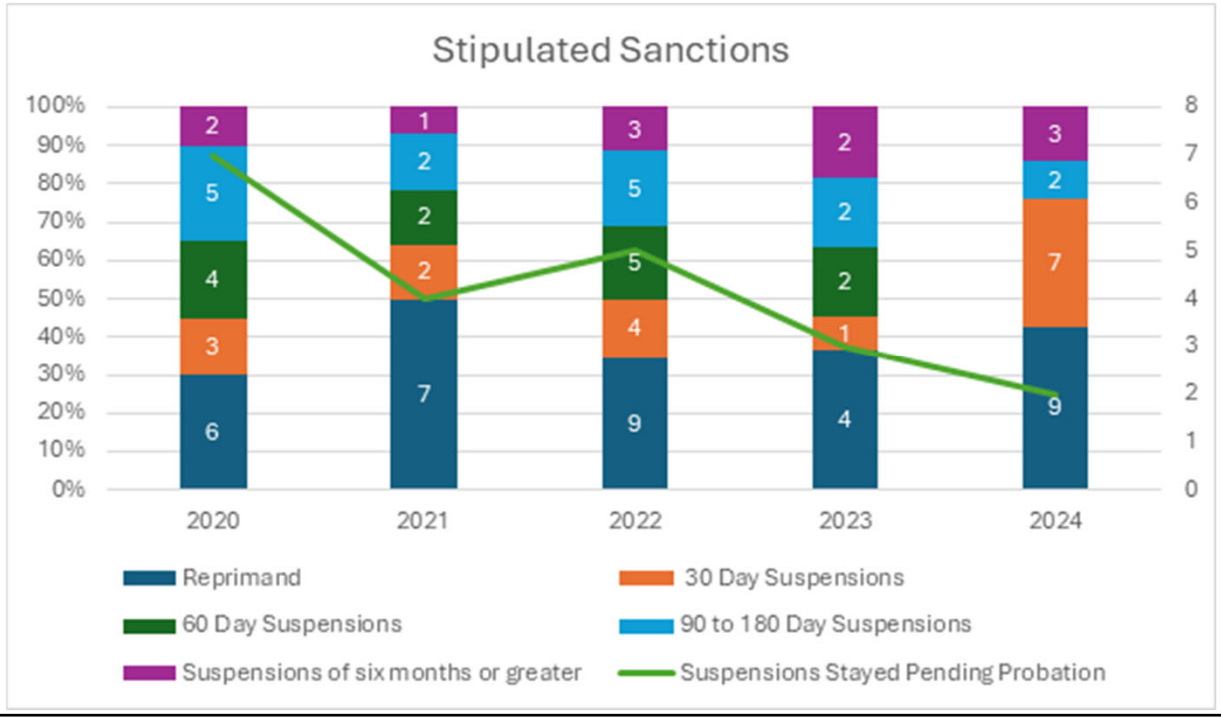
Upon filing of a formal complaint with the Disciplinary Board, a trial panel is assigned to oversee the trial. The Adjudicator and two other members of the Disciplinary Board sit in panels of three (the Adjudicator, one lawyer panelist and one public member of the DB).

The regional chairs of the DB appoint the two other members to serve with the Adjudicator. The Adjudicator rules on all pretrial matters and is responsible for bringing each case to hearing trial within a specific time frame established by the BRs.

DISPOSITION OF MATTERS BEFORE THE DISCIPLINARY BOARD

A significant number of cases are resolved by stipulations for discipline. Stipulations must be approved by the SPRB or its chair on behalf of the Bar.

Judicial approval is required from the Disciplinary Board Adjudicator in cases where sanctions do not exceed a 6-month suspension, or from the Oregon Supreme Court for cases involving greater sanctions.



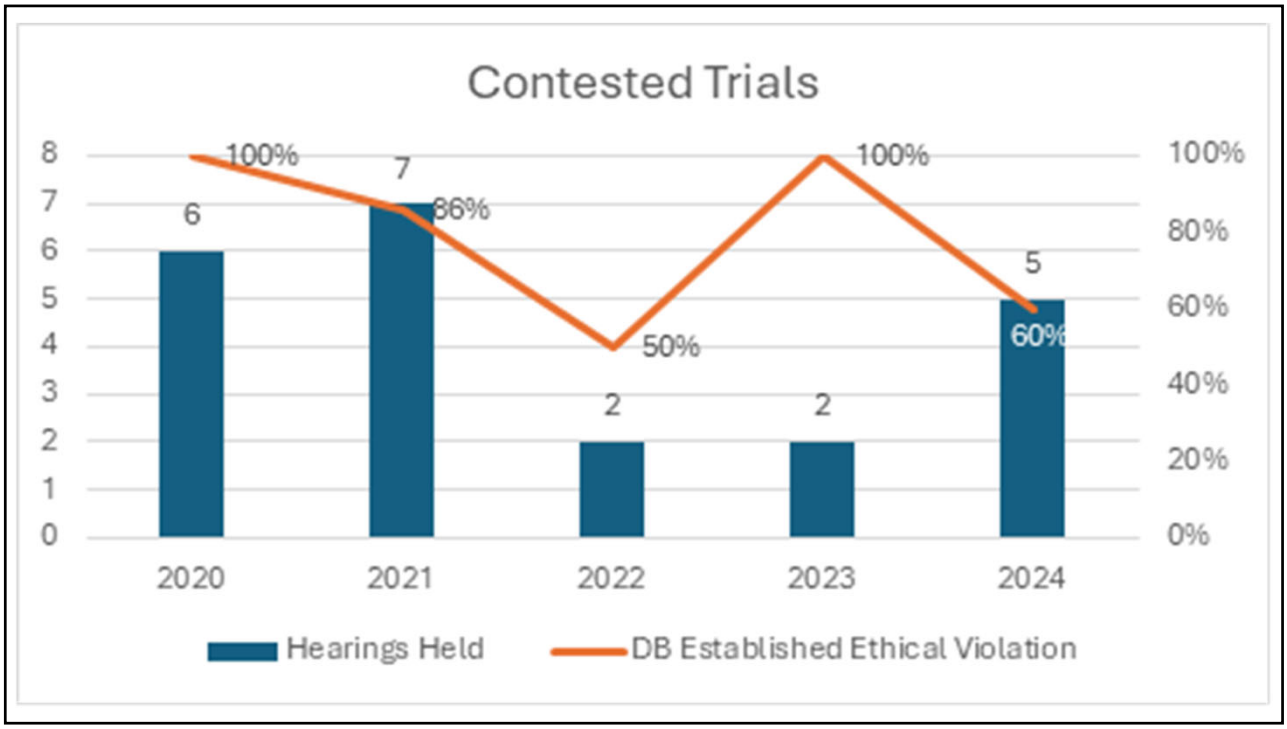
45

DISPOSITION OF MATTERS BEFORE THE DISCIPLINARY BOARD

Cases that are not resolved by stipulation, dismissal or a lawyer's resignation with charges pending (functionally equivalent to disbarment) are tried.

The Bar has the burden of proving an allegation of misconduct to the standard of clear and convincing evidence.

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	Misconduct alleged in initial inquiries to Intake Office	Misconduct for which legal professionals are ultimately sanctioned by Disciplinary Board
#1	Inadequate client communication	Inadequate client communication
#2	Competence or Diligence	Neglect of legal matter
#3	Dishonesty	Failure to Respond to OSB
#4	Conduct Prejudicial to the Administration of Justice	Dishonesty
#5	Failure to provide file materials	Conduct prejudicial to the administration of justice

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APPELLATE REVIEW BY THE SUPREME COURT

The Oregon Supreme Court does not automatically review discipline cases. Trial panel decisions, even those imposing disbarment, are final unless either the Bar or the respondent lawyer seeks Court review. (The SPRB decides whether the Bar will seek Court review.) Appellate review is mandatory if requested by a party.

Appellate review is *de novo*, on the record made before the Disciplinary Board.

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ANNUAL REPORTS

https://www.osbar.org/surveys_research

50

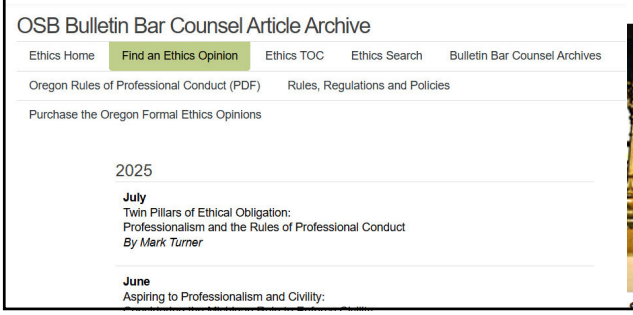
LEGAL ETHICS RESOURCES

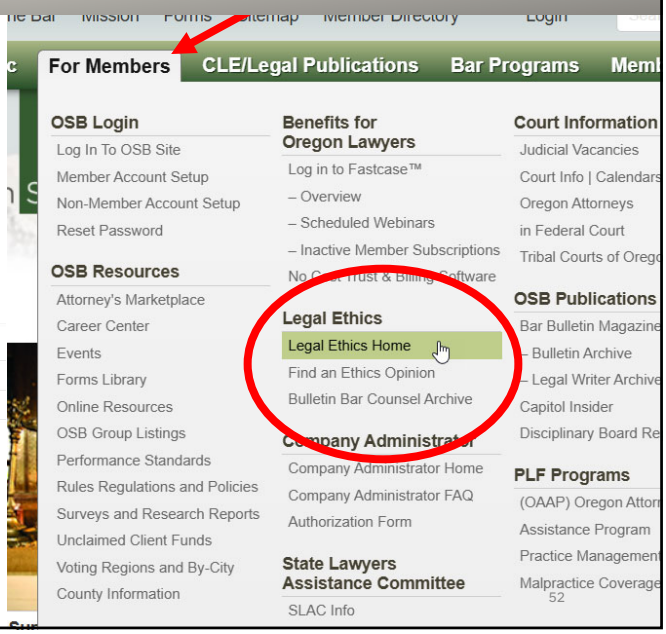


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OSB ETHICS

- Legal Ethics Helpline (503-431-6475)
- Oregon Formal Ethics Opinions
- OSB Bulletin Bar Counsel Article Archive

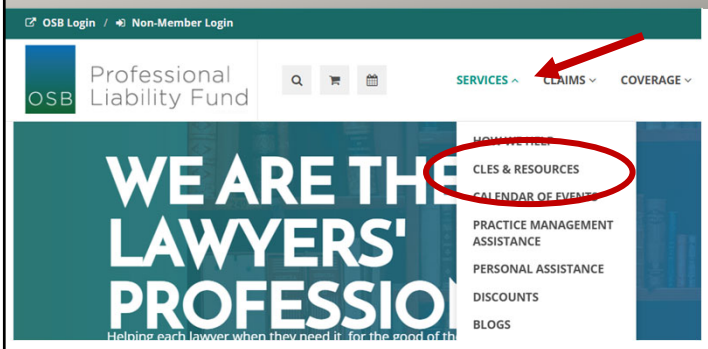




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PLF SUPPORT



- Practice Aids
- PLF inBrief: Newsletter
- PLF inPractice: Blog

Practice Aids:

- Conflicts of Interest
- Client Relations
- Trust Accounting

Blogs:

- Communication
- File Storage
- Email Management

Free CLEs:

- Employment Transitions
- Mandatory Reporting
- Cybersecurity

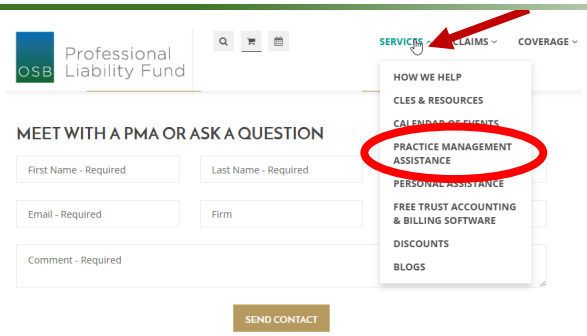
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Oregon State Bar

Legal Ethics Helpline

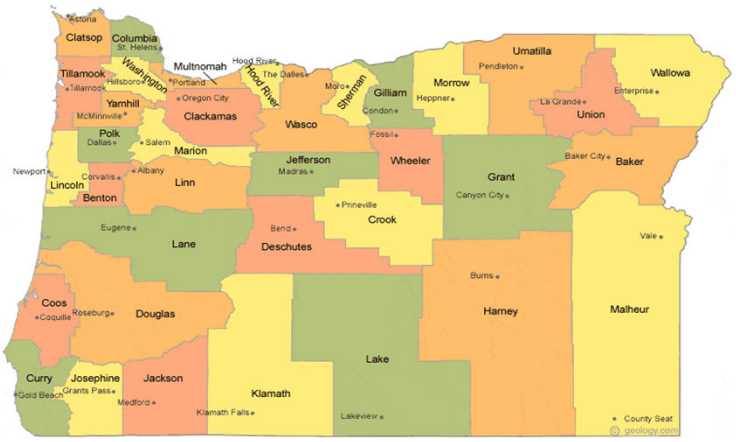
503-431-6475





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WHAT ARE SOME DIFFERENCES IN OREGON RULES OR LAW THAT AFFECT POTENTIAL DISCIPLINARY MATTERS?



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OREGON PUBLIC RECORDS LAW

The Oregon State Bar's disciplinary system is open to the public, and records are available from the time a bar complaint is filed until a final disposition is reached. Some materials in a lawyer disciplinary file, however, may be exempt from disclosure. For example, the bar may exempt sensitive financial information, juvenile records, confidential client information, or sensitive personally identifiable information from bar records, when authorized by Oregon law.

RESPONDING TO BAR COMPLAINTS

Oregon RPC 1.6(b)(4) permits disclosure of information relating to the representation of a client to the extent the lawyer reasonably believes necessary to respond to allegations in any proceeding concerning the lawyer's representation of the client.

What is reasonable could be shaped in part by who makes the complaint. Is it the client or an opposing party?

If you have question whether information may be necessary, look to the rules cited by bar staff (not the miscellaneous issues the complaint might raise). Call bar staff if you need to. Indicate that you have other information (describe which you have reserved unless bar staff

RESPONDING TO BAR COMPLAINTS

If you have question whether information may be necessary, look to the rules cited by bar staff (not the miscellaneous issues the complaint might raise). Call bar staff if you need to.

Indicate in your response that you have other information (describe the nature of the information) which you have reserved unless bar staff asks you to provide it.

Avoid disparagement of the complainant, especially if the complainant is a current or former client.

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OREGON FEE AGREEMENTS



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IS A LAWYER REQUIRED TO HAVE A WRITTEN FEE AGREEMENT?

A. Yes, if the fee is contingent.

B. Yes, if the fee is paid in advance and not to be deposited into a lawyer trust account.

C. No, an oral agreement is sufficient.

D. No, I like client complaints.

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IS A LAWYER REQUIRED TO HAVE A WRITTEN FEE AGREEMENT?

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C. No, an oral agreement is sufficient.

D. No, I like client complaints.

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ORS 20.340 Contingent fee agreement

(1) In any civil action arising out of bodily injury, death or property damage, including claims for emotional injury etc.

(a) The contingent fee agreement must be written in simple language reasonably believed to be understandable by the plaintiff.

(b) The attorney must explain the terms in compliance with a model explanation in simple language prepared by the Oregon State Bar before the agreement is signed.

(c) The contingent fee agreements must contain a provision allowing the plaintiff to rescind the agreement within 24 hours after signing upon written notice to the attorney.

(2) Any contingent fee agreement entered into that does not comply with the requirements of subsection (1) of this section is **voidable**!



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Now viewing all practice aids in "Engagement Letters and Fee Agreements"

CHECKLIST FOR DRAFTING ENGAGEMENT LETTERS

Date Revised: May 2023
Engagement Letters and Fee Agreements

ENGAGEMENT LETTERS AND FEE AGREEMENTS

Date Revised: May 2023
Engagement Letters and Fee Agreements

OSB MODEL EXPLANATION OF CONTINGENT FEE AGREEMENT

Date Revised: May 2023
Engagement Letters and Fee Agreements

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Current RPC 1.5(c) (November 2025)

A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement;

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

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RPC 1.5(c) (eff. January 2026?)

(c) A lawyer shall not enter into an arrangement for, charge or collect: * * * •

(3) a fee denominated as "earned on receipt," "nonrefundable," or similar terms.

(4) a fee described as a “prepaid fee” or similar terms, unless it is pursuant to a written agreement signed by the client which explains that (i) the nature of the fee arrangement and the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) the fee will not be deposited into a lawyer trust account; (iv) the client may terminate the services of the attorney at any time for any reason or no reason; and (v) the client may be entitled to a refund of all or part of a fee if the services for which the fee was paid are not completed and how any such refund would be calculated.

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PRACTICAL TIPS

-Use BarBooks Fee Agreement Compendium

-Be clear with clients about fees

-Use written engagement agreements

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FORMAL OPINION NO 2021-197:
Payment to Lawyer from Estate Assets

Facts: Lawyer represents Personal Representative in connection with the administration of a decedent's probate estate.

Questions:

1. May Lawyer receive a fee from probate or estate funds before obtaining a court order authorizing the payments?

2. May Lawyer receive a fee from personal funds of Personal Representative before obtaining a court order authorizing the payments?

3. Are the answers any different if Lawyer is Personal Representative?

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FORMAL OPINION NO 2021-197:
Payment to Lawyer from Estate Assets

Question 1: May Lawyer receive a fee from probate or estate funds before obtaining a court order authorizing the payments?

Answer: No. Legal fees and personal representative fees must be approved by order of the court before they can be paid from estate funds. ORS 116.183. A lawyer who accepts attorney fees from estate assets without obtaining prior court approval engages in unethical conduct by collecting an illegal fee.

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FORMAL OPINION NO 2021-197:
Payment to Lawyer from Estate Assets

Question 2: May Lawyer receive a fee from personal funds of Personal Representative before obtaining a court order authorizing the payments?

Answer: ORS 116.183 does not prohibit a lawyer from being paid from the personal representative's own funds. In fact, the statute clearly contemplates that Personal Representative will typically expend his or her own funds on attorney fees and subsequently apply for reimbursement from the estate.

NOTE: This opinion is not intended to address more restrictive local court rules or standing orders regarding the approval of attorney fees in probate cases, and attorneys are advised to review any such rules or orders before accepting payment from a personal representative.

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FORMAL OPINION NO 2021-197:
Payment to Lawyer from Estate Assets

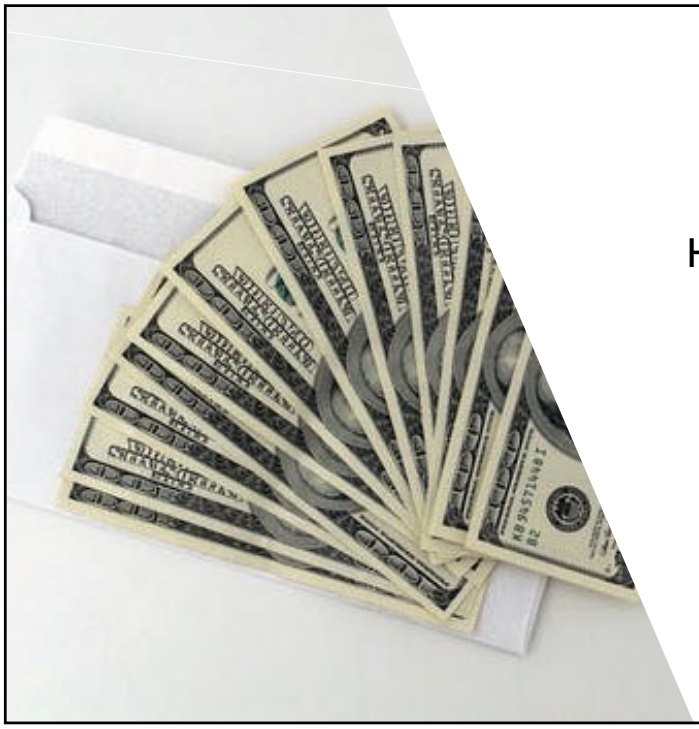
Question 3: What if Lawyer IS the Personal Representative?

Answer: When Lawyer is serving as Personal Representative, the same analysis applies, and Lawyer may not receive compensation from estate assets prior to the issuance of a court order approving the payment.

Interim fees may be paid to either Lawyer or Personal Representative from estate funds upon issuance by a court of an order authorizing payment of interim fees. “A partial award of such expenses, including fees, may be allowed prior to settlement of the final account upon petition, showing that the final account reasonably cannot be filed at that time, and upon notice as directed by the court.” ORS 116.183(1).

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HANDLING MONEY

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WHEN ARE FUNDS REQUIRED TO BE DEPOSITED INTO A LAWYER TRUST ACCOUNT?

A. Any time a lawyer receives funds from a client.

B. When a lawyer takes into possession funds that belong to anyone other than the lawyer.

C. Upon request of or agreement with a client or third party.

D. When a client deposits funds in anything more than a nominal amount with the lawyer.

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RULE 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" [...]

(c) [...] to be withdrawn by the lawyer only as fees are earned or expenses incurred [...]

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Other property must also be kept separate, not only funds.

Complete records must be maintained while the property is in the custody of the lawyer, and **preserved for five years** after the representation ends.

RULE 1.15-1 SAFEKEEPING PROPERTY

(a) [...] Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

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What is a complete record?

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What is a complete record?

Receipt

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What is a complete record?

Receipt

Deposit

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What is a complete record?

Receipt

Deposit

Transactions –
time/date/amount/purpose/receipts

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RULE 1.15-1 SAFEKEEPING PROPERTY

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

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Disputed entitlement?

RULE 1.15-1 SAFEKEEPING PROPERTY

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. **The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.**

FORMAL ETHICS OPINION 2022-199

Safekeeping Property: Depositing Funds into Trust Accounts

https://www.osbar.org/_docs/ethics/2017-192.pdf

Question: May Lawyer deposit Lawyer's own funds into Lawyer's Lawyer Trust Account after third-party theft or identity fraud in order to safeguard funds in the Lawyer Trust Account or to disburse funds promptly upon clients' requests?

Answer: No; however, Lawyer may use Lawyer's own funds to restore the client's funds that should have been maintained in the Lawyer Trust Account, as long as proper notice of the initial loss and transfer of property is given to the client.

See also, **Formal Opinion 2023-202: Law Firm Staff Theft of Client Funds - Potential Conflict of Interest Issue!**

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FILES

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LEGAL FILES BELONG TO?

A. Me. They are my files.
B. The clients. They are the clients' files.
C. They belong to us both.

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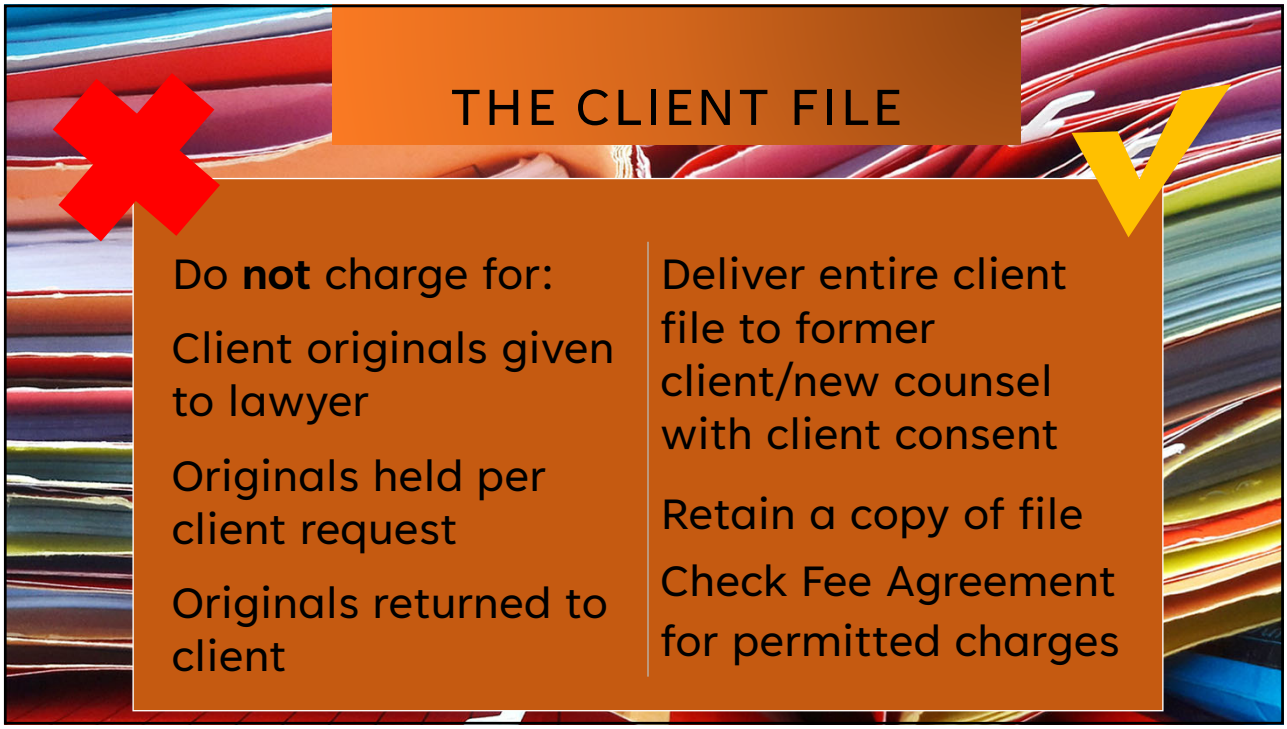
87

LEGAL FILES BELONG TO?

A. Me. They are my files.
B. The clients. They are the clients' files.
C. They belong to us both.

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FORMAL ETHICS OPINION 2017-192: Client Property: Duplication Charges for Client Files, Production or Withholding of Client Files

Facts: Client A terminates Lawyer A while a matter is ongoing. Client A does not owe Lawyer A any fee. Client A asks Lawyer A to provide a copy of the entire file to Client A's new lawyer.

Lawyer B represented Client B in a matter some years ago. Client B now requests a copy of Lawyer B's entire file. Client B does not owe any fee to Lawyer B.

Lawyer A and Lawyer B would like to withhold portions of the client files. Lawyer A and Lawyer B also would like to keep either the original or a copy of what they do provide to Client A and Client B.

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QUESTION 1. WHAT MUST LAWYER A AND LAWYER B MAKE AVAILABLE TO THEIR CLIENTS?

"[R]egardless of form or location, the sum total of all documents, records, or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing the client."

"[A]s a general proposition, and absent viable attorney liens [or a court order or other valid legal reason precluding delivery to the client], a lawyer is obligated to deliver the entire client file to the former client or forward it to the client's new counsel upon receiving client consent."

Both clients are entitled to a copy of their entire file i.e. everything made, sent or received from any source for the purpose of representing the client. Including work product created for the purpose of representing the client, unless there is a valid legal basis for withholding the file or particular items.

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QUESTION 2. MAY LAWYER A AND LAWYER B RETAIN A COPY OF THE CLIENT FILES AND CHARGE THEIR CLIENTS FOR EXPENSES RELATED TO DUPLICATING THE FILES?

A lawyer has a right to retain a copy of the client file.

The lawyer cannot charge for copies of original documents given by the client to the lawyer.

The lawyer cannot charge for copies of original documents prepared by the lawyer for the client and held by the lawyer at the client's request (e.g., the original of a client will or trust agreement).

Any copies of such documents to be retained by the lawyer upon providing the original to the client must be made at the lawyer's expense. (These copies are for the benefit of the lawyer.)

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QUESTION 2. MAY LAWYER A AND LAWYER B RETAIN A COPY OF THE CLIENT FILES AND CHARGE THEIR CLIENTS FOR EXPENSES RELATED TO DUPLICATING THE FILES?

With respect to all other documents, the question of duplication expenses depends primarily on the fee agreement between the lawyer and the client. If the fee agreement provides for duplication charges to be paid by the client, there is generally no reason to apply a different standard just because the lawyer-client relationship has ended.

On the other hand, if the fee agreement provides that the client is entitled to copies of documents without separate charge, the client is entitled to one copy, without charge, of any documents not previously provided to the client. To the extent that a client wants duplicate copies of documents or information previously sent to the client, the lawyer is entitled to charge for those costs.

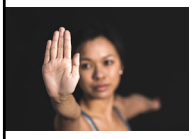
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FORMAL ETHICS OPINION 2005-90: POSSESSORY LIENS YIELD TO FIDUCIARY DUTIES

ORS 87.430 creates an attorney's possessory lien on client papers and property, and ORS 87.435 and ORS 87.440 provide a procedure by which a client may file a surety bond and obtain discharge of the lien.

-If the lien is otherwise valid and if the client has sufficient resources to pay the lawyer what is due but chooses neither to make payment nor to file a bond, the lawyer may lawfully withhold the client's materials.



-If the client does not have sufficient resources to pay the lawyer in full and surrender of the materials is necessary to avoid foreseeable prejudice to the client, the attorney lien must yield to the fiduciary duty that the lawyer owes to the client on payment of whatever amount the client can afford to pay.

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PRACTICAL TIPS



Keep all documents in one place



Provide copies to client during case



Offer to return originals ASAP



Bill regularly

Oregon's Judicial Branch

RAMÓN A. PAGÁN
JUDGE, OREGON
COURT OF APPEALS



Overview

Oregon Supreme Court

Oregon Court of Appeals

Oregon Tax Court

Oregon Circuit Courts



Oregon Supreme Court

Overview:

- Seven Justices, elected on non-partisan, statewide ballot or appointment for six-year terms
- Chief Justice is elected by colleagues for six-year terms



Oregon Supreme Court

Overview:

-Article VII, Section 1:

"The judges of the supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected."



Oregon Supreme Court

Overview:

-Article VII, Section 1a:

- Judge "shall" retire in the calendar year they reach 75 years old
- Judges may not seek re-election upon reaching 70 years old



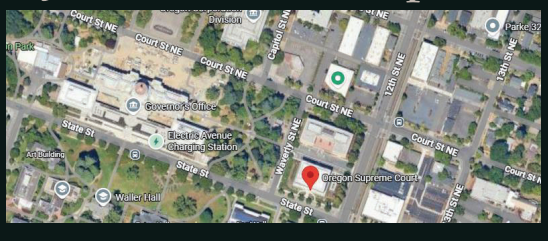
Oregon Supreme Court

Overview:

- Justices must be United States citizens, members of the OSB, and residents of Oregon for three years prior to election

- Located in Salem, adjacent to the Capitol





Oregon Supreme Court

Powers and Authority

- Article VII of the Oregon Constitution: The Judicial Branch
- Court of permissive review, via petition for review, direct appeal in certain exclusive matters, and mandamus

Oregon Supreme Court

Powers and Authority

- Mandamus: limited jurisdiction interlocutory review from circuit courts
- If a Court of Appeals case is denied review, it is considered final on the issue decided

Oregon Supreme Court

Powers and Authority

Direct review in:

- Death Penalty
- Lawyer and Judicial fitness
- Tax Court appeals

Oregon Supreme Court

Administrative Authority

- The Chief Justice is the administrative head of the Oregon Judicial Department and all state courts



Chief Justice
Megan Flynn
Elected CJ
2023

Oregon Supreme Court

Chief Justice Duties:

- Appoints chief judge / presiding judges of the Court of Appeals and Circuit Courts
- Special attorney and judicial appointments

Oregon Supreme Court

Chief Justice Duties:

- Adopts rules and regulations regarding court procedures
- Sets and manages judicial budget, works with legislative and executive branches

Oregon Supreme Court

Admission and Disciplinary Authority

- Attorney admissions and policies and procedures around admission
- Takes recommendations for admission and policies from Board of Bar Examiners
  - 14 member body, appointed by Supreme Court
  - 2 non-lawyer public members

Oregon Supreme Court

Admission and Disciplinary Authority

- Exclusive jurisdiction over discipline and licensing of attorneys, including the power to reprimand, suspend or disbar
- Judicial conduct:
  - Power to censure, suspend, or remove judges
  - Considers recommendation of Commission on Judicial Fitness and Disability



Oregon Court of Appeals

Overview

- Created in 1969 with only 5 judges, expanded over time to 13 in 2013
- Elected on non-partisan, statewide ballot or by gubernatorial appointment for 6-year terms
  - NB: all appointed judges must run for re-election in the next general election after their appointment by statute

Oregon Court of Appeals

Overview

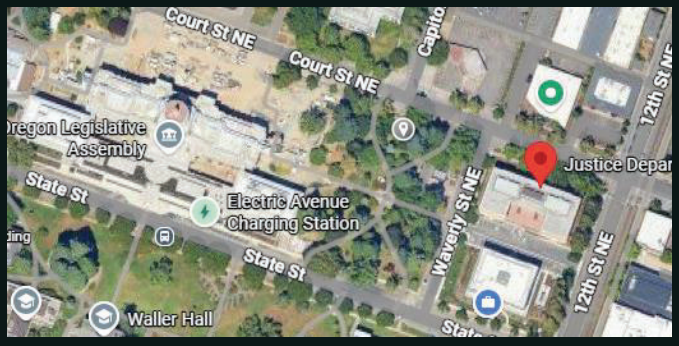
- Judges must be citizens, members of the OSB, and qualified electors of the county of their residence
- Chief Justice of the Supreme Court appoints the Chief Judge among the active judges of the Court of Appeals

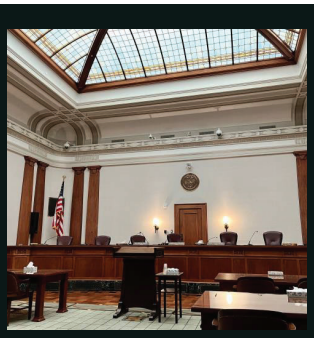
Oregon Court of Appeals

Overview

- Located in Salem adjacent to Supreme Court in the Oregon Justice Department Building







Oregon Court of Appeals

Overview

- Sit on three-judge panels, designated "Departments" by the Chief Judge
- Each judge, besides the Chief Judge, is assigned a department for a period of time chosen by the Chief Judge

Oregon Court of Appeals

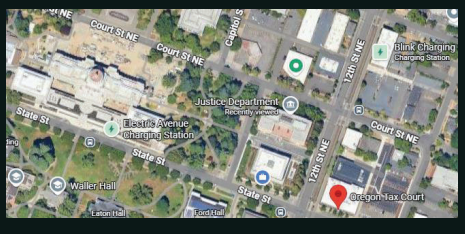
Overview

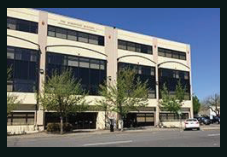
- There are currently four departments of three judge panels
- Jurisdiction over all direct appeals besides Tax Court and Death Penalty cases.
- Parties may petition to Supreme Court for review

Oregon Tax Court

Overview

- Exclusive, statewide jurisdiction over all question of law or fact arising under the state tax laws
- Located in Salem near the Supreme Court and Court of Appeals







Oregon Tax Court

Overview

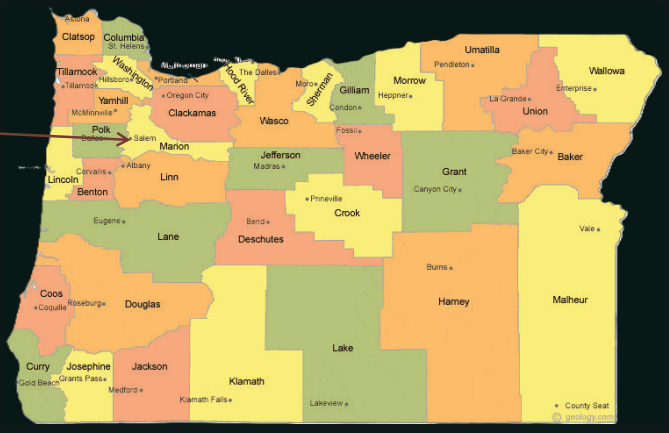
- Two divisions:
  - Magistrate, which includes informal proceedings
  - Regular, appeals from Magistrate, akin to Circuit Court proceedings

Oregon Circuit Courts

Overview

- There are 36 counties in Oregon with 27 judicial districts

- Oregon Supreme Court
- Oregon Court of Appeals
- Oregon Tax Court



Oregon Circuit Courts

Jurisdiction

- Courts of general jurisdiction
    - Criminal
    - Civil
    - Domestic Relations / Adoptions
    - Estate / Probate
    - Juvenile Dependency and Delinquency

Oregon Circuit Courts

Judges

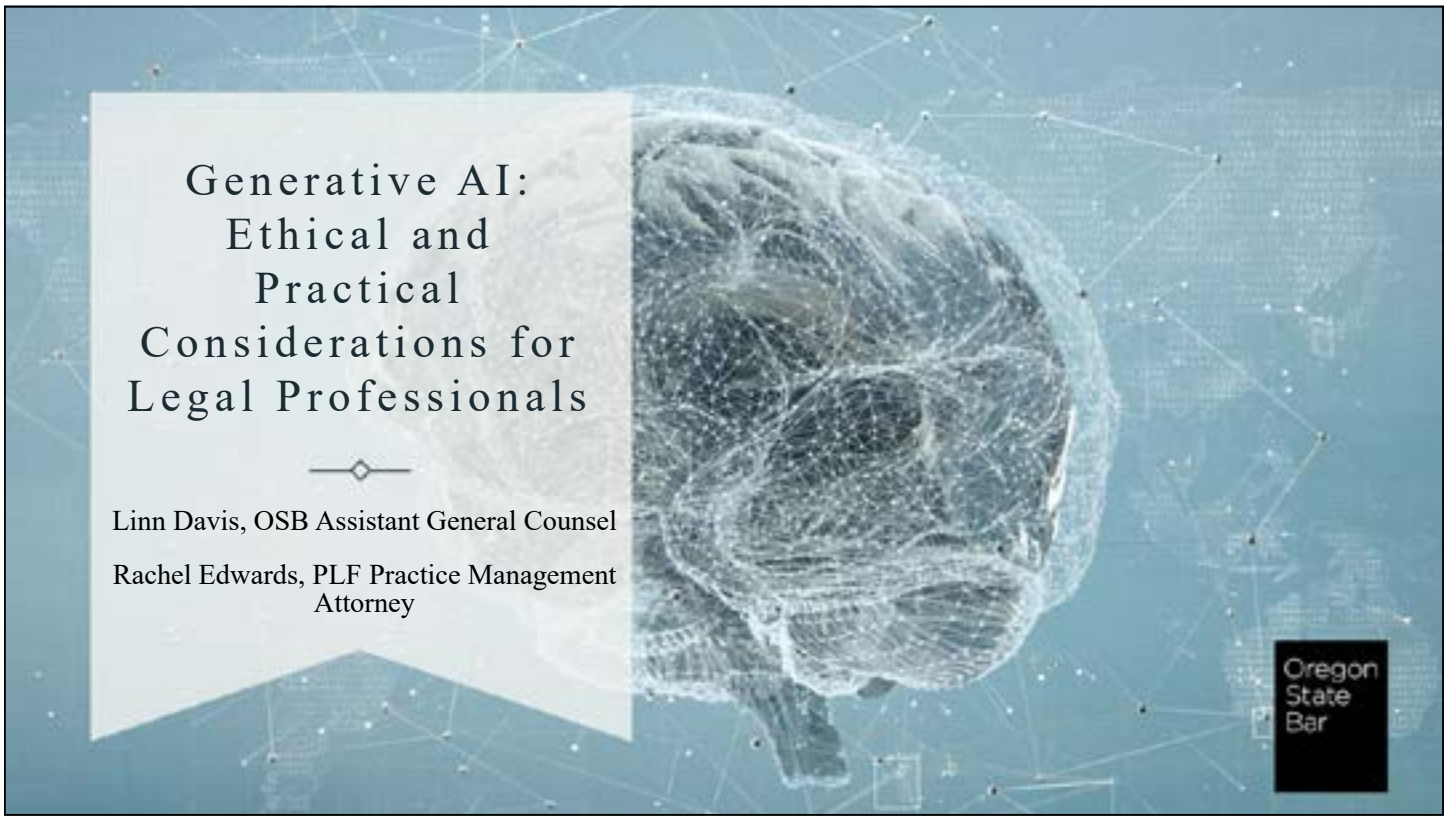
- Circuit court judges are elected on a non-partisan, county-wide ballot for six-year terms or by appointment by the governor

- Judges must be a citizen, a member of the OSB, and live in the county (with minor exceptions) of their elected position

Oregon Circuit Courts

Judges

- Some counties have district courts or municipal courts that handle juvenile matters or other criminal and civil matters, with appeals to a circuit court



What is AI?

"AI is not a single piece of hardware or software, but rather, a constellation of technologies that gives a computer system the ability to solve problems and to perform tasks that would otherwise require human intelligence."

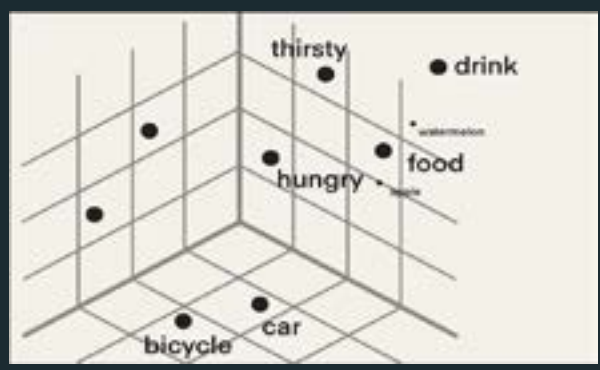
- Expands usage of computing into areas requiring human cognition
- Been in development since the 1950s, but has advanced as technology has matured

What is Generative AI?

- **Generative AI** is a new field of AI
  - Generative AI models can generate new unique data by learning from existing data
  - Relies on data to train and "fine-tune" the model
  - Users provide Generative AI with a prompt to start the creation of new data in response to that prompt
- Models now capable of generating text, images, and videos
  - Been in development since 2010

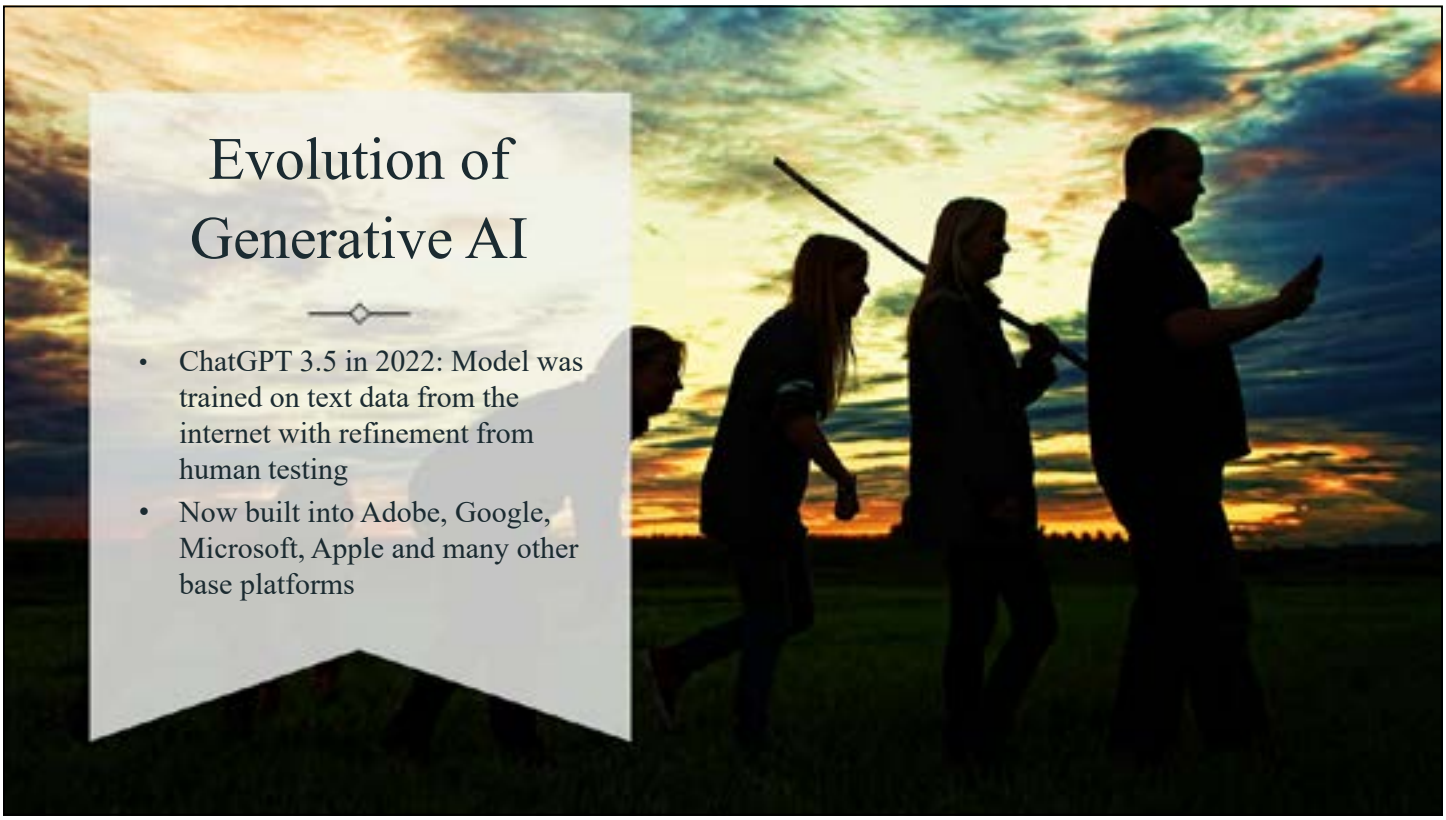
How Generative AI Works

- The training is probability based, so it uses materials for training to cluster words and phrases that are statistically close together
- For instance, a LLM would cluster "US Supreme Court," "Ruth Bader Ginsburg," and "Antonin Scalia" close together, and maybe "U.S. Court of Appeals" or "U.S. District Court" further apart





- Results are only as good as the data the AI is trained on
- The AI understands how language works, but it does not understand the meaning of its output



Evolution of Generative AI

- ChatGPT 3.5 in 2022: Model was trained on text data from the internet with refinement from human testing
- Now built into Adobe, Google, Microsoft, Apple and many other base platforms

Change at Lightning Speed

- Generative AI tools have increased substantially in the last year
  - 2024 saw most computer systems integrate AI in some form as an add-on
  - New models (e.g., GPT4) are larger, can look at more interconnected words, and continue to grow
- A lot of the improvements focus on prompt engineering to help users get the most out of an LLM
- Additional focus has been to also limit the occurrence of hallucinations through restrictions on data sets, forced referencing, and retrieval augmented generation



Generative AI Agents

- The newest technology is moving into a product known as AI Agents.
- Agents give AI the ability to execute instructions autonomously in addition to providing information.
- For instance, an AI Agent could
  - Receive a draft contract
  - Review the draft contract
  - Note any potential issues as set up by a contract policy
  - Draft a memorandum about the contract, and the changes needed
  - Send the memorandum to the client

All without human interaction…

Applications of Generative AI

- Immense capabilities for many industries:
  - Content generation
  - Virtual assistants
  - Language translation services
  - Document review and revisions
  - Customer support services
- The multiple uses in several industries has triggered a substantial push in AI research and adoption in every field, including the legal field.

How are Attorneys Using Generative AI?

- Legal research
- Case and statute analysis
- Contract and document review, summarizing
- Drafting pleadings, briefs, correspondence
- Simplifying legal jargon and complex issues
- Answering legal questions
- Ideation
- eDiscovery



Popular Tools for Lawyers

- ChatGPT (chatbot)
- Claude (chatbot)
- Perplexity (chatbot)
- Microsoft 365 CoPilot (virtual assistant)
- CoCounsel (virtual assistant)
- Harvey AI (virtual assistant)
- Vincent AI (legal research)
- Westlaw CoCounsel (legal research)
- LexisNexis+ (legal research)
- Spellbook (contract drafting)
- Everlaw (eDiscovery)
- Relativity (eDiscovery)
- Zoom AI companion (notetaking)
- Otter.ai (notetaking)
- Practice management software
  - Clio Duo
  - Smokeball Archie
  - MyCase IQ
- Gavel.io (document automation)

Considerations for Using AI

- Large firms are actively using it
- A lot of small firms are testing it and using (especially with trials)
- Your opposing counsel will eventually be using it
- Models continue to improve over time
- Can assist with limited staff and budgets
- AI can reduce the burden of repetitive and time-consuming tasks



Concerns for Attorneys

- Incomplete/false answers
- Data collection and privacy
- Intellectual property and liability
- Data Sovereignty
- Bias



Ethical Considerations

Oregon Formal Op. 2025-205

- Lawyers may use AI and Generative AI, subject to ethical considerations
- Primary Ethical Considerations:
  - Competence (RPC 1.1)
  - Confidentiality (RPC 1.6)
  - Communication (RPC 1.4)
  - Fees (RPC 1.5)
  - Candor to the tribunal (RPC 3.3)
  - Supervision (RPC 5.1 & 5.3)

RPC 1.1 – Duty of Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- Comment [8] - To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.



RPC 1.1 – Duty of Competence

- With technological competence, we need to understand at a certain level how the technology works, and the risks/benefits involved
- In the same manner which the RPCs allows for the use of other technologies, the RPCs does not bar it, but it does require us to understand it

Violations of Duty of Competency

- *Mata v. Avianca, Inc.* – S.D.N.Y. – March 1, 2023 – attorney submitted affirmation with cases "found" by ChatGPT
  - ChatGPT "hallucinated" by making up cases
  - Attorneys noted that they thought ChatGPT was a "super search engine"
  - Firm sanctioned $5,000
- *People v. Crabill* – Colorado (Nov. 23, 2023) – attorney submitted motion to set aside judgment using ChatGPT cases
  - Cases were hallucinated
  - Suspended from practice
- *Park v. Kim* (91 F.4th 610 (2d Cir. 2024) – attorney referred to grievance panel for submitting non-existent authority from ChatGPT

Additional Violations

- Dennis Block – Attorney in southern California likely used some form of Generative AI to draft brief that had inaccurate citations.
- Michael Cohen Case – S.D.N.Y. – *U.S. v. Cohen* – Attorney used Google Bard (nka Gemini) to generate filing - He thought it was a super search engine.
- *Smith v. Farwell* – Mass. – Filed legal memorandum with false cases cited by an unnamed AI system. Attorney sanctioned $2,000.
- *Iovino v. Michael Stapleton Assocs., Ltd.,* W.D. Va. – Attorney used AI tool that miscited cases, but named actual cases. The court declined to sanction the attorney, noting the attorney had been remorseful.
- Brandon Monk – Sanctioned $2,000 for using cases generated by AI in a Texas case in Nov. 2024.
- Australian Lawyer submitted an administrative appeals case in October 2024 with fake cases generated by AI – submitted to disciplinary counsel for potential sanctions.
- Morgan and Morgan attorneys in Wyoming sanctioned $3,000 and had pro hac vice admission revoked after submitting fake legal cases.
- Bunce v. Visual Technology Innovations – E.D. Pa. – Attorney sanctioned $2,500 in Feb. 2025 for using false cases from AI.



RPC 1.6 – Duty of Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).



AI Implications of RPC 1.6

- A core component of most AI services is utilizing user input to train the AI
- RPC 1.6 prohibits a lawyer from revealing information related to the representation of the client
- This is an extremely broad scope of information
  - Includes information that may already be publicly available
  - *In re Conry,* 368 Or 349, 362, 491 P3d 42 (2021)



AI Implications of RPC 1.6

Does this mean that we can't use AI?

- To uphold our duties under RPC 1.6, we must exercise technological competence
- Formal Op. 2011-188 requiring third-party data storage is helpful, noting that the attorney has the duty to review the capabilities to securely store client data
- In the same way, we must review AI tools we use to see what they do with our information and data

RPC 1.2(a) and 1.4(b) – Duty to Communicate

If we use AI, do we have the duty to communicate this to our clients?

- RPC 1.2(a): . . . [a] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

- RPC 1.4(b): A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RPC 1.2(a) and 1.4(b) – Duty to Communicate

- If the AI is used for contracts, pleadings or other legal documents, the lawyer should advise the client that the means of their objective would utilize AI
- Advising the client should provide the client with information to make an informed decision
- May involve a discussion with the client about:
  - The objective that AI involvement would achieve
  - The anticipated costs
  - Any benefits or drawbacks to using AI over lawyer (or support staff) labor
  - Client's concerns should be addressed during this discussion

RPC 5.1 and 5.3 – Duty to Supervise

- RPC 5.1 - attorneys in supervisory roles have an obligation to know the technology their associates are using and make sure they conform with the RPCs
  - Understand whether associates are using AI or not to accomplish work
- RPC 5.3 - lawyers have the same obligation to know about the technology outside the firm utilized in rendering legal assistance
  - Comment [3], ABA Model Rules: "When using such [nonlawyer] services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations."



RPC 5.1 and 5.3 – Duty to Supervise

- For AI, attorneys with associates and other nonlawyer staff should discuss AI, and its utilization within the firm
- Be aware of the risks of AI – have to check documents to be submitted carefully for potential issues related to hallucinations, or other misinformation

Supervision Scenario

- You request your paralegal to prepare a letter to your client on a matter. The paralegal sends you a draft letter to review within 30 minutes. Amazed by the efficiency of your paralegal, you review it, don't see any issues with the letter and sign off on it.
- Two weeks later, you get an angry call from your client. There has been a data breach at FoundationAI, a generative AI tool open to the public. The data was published, and apparently your client's information was in the data, even though your firm does not contract with FoundationAI.
- After discussing with your staff, you learn that your efficient paralegal has been using FoundationAI for drafting correspondence and other memorandum. She has provided client information through the prompts to tailor the letters.

Duty of Candor to the Court

- RPC 3.3 requires that we not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact.
- Hallucinations may be implicated if we submit work we did not wrote under our own name.
- Additionally, practitioners should be aware of the Court's rules, especially if they require disclosure of AI assistance



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Legal and Non-Legal Examples of Failure to Anchor to a Source of Truth

- Iovino v. Michael Stapleton Associates (2024)- Oregon attorney cited fake cases in a brief
  - Judge said he was open to attorneys' use of AI, but they must still take reasonable measures to ensure that what they file in court is true and accurate
- Chicago Sun-Times and The Philadelphia Inquirer published a syndicated summer book list for 2025 that includes nonexistent books
- U.S. Health and Human Services "Make America Healthy Again" report (2025) contains citations to studies that do not exist



Disclosure Rules

- Some of the jurisdictions are federal courts and state courts
- Some require disclosure, others require attestation that work was checked by attorney
- A few states ban use by pro se litigants



Judges with AI Disclosure Rules

- Alabama
- Arizona
- California
- Colorado
- Florida
- Geogia
- Hawaii
- Illinois
- Missouri
- Montana
- Nebraska
- Nevada
- New Jersey
- New York
- North Carolina
- Ohio
- Oklahoma
- Pennsylvania
- Texas
- Virginia
- Fifth Circuit
- Int'l Court of Trade

Judicial Use of AI

- West Virginia is a little more straightforward judicial opinion
- A judge may use AI for research, but "because of perceived bias that may be built into the program, a judge should **NEVER** use AI to reach a conclusion on the outcome of a case" (emphasis in original).

Judicial Use of AI

- Michigan came out with the first opinion dealing with judicial use - Focuses on Competency and Bias

  Canon 2(B) and (C) could be triggered, for example, if a judicial officer uses an AI solution that is considered partial or unfair and may influence the judicial officer's judgment.[2] This could occur if the tool's algorithm or training data creates bias.

  Specifically, if an AI tool's algorithm's output deviates from accepted norms, would the output influence judicial decisions in violation of Canon 2(C)? An algorithm may weigh factors that the law or society deem inappropriate or do so with a weight that is inappropriate in the context presented. This is but one example of why knowledge of technology and AI is essential. AI does not understand the world as humans do, and unless instructed otherwise, its results may reflect an ignorance of norms or case law precedent.

Recent Use of AI in Circuit Court



- Judge Newsom of 11th Circuit used AI to conduct statutory interpretation of certain phrases
- Noted the results in his concurrence in *United States v. Deleon*, 11th U.S. Circuit Court of Appeals, No. 23-10478, Sept. 6, 2024 and *Snell v. United Specialty Ins. Co.*, 102 F.4th 1208, 1221 (11th Cir. 2024)

Additional Resources

- ABA Formal Op. 512
- California – Practical Guidance
- DC – Ethics Opinion 388
- Florida – Opinion 24-1
- Kentucky – Opinion KBA E-457
- Michigan – AI for Attorneys FAQ
- Minnesota – AI Working Group Report
- Mississippi – Ethics Opinion 267
- Missouri – Informal Op. 2024-11
- New Jersey – Preliminary Guidance
- New York – NYC Bar Op. 2024-5
- North Carolina - 2024 Formal Op. 1
- Oregon – Formal Op. 2025-205
- Pennsylvania – Formal Op. 2024-200
- Texas – Ethics Opinion 705
- Virginia – Guidance on Generative AI
- West Virginia – Ethics Opinion 24-01
- Michigan has issued an opinion for judges (JI-155).
- The Federal Judicial Center has a book "An Introduction to AI for Federal Judges"



Florida Ethics Op. 24-1 (2024)

"Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies."

California State Bar Practical Guide

"Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services."

The Stranger Issues

- Copyright Law
- Bias
- Deep fakes (issues with generative photographs and video)
  - Used in spreading false information
  - Also used in cyber crimes
- Judicial use of AI
- Unlawful Practice of Law



Deep Fakes

- Several instances of use of AI to generate photography
  - As technology has been getting better, has been used to replicate voice and video
  - One financial firm paid out $25 million to fraudsters after being on a call with the firm's CFO
- Forensic detection of false multimedia has improved as well
  - Some companies have specialized models that help to monitor media for deep fakes





Unlawful Practice of Law?

- The larger looming question is the usage of AI by non-lawyers, and the unlawful practice of law
- The practice of law, in Oregon, has generally been considered
  - "the representation and advising of a particular person in a particular situation," and
  - "the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other assistance"
- Issue has been litigated in several areas, including
  - Publication of legal forms
  - Online software asking questions to fill out legal forms

Will Technology Practice Law?

- As the technology for AI gets better, question as to whether the technology will be the practice of law?
  - Starts to resemble more practice of law with the ability to review facts from a user and apply law to both provide potential solutions
  - Could start filings for cases for people pro se?
- Chat GTP has already added warning to prompts that it does not constitute legal advice





Pro Se Users

- We are starting to see it used to help guide self-navigators through the legal field
- For example, Illinois Legal Aid added AI chatbot to guide self-navigators

AI Usage Best Practices





- Understand the AI tool before using it
- Must use it effectively
- Requires human oversight
- Anchor to a source of truth
- Document use of AI as part of workflow
- Stay within knowledge limits

Evaluating AI Tools Before Use

- Security and confidentiality
- Accuracy and performance
- Vendor reputation and support
- Legal specific
- Return on investment

Security and confidentiality

- Does it store input on their server?
- Does it train the model using your data?
- Review terms of use and privacy policy

Accuracy and performance

- Evaluate output
- Is it accurate?
- Does it contain hallucinations?
- Compare AI result with your own research

Vendor reputation and support

- Is it a reputable company?
- Look for reviews from other law firms
- Does it provide customer support and training resources?

Legal specific

- Is it designed for legal work?
- What type of legal work?
- Determine the right tool for the job (e.g., legal research, eDiscovery)

Return on investment

- Weigh pricing against potential efficiency gains
- Factor in training, upgrade costs

Tips to Mitigate Risk of Using AI Tools

- Prompt engineering
- Develop and periodically review/update policy
- Training and supervising all lawyers and nonlawyer support staff
- Testing and monitoring compliance





Prompt Engineering

- Use clear wording to prevent inconsistent output
- Be as specific as possible to get relevant responses
- Provide context and constraints to guide the program's thinking
- Give it a role to play
- Refine as necessary (e.g., Clarify/elaborate, simplify/focus, summarize/outline, compare/evaluate)
- Tell it your desired output (e.g., Format, length, tone/style, detail)

Improving Prompts

- Too vague: “How can lawyers be more productive?”
- Better: “Provide specific strategies for lawyers to enhance productivity while maintaining wellbeing. Focus on time management techniques tailored to the demands of legal practice. Include tips for incorporating mindfulness practices into daily routines to reduce stress and improve focus. Limit recommendations specific to the legal field.”



Do you have an AI Policy?

- The potential risks of AI to necessitate everyone in your firm understanding it
- The relative availability of free or cheap models of AI means that there is substantial opportunity for use
- Allows the organization to consider the risks and benefits of AI
- It opens the door for discussion with staff about AI, and what the organization’s position is on the use of AI at work

- Offer proper training and education on AI tool usage
- Establish clear policies and procedures for using AI technologies
- Implement robust quality control and review



Training

- Train lawyer and nonlawyer staff about acceptable generative AI technologies and risks
- When AI increases risk and exposure to violation of ethical duties
- Set clear policies about what tools can be used
- Quality control and review to ensure supervisory obligations are met
- Check documents for potential issues related to hallucinations, misinformation, or other problems that can be caused by generative AI output



Evaluating Strengths and Avoiding Weaknesses

Strengths of using AI

- AI summarizes dense, technical materials from subject matter experts with high efficiency.
- Streamlines rote tasks, such as editing drafts and translating content into plain language, freeing staff to focus on site enhancements and stakeholder engagement.
- Supports consistent style and plain language aligned with user experience design best practices.

Avoiding Weaknesses

- AI use must strictly follow ethics-compliant company AI policy.
- Consistent prompts and customized GPTs optimize accuracy and relevance for specific use cases.
- Human oversight ensures AI outputs are reviewed, refined, and free of inaccuracies or "hallucinations."

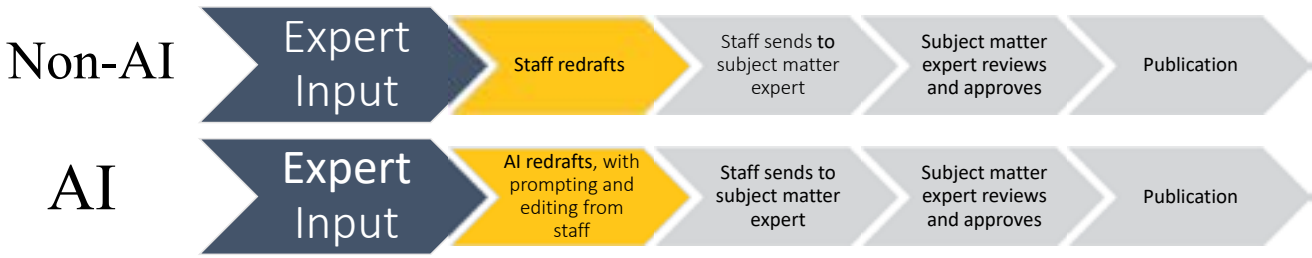
Real World AI Examples



Microsoft 365 CoPilot

- Word- Create new text, edit, adjust tone, summarize, condense
- PowerPoint- Create presentations using Word outlines, adjust/add slides with specific prompts
- Outlook- Draft emails, adjust tone, summarize, simplify language
- Teams- Transcribe meetings, create summary, task items

Language Simplification



Language Simplification Using ChatGPT

ABC Corp stopped performing under a 2019 supply contract, citing COVID-19 as a force majeure event. The legal issue is whether the pandemic qualifies under the contract's force majeure clause and whether ABC Corp followed required procedures, including timely notice and mitigation efforts. Failure to meet these obligations could invalidate their defense and expose them to breach of contract liability.



ABC Corp says the pandemic excused them from delivering goods under your contract. But they had to follow certain steps—like notifying you quickly and trying to work around the issue. It looks like they may not have done that, which means they could still be responsible for breaking the contract.

Videoconferences

- Many videoconference platforms offer transcription, meeting summaries, and action items (e.g., Zoom, Teams, Otter.ai)
- Others help spot possible legal issues brought up during the conversation and assist with task creation and time entries (e.g., Querious)

Practice Management Software

- Document summaries, comparisons, and automation
- Matter queries
- Draft tone-specific correspondence and adjust for improvement
- Task generation

Legal Research and AI Assistants

- Intelligent document analysis to identify bad law and other relevant authorities
- Litigation analytics to compile information on judges, courts, attorneys
- Complex batch document analysis and comparison
- Search large databases to find specific information
- Create detailed chronologies
- Draft pleadings, contracts, and correspondence

Podcast Creation



- 16 page annual report
- Describes various aspects of the OSB client intake assistance office
  - Number of calls
  - Types of inquiries
  - Process for handling
  - Outcome



NotebookLM





Thank you

FORMAL OPINION NO 2025-205
ARTIFICIAL INTELLIGENCE TOOLS

Facts:

Artificial intelligence (AI) tools have become widely available for use by lawyers. AI has been incorporated into a multitude of products frequently used by lawyers, such as word processing applications, communication tools, and research databases. AI tools generally use predictive text and other features to prompt or complete complex tasks. Generative AI (GAI) tools are a type of AI that use heuristics to produce complex and specific data, which can include generating full legal documents like briefs, contracts, and demand letters.

Questions:

1. May Oregon lawyers utilize AI tools in their legal practice?
2. May Oregon lawyers utilize GAI tools in their legal practice?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.

Discussion:

Competence

Oregon RPC 1.1 requires lawyers to be competent in both the law and in the tools that they use to provide legal services to clients.[1] Lawyers may utilize AI in their legal practice only if they have taken reasonable steps to become competent in the use of such technology. Here, competence requires understanding the benefits and risks associated with the specific use and type of AI being used.

Competence is an ongoing obligation. At this point, AI includes thousands of rapidly evolving tools, and the associated benefits and risks of using AI are constantly changing.

[1] *See* ABA Model RPC 1.1 cmt [8], which requires lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

Lawyers must consider and continually evaluate the following when determining whether and how to incorporate AI into their practice:[2]

- Lawyers must understand how any AI that they utilize stores information and responds to prompts. For example, some GAI products may produce hallucinations[3] or collect user prompts to train the product for use by other future users. The collection of data raises questions related to client confidentiality and protection of the attorney-client privilege. Thus, adequately understanding AI may require lawyers to conduct research, attend trainings, and hire a professional to assist them.
- Lawyers must conduct due diligence on AI and potential vendors to determine whether the product can be implemented and utilized in a manner consistent with the lawyers' ethical duties.
- Lawyers must provide adequate training on the use and risks of the technology to anyone they owe a supervisory duty to, including any nonlawyer assistants who will be using AI.
- Lawyers must take reasonable measures to protect clients' confidential information. Accordingly, before utilizing AI or otherwise implementing any other new technology, lawyers must either confirm that any information communicated through or stored by the technology is reasonably secure, or develop policies that prohibit client information from being input into a system that could compromise its confidentiality.
- Lawyers should consider consulting with their clients before using AI or other new technology in connection with the client's legal matters. In some cases, as described below, disclosure of an attorney's use of AI may be required.

Communication

Lawyers may be required to disclose the use of AI to their clients under certain circumstances. Oregon RPC 1.4(b) requires a lawyer to provide enough information to enable the client to make "informed decisions regarding the representation." Oregon RPC 1.2(a) requires lawyers to "consult with the client as to the means" used to pursue

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2 *See* ABA Formal Ethics Op No 477R (2017) (Securing Communication of Protected Client Information).

3 Some GAI tools may produce plausible responses that have no basis in fact or reality. These responses are known as hallucinations and are a concern for legal practitioners due to the false information provided. ABA Formal Ethics Op No 512 at 3 (2024); *see Mata v. Avianca, Inc.*, 678 F Supp 3d 443 (SDNY 2023) (sanctioning lawyers who submitted ChatGPT hallucinations to the court).

a client's objectives. However, lawyers are allowed to take actions without consulting the client that are "impliedly authorized" by the representation. The use of word processing applications and research databases are generally considered to be impliedly authorized. However, the use of new technologies that deviate materially from the client's expectations concerning the scope of representation may have an impact and should be communicated to the client.

To determine whether the use of AI may have an impact on the client's expectations about the scope of representation, lawyers should evaluate each case individually.[4] Lawyers must consider several factors, including the type of case, similarities to and deviations from technology typically used, novelty of the technology, risks to client data, risks that incorrect information will be included in the lawyer's work product, sophistication of the client, deviation from explicit client instructions or reasonable expectations, the scope of representation, the extent of the lawyer's reliance on the technology, the existence of safeguards present in the technology and independently implemented by the lawyer, and whether the use of AI or other new technology would have a significant impact on attorney fees or is a cost passed on to the client.

Fees

Lawyers are required to adequately explain their fee arrangements to their clients.[5] Oregon RPC 1.5(a) prohibits lawyers from agreeing to, charging, or collecting an illegal or clearly excessive fee or clearly excessive amount for expenses. Subsection (b) sets forth the factors to be considered in evaluating what is clearly excessive. With limited exceptions, written fee contracts for legal services are not required in Oregon, but lawyers who fail to reduce the terms of payment to writing risk problems in proving their right to a particular fee and the possibility of discipline.

Lawyers may charge clients for reasonable time spent for case-specific research and drafting when using AI. To the extent the use of AI results in significant time savings, lawyers may not ethically engage in any billing practices that duplicate charges or that falsely inflate billable hours. *See, e.g.*, ABA Formal Ethics Op No 93-379 (1993) (prohibiting billing multiple clients for the same time spent on research or "recycled work

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[4] So long as AI and GAI are not commonly used in the legal field, it may be appropriate to include in the engagement letter that AI or GAI will be used, disclose the risks associated with such tools, and/or seek the client's acknowledgment that such tools will be used. *See* New York State Bar Association Task Force on Artificial Intelligence, *Report and Recommendations to NYSBA House of Delegates*, 56 (Apr 6, 2024), https://nysba.org/app/uploads/2024/02/Task-Force-on-AI-Report-final.pdf ("Consider including in your client engagement letter a statement that the Tools may be utilized in your representation of the client and seek the client's acknowledgment.").

[5] *See, e.g.*, Oregon RPC 1.4(b); Oregon RPC 1.5(a).

product"). In accordance with the American Bar Association's (ABA's) guidance, lawyers may bill time related to learning specialized AI, including GAI, at the client's request, subject to a clear agreement with the client.[6] Otherwise, lawyers may not charge for the time spent developing competence in the use of such tools.

With respect to costs, lawyers must not duplicate charges that are already accounted for as overhead. *See In re Yacob*, 318 Or 10, 18, 860 P2d 811 (1993) (a lawyer who charges an additional fee for work covered by a flat-fee agreement violates the excessive fee prohibition); ABA Formal Ethics Op No 93-379 (1993) (lawyer should charge clients only for costs that reasonably reflect the lawyer's actual costs); Florida Bar Ethics Opinion 24-1 at 5–6 (Jan 19, 2024).

Lawyers must inform their clients, preferably in writing, if they intend to charge clients for the actual costs of using AI. This obligation is similar to informing clients of the intent to pass on costs associated with using research databases. Likewise, clients may not be charged for research of a general nature that is not case-specific and is intended for lawyers' own general knowledge of a legal issue.[7] Lawyers who are unable to determine the actual cost associated with a particular client's matter may not ethically prorate the periodic charges of a specialized AI, including GAI, and instead must account for those charges as overhead.

Confidentiality

Before using AI (or any technology) to assist with client legal matters, lawyers must consider their ethical obligations under Oregon RPC 1.6, which states that "[a] lawyer shall not reveal information relating to the representation of a client" and must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

AI includes nascent technologies that rely on complex algorithms to generate new content by learning from vast quantities of data. Some of the of algorithms are "open," continuously learning from data inputs, including potentially sensitive information, thereby enhancing the algorithm's response accuracy over time. An open model poses confidentiality risks as it may inadvertently incorporate and disclose sensitive client data that is input by lawyers or their assistants.[8] Other algorithms are "closed" and operate in

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6 ABA Formal Ethics Op No 512 at 14.

7 *See* Florida Bar Ethics Opinion 24-1 at 6 (citing *Attorney Grievance Commission of Maryland v. Manger*, 396 Md 134, 913 A2d 1, 5 (2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client.")).

8 For further discussion on the confidentiality concerns of open-model GAI, *see* ABA Formal Ethics Op No 512 at 6-7.

isolation, ingesting data and then isolating it to prevent further external utilization. In those models, data is processed and retained within a secure environment, which is critical for preserving the confidentiality of client information but limits the scope of AI's learning capacity.

If lawyers would like to use their clients' information in an open model, lawyers must obtain their clients' informed consent. "'[I]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Oregon RPC 1.0(g). To obtain informed consent, lawyers must clearly describe the risks (which may include disclosure and the possible loss of confidentiality or valuable intellectual property rights) and benefits of using AI, as well as alternatives that do not involve potentially revealing the client's information. When using an open model without client consent, lawyers need to anonymize or redact information that the client considers sensitive.[9] Lawyers must ensure that the anonymization or redaction is complete and effective, and even so, the client's informed consent may still be required.[10]

The use of AI in a closed model should inherently provide greater confidentiality protection than the use of AI in an open model. However, the mere engagement of a closed model does not absolve the necessity for a lawyer to be vigilant. Lawyers should approach contract negotiations with any AI providers carefully, taking the time to review the terms and conditions much as lawyers review any cloud service and recycling vendors to understand procedural and security commitments that reasonably safeguard client confidentiality.[11] Lawyers must ensure that these contracts include provisions that address how data is to be handled, encrypted, stored, and ultimately destroyed. The contract must include clear terms that protect client confidentiality and ensure that the technology uses strict privacy protocols in compliance with the confidentiality requirements of Oregon RPC 1.6. Moreover, any such agreements must delineate clear parameters around data usage, ensuring that sensitive client information is neither exposed to,

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9 *See* OSB Formal Ethics Op No 2011-184; OSB Formal Ethics Op No 2024-204.

10 *See* OSB Formal Ethics Op No 2011-184 ("Framing a question as a hypothetical is not a perfect solution, however. Lawyers face a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the lawyer's firm to determine the client's identity. When the facts are so unique or when other circumstances might reveal the identity of the consulting lawyer's client even without the client being named, the lawyer must first obtain the client's informed consent for the disclosures.").

11 *See* OSB Formal Ethics Op No 2011-188 (rev 2015) (cloud services); OSB Formal Ethics Op No 2005-141 (rev 2015) (paper recycling services).

nor used by, any external systems or entities, and is protected against both inadvertent and unauthorized disclosures. This is particularly critical in AI models using heuristics, which take data to train the model. Even in a closed AI model, lawyers may determine that it is appropriate to anonymize or redact certain information that their client considers sensitive or that could create a risk of harm to the client.

In summary, lawyers must attentively align the choice of any technology, including AI, with the ethical mandates concerning client confidentiality. If the lawyer chooses to use either a closed or open AI model, the lawyer must consider whether their clients' consent is required. The lawyer must also carefully review the operative contract to ensure the confidentiality parameters of the technology. In addition, if the lawyer chooses to use an open AI model, the lawyer may also need to take additional precautions against disclosure through the anonymization or redaction of sensitive client information.

Responsibilities of Partners, Managers, and Supervisory Lawyers;
Responsibilities of a Subordinate Lawyer; and
Responsibilities Regarding Nonlawyer Assistance

Oregon RPC 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers.[12] Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the Oregon Rules of Professional Conduct, and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants similarly conform to the rules. These responsibilities impact the use of AI by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of AI, including specifically GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using such technologies. Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained, including in the ethical and practical use of AI relevant to their work, as well as on risks associated with AI use. Training must include the basics of the actual type of AI being used (rather than just AI in general), the capabilities and limitations of the tools, ethical issues in the use of that specific AI, and best practices for secure data handling, privacy, and confidentiality. Importantly, supervisory lawyers must ensure subordinate lawyers and nonlawyers understand the dif-

[12] See also ABA Formal Ethics Op No 512 on GAI. This opinion confirms that attorneys who utilize GAI must appreciate its effect on the attorneys' ethical obligations. The opinion discusses the use of GAI in the context of six ethical obligations covered by the ABA Model Rules of Professional Conduct: competence, confidentiality, communication, candor toward the tribunal, supervisory responsibilities, and fees.

ference between open-model and closed-model AI systems, as well as the unique ethical issues attendant to each.

Lawyers have additional supervisory obligations when they rely on others outside the law firm who employ, or may employ, AI in connection with the legal representation. Rule 5.3(a) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to "make reasonable efforts" to ensure the nonlawyer's conduct conforms with the lawyer's professional obligations. Rule 5.3(b) further imposes responsibility on lawyers with direct supervisory authority over nonlawyers to the extent that the nonlawyer's conduct does not conform with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party performs competently and protects the confidentiality of information relating to the representation. These opinions note the importance of reference checks and vendor credentials, understanding vendor's security policies and protocols, familiarity with vendor's hiring practices, using confidentiality agreements, understanding the vendor's conflicts check system to screen for adversity among firm clients, and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to AI providers and tools as well as other nonlawyer assistance that utilizes or may utilize AI and other technologies.

Ultimately, Oregon lawyers are professionally responsible to supervise the accuracy of all their work product, including that which is produced by AI and the ethical use of AI by subordinate lawyers and nonlawyers. Subordinate lawyers must not use AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility and obligations. Oregon RPC 5.2.

Candor Toward the Tribunal, Truthfulness in Statements to Others, and Misconduct

Lawyers must verify any work done by or with the assistance of any third-party technology, including AI. Oregon RPC 3.3 prohibits lawyers from knowingly[13] making a false statement of fact or law to a tribunal, which, if made, must be disclosed and corrected without violating client confidences. Oregon RPC 3.3(a)(1), (c). These duties extend throughout the entirety of a legal proceeding. Oregon RPC 3.3(c). Oregon RPC 4.1 is similarly straightforward: while representing a client, lawyers shall not knowingly make a false statement of material fact or law to a third person.

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[13] Oregon RPC 1.0(h) defines knowingly as "denot[ing] actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances."

Lawyers must check for any rules, orders, or other requirements that the court may have in place either prohibiting the use of technology (including AI) in court filings or requiring the disclosure of its use. The most obvious way in which a lawyer could run afoul of Oregon RPCs 3.3 and 4.1 is through the submission of and reliance on unverified and fictitious cases, citations, quotes, or conclusions generated by AI.[14] Therefore, to avoid violation of Oregon RPCs 3.3 and 4.1, lawyers must review for accuracy any GAI output discussing case-specific facts or providing a case citation, quotation, or conclusion to ensure that the GAI did not hallucinate when providing its answer, or simply get the answer wrong. Lawyers who discover that they inadvertently provided the court with a false statement of fact or law must notify the court and correct the false statement without violating client confidences.

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[14] This may occur more often than has previously been reported. For example, in a test examining more than 200,000 legal questions, AI researchers at Stanford University found that general-purpose large language models—including Meta, Google, and OpenAI programs—hallucinate at least 75% of the time when answering questions about a court's core rulings. Isabel Gottlieb & Isaiah Poritz, *Legal Errors by Top AI Models "Alarmingly Prevalent," Study Says*, Bloomberg Law (Jan 12, 2024).

Understanding the Ethics Surrounding Generative AI

Remain Vigilant

By Ankur Doshi



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Throughout 2023, generative AI and its potential ethical pitfalls were some of the hottest topics for discussion at every legal conference. When ChatGPT opened to the public in 2022, ethics experts raised questions about whether lawyers could use this powerful technology effectively and without creating ethical quandaries.[1] A number of industries, including the legal industry, raced to adopt new technologies based on generative AI.

It was not long until the first case of an attorney misusing a generative AI tool (ChatGPT) arose in court proceedings. In June 2023, attorneys for the plaintiffs in *Mata v. Avianca, Inc.* were sanctioned $5,000 for filing an opposition drafted by ChatGPT that contained fictional citations and authority, and then again using ChatGPT to provide fictional excepts to the court.[2] Shortly thereafter, other courts grappled with ethical issues surrounding generative AI. Many issues within these cases could be avoided through the understanding of the Rules of Professional Conduct (RPC) and their application to these technological tools.

Technology and Ethics

It's no surprise that the legal profession lags in the adoption of new technologies. With new shifts in technology, the law struggles to adopt until technology becomes more mainstream. We've seen this challenge in the past with email and again with cloud computing.[3] As these changes become more frequent, the RPCs are crafted to provide the flexibility necessary to apply to rapidly evolving technology.[4] As the preamble notes, the ABA Model Rules of Professional Conduct and our RPCs are rules of reason.[5]

Even with the unique abilities and challenges of generative AI in the legal field, we find that applying the underlying principles of the RPCs provide guidance as to how to best use this technology while also protecting our clients' interests and the integrity of the legal system.

Competence (RPC 1.1)

A fundamental principle of legal ethics is that lawyers must provide competent representation to their clients. As noted by RPC 1.1, competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

While RPC 1.1 focuses on substantive knowledge of the areas of law in which a lawyer practices, the rule inherently includes the competence more broadly required in the practice of law, including competent use of technology. The ABA made this inference explicit in the comments through the Commission on Ethics 20/20 in 2012.[6] Comment (8) to ABA Model Rule (MR) 1.1 notes that

> To maintain the requisite knowledge and skill, *a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

(emphasis added). Comment [8] recognizes an ongoing duty to update our knowledge of current practices, including understanding the benefits and risks associated with technologies utilized in the practice of law. Within the past 20 years, lawyers have witnessed the practice of law fundamentally change with the introduction of technologies such as online legal research, email, electronic filings in court and e-discovery platforms. Many technologies which were once new and the subject of intense scrutiny are now mandatory to practice law.[7]

Understanding the risks and benefits of technology is an area of competence frequently overlooked by attorneys. It requires learning how the technology functions at a high enough level that we are aware of the risks associated with it. Attorneys are better equipped to evaluate the risks to their clients by understanding the technology.

Many of the ethical lapses involving attorneys and AI start with a misunderstanding of generative AI itself. Within five months after the introduction of ChatGPT to the public, an attorney used the program to generate an opposition to a motion and submitted it to a court in *Mata v. Avianco, Inc.*[8] ChatGPT "hallucinated"[9] in the filing, generating names to cases that sounded correct, but did not exist.[10] Five additional instances of attorneys submitting documents with fictional cases generated by AI to courts followed afterward.[11]

In each instance, the attorney's explanation for submitting documents citing nonexistent case law revealed that the attorney misunderstood the fundamentals of the technology. Attorneys stated that they believed that these generative AI programs were "super search engines" akin to Google.

They did not understand the potential risks of using the new technology, including the potential for fabricating citations, nor did they properly evaluate what had been generated, using their own professional judgment to supervise the work performed by the tool. Attorneys that understand the risks employed with AI know that they must evaluate the content created by AI to ensure accuracy.[12]

These cases highlight the need for attorneys to be competent in technology utilized in their practice. If we want to use these technologies, we must also fundamentally understand how they work.

Confidentiality (RPC 1.6)

One of the unique aspects of AI tools, and especially generative AI tools, is their ability to improve through iteration. However, iteration requires massive amounts of source data.[13] Generative AI incorporates user prompted data to train and improve its responses to user requests for information. The use of data and information within generative AI raises significant concerns for lawyers given our duty to protect confidential client information from unauthorized disclosure.

Our duties to protect client information are found in RPC 1.6. Specifically, RPC 1.6(a) states:

> a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

RPC 1.6(c) further specifies:

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

"Information related to the representation of a client" is a defined term under RPC 1.0(f) denoting "information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." The Oregon Supreme Court has noted that this definition is broad in scope and may encompass publicly available information if such information could be detrimental or embarrassing to the client and if not generally known.[14]

At first look, generative AI and the attorney's duty of confidentiality may appear incompatible. However, introductions of new technologies in the practice of law and the ethics analysis involved with those new technologies provide attorneys with guidance as to how to ethically utilize generative AI if they wish to do so. Oregon Formal Opinion 2011-188 states that attorneys have the duty to review the capabilities of the technology to securely store client data. That means that attorneys must make a "reasonable effort" to determine whether a third party follows industry standards for confidentiality and security.[15]

RPC 1.6 requires us to understand what happens to our data when it is submitted to an AI program. If an AI program is storing an attorney's data for other purposes, an attorney must evaluate if they can risk utilizing the AI program, even if they're using nonspecific and hypothetical data, without exposing information related to representation of the client.[16] Comment (19) to Model Rule 1.6 provides us with guidance, noting "(f)actors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."

As an example, ChatGPT generally does not provide protection for confidential information.[17] It provides warnings within its terms and conditions that data provided to ChatGPT will be utilized to "provide, maintain, develop, and improve our Services, comply with applicable law, enforce our terms and policies, and keep our Services safe."[18] An option is also provided to opt out of data collection.[19] Newer AI tools specializing in assisting lawyers are affording more robust data protection and specifically stressing the protection of client data in the same manner as many other legal software solutions.[20] However, an attorney seeking to use such tools must review the terms and conditions of such software to ensure that the necessary protections are available to keep their client's information confidential.

An additional aspect of utilizing an AI tool, and any tool that stores client information online, is the potential for a data breach.[21] Incorporating AI requires an understanding of the security measures in place that secure and protect the data from data breaches and other potential intrusions. Attorneys should undertake reasonable steps, including reviewing the terms and conditions and the privacy policy, of AI tools to determine whether the AI tool complies with industry standards for confidentiality and security.[22]

Duty to Communicate under RPC 1.2 and 1.4

If you decide to use a secure AI tool in your practice, do you need to inform your client that you use such a tool? While AI may feel like a research tool like Westlaw or Lexis, its capabilities may require disclosure of use to the client, along with discussion to allow the client to make an informed decision.

Our duties under RPC 1.2 and 1.4 define how we must communicate with our clients about the representation:

> RPC 1.2(a): . . . (a) lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
>
> RPC 1.4(b): A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Both of these RPCs create a duty to abide by the client's objectives and provide enough information to the client to allow them to make informed decisions. However, lawyers do not have to inform their client of every single step of the representation.[23] For instance, lawyers do not generally disclose the type of electronic research database or the type of word processing software they use.

Whether there is a need to communicate with the client on the usage of AI can vary substantially depending on how an attorney uses AI. For example, relatively trivial uses of AI, such as word suggestions in word processing[24] can be nonconsequential to the representation and do not require disclosure.

On the other end of the spectrum, in a recent criminal trial in D.C., an attorney

utilized a never-before-used AI program to draft the closing argument of the trial without informing the client defendant.[25] The defendant is now seeking a new trial based on ineffective assistance of counsel, noting that the closing argument used by his counsel made frivolous arguments and ignored multiple weaknesses within the prosecutor's case.[26]

With the unique aspects of generative AI, and its relative infancy in legal practice, lawyers are "well-advised to consult with clients before using generative AI to assist with anything other than *de minimis* usage."[27] Guidance from New Jersey reaches a similar conclusion, noting "(The New Jersey) RPCs do not impose an affirmative obligation on lawyers to tell clients every time that they use AI. However, if a client asks if the lawyer is using AI, or if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer's use of AI."[28] Considering the breadth of potential uses for AI, transparency will be a critical factor in ensuring that our clients understand how we use generative AI and what information we use with generative AI.[29] It also provide us with an understanding of the concerns the client may have about confidentiality and AI. Many firms experimenting with generative AI have explored placing initial disclosures within their engagement letters to start the discussion with their clients.[30]

Duty to Supervise under RPCs 5.1 and 5.3

Imagine a scenario where you request your paralegal to prepare a letter to your client on a matter. The paralegal sends you a draft letter to review within 30 minutes. Amazed by the efficiency of your paralegal, you review it, don't see any issues with the letter and sign off on it. Two weeks later, you get an angry call from your client. There has been a data breach at FoundationAI, a generative AI tool open to the public. The data was published, and apparently your client's information was in the data, even though your firm does not contract with FoundationAI. After discussing with your staff, you learn that your efficient paralegal has been using FoundationAI for drafting correspondence and other memoranda. In order to do that, she's provided client information through the prompts to tailor the letters.

This scenario has occurred[31] and is a likely scenario that many lawyers may encounter related to generative AI. As these publicly available models become more available and useful, there will be a substantial number of associates and nonlawyer staff tempted to use the programs for certain types of work, especially letters and other correspondence. Attorneys need to be prepared to provide guidance and training to lawyer and nonlawyer staff alike about acceptable technologies and the risks that such technologies pose.

RPC 5.1 and 5.3(a) place responsibility on the supervising attorney for the work of their associate attorneys and nonlawyer staff. RPC 5.1 states:

> A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:
>
> (a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

And RPC 5.3(a) states:

> With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:
>
> (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer

Attorneys in supervisory roles have an obligation to know the technology their associates and nonlawyer staff are using and make sure they conform with the RPCs. This rule extends to third parties that the lawyer contracts with for services to their firm. ABA Comment (3) to Model Rule 5.3 emphasizes:

> "When using such (nonlawyer) services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations."

Because of the transformative capabilities of AI, it is paramount that attorneys provide time for discussions and training to staff about how and when to use AI, and when using AI increases risk and exposure to a violation of our ethical duties.

To avoid ethical pitfalls, attorneys must be proactive. Attorneys with staff should consider offering proper training and education on AI tool usage, establishing expectations about what tools employees can use, setting clear policies and procedures for using AI technologies, and implement robust quality control and review to ensure their obligations under RPC 5.1 and 5.3 are met. Absent any type of training, policies, or education for their staff, attorneys face a significant risk.

Candor to the Court

Generative AI does not change our duty of candor to the court encompassed within the RPCs. Under RPC 3.3(a):

> a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;(.)

An attorney's submission of unverified and fictitious cases cited by a generative AI obviously runs afoul of this RPC, as well as several other RPCs related to truthfulness.[32] The publicity of several cases involving fictitious cases cited by generative AI has raised additional concerns with the judiciary. Several judges have standing orders prohibiting the use of generative AI.[33] Additional judges have required disclosure of the use of generative AI.[34] In November 2023, the U.S. Court of Appeals for the 5th Circuit specified certification of either that a document was not drafted by generative AI, or that a document drafted by generative AI was further reviewed for accuracy by a human.[35] Attorneys utilizing generative AI should be aware of any standing orders within the courts they practice in case they do require disclosure of generative AI.

Additional Guidance

Oregon's Legal Ethics Committee is reviewing whether additional guidance on AI would assist Oregon attorneys in clarifying their ethical duties. Currently, California,[36] Florida,[37] New Jersey[38] and North Carolina[39] have issued opinions related to generative AI. Other states are also considering releasing additional opinions. California issued practical guidance on generative AI late in 2023, which noted several best practices and considerations for using generative AI. It also noted:

> Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.[40]

Florida echoed those sentiments and reiterated an attorney's duty of competence in using generative AI:

> "Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies."[41]

Each of these states evaluated many of the same questions raised here and provided guidance to their practitioners. If you believe that an opinion related to AI would be helpful, Oregon's Legal Ethics Committee would like to hear from you. You can provide feedback to them at *feedback@osbar.org*. ■



Ankur Doshi is general counsel for the Oregon State Bar. He wrote about the 2023 Client Security Fund Report in the February/March Bulletin.

ENDNOTES

1. Andrew Perlman, "The Implications of ChatGPT for Legal Services and Society," *The Practice,* March/April 2023, at *https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/* (noting potential challenges in ChatGPT for lawyers related to accurate and reliable results and accounting for the nuances and complexities of law).
2. *Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), 2023 U.S. Dist. LEXIS 108263, at *2 (S.D.N.Y. June 22, 2023) ("[Plaintiff's attorneys] abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.").
3. Andrew Perlman, "The Legal Ethics of Generative AI," at 3, 17, (February 22, 2024), *Suffolk University Law Review*, forthcoming, available at SSRN: *https://ssrn.com/abstract=4735389* (" When [email] first became available, ethics opinions urged considerable caution and even suggested that lawyers might violate their duty of confidentiality by using it. We have now reached the point where lawyers must have an email address in order to remain licensed to practice law.").
4. *Id.* at 18 *citing* Letter from ABA Comm'n. on Ethics 20/20 Working Group, to ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Individuals, and Entities.(Sept. 20, 2010).
5. Model Rules of Prof'l Conduct: Preamble: Scope, Comment [14] (2024).
6. ABA Commission on Ethics 20/20 Report to the House of Delegates, 105A, August 2012.
7. *See In re Schaefer*, 33 D.B. Rptr. 461 (2019) (attorney expected to know how to communicate with clients and court via email); *In re Fjelstad*, 31 D.B. Rptr. 268 (2017) (attorney expected to know how to utilize electronic filing with the court); *In re Heinzelman*, 31 D.B. Rptr. 11 (2017) (same). *See also* Perlman *supra* note 3 at 17 (attorney requires email address to be member of California State Bar).
8. *Mata v. Avianca, Inc. supra* note 2.
9. *See* Jordan Murphy, "AI in the Legal Sector – an Overview for Information Professionals, *Legal Information Management*, 23 (Sept. 2023), at 150 ("Known limitations of the [ChatGPT] tool include 'hallucinations'; outputs that sound plausible but are factually incorrect. These can arise from misunderstanding or a lack of contextual understanding.").
10. *Mata v. Avianca, Inc. supra* note 2.
11. *Park v. Kim*, 91 F.4th 610, 615 (2d Circ. 2024) (Second Circuit referred an attor-

ney for submitting brief relied on fictional authority created by ChatGPT); *Smith v. Farwell*, 2282CV01197, (Superior Court, Norfolk, Mass., Feb. 12, 2024) (attorney sanctioned $2,000 by court for submitting several legal memoranda relying on wholly fictitious case law generated by an AI system); *U.S. v. Cohen*, 18CR602JMF. 2023 WL 8635521 (S.D.N.Y. Dec. 12, 2023) (client (former attorney) sent attorney fictional cases citations on Google Bard AI that were submitted to the court); *People v. Crabill,* 23PDJ067, 2023 Colo. Discip. LEXIS 64, (Sup. Ct. Colorado, Nov. 22, 2023) (Attorney suspended for one year and one day, with 90 days served, for submitting a motion that containing citations created by AI and not verifying them); *see also* David Wagner, "This Prolific LA Eviction Law Firm was Caught Faking Cases in Court. Did They Misuse AI?," *LAist.com*, Oct. 12, 2023, at *https://laist.com/news/housing-homelessness/dennis-block-chatgpt-artificial-intelligence-ai-eviction-court-los-angeles-lawyer-sanction-housing-tenant-landlord* (attorney was sanctioned for submitting filing with fictional cases in eviction case). *See generally* Pranshu Verma and Will Oremus, "These lawyers used ChatGPT to save time. They got fired and fined." *Washington Post*, Nov. 16, 2023, at *https://www.washingtonpost.com/technology/2023/11/16/chatgpt-lawyer-fired-ai/*.

12. The State Bar of California Standing Committee on Professional Responsibility and Conduct, "Practical Guidance For The Use Of Generative Artificial Intelligence In The Practice Of Law," Nov. 16, 2023 at *https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf* ("A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client").
13. *See* Henry H. Perritt, Jr., "Robots as Pirates," 73 *Cath. U.L. Rev.* 57, 75 ("Large language models learn from enormous databases of text . . . [these] databases are constructed from crawling the Web, for specialized sources such as FreeLaw and PubMed, from online discussion groups like Reddit, from the Gutenberg books collection, and from Wikipedia").
14. *In re Conry*, 368 OR 349, 362 (2021).
15. Or. Formal Op. 2011-188; *see also* Or. Formal Op. 2005-141.
16. California's Practical Advice on Generative AI notes "A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections. A lawyer must anonymize client information and avoid entering details that can be used to identify the client." Cal. Practical Advice, *supra* note 12 at 2.
17. Foster J. Sayers, "ChatGPT and Ethics: Can Generative AI Break Privilege and Waive Confidentiality?" 20 *N.Y. Law Journal* 269 3(2) (January 31, 2023); *see also* David Canellos, "What to Know About Sharing Company Data with Generative AI," *Forbes*, Aug. 10, 2023) at *https://www.forbes.com/sites/forbestechcouncil/2023/08/10/what-to-know-about-sharing-company-data-with-generative-ai/?sh=7135e06c6022*.
18. OpenAI, *Terms of Use* (November 14, 2023) at *https://openai.com/policies/terms-of-use*.
19. *Id.*
20. *See* John Tredennick and William Webber, "Attorneys Using AI Shouldn't Worry About Waiving Privilege," *Law360* (Aug. 22, 2023), at *https://www.law360.com/articles/1706972/attorneys-using-ai-shouldn-t-worry-about-waiving-privilege*.
21. Romaine C. Marshall and Gregory Cohen, Artificial Intelligence Applications and The Rules of Professional Conduct, 36 *Utah Bar J.* 18 (Sept./Oct. 2023) ("Generative AI applications are at risk of data breaches to the same extent as any other software").
22. See Or. Formal Op. 2011-188 at 1-2.
23. See Pearlman, *supra* note 3 at 7.
24. *Id.*
25. *United States v. Prakazrel Michel*, Case No. 19-CR-148-1 (CKK), Def's Mot. For New Trial, (Oct. 16, 2023) 22.
26. *Id.* at 23-24. *see also* Jon Brodkin, "Rapper Pras' Lawyer Used AI To Defend Him in Criminal Case—It Did Not Go Well," *Ars Technica*, October 18, 2023, at *https://arstechnica.com/tech-policy/2023/10/fugees-rapper-blames-conviction-on-his-lawyers-ai-fueled-closing-argument/*.
27. See Perlman, *supra* note 3 at 7.
28. N.J. Supreme Court Committee on Artificial Intelligence and the Courts, "Notice-Preliminary Guidelines on The Use of Artificial Intelligence By New Jersey Lawyers," (Jan. 24, 2024) at 4-5.
29. Kassi Burns, "Demystifying Generative AI," 63 *Judges' Journal* 13 (Winter 2024).
30. See Isabel Gottlieb, "Law Firms Wrestle with How Much to Tell Clients About AI Use," *Bloomberg Law*, (Nov. 29, 2023) at *https://news.bloomberglaw.com/business-and-practice/law-firms-wrestle-with-how-much-to-tell-clients-about-ai-use*.
31. *See* Wagner, *supra* note 11 (noting that lawyer sanctioned for filing indicated that a first-year attorney had drafted the opposition citing fictional cases).
32. *See* RPCs 3.1, 4.1, 8.4(a)(3).
33. J. Michael J. Newman, Artificial Intelligence ("AI") Provision in Both Civil and Criminal Cases (S.D. Ohio July 14, 2023); J. Roy Ferguson, Standing Order Regarding Use of Artificial Intelligence (394th Jud. Dist. Tex, June 9, 2023); J. Stephen Alexander Vaden, Order on Artificial Intelligence, (U.S. Ct. Int'l.

Trade, June 6, 2023). *See generally* Perlman, *supra* note 3 at 11-12 (discussing standing orders banning the use of generative AI).

34. Magis. J. Gabriel A. Fuentes, Standing Order for Civil Cases Before Magistrate Judge Fuentes, (N.D. Ill. May 5, 2023); J. Brantley Starr, Mandatory Certification Regarding Generative Artificial Intelligence, (N.D. Tex. May 30, 2023). *See generally* Perlman*, supra* note 3 at 13-15 (discussing orders requiring disclosure of the use of generative AI).
35. 5th Cir. R. 32.3 (Jan. 4, 2024).
36. Cal. Practical Advice, *supra* note 12.
37. Fla. Eth. Op. 24-1 (Jan. 19, 2024), at *https://www.floridabar.org/etopinions/opinion-24-1/*.
38. N.J. Guidance at *supra* note 28.
39. N.C. Proposed 2024 Formal Eth. Op. 1, "Use of Artificial Intelligence in a Law Practice" (Jan. 18, 2024).
40. Cal. Practical Advice, *supra* note 12 at 1.
41. Fla. Eth. Op. 24-1, *supra* note 37 at 7.

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Rachel Edwards, *Professional Liability Fund, Tigard*

Rachel Edwards received her BA from the University of Washington in Seattle and her JD from Willamette University College of Law. She is a member of the Oregon State Bar, Oregon Women Lawyers, Multnomah Bar Association, Washington County Bar Association, and has been an elected board member of the Washington County Bar Association and a founding subcommittee member of the New Lawyers Division of the Washington County Bar Association. She has served as a Classroom Law Project Mock Trial Volunteer Judge, an Oregon Department of Human Services Adoption Contract Vendor Attorney, and a volunteer for the Convocation on Equality and the St. Andrew Legal Clinic.

Prior to joining the Professional Liability Fund in 2016, Ms. Edwards was in private practice for four years. Her areas of practice included Social Security disability, family law, adoption, and estate planning. In her role as a Practice Management Attorney for the PLF, Ms. Edwards provides practice management assistance to Oregon attorneys to reduce their risk of malpractice claims and enhance their enjoyment of practicing law. Her assistance is free and confidential.

FRONT END OF REPRESENTATION/FORMING THE ATTORNEY-CLIENT RELATIONSHIP

Section 7—Basic Law Office Responsibilities

A. Law Office Structure

1. Attorneys who share offices and who do not wish to be regarded as members of a single firm must, *inter alia,* protect the confidences and secrets of each attorney's client and must not permit any joint employees to share client confidences or secrets. OSB Formal Opinion No 2005-50.

2. An attorney may share office space with a nonattorney professional who maintains a separate and independent business. An attorney may not, however, agree to a system of cross-referrals on a quid pro quo basis with another professional. OSB Formal Opinion No 2005-2.

3. A legal aid service is a "firm" or "law firm" within this definition. OSB Formal Opinion No 2005-138.

4. An attorney designated as "of counsel" for a law firm is considered a member of the firm for conflict of interest purposes. Therefore, when the attorney has a practice separate from the firm to which she is "of counsel," the current and former clients of both firms must be considered in evaluating whether conflicts exist. OSB Formal Opinion No 2005-155.

5. Because RPC 1.0(d) specifically defines a law firm as including a public defender's office, if one attorney in such an office is disqualified because of a former client information-specific conflict, all other attorneys in the office are disqualified as well, unless the conflict is waived. OSB Formal Opinion No 2005-174.

6. A former partner who is without PLF coverage may consult with firm lawyers as long as she assumes no direct responsibility for client matters. OSB Formal Opinion No 2005-169.

7. Law firms that represent clients on the opposite side of a matter may employ the same nonattorney if the nonattorney does not acquire confidences or secrets from the client of either firm. If the nonattorney does acquire confidences or secrets from the client of either firm, the law firms may not both employ the nonattorney unless both clients consent after full disclosure. OSB Formal Opinion No 2005-44.

B. Communications About the Lawyer or Law Firm

1. The United States Supreme Court has ruled that attorney advertising is a form of commercial speech that is entitled to some constitutional protection. In *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2nd 810 (1977), the court ruled that a ban on all lawyer advertising could not withstand constitutional scrutiny as the First Amendment protects such advertising that is truthful and not misleading. Oregon's Rules of Professional Conduct codify that ruling.

2. An attorney may ethically solicit clients in writing as long as the written solicitations are truthful and not misleading and as long as the attorney otherwise complies with RPC 7.1 and 7.3. OSB Formal Opinion No 2005-127.

✪ Mark J. Fucile, "Avoiding Bad News: Risk Management in Law Firm Marketing," *OSB Bulletin,* Jan. 2009: https://www.osbar.org/publications/bulletin/09jan/practice.html.

Notes re 2014 Changes to the Advertising Rules

RPC 7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

▸ *In re Lopez,* 350 Or 192, 252 P3d 312 (2011); *In re Hendrick,* 24 DB Rptr 138 (2010); *In re Magar,* 337 Or 548, 100 P3d 727 (2004); *In re Shatzen,* 18 DB Rptr 213 (2004); *In re Duncan,* 17 DB Rptr 202 (2003)

➢ OSB Formal Opinion No 2005-49; 2005-3; 2005-31; 2005-127; 2005-35; 2005-112; 2007-180

✪ American Bar Association Formal Opinion 10-457, Lawyer Websites (August 8, 2010): https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal%20_opinion_10_457.pdf

✪ Helen Hierschbiel, "Internet Marketing: Rules of the Road," *OSB Bulletin,* Jan. 2008: https://www.osbar.org/publications/bulletin/08jan/barcounsel.html

RPC 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

➢ OSB Formal Opinion No 2007-180; 2005-175; 2005-112; 2005-108; 2005-73

RPC 7.2 ADVERTISING

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a lawyer referral service; and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and contact information of at least one lawyer or law firm responsible for its content.

➢ OSB Formal Opinion No 2005-168

✪ Amber Hollister, "What Hath the Web Wrought? Advertising in the Internet Age," *OSB Bulletin,* May 2011: https://www.osbar.org/publications/bulletin/11may/barcounsel.html

C. Solicitation

RPC 7.3 SOLICITATION OF CLIENTS

A lawyer shall not solicit professional employment by any means when:

(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer.

To "initiate" personal contact with a prospective client to obtain professional employment, a lawyer must act intentionally to violate the rule. *In re Blaylock,* 328 Or 409, 978 P2d 381 (1999) (because attorney was also an emergency physician on duty in the emergency and was told by a nurse that the family of a critically injured man had requested to see him in his capacity as an attorney, he did not solicit the potential clients as contemplated by the former rule as the attorney was under the impression that the prospective client had sought his advice through an intermediary).

➢ OSB Formal Opinion No 2005-175; 2005-127; 2005-106; 2005-100; 2005-70; 2005-51; 2005-35; 2005-10

RPC 7.3 SOLICITATION OF CLIENTS

(b) the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(c) the solicitation involves coercion, duress or harassment.

▸ *In re Idiart,* 19 DB Rptr 316 (2005)

➢ OSB Formal Opinion No 2005-79

HYPOTHETICAL 7-1

Attorney had a solo law practice, specializing in sports litigation. He operated his practice under the names "Attorney & Associates," "Law Offices of Attorney & Associates," and similar names. Attorney used these names on his firm letterhead and other documents, as well as in his advertisements and directory listings.

What was wrong with Attorney's firm name?

A. It lacked creativity.

B. It was misleading.

C. Nothing. Attorney had been looking to hire associates.

D. Nothing, because the letterhead and advertisements listed him as the only attorney with the firm.

Answer: _____

D. Firm Names

RPC 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

▸ *In re Shatzen,* 18 DB Rptr 213 (2004) (DR 2-101(A)(1))

➢ OSB Formal Opinion No 2005-153; 2005-101; 2005-65

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an

office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

➢ OSB Formal Opinion No 2005-109; 2005-103

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

◗ *In re Cain,* 26 DB Rptr 55 (2012); *In re Kinney,* 26 DB Rptr 59 (2012)

➢ OSB Formal Opinion No 2005-12

(e) A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationery of a client if the lawyer of the lawyer's firm devotes a substantial amount of professional time in the representation of the client.

➢ OSB Formal Opinion No 2005-155; 2005-169

Section 8—Law Office Management

A. Business Plan

See generally PracticePRO (Canadian PLF) practice aids at http://practicepro.ca/practice/PracticeFinances.asp and http://practicepro.ca/practice/financesbookletprecedents.asp related to "managing the finances of your practice."

PracticePRO also has additional materials that can be downloaded, such as a business plan, a sample budget, and an associate agreement, along with some other aids that can be downloaded in Word for easy customization.

✪ Lawyer's Professional Indemnity Company: Business Plan Outline: https://www.practicepro.ca/wp-content/uploads/2017/07/BusinessPlanOutline.docx

✪ Professional Liability Fund Practice Aids and Forms: https://www.osbplf.org/practice-management/forms.html

✪ Sheila Blackford, Dee Crocker, and Beverly Michaelis, "Business Essentials: Tips for the Small Firm and Sole Practitioner," *OSB Bulletin,* May 2011: https://www.osbar.org/publications/bulletin/11may/practice.html

✪ Randal Acker, "Riding the Wave: So You Want to Hang Out Your Own Shingle?" *OSB Bulletin,* Oct. 2010: https://www.osbar.org/publications/bulletin/10oct/practice.html

✪ Sheila Blackford, "Law Office Start-Up—Law Office on a Shoestring," *OSB Bulletin,* Oct. 2008: https://www.osbar.org/publications/bulletin/08oct/practice.html

1. Financial Plan

✪ PLF Practice Aids and Forms: Financial Management and Trust Accounting categories: https://www.osbplf.org/practice-management/forms.html

a. Trust accounts

✪ PLF Frequently Asked Trust Account Questions: https://www.osbplf.org/assets/forms/pdfs/Frequently%20Asked%20Trust%20Account%20Questions.pdf

b. Accounts receivable

c. Accounts payable

d. Tracking of financial transactions

✪ PLF Client Ledger Card and Trust Account Journal: https://www.osbplf.org/assets/forms/pdfs/Client%20Ledger%20Card%20and%20Trust%20Journal.docx

e. Regular review procedures

✪ PLF Trust Account Reconciliation: https://www.osbplf.org/assets/forms/pdfs/Trust%20Account%20Reconciliation.docx

2. Human Resources Plan

✪ PLF Practice Aids and Forms: Office Manuals and Staff categories: https://www.osbplf.org/practice-management/forms.html

a. Partners/associates

✪ PLF Delegation Memo: https://www.osbplf.org/assets/forms/pdfs/Delegation%20Memo.docx

b. Contract attorneys

✪ Heidi O. Strauch, "Choosing a Contract Attorney: Tips for Establishing a Working Relationship," *OSB Bulletin,* Feb./Mar. 2011: https://www.osbar.org/publications/bulletin/11febmar/practice.html

✪ PLF Delegation Memo: https://www.osbplf.org/assets/forms/pdfs/Delegation%20Memo.docx

c. Support staff

✪ PLF Checklist for New Staff: https://www.osbplf.org/assets/forms/pdfs/New%20Staff%20Checklist.pdf

✪ PLF Delegation Memo: https://www.osbplf.org/assets/forms/pdfs/Delegation%20Memo.docx

d. Training and regular review of needs

✪ PLF Confidentiality in the Office: https://www.osbplf.org/assets/forms/pdfs/Confidentiality%20in%20the%20Office.pdf

3. Work Flow Plan

✪ PLF Practice Aids and Forms: Docketing & Calendaring, Financial Management, Office Manuals, and Staff categories: https://www.osbplf.org/practice-management/forms.html

a. Employee job descriptions

✪ PLF Receptionist's Duties: https://www.osbplf.org/assets/forms/pdfs/Reception%20Duties.pdf

b. Define office procedures

c. Assign responsibility

i. Calendars

ii. Docket control/tickling

iii. Time-keeping

iv. Billing

B. Systems

✪ PLF Office Systems Review Checklist: https://www.osbplf.org/assets/forms/pdfs/Office%20Systems%20Review%20Checklist.pdf

1. Comprehensive Filing and Storage System

✪ PLF Practice Aids and Forms: File Management category: https://www.osbplf.org/practice-management/forms.html

✪ Beverly Michaelis, Setting Up an Effective Filing System: https://www.osbplf.org/assets/forms/pdfs/Setting%20Up%20an%20Effective%20Filing%20System.pdf

a. Active files (open)

b. Inactive files (closed)

✪ PLF File Retention and Destruction: https://www.osbplf.org/assets/forms/pdfs/File%20Retention%20and%20Destruction.pdf

✪ PLF File Closing Checklist: https://www.osbplf.org/assets/forms/pdfs/File%20Closing%20Checklist.pdf

c. General office files

d. Master client information files

e. Clients' original document files and case documents files

f. Managing data

✪ Dee Crocker, "Backing Up: Your Most Important Office System," *OSB Bulletin,* April 2011: https://www.osbar.org/publications/bulletin/11apr/practice.html

✪ PLF How to Back Up Your Computer: https://www.osbplf.org/assets/forms/pdfs/How%20to%20Back%20Up%20Your%20Computer.pdf

✪ Robert J. Ambrogi, "Do-It-Yourself Security: Help Keeping Your Data Safe," *OSB Bulletin,* Feb./Mar. 2009: https://www.osbar.org/publications/bulletin/09febmar/legalonline.html

2. Calendaring and Docket Control System

✪ PLF Practice Aids and Forms: Docketing & Calendaring category: https://www.osbplf.org/practice-management/forms.html

✪ PLF Calendaring and File Tickling Systems: https://www.osbplf.org/assets/forms/pdfs/Calendaring%20and%20File%20Tickling%20Info.pdf

a. More than one system

b. More than one person

c. Understood by everyone

3. Client Information System

✪ PLF Practice Aids and Forms: Client Relations, Conflicts of Interest, Docketing & Calendaring, Financial Management, and Technology categories: https://www.osbplf.org/practice-management/forms.html

✪ PLF New Client Information Sheet with Disclaimer: https://www.osbplf.org/assets/forms/pdfs/New%20Client%20Information%20Sheet%20with%20Disclaimer.pdf

✪ PLF Declined Prospective Client Information Sheet: https://www.osbplf.org/assets/forms/pdfs/Declined%20Prospective%20Client%20Information%20Sheet.pdf

a. Client index

b. Log of actions in each client matter

c. Tickler system for events and deadlines

d. Conflicts index

✪ PLF Conflict of Interest Systems: https://www.osbplf.org/assets/forms/pdfs/Conflict%20of%20Interest%20Systems%20-%20Procedures.pdf

✪ PLF Request for Conflict Search and System Entry: https://www.osbplf.org/assets/forms/practice_forms/Conflict%20of%20Interest%20Systems%20-%20Procedures.pdf#page=5

e. Up-to-date billing records (including accounting of any entrusted funds)

✪ PLF Client Ledger Card and Trust Account Journal: https://www.osbplf.org/assets/forms/pdfs/Client%20Ledger%20Card%20and%20Trust%20Journal.docx

f. Maintain an easily-accessible permanent record of client information

i. Card or computer file with a separate card or file for each client and cross-referencing of multiple names

ii. Must have ability to check conflicts with a new client matter

- Before initial consultation with the potential new client *and*
- Repeat as additional parties or participants become known

4. The Internal Organization of All Files Should Be Planned and Consistent for Each Type of File

✪ PLF Practice Aids and Forms: File Management, Financial Management, Mail Handling, Office Sharing, and checklists customized to practice areas in substantive practice area listings: https://www.osbplf.org/practice-management/forms.html

C. Timekeeping, Billing, and Collection

✪ PLF Practice Aids and Forms: Financial Management category, technology: https://www.osbplf.org/practice-management/forms.html

1. Choose a timekeeping system and train all timekeeping attorneys and staff to adhere to it

✪ Dee Crocker: "Choices—Law Firm Billing and Accounting Software," *OSB Bulletin,* Dec. 2008: https://www.osbar.org/publications/bulletin/08dec/practice.html

✪ Dee Crocker: "SaaS in the Office: Internet-Based Case Management and Billing Software," *OSB Bulletin,* Aug./Sep. 2009: https://www.osbar.org/publications/bulletin/09augsep/managing.html

✪ PLF Billing and Time Slips: https://www.osbplf.org/assets/forms/pdfs//Billing%20and%20Time%20slips.pdf

✪ PLF Daily Time Sheet: https://www.osbplf.org/assets/forms/pdfs//Daily%20Time%20Sheets.doc

2. Billing cycle
   a. Set a regular billing cycle
   b. Notify clients of the billing cycle
   c. Set aside sufficient staff time to process billings and collections
3. Costs
   a. Inform clients of costs to be charged to them
   b. Maintain accurate cost records
   c. Bill costs to the clients
4. Bill only for work performed and costs incurred
5. Consider employing collection procedures when clients do not pay

D. Office Manual

✪ PLF Practice Aids and Forms: Client Relations, Office Manuals, and Staff categories: https://www.osbplf.org/practice-management/forms.html

1. Inform employees of various office systems (e.g., mail handling, telephone messages, tickler systems), office procedures, obligations, and benefits.
2. Confidentiality. *See* RPC 5.1, RPC 5.2, and RPC 5.3.

✪ PLF Confidentiality—A Responsibility of Legal Staff: https://www.osbplf.org/assets/forms/pdfs//Confidentiality%20in%20the%20Office.pdf

3. Establish terms of employment of employees, with care not to create implied contractual obligations between your firm and the employees.
4. Suggest that also include:
   a. Office conduct
   b. Compensation
   c. Continuing education
   d. Staff meetings
   e. Absence from the office during office hours
   f. Personal telephone calls
   g. Resignation or termination

h. Office hours

E. Other Considerations

1. Research tools

✪ Dee Crocker, "In Search Of: Evaluating Legal Research Tools," *OSB Bulletin,* April 2010: https://www.osbar.org/publications/bulletin/10apr/practice.html

2. Contingency plan

✪ Beverly Michaelis, "Plan Ahead—Are You Prepared for the Unthinkable?" *OSB Bulletin,* July 2005: https://www.osbar.org/publications/bulletin/05jul/practice.html

HYPOTHETICAL 9-1

For many years Partner owned and operated a successful law partnership with Associate. A few years ago, because of concerns over a pending divorce, Associate was made an employee of the firm, without an equity share. Nevertheless, Associate has continued to act as the office manager, including responsibility over all financial matters.

A number of clients have begun to complain to Partner about the legal services provided by Associate, and the fees charged for those services. Complaints of incompetence and unpreparedness have mounted, in large part, because of Associate's personal problems related to alcohol abuse, potential mental-health issues, inattention to work, her pending divorce, and significant personal financial issues. Staff have complained to Partner that Associate is regularly visibly intoxicated at the office; checks have gone missing; bills have gone unpaid; services have been interrupted; and vendors are refusing to extend credit to the firm.

Associate's unpredictable actions recently forced Partner to prohibit Associate from making court appearances (so she does not embarrass the firm) but she has instead spent more time "working" at the office. Staff tells Partner that client money has now begun going missing and firm obligations have continued to go unpaid.

What are Partner's and Associate's responsibilities for Associate's clients and their funds?

A. Both Partner and Associate are responsible for each of Associate's client matters and their money.

B. Only Associate is responsible. She is her clients' attorney and also responsible for the firm finances.

C. Partner and Associate are both responsible for the legal matters but only Associate is responsible for the money issues.

D. Only Partner is responsible. As Associate's supervisor, he must assist with her clients and is ultimately responsible for client funds.

Answer: _____

RPC 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

▸ *In re Connall,* SC S061623 (2013); *In re Sunderland,* 21 DB Rptr 257 (2007)

➢ OSB Formal Opinion No 2007-179; 2007-178

RPC 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

➢ OSB Formal Opinion No 2007-178

OPTIONAL HYPOTHETICAL 9-2

About 10 years ago, a California lawyer, "Lawyer," formed "Lawyer & Attorney," a law partnership with California lawyer, "Attorney," and set up shop in Northern California.

Five years ago, Lawyer was admitted to practice in Oregon. However, despite interim efforts, Attorney was not admitted to the Oregon Bar until this past year.

Four years ago, Lawyer and Attorney opened a law office in Southern Oregon under the name "Lawyer & Attorney" and used letterhead (at Attorney's suggestion) that stated:

Lawyer & Attorney
Attorneys at Law
Licensed in Oregon and California
Lawyer
Attorney

Each year since they opened their Oregon practice, Attorney has placed the following advertisement in the local Oregon paper directory and in the on-line Yellow Pages:

Lawyer & Attorney
Experienced Trial Attorneys & General Practice
Licensed in Oregon & California

Also since they opened they opened their practice, Attorney has: written and signed letters to opposing counsel and opposing parties regarding substantive matters; rendered legal advice to clients in person and in telephone conferences; engaged in substantive negotiations with opposing counsel; represented a client at a state court deposition; signed a motion and filed it with the state circuit court; and made a routine state court appearance without supervision.

Lawyer is responsible for which of Attorney's actions?

A. The letterhead and phone directory ad, because they were misleading.

B. Rendering advice to clients and appearing on behalf of clients in court, because these acts constituted the unauthorized practice of law.

C. Signing and filing a motion with the court, because this was a misrepresentation about Attorney's authority to do so.

D. All of Cain's conduct.

Answer: _____

RPC 8.5 DISCIPLINARY AUTHORITY

(a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

HYPOTHETICAL 9-3

For nearly 30 years, Attorney practiced law in partnership with his father—who was the head of the firm and the firm manager. Near the beginning of their partnership, they hired Susan as a secretary, paralegal and bookkeeper. Susan was responsible for duties including preparing checks, receiving the bank statements, and reconciling the bank accounts.

Twenty years into her tenure, Susan confessed to Attorney that she had taken firm funds through "payroll draws" to support her gambling habit, and that she had not paid the money back through payroll deductions, as she was supposed to do ("First Thefts"). After Attorney and his father investigated Susan's First Thefts, they did not report Susan to the police but had her agree to pay back the funds (which she never did). Moreover, in spite of her confession, rather than restrict Susan's access to firm accounts and client funds, Susan's job remained secure and her financial and banking responsibilities at the firm continued. Thereafter, notwithstanding Susan's unfettered access to his clients' funds, Attorney did nothing to supervise or monitor Susan because he viewed her as his father's secretary.

Over a subsequent two-year period, Attorney's father's health declined substantially and he became unable to meaningfully continue with the law practice. During this same period, Susan embezzled more than $300,000 from the firm's accounts, including the firm's general account, the trust account, and directly from two of Attorney's clients ("Second Thefts").

Is Attorney responsible for Susan's First or Second Thefts?

A. Yes. Attorney is responsible for Second Thefts but not the First Thefts.

B. No because Susan acted intentionally on her own.

C. Yes. Attorney is on the hook for both the First and Second Thefts.

D. No because Susan was Attorney's father's responsibility—not Attorney's.

Answer: _____

RPC 5.3 RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANTS

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

▸ *In re Cottle,* 29 DB Rptr 79 (2015); *In re Strader,* 27 DB Rptr 219 (2013); *In re Nishioka,* 23 DB Rptr 44 (2009); *In re Idiart,* 19 DB Rptr 316 (2005)

HYPOTHETICAL 9-4

Attorney signed blank trial subpoenas and instructed his investigator to arrange for service on witnesses in a criminal rape case. Without Attorney's knowledge, the investigator used one of the subpoenas to obtain the victim's high school records prior to trial, which the school released in violation of statutes governing such records. Upon receipt of the records, Attorney did not return them or notify the school, but provided them to his client for use in preparing cross-examination of the victim.

When questioned by the judge in the case about his possession and use of the records, Attorney defended the investigator and his own actions.

Attorney did not engage in any misconduct, because the school was the party who improperly turned over the records.

1. True

2. False

Answer: _____

Section 10—Formation of the Attorney-Client Relationship

✪ Beverly Michaelis, "Make the Right Match: What If You Only Represented Clients You Liked?" *OSB Bulletin,* July 2008: https://www.osbar.org/publications/bulletin/08jul/practice.html

A. When Does the Relationship Begin?

1. The Oregon Rules of Professional Conduct do not define the point at which a lawyer-client relationship comes into existence.

2. The creation of the lawyer-client relationship requires no retainer or other express written or oral agreement. *In re Bristow,* 301 Or 194, 202, 721 P2d 437 (1986); *In re Robertson,* 290 Or 639, 648, 624 P2d 603 (1981). The absence of an explicit agreement adds nothing to the evidence on the issue of whether the lawyer-client relationship exists. *In re Weidner,* 310 Or 757, 768 n.7, 801 P2d 828 (1990).

3. Generally where an attorney-client relationship has been found to exist by the court, the factual circumstances have usually included an undisputed past relationship or the lawyer's admissions evidencing the relationship or both. *See, e.g., In re Bristow,* 301 Or 194, 201-02, 721 P2d 437 (1986); *In re Jans,* 295 Or 289, 666 P2d 830 (1983); *In re Robertson,* 290 Or 639, 624 P2d 603 (1981); *In re Galton,* 289 Or 565, 580-81, 615 P2d 317 (1980); *In re Hershberger,* 288 Or 559, 606 P2d 623 (1980).

4. In the absence of factual circumstances such as an undisputed past relationship or the lawyer's admissions evidencing the relationship or both, the court looks to whether:

   a. the services performed by the lawyer were of the kind traditionally done professionally by lawyers, i.e., legal work, and

   b. whether the putative client subjectively intended (or did not intend) that the relationship be created. *In re Weidner,* 310 Or 757, 768-69, 801 P2d 828 (1990); *see also In In re Mettler,* 305 Or 12, 20, 748 P2d 1010 (1988) (lawyer-client relationship did not exist where lawyer was employed by a state agency in a position that did not require that the employee be a lawyer, and despite outward appearances, as viewed by third parties, there was a lack of intent to form the relationship by either the lawyer or the state agency).

5. To establish that the lawyer-client relationship exists based on the client's reasonable expectation, a putative client's subjective, uncommunicated intention or expectation must be accompanied by one or more of the following:

   a. evidence of objective facts on which a reasonable person would rely as supporting existence of that intent;

   b. evidence placing the lawyer on notice that the putative client had that intent;

      i. evidence that the lawyer shared the client's subjective intention to form the relationship; *or*

      ii. evidence that the lawyer acted in a way that would induce a reasonable person in the client's position to rely on the lawyer's professional advice.

   The evidence must show that the lawyer understood or should have understood that the relationship existed, or acted as though the lawyer was providing professional

assistance or advice on behalf of the putative client. In re Weidner, 310 Or 757, 770, 801 P2d 828 (1990).

HYPOTHETICAL 10-1

Attorney received an unsolicited email from Husband asking if she could represent him in a contemplated divorce against his Wife. In the email, Husband disclosed that his Wife was an alcoholic, had mental health issues, and had abused two of their three minor children. Wife was another local attorney and Attorney felt uncomfortable representing Husband, so she replied by email and declined to represent him.

Earlier this month, Husband sent Attorney another unsolicited email saying he understood why she had previously declined to represent him and he had obtained other counsel. However, both he and Wife would now like Attorney to serve as the mediator in their divorce. He asked whether Attorney would be willing to serve in that capacity.

Question 1: Did Attorney form an attorney/client relationship with Husband?

A. Yes

B. No

Answer: _____

Question 2: Which of the following statements is correct and why?

A. Attorney must decline to serve as a mediator in this matter.

B. Attorney may accept the request to serve as a mediator.

Answer: _____

RPC 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

(1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and

(2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

(c) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

▸ *In re Van Thiel,* 24 DB Rptr 282 (2010)

➢ OSB Formal Opinion No 2005-167; 2005-101

RPC 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

HYPOTHETICAL 10-2

Attorney was asked by an insurance friend, "Friend," to represent Client concerning the administration of the estate of his brother, Decedent. Attorney agreed, and prepared and delivered a fee agreement to Friend to give to Client, which Friend returned signed a few days later.

Based on information provided by Friend, Attorney prepared and delivered to Friend a probate petition. After Friend returned the signed petition, Attorney filed it with the court ("Probate Case"), and Client was appointed as the personal representative of Decedent's estate.

Based on information from Friend, Attorney prepared and delivered to Friend an inventory of the estate property and certain waivers to be signed by the five heirs. Friend returned two signed waivers.

A few months later, based on information from Friend, Attorney prepared and delivered to Friend a statement in lieu of final account, which Attorney filed with the court after Friend obtained Client's signature. The court's order approving the verified statement awarded Attorney a $1,200

attorney fee and the remaining assets were divided equally among the five heirs.

Finally, based on information Friend provided, Attorney prepared and filed an order to close the estate, which the court signed, closing the Probate Case.

At no time during the representation did Attorney meet, speak to or otherwise communicate directly with Client. In fact, Attorney did not know whether Client actually existed.

Who was Attorney's client?

A. Friend.

B. Client.

C. Both Friend and Client.

D. Neither Friend nor Client.

Answer: _____

B. Duties to Prospective Clients

1. Oregon Evidence Code defines "client," for purposes of the lawyer-client privilege, to include, among others, a person "who consults a lawyer with a view to obtaining professional legal services from the lawyer." OEC 503(1)(a).

2. Oregon Rules of Professional Conduct also provide for specific duties to would-be clients, even in the absence of a formalized relationship.

RPC 1.18 DUTIES TO PROSPECTIVE CLIENT

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(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

✪ Sylvia Stevens, "Prospective Clients, Effective Use of RPC 1.18," *OSB Bulletin,* Feb./Mar. 2010: https://www.osbar.org/publications/bulletin/10febmar/barcounsel.html

3. When a person delivers "funds, securities or other properties" to a lawyer who is considering whether to represent that person, the person has entrusted those materials to the lawyer as a lawyer and, as such, is as much entitled to be considered a "client" for that limited purpose as if the person had made a confidential, verbal communication to the lawyer. *In re Spencer,* 335 Or 71, 84, 58 P3d 228 (2002).

4. There is the potential to trigger these duties through on-line questionnaires or email communications with members of the public. *See, e.g., Barton v. US District Court for the Central District of California,* 410 F3d 1104 (9th Cir 2005).

✪ Mark J. Fucile, "Avoiding Bad News: Risk Management in Law Firm Marketing," *OSB Bulletin,* Jan. 2009: https://www.osbar.org/publications/bulletin/09jan/practice.html.

C. Scope of Representation: How to Avoid Confusion About Services You Have Agreed to Provide

1. Look to the Oregon Rules of Professional Conduct:

RPC 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

▸ *In re Johnson,* 30 DB Rptr 300 (2016); *In re Hudson,* 27 DB Rptr 226 (2013); *In re Billman,* 27 DB Rptr 126 (2013); *In re Ingram,* 26 DB Rptr 65 (2012); *In re Bailey,* 25 DB Rptr 19 (2011); *In re Spencer,* 24 DB Rptr 209 (2010); *In re Sushida,* 24 DB Rptr 58 (2010); *In re Dames,* 23 DB Rptr 105 (2009); *In re Clarke,* 22 DB Rptr 320 (2008); *In re Groom,* 22 DB Rptr 124 (2008); *In re Banks,* 21 DB Rptr 193 (2007); *In re Cherry,* 20 DB Rptr 59 (2006); *In re Derby,* 19 DB Rptr 306 (2005); *In re O'Dell,* 19 DB Rptr 287 (2005); *In re DenHartigh,* 19 DB Rptr 159 (2005); *In re Davis,* 19 DB Rptr 116 (2005); *In re Ames,* 19 DB Rptr 66 (2005); *In re Schenck,* 18 DB Rptr 309 (2004); *In re Clark,* 17 DB Rptr 231 (2003); *In re Gorham,* 17 DB Rptr 159 (2003); *In re Hughes,* 17 DB Rptr 69 (2003)

➢ OSB Formal Opinion No 2011-187; 2007-178

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

▸ *In re Schwindt,* SC S060906, 28 (2013)

➢ OSB Formal Opinion No 2011-183

✪ Amber Hollister, "Unbundling Legal Services: Limiting the Scope of Representation," *OSB Bulletin,* July 2011: https://www.osbar.org/publications/bulletin/11jul/barcounsel.html

✪ Beverly Michaelis, "Unbundling in the 21st Century: How to Reduce Malpractice Exposure While Meeting Client Needs," *OSB Bulletin,* Aug./Sep. 2010: https://www.osbar.org/publications/bulletin/10augsep/practice.html

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

▸ *In re Daum,* 24 DB Rptr 199 (2010); *In re Rasmussen,* 21 DB Rptr 304 (2007)

➢ OSB Formal Opinion No 2005-92; OSB Formal Opinion No 2005-7

2. Utilize engagement letters to define both the client and the scope of the representation.

✪ Mark J. Fucile, "Starting Right: Using Engagement Letters as a Risk Management Tool," *OSB Bulletin,* July 2005: https://www.osbar.org/publications/bulletin/05jul/tips.html

3. Always use written fee agreements signed by the client.

The importance of a clear written fee agreement to avoid fee and other disputes with a client cannot be emphasized enough.

4. Consider also sending letters declining representation or the Write and Refuse (WAR) letter to ensure that the layperson understands that you do not represent them and to avoid the resulting battle of "he said/she said."

✪ Disengagement Letter—Declining Further Representation: https://www.osbplf.org/assets/forms/pdfs//Disengagement%20Letters.docx

D. Factors to Consider When Deciding Whether to Accept a Client Matter

✪ Sheila Blackford, "Recognizing Difficult Client Types," PLF In Brief, Issue 110, Sept 2011: https://www.osbplf.org/assets/in_briefs_issues/Recognizing%20Difficult%20Client%20Types%20IN%20BRIEF%209%202011.pdf

✪ Joan Feldman, "Tech Tips: Best Advice for Improving Client Intake: Is intake the new black?" Attorney at Work, https://www.attorneyatwork.com/tech-tips-best-advice-for-improving-client-intake/

1. What are the client's objectives?

a. Avoid representing clients for whom the matter is a personal vendetta or who view attorneys as "hired guns."

b. Determine whether the objectives of the representation are within the limits of the law. *See* RPC 1.2(c).

c. Determine whether the matter is within the limits otherwise imposed by a lawyer's professional obligations. See, e.g., RPC 3.1, RPC 8.4(a)(1).

RPC 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

▸ *In re Cyr,* SC S063187 (2015); *In re Roe,* 28 DB Rptr 87 (2014); *In re Anderson,* 27 DB Rptr 243 (2013); *In re Summer,* 27 DB Rptr 39 (2013); *In re Partington,* SC S060387, OSB Case Nos. 12-51 and 12-65 (2013); *In re Obert,* 352 Or 231, 282 P3d 825 (2012); *In re Marandas,* 351 Or 521, 270 P3d 231 (2012); *In re Smith,* 348 Or 535, 236 P3d 137 (2010); *Dimeo v. Gesik,* 197 Or App 560, 106 P3d 697 (2005); *In re Matthews,* 19 DB Rptr 193 (2005); *In re Leuenberger,* 337 Or 183, 93 P3d 786 (2004); *In re Andersen,* 18 DB Rptr 172 (2004); *In re Magar,* 335 Or 306, 66 P3d 1014 (2003)

➢ OSB Formal Opinion No 2005-59

RPC 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

▸ *In re Partington,* SC S060387 (2013); *In re Idiart,* 19 DB Rptr 316 (2005)

➢ OSB Formal Opinion No 2007-179; 2007-178; 2005-115; 2005-106; 2005-47; 2005-10; 2005-2

2. Does the client appear to be excessively needy or unstable or does he or she suffer from diminished capacity?

a. If the former, consider a nonengagement letter.

b. If the latter, there may be additional considerations for the lawyer if the individual is undertaken as a client under RPC 1.14.

RPC 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

➢ OSB Formal Opinion No 2005-159; 2005-41

3. Has the would-be client employed/discharged multiple prior attorneys on the same matter?

a. How many (more than one)?

b. What happened to dissolve those attorney-client relationships?

i. Does the client still owe those attorneys money?

ii. Do agreements with prior attorney(s) limit your potential fee?

iii. Consider contacting the Bar to determine whether the prospective client filed any complaints in connection with those prior representations.

4. What is the prospective client's realistic budget for the legal matter?

a. Does the client have a source for funding legal matter?

b. Is he or she willing to put down a retainer?

i. More likely to pay money at the outset than at the end when enthusiasm for the case has subsided (especially if do not prevail).

ii. Attorneys are not permitted to "fund" the representation. See RPC 1.8(e).

RPC 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

▸ *In re Noble (II),* 30 DB Rptr 264 (2016); *In re Noble (I),* 30 DB Rptr 116 (2016); *In re Spencer,* 355 Or 679, 330 P3d 538 (2014); *In re Seligson,* 27 DB Rptr 314

(2013); *In re Ghiorso,* 27 DB Rptr 110 (2013); *In re Hendrick,* 19 DB Rptr 170 (2005); *In re Carstens,* 17 DB Rptr 46 (2003)

➢ OSB Formal Opinion No 2005-4

c. How likely is it that the prospective client will have the ability to pay during or at the conclusion of the representation?

5. Will you be able to get along with the client?

a. Trust your instincts—will there be a personality clash?

b. Is the client an "expert" or a "hands-on" manager?

c. Does the prospective client insist on an incorrect version of the law?

d. Does the individual listen to you?

6. What are the prospective client's justifiable or reasonable expectations? Are they manageable? Are they achievable?

7. Who is the client?

a. An individual? Multiple individuals? A company?

i. Does this create a current-client conflict of interest? *See* RPC 1.7 (discussed in Section 15, below).

ii. Will there be confusion about who the attorney represents?

b. Does the prospective client have an interest adverse to a former client? *See* RPC 1.9(a) and (b); Section 18A, below.

8. What are your own expectations of the proposed representation?

a. Evaluate your skill, competency and experience.

RPC 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

▸ *In re Johnson,* 30 DB Rptr 300 (2016); *In re Brewster,* 30 DB Rptr 181 (2016); *In re Oliveros,* 30 DB Rptr 145 (2016); *In re Gifford,* 29 DB Rptr 299 (2015); *In re Sheridan,* 29 DB Rptr 179 (2015); *In re Jagger,* 357 Or 295, 348 P3d 1136 (2015); *In re McCarthy,* 354 Or 697, 318 P3d 747 (2014); *In re Hudson,* 27 DB Rptr 226 (2013); *In re May,* 27 DB Rptr 200 (2013); *In re Kleinsmith,* SC S061057, OSB Case No. 12-169 (2013); *In re Obert,* 352 Or 231, 282 P3d 825 (2012); *In re Fredrick,* 26 DB Rptr 129 (2012); *In re Soto,* 26 DB Rptr 81 (2012); *In re Richardson,* 350 Or 237, 253 P3d 1029 (2011); *In re Lopez,* 350 Or 192, 252 P3d 312 (2011); *In re O'Rourke,* 24 DB Rptr 227 (2010); *In re Daum,* 24 DB Rptr 199 (2010); *In re Hammond,* 24 DB Rptr 97 (2010); *In re Dixon,* 22 DB Rptr 241 (2008); *In re Later,* 22 DB Rptr 340 (2008); *In re DeBlasio,* 22 DB Rptr 133 (2008); *In re Hilborn,* 22 DB Rptr 102 (2008); *In re Wetsel,* 21 DB Rptr 129 (2007); *In re Black,* 21 DB Rptr 6 (2007); *In re Bettis,* 342 Or 232, 149 P3d 1194 (2006); *In re White,* 19 DB Rptr 343 (2005); *In re Hendrick,* 19 DB Rptr 170 (2005); *In re Trukositz,* 19 DB Rptr 78 (2005); *In re Breckon,* 18 DB Rptr 220 (2004)

b. Determine whether undertaking the representation would impose significant financial hardships on you or your law practice.

c. Evaluate your current workload and the anticipated time and effort that the contemplated representation will require. There is no "full plate" defense for failing to timely or competently complete a matter.

- *In re Kesner,* 21 DB Rptr 199 (2007)

- OSB Formal Opinion No 2007-178

d. Assess whether there are reliable office systems in place (including staff) to adequately manage the case.

HYPOTHETICAL 11-1

Client and Attorney met to discuss her contemplated divorce. Afterward, Client understood that Attorney would charge her $250/hour against a $10,000 retainer to complete her divorce. Attorney believed that while they discussed his $250 hourly rate, Client ultimately agreed to a nonrefundable "minimum fee" of $10,000. Attorney did not, however, prepare any document reflecting his understanding of the fee agreement. Client gave Attorney a $10,000 check, which he immediately deposited into his general account (not trust).

One month later, Client terminated the representation. By letter, she asked Attorney to discontinue work on her behalf and return her retainer less fees incurred. Attorney did not respond to Client's letter.

The next month, Client's new attorney reiterated Client's request for a refund of the unearned retainer. Attorney responded that because the $10,000 she had paid him was a "minimum fee," she was not entitled to any refund. Attorney offered to arbitrate the matter, but did not make any refund.

Was it appropriate for Attorney to retain *any or the entire* $10,000 fee?

A. No—None of it. He had not fully performed under the agreement (i.e., he had not completed the dissolution). Therefore, he was not entitled to any of the fee.

B. Yes—All of it. They at least orally agreed that the $10,000 fee would be earned upon receipt.

C. Yes—Some of it. It was appropriate for Attorney to keep some of the retainer, but not all of it, because he had not fully performed under the agreement.

D. No and yes. It was a flat fee, so it was *all or nothing.* Attorney was permitted to keep all of the fee or return all of the fee, but there was no means in the agreement for apportioning or allocating a portion of the fee to the services actually performed.

Answer: _____

A. First and Foremost—Fees Cannot Be Illegal or Excessive

1. Lawyers are prohibited by RPC 1.5(a) from charging or collecting illegal or excessive fees. By its terms, this rule prohibits charging inappropriate fees, even if they are never collected (or never intend to be).

> RPC 1.5 FEES
>
> (a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

2. Illegal fees are those which are prohibited by statute or require court or other regulatory approval. *See In re Altstatt,* 321 Or 324, 897 P2d 1164 (1995) (it is impermissible to

collect attorney fees from an estate in probate without prior court approval. Such a fee is unlawful and therefore "illegal").

▸ *In re Krueger,* 29 DB Rptr 273 (2015); *In re Vanagas,* 27 DB Rptr 255 (2013); *In re Lopez,* 350 Or 192, 252 P3d 312 (2011); *In re Hammond,* 24 DB Rptr 187 (2010) (reprimand); *In re Sunderland,* 23 DB Rptr 61 (2009); *In re Knappenberger,* 344 Or 559, 186 P3d 272 (2008); *In re Runnels,* 22 DB Rptr 254 (2008); *In re Odman,* 22 DB Rptr 34 (2008); *In re Nealy,* 20 DB Rptr 34 (2006); *In re Anderson,* 12 DB Rptr 136 (1998)

➢ OSB Formal Opinion No 2005-171

PRACTICE TIP: Lawyers should be cautious of the amount, source and form of money received from clients. The denomination may significant in light of federal money-laundering statutes. Federal law requires financial institutions to report cash transactions of more than $10,000 to the federal government. 31 USC §5313; 31 CFR §103.22(b)(1). In addition, 18 USC §1956(a)(1)(B) provides, in part: "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity knowing that the transaction is designed in whole or in part (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under state of federal law, shall be sentenced to a fine or imprisonment for not more than twenty years, or both. Additionally, 18 USC §1957 makes it a crime to: "knowingly engage . . . in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." *See In re Albrecht,* 333 Or 520, 526 (2002) (lawyer disbarred for engaging in money-laundering scheme with client).

3. Whether a fee is excessive is determined by a reasonableness standard, including the criteria set forth in RPC 1.5(b). However, this list is not exclusive. *See In re Potts/Trammel/Hannon,* 301 Or 57, 66, n 3, 718 P2d 1363 (1986).

> RPC 1.5 FEES
>
> (b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

▸ *In re Bosse,* 30 DB Rptr 311 (2016); *In re Einhorn,* 30 DB Rptr 283 (2016); *In re Simon,* 30 DB Rptr 214 (2016); *In re Fisher,* 30 DB Rptr 196 (2016); *In re Dowell,* 30 DB Rptr 168 (2016); *In re Smith,* 30 DB Rptr 134 (2016); *In re Meyer,* 29 DB Rptr 64 (2015); *In re Cottle,* 27 DB Rptr 22 (2013); *In re Mahr,* SC S041496, Case No. 13-52 (2013); *In re Obert,* 352 Or 231, 282 P3d 825 (2012); *In re Jordan,* 26 DB Rptr 191 (2012); *In re Morasch,* 26 DB Rptr 146 (2012); *In re Cain,* 26 DB Rptr 55 (2012); *In re Kinney,* 26 DB Rptr 59 (2012); *In re Isaak,* 23 DB Rptr 91 (2009); *In re Moore,* 21 DB Rptr 281 (2007); *In re Luetjen,* 18 DB Rptr 41 (2004); *In re Morin,* 319 Or 547, 878 P2d 393 (1994)

4. Fees can be both illegal and excessive.

▸ *In re Lopez,* 350 Or 192, 195, 252 P3d 312 (2011); *In re Paulson,* 346 Or 676, 216 P3d 859 (2009), *adhered to on recons.,* 347 Or 529 (2010); *In re Nishioka,* 23 DB Rptr 44 (2009); *In re Hammond,* 22 DB Rptr 168 (2008); *In re Morrison,* 14 DB Rptr 234 (2000)

5. Charging a client for activities that have no benefit to the client amounts to an excessive fee.

▸ *In re May,* 27 DB Rptr 200 (2013); *In re Kleinsmith,* SC S061057, Case No. 12-169 (2013); *In re Knappenberger,* 344 Or 559, 186 P3d 272 (2008); *In re Paulson,* 335 Or 436, 71 P3d 60 (2003); *In re Benett,* 331 Or 270, 14 P3d 66 (2000); *In re Potts/Trammel/Hannon,* 301 Or 57, 718 P2d 1363 (1986)

➢ OSB Formal Opinion No 2005-78

6. Expenses can also be deemed excessive.

a. General office overhead is included in a lawyer's fee and may not be billed separately.

▸ *In re Moore,* 21 DB Rptr 281 (2007)

b. Costs may be billed separately but cannot be used to generate a profit for the lawyer. *See, e.g.,* OSB Formal Opinion No 2005-125 (discussing when costs may be charged in connection with providing copies of a client's file).

Contract lawyer's services billed as a cost or expense may not exceed the actual costs of those services. However, if they are billed as legal services, the billing lawyer may add a surcharge for those, so long as the adjusted charges are still reasonable under RPC 1.5. ABA Formal Ethics Op. 00-420 (2000).

B. Fee Structure

1. Charging and collecting an excessive fee is a serious ethical violation. Lawyers should make sure to reach an early, clear understanding of fees with their clients. *In re Potts/Trammel/Hannon,* 301 Or 57, 74, 718 P2d 1363 (1986); *In re Wyllie,* 331 Or 606, 625, 19 P3d 338 (2001).

2. A lawyer may not charge or collect more than the agreed-on fee. OSB Formal Opinion Nos 2005-15, 2005-69, and 2005-96; *see also In re Yacob,* 318 Or 10, 860 P2d 811 (1993).

3. Hourly rate

a. There is no requirement that an hourly fee agreement be in writing. *In re Campbell,* 345 Or 670, 685, 202 P3d 871 (2009).

b. Hourly rates must be reasonable under the criteria listed in RPC 1.5(b) and should be based upon rates for attorneys in the area performing similar services. Fees should not be based upon a lawyer's "intuition" or reliance on the court to instruct if it believes that the fees are excessive in any particular case. *In re Potts/Trammel/Hannon,* 301 Or 57, 69, 718 P2d 1363 (1986).

c. Retainers are often utilized in conjunction with hourly-rate agreements. Remember: retainers are client funds until they are earned and must be properly treated as such. *See* Section 11, below.

d. Once an hourly rate is established, client approval must be obtained to increase that rate.

PRACTICE TIP: If a lawyer is charging by the hour, he or she should have a minimum retainer and the terms of the replenishment should be in the written agreement. The lawyer should then adhere to the replenishment schedule so that he or she does not spent a lot of time working on a case for which the lawyer is never paid. Billings need to be sent monthly along with a cover letter that identifies something substantive that is happening in the client's legal matter. In that way, the client gets some service/information with a bill. If the lawyer decides not to charge a client for something, the bill should reflect the work done, the time spent, and the fact that you are not charging the client for it.

▸ *In re Simon,* 30 DB Rptr 214 (2016); *In re Kinney,* 26 DB Rptr 59 (2012); *In re Nishioka,* 23 DB Rptr 44 (2009); *In re Unfred,* 22 DB Rptr 276 (2008); *In re Gudger,* 21 DB Rptr 160 (2007); *In re Campbell,* 17 DB Rptr 179 (2003)

4. Flat or fixed fee

a. Fixed fee agreements are permitted in Oregon, so long as they are not excessive or unreasonable. *In re Hedges,* 313 Or 618, 623-24, 836 P2d 119 (1992); *In re Biggs,* 318 Or 281, 293, 864 P2d 1310 (1994).

b. The mere fact that a fixed fee may result in a fee in excess of a reasonable hourly rate does not in itself make the fee unethical. *In re Gastineau,* 317 Or 545, 552, 857 P2d 136 (1993).

c. However, "[t]he disjunctive use of the word 'collect' means that the excessiveness of the fee may be determined after the services have been rendered, as well as at the time the employment began." *In re Gastineau,* 317 Or at 550–551; OSB Legal Ethics Op Nos 2005-15, 2005-69, 2005-97, 2005-151; *In re Sassor,* 299 Or 720, 705 P2d 736 (1985).

d. An initially reasonable flat fee becomes excessive when an attorney fails to perform or complete the professional representation for which the fee was paid and does not remit the unearned portion of the fee. *In re Gastinueau,* 317 Or 545, 857 P2d 136 (1993).

e. Regardless of the reason why an attorney fails to do the work, it is the lack of agreed effort that causes the violation. *In re Gastineau,* 317 Or 545, 857 P2d 136 (1993).

f. Once a flat-fee arrangement has been made, an attorney cannot attempt to justify retention of the fee based upon calculation of time spent on the matter at his or her hourly rate; this would deny the client the benefit of the flat-fee arrangement. *See In re Balocca,* 342 Or 279, 292, 151 P3d 154 (2007).

g. A lawyer may not charge more than the agreed-on fee, and any fee charged in excess of the agreed-on fee is excessive as a matter of law. It follows that unless either (a) the fixed fee agreement itself allows for changes over time or (b) the fixed fee agreement is permissibly modified pursuant to OSB Formal Opinion No 2005-97, the agreed-on fixed amount is all that the lawyer may collect. OSB Formal Opinion No 2005-151.

PRACTICE TIP: If a lawyer is charging a flat fee, the fee agreement should make it clear that no work will be done until the fee is paid in full. The lawyer should then stick to that requirement. Give the client a reasonable time in which to come up with the money, and if they cannot, refund the entire deposit (unless the fee agreement states that some of what the client deposited goes to pay for the initial meeting). With this financial relationship, the lawyer will not spend time working on a case for which he or she will never get paid.

▸ *In re Simon,* 30 DB Rptr 214 (2016); *In re Fisher,* 30 DB Rptr 196 (2016); *In re Dowell,* 30 DB Rptr 168 (2016); *In re Lopata,* 29 DB Rptr 170 (2015); *In re Meyer,* 29 DB Rptr 64 (2015); *In re Cottle,* 27 DB Rptr 22 (2013); *In re Obert,* 352 Or 231, 282 P3d 825 (2012); *In re Lounsbury,* 24 DB Rptr 53 (2010); *In re Balocca,* 342 Or 279, 151 P3d 154 (2007)

HYPOTHETICAL 11-2

Attorney was hired to represent Client in direct appeal of his most recent criminal convictions. Pursuant to a written fee agreement drafted by Client, Attorney agreed to represent Client on direct appeal for a flat fee.

Prior to the completion of the representation, Client offered to pay Attorney a bonus fee for each month that Client's sentence was reduced on appeal. Attorney accepted that offer.

Attorney was permitted to accept Client's bonus offer because:

A. Client was already a current client.

B. The request expanded the scope of the representation and therefore it was permissible to negotiate an additional fee.

C. It was Client's suggestion, rather than Attorney's request.

D. Attorney was willing to be subject to Bar discipline.

Answer: _____

5. Contingency

a. The mere fact that a contingent fee is charged does not make a fee unreasonable or excessive in violation of RPC 1.5. See RPC 1.5(b); OSB Formal Opinion No 2005-13.

b. Like other types of fees, contingent fees must be reasonable under the criteria listed in RPC 1.5(b).

c. The "clearly excessive" standard in RPC 1.5(a) and the "reasonable contingent fee" standard in RPC 1.8(i)(2) are the same. OSB Formal Opinion Nos 2005-54, 2005-97, 2005-124.

RPC 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

d. Apart from some statutory limitations on contingent fee arrangements in certain types of matters (e.g., ORS 20.340, placing certain limitations on personal injury or wrongful death contingency fee arrangements, and requiring them to be in writing), the amount and provisions of such agreements are up to the lawyer and client to determine under general principles of contract law. OSB Formal Opinion No 2005-97.

e. In addition to being subject to discipline, excessive fees, especially those based upon a contingent fee arrangement, may be subject to disgorgement. *See, e.g., Harrington v. Thomas,* 73 Or App 648 (1985) (Contingency agreement entered into between attorney and conservator for incompetent man was held to be excessive by the appellate court and a majority of the fees disgorged when the court found that the conservator had not been fully informed about the arrangement and may not have signed the document had she been so).

PRACTICE TIP: An attorney should keep contemporaneous time records, even where the representation is based upon a contingency arrangement. This aids the lawyer in determining whether the contingent fee structure is a fair and beneficial way of handling similar types of legal matters in the future and also allows for the recovery of fees on a quantum meruit basis if it should become necessary.

▸ *In re Angel,* 22 DB Rptr 351 (2008); *In re Kerrigan,* 271 Or 1, 530 P2d 26 (1975)

➢ OSB Formal Opinion No 2005-54; 2005-15

RPC 1.5 FEES

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement; or

(2) a contingent fee for representing a defendant in a criminal case.

▸ *In re Coran,* 24 DB Rptr 269 (2010)

f. An attorney may not accept a contingent fee in a proceeding which seeks a division of assets between an unmarried couple. OSB Formal Opinion No 2005-13.

g. An attorney may accept a contingent fee for representing a client in enforcing an order for spousal or child support that was previously obtained by other counsel. OSB Formal Opinion No 2005-13.

h. An attorney may not accept a contingent fee for representing a spouse in dissolution proceedings. OSB Formal Opinion No 2005-13.

▸ *In re Hill,* 261 Or 573, 495 P2d 261 (1972); *In re Pederson/Spencer,* 259 Or 429, 486 P2d 1283 (1971)

C. Refundable vs. Nonrefundable

1. There is no such thing as a truly nonrefundable fee.

2. A fee can be required to be refunded, in whole or in part, if the legal work for which it was paid is not fully performed. *In re Gastineau,* 317 Or 545, 857 P2d 136 (1993); OSB Formal Opinion No 2005-151.

3. RPC 1.5(c)(3) specifically provides the "magic words" that must appear in fee agreements to allow a lawyer to treat funds received from a client as his or her own in advance of work being performed.

RPC 1.5 FEES

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

▸ *In re Baldwin,* 30 DB Rptr 328 (2016); *In re Fowler,* 30 DB Rptr 190 (2016); *In re Bowman,* 30 DB Rptr 157 (2016); *In re Ferrua,* 30 DB Rptr 99 (2016); *In re Dickey,* 30 DB Rptr 19 (2016); *In re Bottoms,* 29 DB Rptr 210 (2015); *In re Bertoni,* 28 DB Rptr 196 (2014); *In re Eckrem,* 28 DB Rptr 77 (2014); *In re Coran,* 27 DB Rptr 170 (2013)

4. This rule merely codifies what the courts have consistently held.

a. Even if an attorney and client orally agree that a fee will be earned on receipt and not refundable, an oral agreement does not provide a sufficient basis for a lawyer to

treat a client's funds as if they were his or her own. *In re Fadeley,* 342 Or 403, 153 P3d 682 (2007)

b. A lawyer may be excused from depositing into a trust account money received from a client before services are performed if the client has agreed, in writing, that all legal fees paid are deemed earned by the lawyer upon receipt. *In re Hedges,* 313 Or 618, 623-24, 836 P2d 119 (1992).

c. Without a clear written agreement that fees paid in advance constitute a nonrefundable retainer earned upon receipt, such funds must be considered client property and are therefore afforded the protections imposed by RPC 1.15. *In re Biggs,* 318 Or 281, 293, 864 P2d 1310 (1994); *see also In re Balocca,* 342 Or 279, 287-88 (2007).

▸ *In re Sousa,* 323 Or 137, 914 P2d 408 (1996)

D. Fee Agreement

1. Written

a. Not a per se requirement, unless the lawyer wants to treat the client funds as earned upon receipt. *See* flat fee discussion, above (Section 10B4); OSB Formal Opinion No 2005-151.

PRACTICE TIP: All fee agreements should be in writing, and preferably a writing signed by the client. The agreement should set out the amount of fees, including whether the lawyer will charge for paralegal or secretarial time, the scope of the representation, the duties of the lawyer and the client with regard to the relationship, and what triggers the end of the relationship, either because the matter is completed or for other reasons, such as the nonpayment of fees.

b. Care should be taken in crafting written fee agreements. If a fee agreement is ambiguous, it must be construed against the attorney. OSB Formal Opinion No 2005-124.

c. Both the attorney and client should sign and date any fee agreement.

d. Lawyers cannot attempt to limit liability from malpractice in fee agreement. *See* RPC 1.8(h)(1) and (3).

e. Lawyers cannot limit liability from ethical violations in a fee agreement or any other agreement with the client. RPC 1.8(h)(4)

> RPC 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES
>
> (h) A lawyer shall not:
>
> (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;
>
> * * *
>
> (3) enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or

(4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.

2. Other than written fee agreements

a. As noted above, oral fee agreements are not per se unethical in most circumstances.

b. Where the law does not require that the agreement between the lawyer and client be in writing, the Bar bears the burden to prove that the lawyer charged the client fees that were not authorized by the terms of the agreement. *In re Campbell,* 345 Or 670, 685, 202 P3d 871 (2009).

c. However, in the absence of a written fee agreement, it is the lawyer's burden to establish the terms of the fee arrangement with the client. *See In re Balocca,* 342 Or 279, 289 151 P3d 154 (2007) (where an attorney seeks to rely on the existence of a fee agreement to justify his or her handling of client payments, it is the attorney's burden to demonstrate the existence of such an agreement).

▸ *In re Brown,* 23 DB Rptr 137 (2009)

3. Interest rates

a. Absent an express agreement between attorney and client, an attorney may not charge the client more than statutory 9% interest on past-due bills. OSB Formal Opinion No 2005-97.

b. If the client expressly agrees at the outset of the representation to a charge of 18% interest and it is otherwise lawful for the attorney to charge 18%, the attorney may do so. The attorney may not, however, simply rely on a statement at the bottom of a monthly billing to the fact that 18% interest will be charged thereafter on past-due sums. OSB Formal Opinion No 2005-97.

▸ *In re Campbell,* 345 Or 670, 202 P3d 871 (2009); *In re Schroeder,* 15 DB Rptr 212 (2001)

➢ OSB Formal Opinion No 2005-133

4. It is a good practice to enter into a new fee agreement whenever there is a new matter on which the lawyer has agreed to represent the client or anytime the representation expands beyond the scope of the initially contemplated representation (e.g., an appeal following representation in civil litigation or a criminal matter).

5. Ability to modify, alter, or renegotiate

✪ American Bar Association, Formal Opinion 11-458: Changing Fee Arrangements During Representation: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/11_458_nm_formal_opinion.authcheckdam.pdf

a. Under RPC 1.8(a), changing a fee agreement after the commencement of representation may be considered a business transaction with a client that requires specific consents and disclosures.

RPC 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

b. A modification of a fee agreement in the lawyer's favor requires client consent based on an explanation of the reason for the change and its effect on the client. OSB Formal Opinion No 2005- 97; *In re Skinner,* 14 DB Rptr 38 (2000).

c. Any modification to the fee agreement must be objectively fair. OSB Formal Opinion No 2005-97.

▸ *In re Campbell,* 345 Or 670, 202 P3d 871 (2009); *In re Gudger,* 10 DB Rptr 135 (1996)

E. Division of Fees

1. There is no prohibition against sharing fees with other lawyers so long as the client agrees and the fee otherwise comports with RPC 1.5(a). *See* RPC 1.5(d).

RPC 1.5 FEES

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

2. There is still valid case law indicating that fees must be divided "in proportion to the services performed and responsibility assumed." *See, e.g., In re Potts/Trammel/Hannon,* 301 Or 57, 72, 718 P2d 1363 (1986). However, that provision specifically stated in the former Code of Professional Responsibility did not get incorporated into the Oregon Rules of Professional Conduct. Accordingly, it appears that proportionality is no longer a requirement, so long as the total fee is reasonable, and the client consents.

HYPOTHETICAL 11-3

Wife and Husband, "Clients," retained Attorney to defend them in a civil lawsuit and pursue counterclaims on their behalf.

Two years into the representation, Attorney requested that the Clients pay him a substantial retainer so that he could try the case scheduled for the following month. Wife instead proposed a fixed fee arrangement, which Attorney sent to the Clients, and they signed soon after.

The agreement provided for the Clients to immediately pay Attorney a $30,000 fixed fee, which would comprise all or part of his compensation through trial. Any compensation over $30,000 was to be paid on a contingent basis—depending upon the outcome of the litigation. The written agreement did not discuss whether the $30,000 fixed fee was considered to be earned upon receipt or nonrefundable.

The Clients paid Attorney $30,000 in cash, which Attorney deposited into his general business account. Thereafter, the trial was postponed a number of times. Attorney performed significant work on the case, but he, Husband and Wife began to disagree on a number of issues and, prior to trial or completion of the case, the court granted Attorney's motion to withdraw. Attorney refused to refund to the Clients any portion of the $30,000 fee.

Was it appropriate for Attorney to retain any or all of $30,000 fee?

A. No—None of it. He had not fully performed under the agreement by taking the case to trial. Therefore, he was not entitled to any of the fee.

B. Yes—All of it. At his hourly rate, Attorney had more than earned the entire $30,000 fee and therefore was entitled to keep it all.

C. Yes—Some of it. It was appropriate for Attorney to keep some of the retainer, but not all of it, because he had not fully performed under the agreement.

D. No and yes. It was a flat fee, so it was *all or nothing.* Attorney was permitted to keep all of the fee or return all of the fee, but there was no means in the agreement for apportioning or allocating a portion of the fee to the services performed.

Answer: _____

HYPOTHETICAL 11-4

Client hired Attorney to represent him in a dissolution proceeding pursuant to a written fee agreement for $150/hour. Client gave Attorney a $1,500 retainer, which Attorney properly deposited into trust.

Over the following two months, Atta spent 7.95 hours working on Client's matter, earning $1,192.50 at his hourly rate. Nevertheless, during this period, Attorney negligently withdrew $1,305 from trust. Attorney ultimately spent enough time on the matter to justify all of the funds he took.

Attorney later used computer software to implement an increase in his general rate. Due to an oversight, his rate was increased to $200/hour for all entries after the stated increase date, including on Client's account. Prior to any notification from Attorney, an invoice was sent to Client that charged him for several hours of time at $200/hour. Client did not pay the increased rate, but instead paid Attorney the balance reflected on the prior invoice.

Which of the following is *not true* about Attorney's conduct?

A. He violated the excessive fee rule even though his billing was in done in error and his client did not pay it.

B. He knowingly converted client funds.

C. He failed to maintain client funds in trust, notwithstanding that he ultimately earned all of the funds he withdrew.

D. He violated the rules regarding the handling of client property even though the additional amount withdrawn was de minimis and eventually earned.

Answer: _____

PRACTICE TIP: Focus on making the financial relationship clear from the beginning so that it does not become a sticking point or bone of contention later. The lawyer can then spend time working with the client instead of doing work that for which the client will not pay.

HYPOTHETICAL 11-5

Girlfriend referred her boyfriend, Client, to Attorney for a bankruptcy consultation. After reviewing Client's finances with him during their meeting, Attorney agreed to prepare and file a bankruptcy petition for a flat fee of $550. Attorney believed that he told Client that the fee was earned upon receipt, however, he was unable to locate a fee agreement signed by Client.

Client paid a total of $300 over a few months, but did not pay the balance. Attorney did not deposit the $300 into his lawyer trust account. Attorney and Client never met again. Attorney did not prepare a bankruptcy petition for Client, but "closed" Client's file several months later, without notice to Client and without refunding any of the money Client had paid.

After the birth of her and Client's child, Girlfriend asked Attorney to defend her in the paternity action filed by Client. Attorney reviewed his files and determined that he had not received confidences from Client regarding Girlfriend's affair, her pregnancy, or the child, so he filed Girlfriend's answer without seeking written consent from Client or Girlfriend.

Client's counsel asserted a conflict of interest due to Attorney's former representation of Client, and requested that Attorney refund the $300 that Client had paid him, since Attorney had not performed any services. Attorney replied that there was "no attorney-client relationship" with

Client, but that the money Client had paid him was "earned when received and not refundable."

Attorney's statements to Client's counsel:

A. Were correct.

B. Were correct with respect to the conflict, but not the fees.

C. Were correct with respect to the fees, but not the conflict.

D. Were incorrect.

Answer: _____

✪ Scott Morrill, "Disbursing Disputed Funds: Understanding RPC 1.15-1(d)(e)," *OSB Bulletin,* Jan. 2011: https://www.osbar.org/publications/bulletin/11jan/barcounsel.html

✪ Helen Hierschbiel, "The Transformation: When Fee Disputes Become Ethical Misconduct," *OSB Bulletin,* Dec. 2008: https://www.osbar.org/publications/bulletin/08dec/barcounsel.html

Section 12—Protecting Client Property

A. Identifying and Safeguarding Property of Others

1. Rule 1.15 imposes obligations on lawyers for safekeeping, accounting and delivery of property or money not belonging to the lawyer, but which finds its way into the lawyer's possession. See RPC 1.15-1. Such property may include:

a. Client funds paid in advance or otherwise not owing to the attorney at the time of receipt

b. Third-party funds provided to the attorney to be held in escrow

c. Settlement funds paid to or owed by a client

d. Original documents given to the lawyer by clients or others on behalf of clients

e. Wills and other estate planning documents prepared by or given to the lawyer for safekeeping

f. Client files

2. A lawyer should hold property of others with the care required of a professional fiduciary. ABA Model Rules, Rule 1.15, Comment [1]

RPC 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

* * *

PRACTICE TIP: RPC 1.15-1(a) requires a lawyer to keep and preserve complete records of client funds for five years after the termination of the representation—a bank statement or electronic transaction record does not suffice; nor is it enough to request records from the bank when questioned by the client or the Bar. The rule requires actual possession of complete records. Be sure that your records are up to date and kept current.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with Rule 1.5(c)(3).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except

as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

PRACTICE TIP: Do not rely entirely on electronic banking to track and manage trust account funds. In addition to being insufficient to meet obligations for recordkeeping, electronic tracking often results in lazy practices and bad records. Attorneys must:

- Keep individual client ledgers
- Identify withdrawals to particular clients
- Identify deposits to particular clients
- Have simultaneous records regarding all transactions in and out of trust.

3. In addition to current and former clients, the plain language of the rule applies to property of prospective clients and third parties.

4. The language of the rule is mandatory and may not be waived by a client. An attorney therefore cannot place a client's funds in anything other than an interest-bearing account or in any type of institution not described in this section. OSB Formal Opinion No 2005-117.

✪ Sylvia Stevens, "Trust Accounts and the FDIC—Protecting Client Funds in Uncertain Times," *OSB Bulletin,* Oct. 2008: https://www.osbar.org/publications/bulletin/08oct/barcounsel.html

✪ Sylvia Stevens, "Trust Account Lessons—Cautionary Notes," *OSB Bulletin,* July 2008: https://www.osbar.org/publications/bulletin/08jul/barcounsel.html

5. Identifying client funds

a. In general, all funds provided to a lawyer that are not earned funds remain client funds (unless otherwise specified in a written fee agreement).

▸ *In re Cauble,* 27 DB Rptr 288 (2013); *In re Ireland,* 26 DB Rptr 47 (2012)

b. A fixed fee paid in advance remains the property of the client until earned and must be deposited into the attorney's trust account unless the fee agreement indicates that the prepaid fee is earned and becomes the property of the attorney upon receipt. Funds held in trust may subsequently be transferred only after completion of the agreed-on services, unless otherwise specifically provided for. *See In re Fadeley,* 342 Or 403, 153 P3d 682 (2007); *In re Balocca,* 342 Or 279, 151 P3d 154 (2007); OSB Formal Opinion No 2005-151.

▸ *In re Cottle,* 27 DB Rptr 22 (2013)

c. Money paid to an attorney by opposing counsel, rather than the client, may still be considered client funds, and therefore subject to the protections of RPC 1.15.

▸ *In re McIlhenny,* 18 DB Rptr 82 (2004)

6. Failure to safeguard client funds by depositing them into and/or maintaining them in trust violates the rule.

▸ *In re Einhorn,* 30 DB Rptr 283 (2016); *In re Noble (II),* 30 DB Rptr 264 (2016); *In re Kmetic,* 30 DB Rptr 250 (2016); *In re Hellewell,* 30 DB Rptr 204 (2016); *In re Fowler,* 30 DB Rptr 190 (2016); *In re Noble (I),* 30 DB Rptr 116 (2016); *In re Ferrua,* 30 DB Rptr 99 (2016); *In re Landers,* 30 DB Rptr 89 (2016); *In re Dickey,* 30 DB Rptr 19 (2016); *In re Sumner,* 29 DB Rptr 346 (2015); *In re Kolstoe,* 29 DB Rptr 128 (2015); *In re Obert,* 352 Or 231, 282 P3d 825 (2012); *In re Bertoni,* 26 DB Rptr 25 (2012); *In re Eckrem,* 23 DB Rptr 84 (2009); *In re Oh,* 23 DB Rptr 25 (2009); *In re Skagen,* 342 Or 183, 149 P3d 1171 (2006); *In re Koessler,* 20 DB Rptr 246 (2006); *In re Rose,* 20 DB Rptr 237 (2006); *In re Scott,* 20 DB Rptr 3 (2006); *In re Carreon,* 19 DB Rptr 297 (2005); *In re Joiner,* 18 DB Rptr 314 (2004); *In re Koessler,* 18 DB Rptr 105 (2004); *In re Hendershott,* 17 DB Rptr 13 (2003)

➢ OSB Formal Opinion No 2005-172; 2005-149; 2005-135; 2005-117; 2005-68; 2005-52; 2005-48

7. With the exception of money to cover bank service charges, funds that do not qualify as client (or third-party) funds cannot be deposited into trust. RPC 1.15-1(b).

RPC 1.15-1 SAFEKEEPING PROPERTY

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purposes of paying bank service charges or meeting minimum balance requirements on that account, but only in amounts necessary for those purposes.

This prohibits a lawyer from placing his own funds in trust regardless of the source. Some examples of funds that cannot be deposited into trust include:

a. Proceeds from the sale of a lawyer's own real or personal property.

b. A lawyer's personal funds to be hidden from creditors. *See In re Howard,* 304 Or 193, 743 P2d 719 (1987).

c. Funds received from a client pursuant to a flat-fee agreement that complies with RPC 1.5(c)(3).

▸ *In re Cottle,* 29 DB Rptr 79 (2015); *In re Bertoni,* 26 DB Rptr 25 (2012); *In re Lafky,* 25 DB Rptr 134 (2011); *In re Levie,* 22 DB Rptr 66 (2008); *In re Lancefield,* 19 DB Rptr 247 (2005); *In re Andersen,* 19 DB Rptr 227 (2005); *In re McMurry,* 14 DB Rptr 193 (2000); *In re Bassett,* 12 DB Rptr 14 (1998)

RPC 1.5 FEES

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

B. Accounting for Property in a Lawyer's Possession

1. When requested by a client or third person for whom the attorney is holding property, the lawyer is required to promptly render an accounting of pertinent funds currently or previously in the lawyer's possession. RPC 1.15-1(d).

RPC 1.15-1 SAFEKEEPING PROPERTY

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

▸ *In re Hubbard,* 30 DB Rptr 378 (2016); *In re LeClaire,* 30 DB Rptr 338 (2016); *In re Bosse,* 30 DB Rptr 311 (2016); *In re Einhorn,* 30 DB Rptr 283 (2016); *In re Ettinger,* 30 DB Rptr 173 (2016); *In re Burt,* 30 DB Rptr 139 (2016); *In re Ferrua,* 30 DB Rptr 99 (2016); *In re Landers,* 30 DB Rptr 89 (2016); *In re Merrill,* 29 DB Rptr 306 (2015); *In re Krueger,* 29 DB Rptr 273 (2015); *In re Houston,* 29 DB Rptr 238 (2015); *In re Simms,* 29 DB Rptr 133 (2015); *In re Throne,* 29 DB Rptr 104 (2015); *In re Beach,* 29 DB Rptr 92 (2015); *In re Sheasby,* 29 DB Rptr 41 (2015); *In re Bertoni,* 28 DB Rptr 196 (2014); *In re Kaufman,* 28 DB Rptr 174 (2014); *In re Zackheim,* 28 DB Rptr 9 (2014); *In re Coran,* 27 DB Rptr 170 (2013); *In re Fjelstad,* 27 DB Rptr 68 (2013); *In re Smith,* 27 DB Rptr 32 (2013); *In re Cottle,* 27 DB Rptr 22 (2013); *In re Cullen,* 26 DB Rptr 173 (2012); *In re Snyder,* 348 Or 307, 232 P3d 952 (2010); *In re Dixon,* 24 DB Rptr 1 (2010); *In re Eckrem,* 23 DB Rptr 84 (2009)

2. The obligation to render an accounting of property to a client under the Rules of Professional Conduct is conditioned on a client's request for such an accounting. In re Koch, 345 Or 444, 198 P3d 910 (2008).

NOTE: The duty under RPC 1.15-1(d) differs from the prior disciplinary rule, which did not require a client request. *See In re Skagen,* 342 Or 183, 149 P3d 1171 (2006).

3. An oral accounting is insufficient to comply with the requirements of this rule. *In re Coyner,* 342 Or 104, 149 P3d 1118 (2006).

4. The "promptness" requirement under the rule is a reasonableness standard. Accordingly, while an instantaneous response is not necessary, something less than several months is generally required. *See, e.g., In re Hedges,* 313 Or 618, 624, 836 P2d 119 (1992) (attorney took 14 months to account for and return unearned funds); *In re Chandler,* 303 Or 290, 295, 735 P2d 1220 (1987) (lawyer disciplined when took just over 11 months to account for client funds and make a refund).

▸ *In re Coran,* 27 DB Rptr 170 (2013); *In re Fjelstad,* 27 DB Rptr 68 (2013); *In re Lopez,* 350 Or 192, 252 P3d 312 (2011); *In re Colvin,* 21 DB Rptr 250 (2007); *In re Skagen,* 342 Or 183, 149 P3d

1171 (2006); *In re Koessler,* 20 DB Rptr 246 (2006); *In re Scott,* 20 DB Rptr 3 (2006); *In re Wilson,* 18 DB Rtpr 285 (2004)

C. Handling Trust Accounts

1. RPC 1.15-1(a) requires lawyers to ensure that any client funds be deposited and maintained in a trust account that bears interest and that is specifically identified by use of the phrase "Lawyer Trust Account." In re Skagen, 342 Or 183, 209, 149 P3d 1171 (2006).

RPC 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

a. Cannot be labeled "Client Trust Account" or some other variation.

b. Must also be in the jurisdiction where the lawyer's office is situated. This may create additional considerations for lawyers practicing in jurisdictions that border Oregon.

2. IOLTA designation

a. A "pooled" trust account (IOLTA) should be used for funds received by a lawyer for a client or third person when the funds are either:

i. relatively small in amount such that the amount of interest they would receive would be de minimis, *or*

ii. the lawyer does not expect to have possession of the funds for a sufficient duration for the funds to be able to generate substantial interest.

RPC 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.

3. A lawyer trust account should not be used as a personal checking account, nor should the lawyer's own funds be commingled with those in trust. *See, e.g., In re Benjamin,* 312 Or 515, 923 P2d 413 (1991); *In re Howard,* 304 Or 193, 743 P2d 719 (1987).

▸ *In re Levie,* 342 Or 462, 154 P3d 113 (2007); *In re Colvin,* 21 DB Rptr 250 (2007); *In re Lancefield,* 19 DB Rptr 247 (2005); *In re Andersen,* 19 DB Rptr 227 (2005); *In re Goyak,* 19 DB Rptr 179 (2005)

PRACTICE TIP: Do not rely entirely on electronic banking to track and manage trust account funds. In addition to being insufficient to meet obligations for recordkeeping, electronic tracking often results in lazy practices and bad records.

Attorneys must:

- Keep individual client ledgers
- Identify withdrawals to particular clients
- Identify deposits to particular clients
- Have simultaneous records regarding all transactions in and out of trust.

4. Both banks and lawyers are required to notify the Bar of any overdrafts on any lawyer trust account. RPC 1.15-2(i) and (l).

> RPC 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION
>
> (i) Overdraft notification agreements with financial institutions shall require that the following information be provided in writing to Disciplinary Counsel within ten banking days of the date the item was returned unpaid:
>
> (1) the identity of the financial institution;
>
> (2) the identity of the lawyer or law firm;
>
> (3) the account number; and
>
> (4) either
>
> (i) the amount of the overdraft and the date it was created; or
>
> (ii) the amount of the returned instrument and the date it was returned.
>
> (l) Every lawyer who receives notification from a financial institution that any instrument presented against his or her lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing of the same information required by paragraph (i). The lawyer shall include a full explanation of the cause of the overdraft.

▸ *In re Soto,* 26 DB Rptr 81 (2012); *In re Colvin,* 21 DB Rptr 250 (2007)

5. Lawyers are also required to file annual compliance forms regarding the maintenance of any IOLTA accounts. RPC 1.15-2(m).

NOTE: Failure to timely do so may result in an administrative suspension.

RPC 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

(m) Every lawyer shall certify annually on a form and by a due date prescribed by the Oregon State Bar that the lawyer is in compliance with Rule 1.15-1 and this rule. Between annual certifications, a lawyer establishing an IOLTA account shall so advise the Oregon Law Foundation in writing within 30 days of establishing the account, on a form approved by the Oregon Law Foundation.

Regardless of the existence of a trust account, the amount it is used or the condition of the account (e.g., zero balance), a lawyer can be suspended for failing to comply with this reporting requirement.

▸ *In re Nielson,* 25 DB Rptr 196 (2011); *In re Klosterman,* 23 DB Rptr 204 (2009); *In re Barteld,* 23 DB Rptr 198 (2009)

D. Duties Regarding Return of Client Property

1. Lawyers are required to promptly return or deliver property in their possession to those entitled to it. RPC 1.15-1(d).

RPC 1.15-1 SAFEKEEPING PROPERTY

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

2. Any time an attorney withholds from a client money to which the attorney is not entitled, the integrity of the whole profession is at stake. In re Hedrick, 301 Or 750, 760, 725 P2d 343 (1986).

▸ *In re Hubbard,* 30 DB Rptr 378 (2016); *In re LeClaire,* 30 DB Rptr 338 (2016); *In re Bosse,* 30 DB Rptr 311 (2016); *In re Einhorn,* 30 DB Rptr 283 (2016); *In re Ettinger,* 30 DB Rptr 173 (2016); *In re Burt,* 30 DB Rptr 139 (2016); *In re Ferrua,* 30 DB Rptr 99 (2016); *In re Landers,* 30 DB Rptr 89 (2016); *In re Merrill,* 29 DB Rptr 306 (2015); *In re Krueger,* 29 DB Rptr 273 (2015); *In re Houston,* 29 DB Rptr 238 (2015); *In re Simms,* 29 DB Rptr 133 (2015); *In re Throne,* 29 DB Rptr 104 (2015); *In re Beach,* 29 DB Rptr 92 (2015); *In re Sheasby,* 29 DB Rptr 41 (2015); *In re Bertoni,* 28 DB Rptr 196 (2014); *In re Kaufman,* 28 DB Rptr 174 (2014); *In re Zackheim,* 28 DB Rptr 9 (2014); *In re Coran,* 27 DB Rptr 170 (2013); *In re Fjelstad,* 27 DB Rptr 68 (2013); *In re Cottle,* 27 DB Rptr 22 (2013); *In re Obert,* 352 Or 231, 282 P3d 825 (2012); *In re Soto,* 26 DB Rptr 81 (2012); *In re Cullen,* 26 DB Rptr 173 (2012); *In re Lopez,* 350 Or 192, 252 P3d 312 (2011); *In re Snyder,* 348 Or 307, 232 P3d 952 (2010); *In re Hendrick,* 24 DB Rptr 138 (2010); *In re Dixon,* 24 DB Rptr 1 (2010); *In re Eckrem,* 23 DB Rptr 84 (2009); *In re Okai,* 23 DB Rptr 73 (2009); *In re Watson,* 22 DB Rptr 160 (2008); *In re DeBlasio,* 22 DB Rptr 133 (2008)

3. However, if the attorney is aware of a dispute over who is entitled to the property, the attorney is required to maintain and segregate the property until the dispute is resolved. RPC 1.15-1(e).

RPC 1.15-1 SAFEKEEPING PROPERTY

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

a. If the client has no colorable argument as to why the attorney should not do so, an attorney who represents a plaintiff in personal injury litigation and who receives funds in settlement of the litigation may properly pay those funds to the plaintiff's creditors if the attorney is statutorily obligated to make such payments (e.g., to a PIP carrier); the attorney has, with the plaintiff's consent, agreed to make such payments; or the creditor has a valid security interest in the settlement proceeds. If the plaintiff has or may have a colorable argument but it is not clear that the plaintiff is entitled to such funds, the attorney may either retain the funds in the attorney's trust account or interplead them in an action to which the plaintiff and any other claimants would be parties. OSB Formal Opinion No 2005-52.

▸ *In re Pierson,* SC S061044, Case No. 13-01 (2013); *In re Petersen,* 26 DB Rptr 186 (2012)

b. The rule does not require that a lawyer replenish disputed funds taken from trust, if the lawyer was unaware of any dispute regarding the funds at the time the funds were removed from trust. OSB Formal Opinion No 2005-149.

4. Special considerations regarding the duty to provide client files or other original documents.

a. As a general proposition, an attorney must provide a former client with the original or copies of everything in the attorney's files that may reasonably be of benefit to the former client. OSB Formal Opinion No 2017-192.

b. With limited exceptions for documents that are intrinsically significant or are valuable original paper documents, such as securities, negotiable instruments, deeds and wills, there is no ethical prohibition against maintaining the client file solely in electronic or paperless form. OSB Formal Opinion No 2016-191.

c. The question of who pays for any photocopy charges for client files or any charges for locating and segregating materials depends, inter alia, on the nature of the documents, the terms of the fee agreement between attorney and client, and the extent to which the attorney had previously provided copies of documents to the client. The charges may not, in any event, be clearly excessive or unreasonable. OSB Formal Opinion No 2017-192.

d. However, if the attorney has a valid lien on any client papers and property at the time requested by the client, the attorney may seek to enforce that lien. OSB Formal Opinion No 2005-90.

CAVEAT: If the client does not have the sufficient resources to pay the attorney in full and if surrender of any property is necessary in order to avoid foreseeable prejudice to the client, the attorney's lien must yield to the fiduciary duties that the attorney owes to

the client upon the payment of whatever amount the client can afford to pay. OSB Formal Opinion No 2005-90.

▸ *In re Gregory,* 19 DB Rptr 150 (2005); *In re Seto,* 18 DB Rptr 134 (2004); *In re Koessler,* 18 DB Rptr 105 (2004)

➢ OSB Formal Opinion No 2005-70; 2005-60; 2005-43

HYPOTHETICAL 12-1

NOTE: Based on a hypothetical by Professor Michael Virzi, University of SC School of Law.

On Monday afternoon, Client walks into your office. He visited your office the previous Friday and gave you a $5,000 cash retainer to represent him in his divorce. You deposited the cash into your IOLTA account on Friday afternoon where other client funds were already on deposit.

Now Client says he has reconciled with his wife and wants his retainer back. Knowing that he paid you in cash, you write him a $5,000 check from your IOLTA account. Fifteen minutes later, you receive a call from your banker across the street informing you that the cash you deposited on Friday was counterfeit and that the $5,000 provisional credit to your IOLTA account has been revoked. You ask your banker to stop payment on the check you just wrote, but Client has already cashed it.

What rules have you violated? What must you do next?

A. RPC 1.15-1(a) and (c)—you drew on client funds. You need to replenish your trust account for the misappropriated funds.

B. RPC 8.4(a)(3)—you converted client funds. You must self-report to the Bar and pay back the funds.

C. You violated no rules. You don't need to take any action because this wasn't your fault—you were the victim of fraud.

D. RPC 1.2(c) and RPC 8.4(a)(2)—you participated in a criminal act with a client. You need to turn yourself into law enforcement and the Bar.

Answer: _____

PRACTICE TIP: Just because the bank or the bank's computer tells you that funds from a deposit are available does not mean you can write checks on those funds. According to the UCC, there is a difference between "available" funds and "collected" funds. Before you can write a check on a deposit, the funds from the deposit must have been collected by your bank, i.e., the money is actually in the account, not merely available. So long as the funds are only "available"—as opposed to "collected"—a deposit can be dishonored and reversed by your bank.

PRACTICE TIP: Instruct your bank to dishonor any NSF check, even if this could prove embarrassing. This instruction will prevent one client's funds from being improperly withdrawn to cover another client's obligations.

See also In re Martin, 328 Or 177, 189, 970 P2d 638 (1998) (attorney placed money in drawer, believing he would later earn it).

HYPOTHETICAL 12-2

Attorney, who was previously employed in a large law firm since graduating from law school, decides to open his own practice. He takes with him his very experienced legal assistant, who is familiar with the bookkeeping and billing programs Attorney intends to use. Attorney is not, however, completely familiar with these programs and has never managed a lawyer trust account.

As he has done in the past, Attorney entrusts the bookkeeping and management of his lawyer trust account to his legal assistant. She determines how much money can be taken out of trust as earned fees, writes the trust checks for costs (lawyer signs all checks), and enters the trust account transactions into the bookkeeping system. The legal assistant is also charged with reconciling the trust account.

For years, the legal assistant overlooks to subtract the checks for costs from the clients' funds in trust. She does not keep individual client ledger cards or know how to obtain a client's trust balance from the bookkeeping program, and when the bookkeeping program shows a different month-end balance in the account from that in the bank statement, she merely adjusts the figure in the bookkeeping program, so it appears to equal the balance in the bank statement.

Which of the following is/are correct?

A. Practice of Attorney's assistant of not recording costs paid out of trust will, eventually, result in payment from trust for clients who did not actually have that amount in the account, resulting in funds belonging to other clients being withdrawn by Attorney before he had earned the money belonging to those clients.

B. Same as answer A and Attorney should be disbarred for conversion of client funds.

C. Attorney acted properly in setting up his lawyer trust account, but he made no effort over a period of years to see if his assistant was properly managing the account and will be subject to discipline.

D. Attorney acted properly in delegating responsibility for the bookkeeping and billing duties as his assistant was experienced in these matters and could ask him if she had any questions about carrying out these responsibilities.

Answer: _____

➢ OSB Formal Opinion No 2005-149

▸ *In re Colvin,* 21 DB Rptr 250 (2007)

THE OREGON CONSUMER PRIVACY ACT (OCPA):

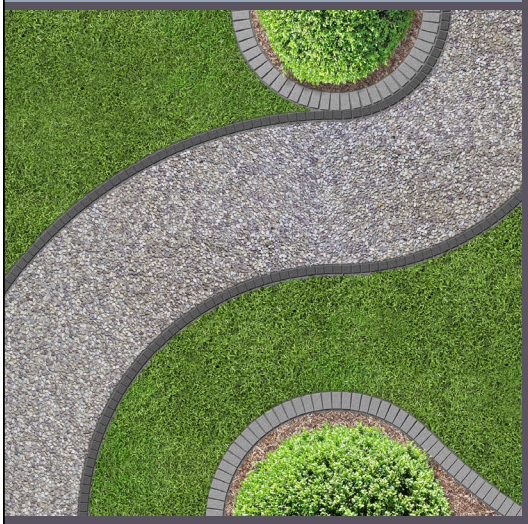
UNDERSTANDING PRIVACY IN THE NONPROFIT SECTOR

Eva Novick, Miller Nash LLP, Portland, OR

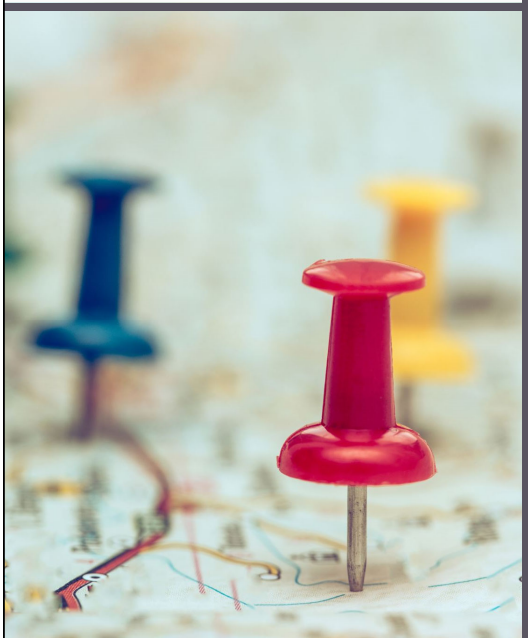
Grady Goodall, Oregon State University Foundation, Corvallis, OR

Summary of this Session

- Overview of the changing privacy landscape for nonprofits.
- Summary of the OCPA, new consumer privacy rights, and responsibilities of covered organizations.
- Best practices and tips for nonprofits to comply with laws and meet constituents' expectations.



THE CHANGING PRIVACY LANDSCAPE FOR OREGON NONPROFITS



A Patchwork of State Laws

- The Oregon Consumer Privacy Act becomes effective July 1, 2025 for NPOs.
- According to the IAPP, 19 states have passed comprehensive privacy bills and 17 others are considering legislation.

https://iapp.org/resources/article/us-state-privacy-legislation-tracker/

- 12 states have exempted nonprofits. Oregon, Colorado, Maryland, Delaware, and New Jersey have not.

https://independentsector.org/blog/fashionable-legislation-how-states-are-taking-charge-of-data-privacy-and-what-it-means-for-nonprofits/

"The General Data Protection Regulation (GDPR) is the toughest privacy and security law in the world."
https://gdpr.eu/what-is-gdpr/

- Effective as of May 25, 2018.
- "Opt-in" law requires active consent.
- Resulted in substantial reduction in data for many nonprofits.

General Data Protection Regulation (GDPR)

The American Privacy Rights Act "eliminates the patchwork of state laws by setting one national privacy standard, stronger than any state."

https://www.commerce.senate.gov/2024/4/committee-chairs-cantwell-mcmorris-rodgers-unveil-historic-draft-comprehensive-data-privacy-legislation

Exempted "small businesses" that process less than 200,000 individuals and $40m of revenue.

https://independentsector.org/wp-content/uploads/2024/04/The-American-Privacy-Rights-Act-APRA-Summary-and-Issues-for-Nonprofits.pdf

06/25/2024 Referred to the House Committee on Energy and Commerce.

Federal Bills?

TAKEAWAY:

Oregon nonprofits need to embrace best practices in privacy.

THE OREGON CONSUMER PRIVACY ACT: THE BASICS

(ORS 646A.570 TO 646A.589)

Consumer Rights

- Right to Know (Access)
- Right to Correction
- Right to Deletion
- Right to Opt Out
- Right to Data Portability



Applicability

- **Conduct business in Oregon or provide products or services to an Oregon resident and, during a calendar year, control or process:**
  - ***The personal data of 100,000+ Oregonians (other than personal data processed solely for completing a payment transaction)***

    or
  - ***The personal data of 25,000+ Oregonians AND derive 25% of annual gross revenue from selling personal data.***

CONTROLLER AND PROCESSOR OBLIGATIONS



- Consent
- Data minimization
- Reasonable administrative, technical, and physical data security
- Protect deidentified data
- Statutory requirements for contract between controller and processor



Key Distinctions from Other Comprehensive State Privacy Laws

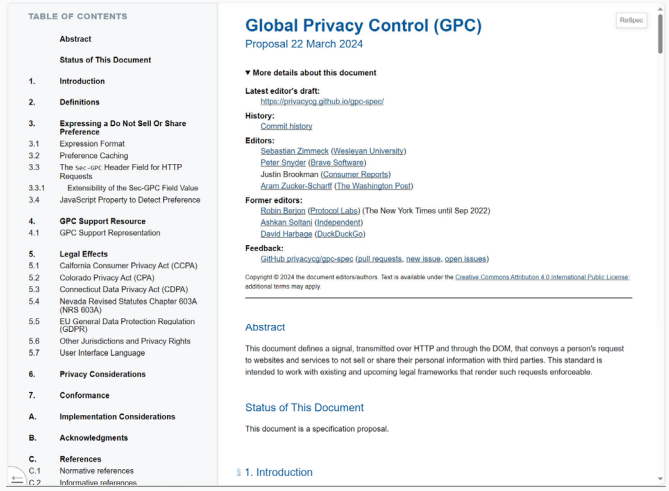
- "Personal data" includes data linked to household devices
- Expands categories of "sensitive data" that require opt-in consent
- Right to know specific third parties to which personal data has been disclosed
- Heightened protections for youth (13-15)
- Limits entity-level exemptions
- Similar to some: "sale" is the exchange of personal data for monetary or other valuable consideration

Universal Opt-Out Mechanism

- No specific option mandated by Oregon law.
- California and Colorado require the Global Privacy Control

https://globalprivacycontrol.org

https://privacycg.github.io/gpc-spec/



Enforcement

- New enforcement mechanism
- Right to cure
- Civil penalties
- Statute of limitations



TAKEAWAY:

The OCPA will be enforced against larger nonprofits that operate in Oregon.



TIPS FOR NONPROFITS

Dual Approach

COMPLY WITH LAWS

MEET CONSTITUENTS' EXPECTATIONS.

Tip 1: Start with DOJ resources.

https://www.doj.state.or.us/consumer-protection/id-theft-data-breaches/privacy/

https://www.doj.state.or.us/oregon-department-of-justice/office-of-the-attorney-general/spotlight-privacy/



July 2024

OREGON'S NEW PRIVACY LAW

What your business needs to know to comply with the law.

OREGON'S CONSUMER PRIVACY LAW
Goes into effect July 1, 2024 (2025 for non-profits)

Attorney General Ellen Rosenblum

The Oregon Consumer Privacy Act gives individual consumers control over personal data about them. Under the law, they can keep their data L.O.C.K.E.D. This allows them to request a List of entities you sold their data too (ex: data brokers). They can Opt-out (say "no") to your business selling, profiling, and using targeted advertising with their personal information. They can get a Copy of the personal and sensitive data your business has about them. They can Know what information your business has collected about them. They can Edit any inaccuracies in the data about them. Finally, they can request that your business Deletes personal and sensitive information that they have on the requesting individual.

Does my business have to comply?

The law only applies to certain businesses. It does not apply to federal, state, or local government. Qualifying private businesses have 1) be physically located in Oregon, OR be outside of Oregon but sell their goods/services to Oregon residents, AND 2) collect/use 100,000+ Oregonian's data, OR have 25,000 Oregonian's data and at least 25% of the business's gross revenue comes from selling* data. It is your company's legal responsibility to understand if your business must comply with OCPA.

*What is a sale? A "sale" could be a straight up exchange of money for customer's personal data, but it could also be gained "value," such as the exchange of a customer list with another business or non-profit.

What is personal data?

Generally, any data that reveals information about a specific person, is considered "personal data." This could be a name, email address, home address, ISP, etc. Data that reveals private information about a specific person, such as their race, ethnicity, religion, mental or physical health, sexuality, citizenship or immigration status, status as transgender or nonbinary, status as a crime victim, genetic or biometric data, or location data, is "sensitive data."

(Any data about children under 13 is also sensitive data.)

This law does not restrict what is called "deidentified data," which is data that cannot be linked to individual consumers.

What does my company have to do?

So, my company qualifies, now what? The two main things your company has to do is create a publicly available privacy notice, and create an internal system to respond to requests for personal data from your consumers.

- Privacy Notice: Your company must publicly post a privacy notice, describing why your company is collecting personal data. It must not collect data that is not relevant or reasonably necessary to your company. Finally, your company must consider and implement minimum safeguard for protecting any personal information. (The more sensitive the data, the more restrictive the safeguards needed.)
- Responding to Rights Requests: in addition, the privacy notice must provide a way for consumer to revoke consent to data collection and provide a way for consumers to contact your business to invoke any of their other L.O.C.K.E.D. rights.

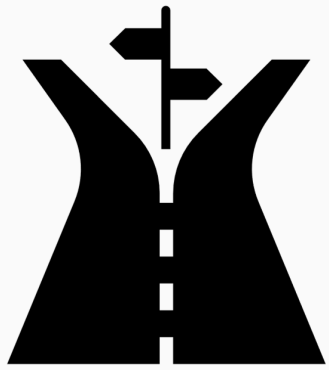
OREGON DEPARTMENT OF JUSTICE
CIVIL ENFORCEMENT
PROVIDING PRIVACY * PROTECTING OREGONIANS

There's a lot more nuances for businesses. If your company qualifies, check out the DOJ's comprehensive Q/A for businesses here: https://www.doj.state.or.us/consumer-protection/id-theft-data-breaches/privacy/

This document is for informational purposes only and does not constitute legal advice or imply legal representation.

Tip 2: Verify whether OCPA actually applies to the client.

…Encourage the client to consider what their constituents expect and embrace modern privacy practices.



Tip 3: Advise clients to work with vendors ASAP.

- Most Nonprofits use third party vendors for CRMS, donor databases, emails systems, webpages, etc...
- These processors *may* be updating their systems for compliance.
- Evaluate services and update contracts where needed.

Tip 4: Don’t forget about data security.

646A.622 Requirement to develop safeguards for personal information; conduct deemed to comply with requirement; defenses.

Tip 5: Update privacy notices & conduct a DPIA.

- GDPR uses the term “data protection impact assessment.”
- State laws, including the OCPA, require a controller to conduct and document a “data protection assessment" for each processing activity that presents a heightened risk of harm to a consumer.
- An assessment used to comply with another law can be used to comply with the OCPA.

THANK YOU

OSB LABOR & EMPLOYMENT ANNUAL CONFERENCE



PAID LEAVE OREGON

intersections

OCTOBER 30, 2024

leave basics

1993: FMLA passed
1995: OFLA passed
2015: OR Sick Time passed
2019: PLO/FAMLI passed

2021: PLO launch delayed
2023: SB 912, 913, 999 amend PLO/OFLA to "fit" better
9/3/2023: PLO benefits launch

2024: SB 1515 changes everything



FMLA Basics

- **Benefit:** Provides eligible employees 12 workweeks of unpaid leave a year + job protection (up to 26 weeks to care for a servicemember w/serious injury/illness)
- **PTO:** Employer can dictate usage and order of usage
- **Eligibility:** Employees are eligible for family or medical leave if they work for an employer with at least 50 employees (w/in 75 mi) for at least 12 months and have worked at least 1,250 hours during the 12 months before their FMLA leave starts.
  - 29 C.F.R. § 825.111(a)(2) (for 50-person threshold, teleworking employees work at the worksite where they report to and where their work assignments come from; a "personal residence is not a worksite").
  - *Cf.* 29 C.F.R. § 825.105(b) (employees working remotely outside the U.S. aren't covered or counted)
- **The FMLA protects** limited, specific family members/ circumstances:
  - The birth of a child or placement of a child w/the employee for adoption/foster care;
  - The care for a child, spouse, or parent (but not a PIL) who has a serious health condition;
  - The employee's own serious health condition; and
  - Certain reasons related to an employee's child, spouse, or parent's service in the military.

OFLA Basics

- **Benefit:** Provides eligible employees 12-24 work weeks of unpaid leave in a 52-week time frame + job protection
- **PTO:** Employer can dictate usage and order of usage
- **Eligibility:** Employees are eligible for family or medical leave if they work for an employer with at least 25 employees for at least 180 calendar days before the date the leave begins and have worked an average of at least 25 hours/week.
- **Public Health Emergency:** During a public health emergency, eligibility may also be established with 30 days of employment + 25 hours a week average.
- **Effective July 1, 2024,** OFLA only covers leave for the following circumstances :
  - Bucket #1: Pregnancy disability (incl. prenatal care) (12 wks)
  - Bucket #2: Sick Child/Bereavement (12 wks)
    - To care for a child of the employee who is suffering from an illness, injury or condition that [~~is not a serious health condition but that~~] requires home care or who requires home care due to the closure of the child's school or child care provider as a result of a public health emergency
    - Bereavement Leave is 2 weeks/loss; 4 weeks max/year (only place where expanded family member def. in play)

PLO Basics

- **Benefit:** Provides eligible employees 12-14 workweeks of paid medical, family, and safe leave in a 52-week time frame + job protection
- **PTO:** employee can use PTO ("top off"); not required
- **Eligibility:** Employees are eligible for family, medical, or safe leave if they earn at least $1,000 in wages during the base or alternate base year; no hours/ tenure req., but job protection kicks in at 90 days.
- **PLO covers medical, family, and safe leave:**
  - Due to the birth of a child;
  - To bond with a child (after birth, through adoption, or foster care placement);
  - To care for a family member with a serious health condition;
  - To care for yourself when you have a serious health condition; and
  - To obtain assistance as a survivor of sexual assault, domestic violence, harassment, bias crimes, or stalking.
  - Beginning January 1, 2025, to effectuate the legal process required for placement of a foster child or the adoption of a child.

ELIGIBILITY REQUIREMENTS	Paid Leave Oregon	OFLA	FMLA	Oregon Sick Leave
Covered employers	All employers except federal or Tribal governments	Employers with 25 or more employees	Employers with 50 or more employees and all public employers	All employees are eligible for protected unpaid time[1]
Wages required to be eligible for leave	$1,000 in wages during the base or alternate base year	n/a	n/a	n/a
Required time worked for employer before taking leave and before job protection applies	No work time requirement for Paid Leave benefits, but must have worked 90 days to have job protection	180 days[2]	12 months	90 days[3]

1 Employers who employ 10 or more employees (or 6 or more if the employer is located in the city of Portland) must provide paid sick leave.
2 30 days during public health emergency
3 An employer may allow an employee to use sick leave before the 91st day of employment.

DIFFERENCE IN BENEFIT YEARS

	One-year method	52-week method
Triggering event	10/30/2024	10/30/2024
Reset leave benefit	10/30/2025	10/26/2025
		(52 wks from Sun. 10/27)

DIFFERENCE IN FAMILY MEMBERS

FMLA FAMILY MEMBER	PLO/OFLA/OST FAMILY
An eligible employee's: - Spouse - Child 1) under the age of 18; or 2) age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence. - Parent	An eligible employee's: - Spouse or domestic partner - Child (biological, adopted, stepchild, or foster child), the employee's spouse or DP's child, or the child's spouse or DP - Parent (biological, adoptive, stepparent, foster parent, or legal guardian), the parent of employee's spouse or DP, or employee's parent's spouse or DP - Sibling or stepsibling or their spouse or DP - Grandparent or grandparent's spouse or DP - Grandchild or grandchild's spouse/DP - Any person they're connected to like a family member



SB 1515 + 2024 OARs



Jan. 2024 OARs

- "Pregnancy disability leave" is a form of "Serious health condition"& includes disability related to pregnancy termination, prenatal care, and fertility/infertility treatments
- Consecutive hours/days of sick child leave are a "single occurrence" for "third occurrence" verification
- *An employer may provisionally designate an absence as OFLA leave until sufficient information is received – notice that an employee has applied for PLO leave is enough**
- *OFLA eligibility "hours per week" includes hours not worked due to protected leave**



SB 1515: Big Changes!

- OFLA will no longer run concurrent with PLO
- PLO+FMLA or OFLA+FMLA may still run concurrently
- OFLA now provides up to 12 weeks for sick child leave and bereavement each leave year.
- Sick child leave can include home care or serious health condition
- BOLI: "OFLA will no longer provide *additional* sick child leave for employees who take 12 weeks of parental leave"
- OFLA provides up to 12 additional weeks for pregnancy disability

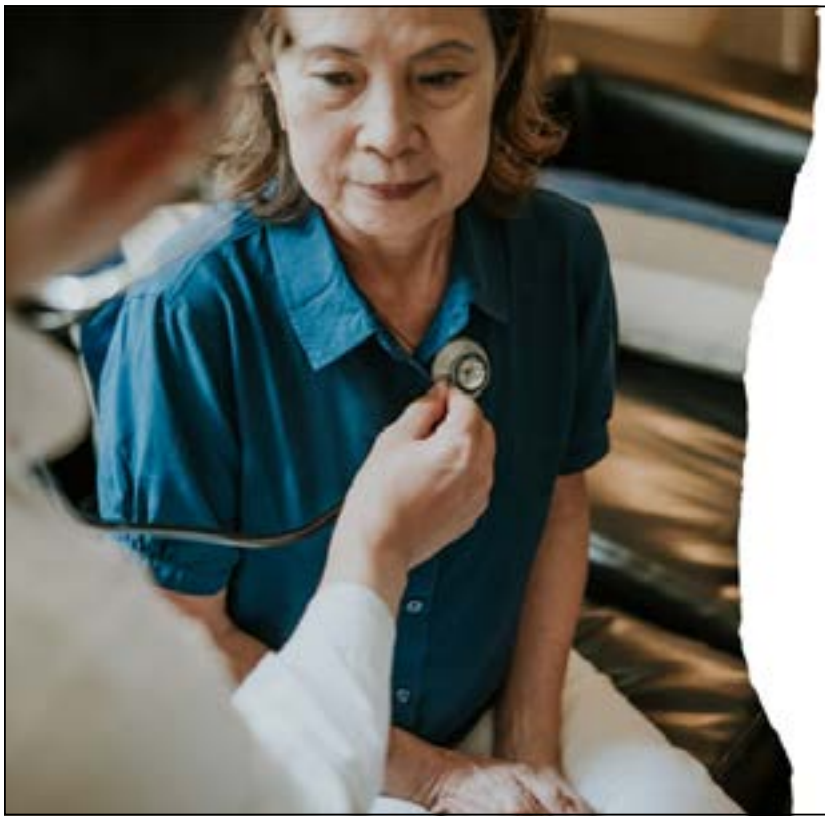


SB 1515, cont'd

- Replaced permissive PTO access language ("may permit") with employee entitlement to use accruals
- Employer can dictate order of PTO usage for PLO top off in policy or CBA
- PLO + PTO can exceed 100% of the employee's regular wage if employer allows
- This is the most important thing to BARGAIN!

Unexpected Consequences

- **Partial Day Absences for Expanded Family Members Extinguished:** FMLA allows intermittent leave but only covers leave for spouse, parent, child, in loco parentis relationships; now that OFLA no longer covers serious health condition leave and PLO only allows for full-day absences, partial day leave to care for the many other extended family members and close affinity relationships is extinguished.
- **Domestic Partners:** FMLA doesn't include DPs or civil unions; no partial day absences for serious health conditions
- **ADA Leave:** not an option for care of someone else, so employers may need to think about Oregon Sick Time leave or other in-house leave policies.



June 2024 OARs

- Reversed the OFLA "hours worked" eligibility– it's "actual hours worked" again
- OST: everything covered by OFLA/PLO + illness, diagnosis, and preventative care
- Pregnancy Disability Leave ~~"Serious health condition"~~ includes pregnancy termination, prenatal care, and fertility/ infertility treatments
- New notice timing language
- Clear OFLA stacking language:
  - 12 weeks' sick/bereavement +
  - 12 weeks' pregnancy disability +
  - 2 weeks' child placement leave (expires 1/1/2025)



PLO Example #1

- Cinder files an application for benefits for seven weeks of paid leave and is approved by the department to care for a family member with a serious health condition and begins a benefit year on November 3, 2024.
- After returning from leave, Cinder has five weeks of leave remaining in their benefit year.
- In March 2025, Cinder and their partner adopt a child. Cinder submits an application for benefits to the department and is approved for the remaining five weeks of paid leave in the benefit year in order to care for and bond with the newly adopted child.
- After Cinder's benefit year expires on November 2, 2025, Cinder submits a new application for benefits to the ED to finish bonding with their child.
- OAR 471-070-1010(2)



PLO Example 1: Answer

- Cinder is approved for leave to care for and bond with the same child and starts a new benefit year.
- Because Cinder already bonded with the same child for five weeks in the prior benefit year, Cinder may only take leave to care for and bond with that child for up to an additional seven weeks in the new benefit year.
- "An individual may not exceed 12 weeks of paid leave per child for the purpose of caring for and bonding with the child during the first year after the birth or initial placement of the child **regardless if a new benefit year starts during the first year following birth or initial placement**." OAR 471-070-1010(2).



PLO Example #2

- Alma files an application for benefits and is approved for leave for their own serious health condition and begins a benefit year on **September 7, 2025**. Alma takes two weeks of leave and then returns to work.
- In **June 2026**, Alma gives birth to twins. Alma submits an application for benefits to the department and is approved for ten weeks of leave to care for and bond with the first twin.
- On **September 4, 2026**, Alma's 52-week benefit year expires and Alma submits another application for benefits to the department for twelve weeks of leave to care for and bond with the second twin.

OAR 471-070-1010(2)

PLO Example 2: Answer

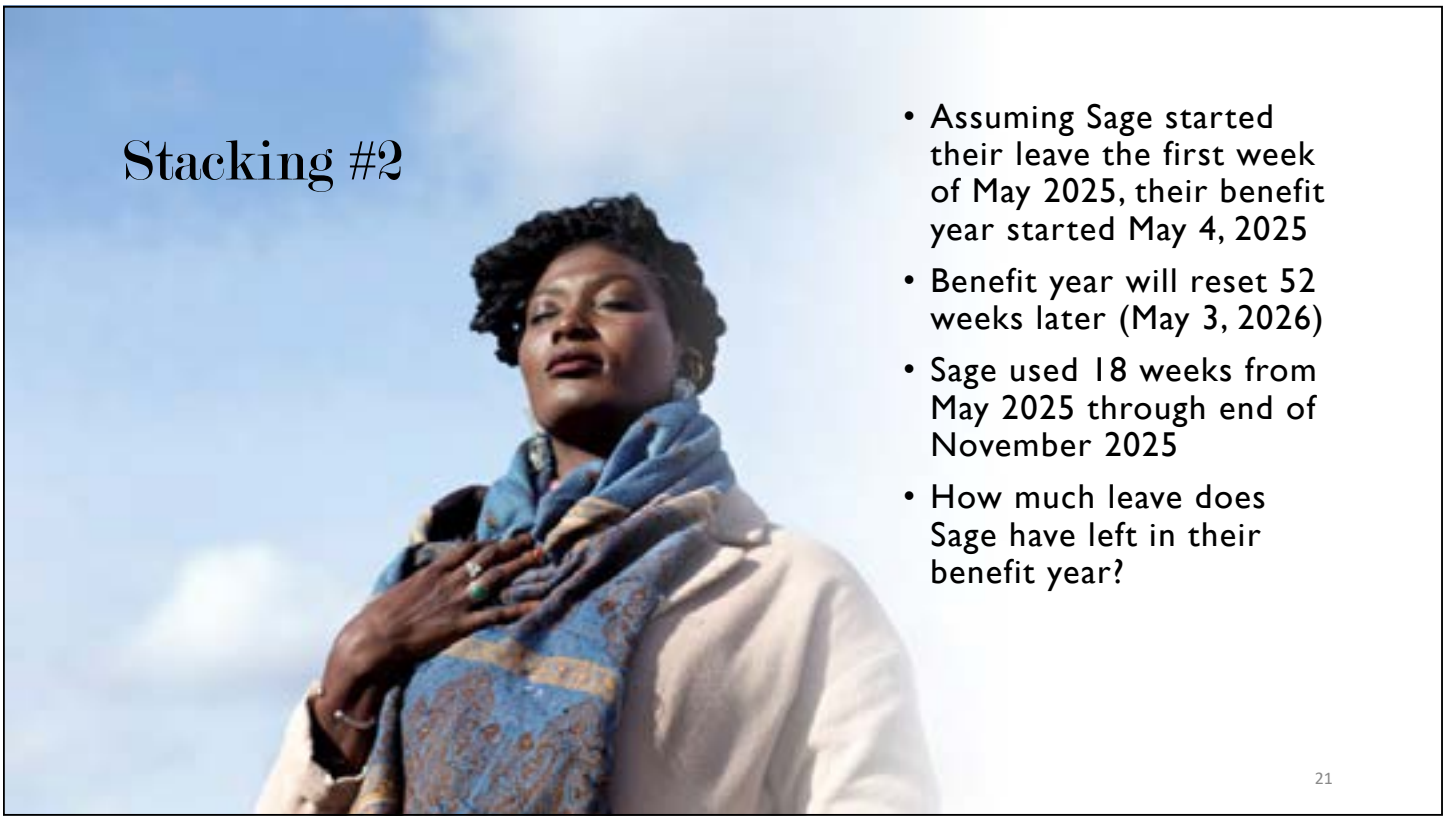
- "An individual may not exceed 12 weeks of paid leave **per child** for the purpose of caring for and bonding with the child during the first year after the birth or initial placement of the child regardless if a new benefit year starts during the first year following birth or initial placement." OAR 471-070-1010(2)
- Yes, the ED approves it in the example in the OARs. "[Employee] submits another application for benefits to the department and is approved for twelve weeks of leave to care for and bond with the second twin, starting a new benefit year," because it's per child and they just started a new benefit year.

Stacking #1



- In January 2025, Sage starts a fifth round of fertility treatments; they take a total of 8 half days off work to attend appointments.
- In March 2025, Sage gets pregnant. They attend prenatal check-ups an hour each week.
- In May 2025, Sage miscarries and takes two weeks off work for a D&C and recovery.
- Sage returns to work briefly, but ultimately has a doctor certify leave for depression for four weeks in July.
- On September 1, 2025, Sage finally gets off a three-year wait list and travels abroad to adopt an infant. The process takes four weeks. Upon return, they take the max remaining parental bonding time.

Stacking #2



- Assuming Sage started their leave the first week of May 2025, their benefit year started May 4, 2025
- Benefit year will reset 52 weeks later (May 3, 2026)
- Sage used 18 weeks from May 2025 through end of November 2025
- How much leave does Sage have left in their benefit year?

Stacking #3

- Fallon needs to take leave to care for their law school best friend, who is "like family"
- PLO approves 12 weeks of benefits/protected time off.
- How does this impact Fallon's OFLA entitlement?
- How does this impact Fallon's FMLA entitlement?



Stacking, cont'd

- Fallon took 12 weeks of PLO benefits for someone like family, so it can't deduct from FMLA entitlement
- Fallon could take up to 4 weeks of bereavement leave under OFLA after this.
- Fallon could take up to another 8 weeks sick child (home care) under OFLA
- Fallon would still have up to 12 weeks of FMLA leave under this hypo remaining





labor trends

Bargaining PLO

- Bargain the employer/employee share of the premiums (pay more than statute?)
- Seniority and benefits (e.g., PTO) do not accrue during PLO "unless the terms of a CBA . . . provide otherwise."
- Non-OFLA eligible members' access to protected intermittent leave of less than a day and bereavement leave
- Memorialize members can still stack leave as applicable
- Bargain for the employer to cover the employee's health insurance premium share while they're on leave (either completely or to be repaid over time upon return to work) so they don't have to send in checks
- Bargain for *employees to choose* whether they can supplement their PLO benefits with accrued PTO beyond 100% wage replacement

RO Case No. UP-051-23

"*We agree with AFSCME's assertion that, "[b]efore August 2023, the City did not make payroll deductions for employees to fund a paid family leave plan." (AFSCME Brief at 5-6, 11.) However, it is equally true that, previously, the City had no PFMLI-related obligations under state law. Accordingly, we generally disagree with AFSCME's nderlying contention that the City changed the status quo when it implemented payroll deductions.* ***In our view, the change at issue in the complaint was primarily the natural result of a new state law going into effect.*** *Fundamentally, the Board's unilateral change doctrine concerns an employer's change to the status quo, not any changes implemented by outside entities that might affect mandatory subjects of bargaining. …* ***Stated differently, an employer need not bargain about mandatory working conditions over which it has no control****."*



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Senate Bill 1515

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Labor and Business)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.** The statement includes a measure digest written in compliance with applicable readability standards.

Digest: Makes changes to laws related to paid and unpaid family and medical leave. The Act takes effect when the Governor signs it. (Flesch Readability Score: 68.7).

Directs the Employment Department to collaborate with the Bureau of Labor and Industries to identify statutory changes that are needed to require the department and the bureau to perform certain duties. Requires the Employment Department to make certain findings regarding benefits that are paid to certain employees under the paid family and medical leave insurance program and report to the interim committees of the Legislative Assembly no later than September 15, 2024.

Makes changes to the statutory provisions governing paid and unpaid job-protected leave entitlements. Makes technical changes and conforming amendments.

Declares an emergency, effective on passage.

A BILL FOR AN ACT

Relating to leave laws concerning time off from work; creating new provisions; amending ORS 653.436, 657B.010, 657B.020, 657B.025, 657B.030, 657B.050, 659A.150, 659A.156, 659A.159, 659A.162, 659A.165, 659A.168, 659A.171, 659A.177, 659A.183 and 659A.186; and declaring an emergency.

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

ADMINISTRATION AND REPORTING

SECTION 1. Section 2 of this 2024 Act is added to and made a part of ORS chapter 657B.

SECTION 2. (1) The Employment Department shall collaborate with the Bureau of Labor and Industries to identify any statutory changes that are necessary to reflect the following:

(a) That the Employment Department shall be responsible for any administrative functions, including providing technical assistance and conducting public outreach, related to the rights of employees and responsibilities of employers with respect to protected leave provided under the provisions of ORS chapters 657B and 659A.

(b) That the Bureau of Labor and Industries shall be responsible for the investigation of complaints of discrimination or retaliation with respect to protected leave provided under the provisions of ORS chapters 657B and 659A.

(2) In addition to the responsibilities under subsection (1) of this section, the Employment Department shall determine to what extent benefits are paid to seasonal employees and persons employed through hiring halls.

(3) The Director of the Employment Department shall report the department's findings under subsections (1) and (2) of this section, including any recommendations for legislation, to an interim committee of the Legislative Assembly related to labor and business no later

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

than September 15, 2024.

TECHNICAL CHANGES

SECTION 3. Section 4 of this 2024 Act is added to and made a part of ORS chapter 657B.

SECTION 4. (1) A health care provider that receives a request from a covered individual to provide medical verification required by the Director of the Employment Department for purposes of deciding whether to allow or deny a claim for benefits:

(a) Shall provide the medical verification to the covered individual within 14 days of receiving the request; and

(b) Except as provided in subsection (2) of this section, may not require the covered individual to pay the costs of completing any medical verification forms or any other costs of furnishing the verification.

(2) Nothing in this section shall prevent a health care provider from seeking reimbursement from a covered individual's health insurance provider for the costs of providing the medical verification described in subsection (1) of this section.

SECTION 5. ORS 653.436 is amended to read:

653.436. (1)**(a)** An employer shall provide an employee with a work schedule in writing at least 14 calendar days before the first day of the work schedule.

(b) Paragraph (a) of this subsection does not apply when an employee first returns to work after taking a period of family leave, medical leave or safe leave pursuant to ORS chapter 657B.

(2) The employer shall post the written work schedule in a conspicuous and accessible location, in English and in the language the employer typically uses to communicate with the employees.

(3) The employer shall provide a written work schedule that runs through the last date of the posted work schedule in effect at the time of delivery to:

(a) A new employee on or before the employee's first day of work; or

(b) An existing employee on the employee's first day of work after a leave of absence.

(4) The written work schedule shall include all work shifts and on-call shifts for the work period.

(5) If the employer requests changes to the written work schedule after the advance notice required in this section:

(a) The employer shall provide the employee with timely notice of the change by in-person conversation, telephone call, electronic mail, text message or other accessible electronic or written format; and

(b) The employee may decline any work shifts not included in the employee's written work schedule.

(6) At any time after the advance notice of written work schedule required in this section, an employee may request in writing that the employer add the employee to one or more work shifts or on-call work shifts. Any changes to the employee's written work schedule resulting from such employee-requested work schedule changes are not subject to the advance notice requirements of this section.

SECTION 6. ORS 657B.010 is amended to read:

657B.010. As used in this chapter:

(1) "Alternate base year" means the last four completed calendar quarters preceding the benefit year.

(2) "Average weekly wage" means the amount calculated by the Employment Department as the state average weekly covered wage under ORS 657.150 (4)(e) as determined not more than once per year.

(3) "Base year" means the first four of the last five completed calendar quarters preceding the benefit year.

(4) "Benefits" means family and medical leave insurance benefits.

(5)(a) "Benefit year" means, except as provided in paragraph (b) of this subsection, a period of 52 consecutive weeks beginning on the Sunday immediately preceding the date on which family leave, medical leave or safe leave commences.

(b) "Benefit year" means, in the event that the 52-week period described in paragraph (a) of this subsection would result in an overlap of any quarter of the base year of a previously filed valid claim, a period of 53 consecutive weeks beginning on the Sunday immediately preceding the date on which family leave, medical leave or safe leave commences.

(6) "Child" means:

(a) A biological child, adopted child, stepchild or foster child of a covered individual or of the covered individual's spouse or domestic partner;

(b) A person who is or was a legal ward of a covered individual or of the covered individual's spouse or domestic partner; or

(c) A person who is or was in a relationship of in loco parentis with a covered individual or with the covered individual's spouse or domestic partner.

(7) "Claimant" means an individual who has submitted an application or established a claim for benefits.

(8) "Contribution" or "contributions" means the money payments made by any of the following under ORS 657B.150:

(a) An employer;

(b) An employee;

(c) A self-employed individual;

(d) A tribal government; or

(e) An employee of a tribal government.

(9) "Covered individual" means any one of the following who qualifies under ORS 657B.015 to receive family and medical leave insurance benefits:

(a) An eligible employee;

(b) A self-employed individual; or

(c) An employee of a tribal government.

(10) "Domestic partner" means an individual joined in a domestic partnership.

(11) "Domestic partnership" has the meaning given that term in ORS 106.310.

(12) "Eligible employee" means:

(a)(A) An employee who has earned at least $1,000 in wages during the base year; or

(B) If an employee has not earned at least $1,000 in wages during the base year, an employee who has earned at least $1,000 in wages during the alternate base year; and

(b) An employee to whom paid family and medical leave insurance benefits may be available under ORS 657B.015.

(13) "Eligible employee's average weekly wage" means an amount calculated by the Director of the Employment Department by dividing the total wages earned by an eligible employee during the base year by the number of weeks in the base year.

(14)(a) "Employee" means:

(A) An individual performing services for an employer for remuneration or under any contract of hire, written or oral, express or implied.

(B) A home care worker as defined in ORS 410.600.

(b) "Employee" does not include:

(A) An independent contractor as defined in ORS 670.600.

(B) A participant in a work training program administered under a state or federal assistance program.

(C) A participant in a work-study program that provides students in secondary or postsecondary educational institutions with employment opportunities for financial assistance or vocational training.

(D) A railroad worker exempted under the federal Railroad Unemployment Insurance Act.

(E) A volunteer.

(F) A judge as defined in ORS 260.005.

(G) A member of the Legislative Assembly.

(H) A holder of public office as defined in ORS 260.005.

(15)(a) "Employer" means any person that employs one or more employees working anywhere in this state or any agent or employee of such person to whom the duties of the person under this chapter have been delegated.

(b) "Employer" includes:

(A) A political subdivision of this state or any county, city, district, authority or public corporation, or any instrumentality of a county, city, district, authority or public corporation, organized and existing under law or charter;

(B) An individual;

(C) Any type of organization, corporation, partnership, limited liability company, association, trust, estate, joint stock company or insurance company;

(D) Any successor in interest to an entity described in subparagraph (C) of this paragraph;

(E) A trustee, trustee in bankruptcy or receiver; or

(F) A trustee or legal representative of a deceased person.

(c) "Employer" does not include the federal government or a [*tribal government*] **federally recognized Oregon Indian tribe**.

(16) "Employment agency" has the meaning given that term in ORS 658.005.

(17) "Family and medical leave insurance benefits" means the wage replacement benefits that are available to a covered individual under ORS 657B.050 or under the terms of an employer plan approved under ORS 657B.210, for family leave, medical leave or safe leave.

(18)(a) "Family leave" means leave from work taken by a covered individual:

(A) To care for and bond with a child during the first year after the child's birth or during the first year after the placement of the child through foster care or adoption; or

(B) To care for a family member with a serious health condition.

(b) "Family leave" does not mean:

(A) Leave described in ORS 659A.159 [*(1)(d)*] **(1)(a)**;

(B) Leave described in ORS 659A.159 [*(1)(e)*] **(1)(b)**; or

(C) Leave authorized under ORS 659A.093.

(19) "Family member" means:

(a) The spouse of a covered individual;

(b) A child of a covered individual or the child's spouse or domestic partner;

(c) A parent of a covered individual or the parent's spouse or domestic partner;

(d) A sibling or stepsibling of a covered individual or the sibling's or stepsibling's spouse or domestic partner;

(e) A grandparent of a covered individual or the grandparent's spouse or domestic partner;

(f) A grandchild of a covered individual or the grandchild's spouse or domestic partner;

(g) The domestic partner of a covered individual; or

(h) Any individual related by blood or affinity whose close association with a covered individual is the equivalent of a family relationship.

(20) "Medical leave" means leave from work taken by a covered individual that is made necessary by the individual's own serious health condition.

(21) "Parent" means:

(a) A biological parent, adoptive parent, stepparent or foster parent of a covered individual;

(b) A person who was a foster parent of a covered individual when the covered individual was a minor;

(c) A person designated as the legal guardian of a covered individual at the time the covered individual was a minor or required a legal guardian;

(d) A person with whom a covered individual was or is in a relationship of in loco parentis; or

(e) A parent of a covered individual's spouse or domestic partner who meets a description under paragraphs (a) to (d) of this subsection.

(22) "Safe leave" means leave taken for any purpose described in ORS 659A.272.

(23) "Self-employed individual" means:

(a) An individual who has self-employment income as defined in section 1402(b) of the Internal Revenue Code as amended and in effect on December 31, 2022; or

(b) An independent contractor as defined in ORS 670.600.

(24) "Serious health condition" [*has the meaning given that term in ORS 659A.150.*] **means:**

(a) An illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice or residential medical care facility;

(b) An illness, disease or condition that in the medical judgment of the treating health care provider poses an imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future, or requires constant care;

(c) Any period of disability due to pregnancy, or period of absence for prenatal care; or

(d) Any period of absence for the donation of a body part, organ or tissue, including preoperative or diagnostic services, surgery, post-operative treatment and recovery.

(25) "Third party administrator" means a third party that enters into an agreement with the Director of the Employment Department to implement and administer the paid family and medical leave program established under this chapter.

(26) "Tribal government" has the meaning given that term in ORS 181A.940.

(27)(a) "Wages" has the meaning given that term in ORS 657.105.

(b) "Wages" does not mean contribution amounts paid to the Paid Family and Medical Leave Insurance Fund by an employer on behalf of an employee under ORS 657B.150 (5).

SECTION 7. ORS 657B.030 is amended to read:

657B.030. (1) Family and medical leave insurance benefits are in addition to any paid sick time under ORS 653.606, vacation leave or other paid leave earned by an employee.

(2) [*An employer may permit an employee to use all or a portion of paid sick time, vacation leave*

or any other paid leave earned by the employee in addition to] **An employee is entitled to use any accrued paid sick leave, accrued paid vacation leave or any other paid leave that is offered by the employer in addition to** receiving paid family and medical leave insurance benefits during a period of leave taken for family leave, medical leave or safe leave.

(3) Subject to the terms of any agreement between the employee and the employer or the terms of a collective bargaining agreement, the employer may determine the particular order in which accrued leave is to be used when more than one type of accrued leave is available to the covered individual.

[*(3)*] **(4)** In any week in which an employee is eligible to receive **wage replacement** workers' compensation **benefits under ORS chapter 656** or unemployment benefits under ORS chapter [*656 or*] 657, the employee is disqualified from receiving family and medical leave insurance benefits.

SECTION 8. ORS 657B.050 is amended to read:

657B.050. (1) The Director of the Employment Department shall set the weekly benefit amount of family and medical leave insurance benefits that a covered individual qualifies for as follows:

(a) If the eligible employee's average weekly wage is equal to or less than 65 percent of the average weekly wage, the employee's weekly benefit amount shall be 100 percent of the employee's average weekly wage.

(b) If the eligible employee's average weekly wage is greater than 65 percent of the average weekly wage, the employee's weekly benefit amount is the sum of:

(A) 65 percent of the average weekly wage; and

(B) 50 percent of the employee's average weekly wage that is greater than 65 percent of the average weekly wage.

(2) Notwithstanding subsection (1) of this section, the director shall establish:

(a) A maximum weekly benefit amount of 120 percent of the average weekly wage.

(b) A minimum weekly benefit amount of five percent of the average weekly wage.

(3) The director shall determine, based on the contribution amounts made by a self-employed individual, a tribal government or the employees of a tribal government under ORS 657B.150, the amount of benefits payable to a self-employed individual or to an employee of a tribal government.

(4) Benefits are payable only to the extent that moneys are available in the Paid Family and Medical Leave Insurance Fund for that purpose. The state, any political subdivision of the state and any state agency are not liable for any amount in excess of this limit.

(5) Benefits payable under this section are exempt from garnishment except for:

(a) Child or spousal support garnishments; and

(b) Restitution for crime victims.

ALIGNMENT

SECTION 9. ORS 657B.020 is amended to read:

657B.020. (1) A covered individual may qualify for up to 12 weeks of family and medical leave insurance benefits per benefit year for leave taken for any of the following purposes, in any combination:

(a) Family leave;

(b) Medical leave; or

(c) Safe leave.

[*(2) Notwithstanding ORS 657B.025 and except as provided under subsection (3) of this section, a*

covered individual who has taken any amount of paid leave available under subsection (1) of this section may take a total of 16 weeks of leave in the benefit year in any combination of the paid leave available under subsection (1) of this section, not to exceed 12 weeks, and unpaid leave under ORS 659A.159 for which the covered individual is eligible under ORS 659A.156. The leave may be taken for any purpose for which leave is allowable under the respective leave programs.]

[*(3)*] **(2)** In addition to the leave available under [*subsections (1) and (2)*] **subsection (1)** of this section, a covered individual may qualify for up to two additional weeks of benefits for limitations related to pregnancy, childbirth or a related medical condition, including but not limited to lactation, for a total amount of leave under this subsection and [*subsections (1) and (2)*] **subsection (1)** of this section, not to exceed [*18*] **14** weeks per benefit year.

SECTION 10. ORS 659A.159 is amended to read:

659A.159. (1) Family leave under ORS 659A.150 to 659A.186 may be taken by an eligible employee for any of the following purposes:

[*(a) To care for an infant or newly adopted child under 18 years of age, or for a newly placed foster child under 18 years of age, or for an adopted or foster child older than 18 years of age if the child is incapable of self-care because of a mental or physical disability.*]

[*(b) To care for a family member with a serious health condition.*]

[*(c) To recover from or seek treatment for a serious health condition of the employee that renders the employee unable to perform at least one of the essential functions of the employee's regular position.*]

[*(d)*] **(a)** To care for a child of the employee who is suffering from an illness, injury or condition that [*is not a serious health condition but that*] requires home care or who requires home care due to the closure of the child's school or child care provider as a result of a public health emergency.

[*(e)*] **(b)** To deal with the death of a family member by:

(A) Attending the funeral or alternative to a funeral of the family member;

(B) Making arrangements necessitated by the death of the family member; or

(C) Grieving the death of the family member.

[*(2)(a) Leave under subsection (1)(a) of this section must be completed within 12 months after birth or placement of the child, and an eligible employee is not entitled to any period of family leave under subsection (1)(a) of this section after the expiration of 12 months after birth or placement of the child.*]

[*(b)*] **(2)** Leave under subsection [*(1)(e)*] **(1)(b)** of this section must be completed within 60 days of the date on which the eligible employee receives notice of the death of a family member.

SECTION 11. ORS 659A.162 is amended to read:

659A.162. (1) Except as specifically provided by ORS [*657B.020 and*] 659A.150 to 659A.186, an eligible employee is entitled to up to a total of 12 weeks of family leave within any one-year period.

(2)(a) Except as provided by paragraph (b) of this subsection, an eligible employee is entitled to a total of two weeks of family leave for the purposes described in ORS 659A.159 [*(1)(e)*] **(1)(b)**.

(b) An eligible employee is entitled to the period of leave described in paragraph (a) of this subsection upon the death of each family member of the employee within any one-year period, except that leave taken as provided by this subsection may not exceed [*the total period of family leave authorized by subsection (1) of this section*] **a total of four weeks within any one-year period**.

(c) A covered employer may not require an eligible employee to take multiple periods of leave described in ORS 659A.159 [*(1)(e)*] **(1)(b)** concurrently if more than one family member of the employee dies during the one-year period.

[*(d) All leave taken for the purposes described in ORS 659A.159 (1)(e) shall be counted toward the total period of family leave authorized by subsection (1) of this section.*]

(3)[*(a)*] In addition to the 12 weeks of family leave authorized by subsection (1) of this section, an eligible employee may take a total of 12 weeks of leave within any one-year period for an illness, injury or condition related to the eligible employee's own pregnancy or childbirth that disables the eligible employee from performing any available job duties offered by the covered employer.

[*(b) An eligible employee who takes 12 weeks of family leave within a one-year period for the purpose specified in ORS 659A.159 (1)(a) may take up to an additional 12 weeks of leave within the one-year period for the purpose specified in ORS 659A.159 (1)(d).*]

(4) When two or more family members work for the same covered employer, the eligible employees may not take concurrent family leave unless:

[*(a) One employee needs to care for another employee who is a family member and who is suffering from a serious health condition;*]

[*(b)*] **(a)** One employee needs to care for a child [*who has a serious health condition*] **for a purpose described in ORS 659A.159 (1)(a)** while another employee [*who is a family member is also suffering from a serious health condition*] **is taking leave under subsection (3) of this section**; or

[*(c)*] **(b)** The employees are taking leave described in ORS 659A.159 [*(1)(e)*] **(1)(b)**.

[*(5) An eligible employee may take family leave for the purpose specified in ORS 659A.159 (1)(a) in two or more nonconsecutive periods of leave only with the approval of the employer.*]

[*(6) Leave need not be provided to an eligible employee by a covered employer for the purpose specified in ORS 659A.159 (1)(d) if another family member is available to care for the child.*]

[*(7)*] **(5)** A covered employer may not reduce the amount of family leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury.

[*(8)(a)*] **(6)** The Commissioner of the Bureau of Labor and Industries shall adopt rules governing when family leave [*for a serious health condition of an eligible employee or a family member of the eligible employee*] may be taken intermittently or by working a reduced workweek. Rules adopted by the commissioner under this paragraph shall allow taking of family leave on an intermittent basis or by use of a reduced workweek to the extent permitted by federal law and to the extent that taking family leave on an intermittent basis or by use of a reduced workweek does not result in the loss of an eligible employee's exempt status under the federal Fair Labor Standards Act.

[*(b) The commissioner shall adopt rules governing when family leave for the purposes described in ORS 659A.159 (1)(e) may be taken to the extent permitted by federal law and to the extent that taking family leave on an intermittent basis does not result in the loss of an eligible employee's exempt status under the federal Fair Labor Standards Act.*]

SECTION 12. ORS 659A.165 is amended to read:

659A.165. [*(1) Except as provided in subsection (2) of this section, a covered employer may require an eligible employee to give the employer written notice at least 30 days before commencing family leave. The employer may require the employee to include an explanation of the need for the leave in the notice.*]

[*(2) An eligible employee may commence taking family leave without prior notice under the following circumstances:*]

[*(a) An unexpected serious health condition of an employee or family member of an employee;*]

[*(b) An unexpected illness, injury or condition of a child of the employee that requires home care;*]

[*(c) A premature birth, unexpected adoption or unexpected foster placement; or*]

[*(d) The death of a family member.*]

[*(3)*] **(1)** [*If an employee commences leave without prior notice under subsection (2) of this section, the*] **An eligible** employee must give oral notice to the employer within 24 hours of the commencement of [*the*] leave **under ORS 659A.150 to 659A.186**, and must provide [*the*] written notice [*required by subsection (1) of this section*] within three days after the employee returns to work. The oral notice required by this subsection may be given by any other person on behalf of the employee taking the leave. **The employer may require the eligible employee to include an explanation of the need for leave in the written notice.**

[*(4)*] **(2)** Except as provided in this subsection, if the employee fails to give notice as required by [*subsections (1) and (3) of*] **subsection (1) of** this section, the employer may reduce the total period of family leave authorized by ORS 659A.162 by three weeks, and the employee may be subject to disciplinary action under a uniformly applied policy or practice of the employer. A reduction of family leave under this subsection may not limit leave described in ORS 659A.159 [*(1)(e)*] **(1)(b)**.

SECTION 13. ORS 659A.168 is amended to read:

659A.168. (1) Except as provided in subsection (2) of this section, a covered employer may require medical verification from a health care provider of the need for the leave if the leave is for a purpose described in ORS 659A.159 [*(1)(b) to (d)*] **(1)(a)** other than to care for a child who requires home care due to the closure of the child's school or child care provider as a result of a public health emergency. [*If an employee is required to give notice under ORS 659A.165 (1), the employer may require that medical verification be provided by the employee before the leave period commences. If the employee commences family leave without prior notice pursuant to ORS 659A.165 (2),*] The medical verification must be provided by the employee within 15 days after the employer requests the medical verification. The employer may require an employee to obtain the opinion of a second health care provider designated by the employer, at the employer's expense. If the opinion of the second health care provider conflicts with the medical verification provided by the employee, the employer may require the two health care providers to designate a third health care provider to provide an opinion at the employer's expense. The opinion of the third health care provider shall be final and binding on the employer and employee. In addition to the medical verifications provided for in this subsection, an employer may require subsequent medical verification on a reasonable basis.

(2) A covered employer may require medical verification for leave taken for the purpose described in ORS 659A.159 [*(1)(d)*] **(1)(a)**, other than to care for a child who requires home care due to the closure of the child's school or child care provider as a result of a public health emergency, only after an employee has taken more than three days of leave under ORS 659A.159 [*(1)(d)*] **(1)(a)** during any one-year period. Any medical verification required under this subsection must be paid for by the covered employer. An employer may not require an employee to obtain the opinion of a second health care provider for the purpose of medical verification required under this subsection.

(3) A covered employer may request verification for the need for leave for the purpose in ORS 659A.159 [*(1)(d)*] **(1)(a)** to care for a child who requires home care due to the closure of the child's school or child care provider as a result of a public health emergency. A request for verification may include a request for:

(a) The name of the child requiring home care;

(b) The name of the school or child care provider that is subject to closure;

(c) A statement from the employee that no other family member of the child is willing and able

to care for the child; and

(d) A statement that special circumstances exist that require the employee to provide home care for the child during the day, if the child is older than 14 years of age.

[*(4) Subject to the approval of the health care provider, the employee taking family leave for a serious health condition of the employee or a family member of the employee shall make a reasonable effort to schedule medical treatment or supervision at times that will minimize disruption of the employer's operations.*]

SECTION 14. ORS 659A.183 is amended to read:

659A.183. **(1) Except as provided under subsection (2) of this section,** it is an unlawful practice for a covered employer to:

[*(1)*] **(a)** Deny family leave to which an eligible employee is entitled under ORS 659A.150 to 659A.186; or

[*(2)*] **(b)** Retaliate or in any way discriminate against an individual with respect to hire or tenure or any other term or condition of employment because the individual has inquired about the provisions of ORS 659A.150 to 659A.186, submitted a request for family leave or invoked any provision of ORS 659A.150 to 659A.186.

(2) It is not an unlawful practice for a covered employer to deny family leave to which an eligible employee is entitled under ORS 659A.150 to 659A.186 if:

(a) The employee meets the eligibility requirements to take leave under the federal Family and Medical Leave Act of 1993;

(b) The purpose for which the employee seeks to take family leave under ORS 659A.150 to 659A.186 is also a qualifying purpose under the federal Family and Medical Leave Act of 1993; and

(c) The employee refuses to take leave under the federal Family and Medical Leave Act of 1993 contrary to the concurrency requirements under ORS 659A.186 (2).

CONFORMING AMENDMENTS

SECTION 15. ORS 657B.025 is amended to read:

657B.025. Any family leave or medical leave taken under this chapter must be taken concurrently with any leave taken by an eligible employee [*under ORS 659A.150 to 659A.186 or*] under the federal Family and Medical Leave Act of 1993 (P.L. 103-3) for the same purposes.

SECTION 16. ORS 659A.150 is amended to read:

659A.150. As used in ORS 659A.150 to 659A.186:

(1) "Covered employer" means an employer described in ORS 659A.153.

(2) "Eligible employee" means any employee of a covered employer other than those employees exempted under the provisions of ORS 659A.156.

(3) "Family leave" means a leave of absence described in ORS 659A.159 **and 659A.162**, except that "family leave" does not include leave taken by an eligible employee who is unable to work because of a disabling compensable injury, as defined in ORS 656.005, under ORS chapter 656.

(4) "Family member" means:

(a) The spouse of [*a covered individual*] **an eligible employee**;

(b) A child of [*a covered individual*] **an eligible employee** or the child's spouse or domestic partner;

(c) A parent of [*a covered individual*] **an eligible employee** or the parent's spouse or domestic

partner;

(d) A sibling or stepsibling of [*a covered individual*] **an eligible employee** or the sibling's or stepsibling's spouse or domestic partner;

(e) A grandparent of [*a covered individual*] **an eligible employee** or the grandparent's spouse or domestic partner;

(f) A grandchild of [*a covered individual*] **an eligible employee** or the grandchild's spouse or domestic partner;

(g) The domestic partner of [*a covered individual*] **an eligible employee**; or

(h) Any individual related by blood or affinity whose close association with [*a covered individual*] **an eligible employee** is the equivalent of a family relationship.

(5) "Health care provider" means:

(a) A person who is primarily responsible for providing health care to an eligible employee or a family member of an eligible employee, who is performing within the scope of the person's professional license or certificate and who is:

(A) A physician licensed under ORS chapter 677;

(B) A physician assistant licensed under ORS 677.505 to 677.525;

(C) A dentist licensed under ORS 679.090;

(D) A psychologist licensed under ORS 675.030;

(E) An optometrist licensed under ORS 683.070;

(F) A naturopath licensed under ORS 685.080;

(G) A registered nurse licensed under ORS 678.050;

(H) A nurse practitioner licensed under ORS 678.375;

(I) A direct entry midwife licensed under ORS 687.420;

(J) A licensed registered nurse licensed by the Oregon State Board of Nursing as a nurse practitioner specializing in nurse midwifery;

(K) A regulated social worker authorized to practice regulated social work under ORS 675.510 to 675.600; or

(L) A chiropractic physician licensed under ORS 684.054, but only to the extent the chiropractic physician provides treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated to exist by X-rays.

(b) A person who is primarily responsible for the treatment of an eligible employee or a family member of an eligible employee solely through spiritual means, including but not limited to a Christian Science practitioner.

(6) "Public health emergency" means:

(a) A public health emergency declared under ORS 433.441.

(b) An emergency declared under ORS 401.165 if related to a public health emergency as defined in ORS 433.442.

[*(7) "Serious health condition" means:*]

[*(a) An illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice or residential medical care facility;*]

[*(b) An illness, disease or condition that in the medical judgment of the treating health care provider poses an imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future, or requires constant care;*]

[*(c) Any period of disability due to pregnancy, or period of absence for prenatal care; or*]

[*(d) Any period of absence for the donation of a body part, organ or tissue, including preoperative*

or diagnostic services, surgery, post-operative treatment and recovery.]

SECTION 17. ORS 659A.156 is amended to read:

659A.156. (1) All employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659A.159 [*(1)(b) to (e)*] **(1)(a) or (b)** except:

(a) An employee who was employed by the covered employer for fewer than 180 days immediately before the date on which the family leave would commence.

(b) An employee who worked an average of fewer than 25 hours per week for the covered employer during the 180 days immediately preceding the date on which the family leave would commence.

[*(2) All employees of a covered employer are eligible to take leave for the purpose specified in ORS 659A.159 (1)(a) except an employee who was employed by the covered employer for fewer than 180 days immediately before the date on which the family leave would commence.*]

[*(3)*] **(2)** Notwithstanding [*subsections (1) and (2)*] **subsection (1)** of this section, all employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659A.159 [*(1)(a) to (e)*] **(1)(a) or (b)** during a period of time covered by a public health emergency except:

(a) An employee who worked for the covered employer for fewer than 30 days immediately before the date on which the family leave would commence; or

(b) An employee who worked for the covered employer for an average of fewer than 25 hours per week in the 30 days immediately before the date on which the family leave would commence.

[*(4)(a)*] **(3)(a)** Notwithstanding [*subsections (1) and (2)*] **subsection (1)** of this section, an employee of a covered employer is eligible to take leave for one of the purposes specified in ORS 659A.159 [*(1)(a) to (e)*] **(1)(a) or (b)** if the employee:

(A)(i) Separates from employment with the covered employer, irrespective of any reason;

(ii) Is eligible to take leave under subsection (1) [*or (2)*] of this section at the time the employee separates; and

(iii) Is reemployed by the covered employer within 180 days of separation from employment; or

(B)(i) Is eligible to take leave under subsection (1) [*or (2)*] of this section at the beginning of a temporary cessation of scheduled hours of 180 days or less; and

(ii) Returns to work at the end of the temporary cessation of scheduled hours of 180 days or less.

(b) Any family leave taken by the employee within any one-year period continues to count against the length of time of family leave the employee is entitled under ORS 659A.162.

(c) The amount of time that an employee is deemed to have worked for a covered employer prior to a break in service due to a separation from employment or a temporary cessation of scheduled hours shall be restored to the employee when the employee is reemployed by the employer within 180 days of separation from employment or when the employee returns to work at the end of the temporary cessation of scheduled hours of 180 days or less.

SECTION 18. ORS 659A.171 is amended to read:

659A.171. (1) After returning to work after taking family leave under the provisions of ORS 659A.150 to 659A.186, an eligible employee is entitled to be restored to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave. If the position held by the employee at the time family leave commenced no longer exists, the employee is entitled to be restored to any available equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. If an equivalent position is not available at the job site of the employee's former position, the employer shall offer the employee an

equivalent position at a job site located within 50 miles of the job site of the employee's former position, if such a position is available. If equivalent positions are available at multiple job sites, the employer shall first offer the employee the position at the job site that is nearest to the job site of the employee's former position.

(2) Except for employee benefits used during the period of leave, the taking of family leave under ORS 659A.150 to 659A.186 shall not result in the loss of any employment benefit accrued before the date on which the leave commenced.

(3) This section does not entitle any employee to:

(a) Any accrual of seniority or employment benefits during a period of family leave; or

(b) Any right, benefit or position of employment other than the rights, benefits and position that the employee would have been entitled to had the employee not taken the family leave.

(4)(a) Before restoring an employee to a position under subsection (1) of this section, an employer may require that the employee receive certification from the employee's health care provider that the employee is able to resume work. Certification under this subsection may only be required pursuant to a uniformly applied practice or policy of the employer.

(b) This subsection does not affect the ability of an employer to require an employee during a period of family leave to report periodically to the employer on the employee's status and on the employee's intention to return to work.

(5)(a) Except as provided in paragraph (b) of this subsection, benefits are not required to continue to accrue during a period of family leave unless continuation or accrual is required under an agreement of the employer and the employee, a collective bargaining agreement or an employer policy.

(b) If the employee is provided group health insurance, the employee is entitled to the continuation of group health insurance coverage during the period of family leave on the same terms as if the employee had continued to work. If family member coverage is provided to the employee, family member coverage must be maintained during the period of family leave. The employee must continue to make any regular contributions to the cost of the health insurance premiums.

(c) Notwithstanding ORS 652.610 (3) and except as provided in paragraph (b) of this subsection, if the employer is required or elects to pay any part of the costs of providing disability, life or other insurance coverage for an employee during the period of family leave that should have been paid by the employee, the employer may deduct from the employee's pay such amounts upon the employee's return to work until the amount the employer advanced toward the payments is paid. In no event may the total amount deducted for insurance under the provisions of this subsection exceed 10 percent of the employee's gross pay each pay period.

(6) Notwithstanding ORS 652.610 (3), if the employer pays any part of the costs of health, disability, life or other insurance coverage for an employee under the provisions of subsection (5) of this section, and the employee does not return to employment with the employer after taking family leave, the employer may deduct amounts paid by the employer from any amounts owed by the employer to the employee, or may seek to recover those amounts by any other legal means, unless the employee fails to return to work because of[:]

[*(a) A continuation, reoccurrence or onset of a serious health condition that would entitle the employee to leave for one of the purposes specified by ORS 659A.159 (1)(b) or (c); or*]

[*(b) Other*] circumstances beyond the control of the employee.

SECTION 19. ORS 659A.177 is amended to read:

659A.177. [*(1) Notwithstanding any other provision of ORS 659A.150 to 659A.186, if a teacher re-*

quests leave for one of the purposes specified in ORS 659A.159 (1)(b) or (c), the need for the leave is foreseeable, and the employee will be on leave for more than 20 percent of the total number of working days in the period during which the leave would extend, the employer of the teacher may require that the employee elect one of the two following options:]

[*(a) The employee may elect to take leave for a period or periods of a particular duration, not to exceed the duration of the anticipated medical treatment; or*]

[*(b) The employee may elect to transfer temporarily to an available alternative position that better accommodates recurring periods of leave than the regular position of the employee. The teacher must be qualified for the alternative position, and the position must have pay and benefits that are equivalent to the pay and benefits of the employee's regular position.*]

[*(2) Notwithstanding any other provision of ORS 659A.150 to 659A.186, if a teacher commences a period of family leave for the purpose specified in ORS 659A.159 (1)(c) more than five weeks before the end of an academic term, the employer of the teacher may require that the employee continue on family leave until the end of the term if:*]

[*(a) The leave is of at least three weeks' duration; and*]

[*(b) The employee's return to employment would occur during the three-week period before the end of the term.*]

[*(3) Notwithstanding any other provision of ORS 659A.150 to 659A.186, if a teacher commences a period of family leave for one of the purposes specified in ORS 659A.159 (1)(a) or (b) during the five weeks before the end of an academic term, the employer of the teacher may require that the employee continue on family leave until the end of the term if:*]

[*(a) The leave is of at least two weeks' duration; and*]

[*(b) The employee's return to employment would occur during the two-week period before the end of the term.*]

[*(4)*] **(1)** Notwithstanding any other provision of ORS 659A.150 to 659A.186, if a teacher commences a period of family leave for [*one of the purposes*] **the purpose** specified in ORS 659A.159 [*(1)(a), (b) or (e)*] **(1)(b)** during the three-week period before the end of the term, and the duration of the leave is greater than five working days, the employer of the teacher may require that the employee continue on family leave until the end of the term.

[*(5)*] **(2)** The provisions of this section apply only to an employee who is employed principally in an instructional capacity by a public kindergarten, elementary school, secondary school or education service district.

SECTION 20. ORS 659A.186 is amended to read:

659A.186. (1) ORS 659A.150 to 659A.186 do not limit any right of an employee to any leave that is similar to the leave described in ORS 659A.159 (1) and to which the employee may be entitled under any agreement between the employer and the employee, collective bargaining agreement or employer policy.

(2) ORS 659A.150 to 659A.186 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Family and Medical Leave Act of 1993. If family leave taken under ORS 659A.150 to 659A.186 qualifies as protected leave pursuant to the federal Family and Medical Leave Act of 1993 (P.L. 103-3) [*or qualifies as family leave or medical leave taken pursuant to ORS chapter 657B*], family leave taken under ORS 659A.150 to 659A.186 must be taken concurrently with, and not in addition to, any leave taken under the federal Family and Medical Leave Act of 1993 (P.L. 103-3) and under ORS chapter 657B.

MISCELLANEOUS

SECTION 21. The unit captions used in this 2024 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2024 Act.

EMERGENCY CLAUSE

SECTION 22. This 2024 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2024 Act takes effect on its passage.

OFFICE OF THE SECRETARY OF STATE
LAVONNE GRIFFIN-VALADE
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE
AND TRIBAL LIAISON



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PERMANENT ADMINISTRATIVE ORDER

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& LEGISLATIVE COUNSEL

BLI 15-2024
CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

FILING CAPTION: Amends OFLA- and Sick Time- related rules to conform to chapter 20, Oregon Laws 2024.

EFFECTIVE DATE: 07/01/2024

AGENCY APPROVED DATE: 06/28/2024

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RULES:
839-001-0250, 839-005-0026, 839-007-0020, 839-007-0045, 839-009-0200, 839-009-0210, 839-009-0215, 839-009-0220, 839-009-0230, 839-009-0235, 839-009-0240, 839-009-0245, 839-009-0250, 839-009-0260, 839-009-0265, 839-009-0270, 839-009-0280, 839-009-0290, 839-009-0300, 839-014-0630

AMEND: 839-001-0250

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends rule relating to OFLA to conform to chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-001-0250
Deductions for Costs of Benefits Paid by the Employer While the Employee Is on OFLA Leave ¶

The Oregon Family Leave Act ~~(ORS 659.470 to 659.494)~~ provides that notwithstanding 652.610(3), when an employer pays the employee's portion of the cost of providing health, disability, life or other insurance coverage for an employee while the employee is on family leave, the employer may recover such cost under the following circumstances:¶
(1) Upon the employee's return to work, the employer may deduct from the employee's pay the amount of the costs it paid, provided, however, that the total amount deducted from any paycheck may not exceed 10% of the employee's gross wages earned in the pay period covered by the paycheck.¶
(2) If an employee does not return to work, the employer may deduct all of the costs it paid from amounts due and owing to the employee, provided, however, that no deduction may be made if the employee fails to return to work for the following reasons:¶
(a) The employee's absence from work is caused by a continuation, recurrence or onset of a serious health condition that would entitle the employee to family leave as provided for ~~in ORS 659.470 to 659.494~~ under OFLA or to benefits under ORS chapter 657B; or¶
(b) The employee's absence from work is caused by circumstances beyond the control of the employee.¶
(3) If an employee does not return to work the employer may seek to recover amounts paid for insurance coverage on behalf of the employee by any other legal means provided however, that no legal action may be initiated if the employee failed to return to work for the reasons set out in subsections (2)(a) or (2)(b) of this rule.¶
(4) The deduction provided for in this rule may be made with or without the employee's authorization. The

employer shall notify the employee of the deduction before the deduction is made.
Statutory/Other Authority: ORS 651.060~~(4)~~, ORS 659A.805
Statutes/Other Implemented: ORS 659~~.484~~A.171

AMEND: 839-005-0026

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends rule to include reference to laws other than OFLA that provide employment-related protections to pregnant persons.

CHANGES TO RULE:

839-005-0026
Employment Protections and Rights Relating to Pregnancy ¶

(1) Pregnant people are protected from sex discrimination in employment.¶
(2) ORS 659A prohibits discrimination regarding employee and dependent spouse or domestic partner benefits for pregnancy when employee and dependent spouse or domestic partner benefits exist for other medical conditions.¶
(3) An employee needing to be absent from work because of pregnancy or childbirth may have rights under the Oregon Family Leave Act, ~~as provided in~~Sick Leave under ORS 65~~9A.150 to 659A.186 and OAR 839-009-0200 to 839-009-0320~~3.601 to 653.661, Paid Leave under ORS chapter 657B, ORS 659A.146 and 659A.147 or the federal Pregnant Workers Fairness Act.
Statutory/Other Authority: ORS 651.060, ORS 659A.805
Statutes/Other Implemented: ORS 659A.029, ORS 659A.030, ORS 659A.1~~50-.186, OL CH. 139, 2019~~47, ORS 659A.148

AMEND: 839-007-0020

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends Sick Leave-related rule to conform to OFLA-related amendments in chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-007-0020
Permissible Use of Sick Time ¶

Pursuant to ORS 653.616 and these rules an employee may use sick time for any of the following:¶
(1) For an employee's mental or physical illness, injury or health condition; need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; or need for preventive medical care.¶
(2) For care of a family member with a mental or physical illness, injury or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or care of a family member who needs preventive medical care.¶
(3) For the following purposes ~~specified in~~under ORS 659A.159~~:¶~~
~~(a) To care for an infant or newly adopted child under 18 years of age, or for a newly placed foster child under 18 years of age, or for an adopted or foster child older than 18 years of age if the child is incapable of self-care because of a mental or physical disability. Leave under this subsection must be completed within 12 months after birth or placement of the child, and an eligible employee is not entitled to~~ to 659A.186:¶
(a) For bereavement leave, child placement leave or pregnancy ~~period of leave under this subsection after the expiration of 12 months after birth or placement of the child.¶~~
~~(b) To care for a family member with a serious health condition as defined in OAR 839-009-0210.¶~~
~~(c) To recover from or seek treatment for a serious health condition of the employee as defined in OAR 839-009-0210 that renders the employee unable to perform at least one of the essential functions of the employee's regular position~~disability leave, as those terms are described in OAR 839-009-0230.¶
(~~d~~b) To care for a child of the employee who is suffering from an illness, injury or condition that ~~is not a serious health condition as defined in OAR 839-009-0210, but that~~requires home care or who requires home care.~~¶~~
~~(e) To deal with the death of a family member within 60 days of the date on which the eligible employee receives notice of the death of a family member by:¶~~
~~(A) Attending the funeral or alternative to a funeral of the family member;¶~~
~~(B) Making arrangements necessitated by the death of the family member; or¶~~
~~(C) Grieving the d~~ due to the closure of the child's school or child care provider as a result of a public health ~~of the family member~~emergency.¶
(4) For the following purposes specified in ORS 659A.272:¶
(a) To seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's minor child or dependent, including preparing for and participating in protective order proceedings or other civil or criminal legal proceedings related to domestic violence, harassment, sexual assault or stalking.¶
(b) To seek medical treatment for or to recover from injuries caused by domestic violence or sexual assault to or harassment or stalking of the eligible employee or the employee's minor child or dependent.¶
(c) To obtain, or to assist a minor child or dependent in obtaining, counseling from a licensed mental health professional related to an experience of domestic violence, harassment, sexual assault or stalking.¶
(d) To obtain services from a victim services provider for the eligible employee or the employee's minor child or dependent.¶
(e) To relocate, pursuant to OAR 839-009-0345, or take steps to secure an existing home to ensure the health and safety of the eligible employee or the employee's minor child or dependent.¶
(5) To donate accrued sick time to another employee if the other employee uses the donated sick time for a purpose specified in this rule and the employer has a policy that allows an employee to donate sick time to a coworker for a purpose specified in this rule.¶
(6) In the event of a public health emergency, including, but not limited to:¶
(a) Closure of the employee's place of business, or the school or place of care of the employee's child, by order of a public official due to a public health emergency;¶
(b) A determination by a lawful public health authority or by a health care provider that the presence of the employee or the family member of the employee in the community would jeopardize the health of others, such that the employee must provide self-care or care for the family member;¶
(c) The exclusion of the employee from the workplace under any law or rule that requires the employer to exclude the employee from the workplace for health reasons;¶

(d) The following public health emergencies are permissible uses of sick leave unless the employee is employed as a first responder:¶
(A) An emergency evacuation order of level 2 (SET) or level 3 (GO) issued by a public official with the authority to do so, if the affected area subject to the order includes either the location of the employer's place of business or the employee's home address; or¶
(B) A determination by a public official with the authority to do so that the air quality index or heat index are at a level where continued exposure to such levels would jeopardize the health of the employee.¶
(7) For purposes authorized under ORS chapter 657B, including during periods of time the absence for which paid sick leave is taken also qualifies as family or medical leave taken pursuant to ORS chapter 657B.¶
~~(8) Sick time provided pursuant to the Oregon Family Leave Act in ORS 659A.159 or Domestic Violence Leave in 659A.272 runs concurrently with sick time provided pursuant to ORS 653.601 to 653.661.~~
Statutory/Other Authority: ORS 651.060, ORS 653.601-653.661
Statutes/Other Implemented: ORS 653.601-653.661

AMEND: 839-007-0045

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends Sick Leave-related rule to conform to OFLA-related amendments in chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-007-0045
Verification and Certification for Sick Time Use ¶

(1) If an employee uses sick time for more than three consecutive scheduled workdays:¶
(a) For a purpose provided in ORS 653.616(1) or (2) or ORS 659A.159(1)~~(b) (d)~~a) or 659A.162 the employer may require the employee to provide verification within 15 calendar days from a health care provider of the need for the sick time.¶
(b) For purposes of ORS 653.616(4) for use of sick time for a purpose specified in ORS 659A.272 relating to domestic violence, harassment, sexual assault, bias or stalking, the employer may require the employee to provide certification of the need for leave as provided in ORS 659A.280.¶
(2) "Three consecutive scheduled workdays" means three consecutive scheduled workdays, not including scheduled days off. For example, if an employee is scheduled to work Monday, Wednesday, and Friday only, and the employee uses sick time for all three days, the employee has used sick time for three consecutive scheduled workdays.¶
(3) If an employee commences sick time without providing prior notice required by the employer under OAR 839-007-0040:¶
(a) Medical verification shall be provided to the employer within 15 calendar days after the employer requests the verification; or¶
(b) Certification as specified in ORS 659A.280 for the purposes of ORS 659A.272 relating to domestic violence, harassment, sexual assault, bias or stalking shall be provided to the employer within a reasonable time after the employee receives the request for certification.¶
(4) If the need for sick time is foreseeable and projected to last more than three scheduled workdays and an employee is required to provide notice under ORS 653.621 and OAR 839-007-0040, the employer may require that verification or certification be provided before the sick time commences or as soon as otherwise practicable.¶
(5) An employer must pay any reasonable costs for providing any medical verification or certification required, including lost wages, that are not paid under a health benefit plan in which the employee is enrolled.¶
(6) An employer may not require that any verification or certification required explain the nature of the illness or details related to the domestic violence, sexual assault, harassment, or stalking that necessitates the use of sick time.¶
(7) If an employer obtains health information about an employee or an employee's family member, such information shall be treated as confidential to the extent provided by law.¶
(8) If an employee fails to provide verification or certification as required by ORS 653.626 and these rules, the employer is not required to pay for the use of sick time for the absence taken until the employee provides verification or certification verifying that the absence was for a qualifying reason as defined by ORS 653.616 and these rules. The employer may discipline the employee for violating policies and procedures but not for using sick time.¶
(9) If an employer reasonably suspects that an employee is abusing sick time, including engaging in a pattern of abuse, the employer may require verification from a health care provider of the need of the employee to use sick time, regardless of whether the employee has used sick time for more than three consecutive days. As used in this section, "pattern of abuse" includes, but is not limited to, repeated use of unscheduled sick time on or adjacent to weekends, holidays, vacation days or paydays.¶
(10) When an employee uses sick time to care for~~ a family member who is related by affinity~~, or to deal with the death of, an individual related by blood or affinity whose close association with the eligible employee is the equivalent of a family relationship, the employer may require the employee to attest in writing that the employee and the person cared for have a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship. An employer that requires a written attestation must provide an attestation form to the employee. The form need not be notarized, must be in the language typically used by the employer to communicate with the employee and may include the following provisions:¶
I, (full name) _____, share a significant bond with (name of other person)_____ and they are like a family member to me.¶

¶
Any facts about your relationship can make it like a family. Common examples include:¶
(~~A~~a) Shared personal financial responsibility, including shared leases, common ownership of real or personal property, joint liability for bills or beneficiary designations;¶
(~~B~~b) Emergency contact designation of the employee by the other individual in the relationship or the emergency contact designation of the other individual in the relationship by the employee;¶
(~~C~~c) The expectation to provide care because of the relationship or the prior provision of care;¶
(~~D~~d) Cohabitation and its duration and purpose;¶
(~~E~~e) Geographic proximity; and¶
(~~F~~f) Other factors that demonstrate the existence of a family-like relationship.
Statutory/Other Authority: ORS 653.601-653.661, ORS 651.060
Statutes/Other Implemented: ORS 653.601-653.661

REPEAL: 839-009-0200

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Repeals rule describing purpose and scope of OFLA rules.

CHANGES TO RULE:

~~839-009-0200~~
~~Oregon Family Leave Act (OFLA): Purpose and Scope~~
~~(1) The Civil Rights Division of the Bureau of Labor and Industries enforces the Oregon Family Leave Act (OFLA), ORS 659A.150 to 659A.186, which provides for OFLA leave and prohibits discrimination against employees using OFLA leave. These rules implement and interpret the Oregon Family Leave Act.¶~~
~~(2) These rules apply to complaints and inquiries received under ORS 659A.150 to 659A.186 and under these rules.~~
~~Statutory/Other Authority: ORS 659A.805~~
~~Statutes/Other Implemented: ORS 659A.150 - 659A.186~~

AMEND: 839-009-0210

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA definitions to implement chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0210
OFLA: Definitions ¶

As used in this Division 9:¶
(1) "Alternate duty" means work assigned to an employee that may consist of:¶
(a) The employee's same duties worked on a different schedule; or¶
(b) Different duties worked on the same or different schedule.¶
(2)(a) "Affinity" means a relationship for which there is a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship.¶
(b) The bond described in subsection (a) of this section may be demonstrated by, but is not limited to the following factors, with no single factor being determinative:¶
(A) Shared personal financial responsibility, including shared leases, common ownership of real or personal property, joint liability for bills or beneficiary designations;¶
(B) Emergency contact designation of the employee by the other individual in the relationship or the emergency contact designation of the other individual in the relationship by the employee;¶
(C) The expectation to provide care because of the relationship or the prior provision of care;¶
(D) Cohabitation and its duration and purpose;¶
(E) Geographic proximity; and¶
(F) Any other factor that demonstrates the existence of a family-like relationship.¶
(3) "Child," means the eligible employee's biological, adopted, foster or stepchild, the child of the employee's spouse or domestic partner or a child with whom the employee is or was in a relationship of in loco parentis. For purposes of ~~par~~child placement~~al~~ leave and sick child leave only, the child must be:¶
(a) Under the age of 18; or¶
(b) An adult dependent child substantially limited by a physical or mental impairment as defined by ORS 659A.104 (1)(a), (3), and (4).¶
(4) "Child care provider" for the purpose of sick child leave during a statewide public health emergency declared by a public health official means a place of care or person who cares for a child.¶
(a) A person who cares for a child includes but is not limited to individuals paid to provide child care, for example nannies, au pairs, and babysitters or individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.¶
(b) Place of care is a physical location in which care is provided for a child including but not limited to day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs. The physical location does not have to be solely dedicated to such care.¶
(5) "Closure" for the purpose of sick child leave during a statewide public health emergency declared by a public health official means a closure that is ongoing, intermittent, or recurring and restricts physical access to the child's school or child care provider.¶
(6) "Covered employer" means any employer employing 25 or more persons in the state of Oregon for each working day during each of 20 or more calendar work weeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken.¶
(7)(a) "Eligible employee" means an employee described in ORS 659A.156 who is employed in the State of Oregon on the date OFLA leave begins.¶
(b) To determine the number of days an employee has worked, the employer must count the number of days an employee is maintained on the payroll, including all time paid or unpaid. If an employee continues to be employed by a successor in interest to the original employer, the number of days worked are counted as continuous employment by a single employer.¶
(c) To determine an employee's average hours of work per week, the employer must count ~~any hours of protected leave taken, including OFLA leave, as well as~~ actual hours worked using guidelines set out pursuant to the federal Fair Labor Standards Act.¶
(d) For eligibility of employees reemployed following a period of uniformed service:¶
(A) The federal Uniformed Services Employment and Reemployment Act, 38 USC §43 (USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and

seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. U.S. Department of Labor regulation 20 CFR §1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. Under USERRA, a reemployed service member would be eligible for leave under OFLA if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet OFLA's eligibility requirements. In the event that a service member is denied OFLA leave for failing to satisfy the OFLA days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under OFLA.¶
NOTE: USERRA also applies to leave under the federal Family and Medical Leave Act of 1993, 29 USC §2601-2654 (FMLA).¶
(B) ORS 659A.082-659A.088 provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. If a reemployed service member was eligible for leave under OFLA prior to the date uniformed service began, OFLA's eligibility requirements are considered met.¶
(e) For the purpose of qualifying as an eligible employee, the employee need not work solely in the state of Oregon.¶
(8) "Family member" means an individual related to an eligible employee by affinity or an individual who is an eligible employee's:¶
(a) Spouse or domestic partner;¶
(b) Child or the child's spouse or domestic partner;¶
(c) Parent or the parent's spouse or domestic partner;¶
(d) Sibling or stepsibling or the sibling's or stepsibling's spouse or domestic partner;¶
(e) Grandparent or the grandparent's spouse or domestic partner; or¶
(f) Grandchild or the grandchild's spouse or domestic partner.¶
(9) "FMLA" is the federal Family and Medical Leave Act, 29 USC §2601.¶
(10) "Foreseeable leave" means OFLA leave ~~taken for a purpose set out in ORS 659A.159~~ that is not "unforeseeable leave."¶
(11) "Foster child" means a child, not adopted, but being reared as a result of legal process, by a person other than the child's biological parent.¶
(12) "Gender" means an individual's assigned sex at birth, gender identity, or gender expression.¶
(13) "Gender expression" means the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with the individual's assigned sex at birth.¶
(14) "Gender identity" has the meaning given that term in ORS 174.100¶
(15) "Health care provider" has the meaning given that term in ORS 659A.150.¶
(16) "In loco parentis" means in the place of a parent, having financial or day-to-day responsibility for the care of a child. A legal or biological relationship is not required.¶
(17) "Intermittent leave" means leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule including but not limited to sick child leave taken requiring an altered or reduced work schedule because the intermittent or recurring closure of a child's school or child care provider due to a statewide public health emergency declared by a public health official.¶
(18) "OFLA" is the Oregon Family Leave Act, ORS 659A.150 to 659A.186.¶
(19)(a) "OFLA leave" means a leave of absence for purposes described in ORS 659A.15~~9 and~~0 to 659A.186 or OAR 839-009-0230~~(1) through (5). Except that.~~¶
(b) "OFLA leave" does not include leave taken by an eligible employee who is unable to work because of a disabling compensable injury, as defined in ORS 656.005, unless the leave qualifies as OFLA leave to which the employee is otherwise entitled and the employee refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary under ORS 659A.043~~(3)(a)(D) and 659A.043(4) or 659A.046(3)(d) and 659A.046(5)~~ or 659A.046.¶
(20) "Parent" means:¶
(a) An eligible employee's biological parent, adoptive parent, stepparent or current or former foster parent or a person who was or is the eligible employee's legal guardian or with whom the eligible employee was or is in a

relationship of in loco parentis; or¶
(b) The parent of the eligible employee's spouse or domestic partner who meets a description in subsection (a) of this section.¶
(21) "Public health emergency" has the meaning given that term in ORS 659A.150.¶
(22) ~~"Serious health condition" means an illness, injury, impairment or physical or mental condition of an employee or family member:¶~~
~~(a) That requires inpatient care in a medical care facility such as a hospital, hospice or residential facility such as a nursing home. When a family member resides in a long-term residential care facility, leave applies only to:¶~~
~~(A) Transition periods spent moving the family member from one home or facility to another, including time to make arrangements for such transitions;¶~~
~~(B) Transportation or other assistance required for a family member to obtain care from a physician; or¶~~
~~(C) Serious health conditions as described in (b) through (h) of this paragraph.¶~~
~~(b) That the treating health care provider judges to pose an imminent danger of death, or that is terminal in prognosis with a reasonable possibility of death in the near future;¶~~
~~(c) That requires constant or continuing care such as home care administered by a health care professional;¶~~
~~(d) That involves a period of incapacity. Incapacity is the inability to perform at least one essential job function, or to attend school or perform regular daily activities for more than three consecutive calendar days and any subsequent required treatment or recovery period relating to the same condition. This incapacity must involve:¶~~
~~(A) Two or more treatments by a health care provider; or¶~~
~~(B) One treatment plus a regimen of continuing care.¶~~
~~(e) That results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity, such as asthma, diabetes or epilepsy;¶~~
~~(f) That involves permanent or long-term incapacity due to a condition for which treatment may not be effective, such as Alzheimer's disease, a severe stroke or terminal stages of a disease. The employee or family member must be under the continuing care of a health care provider, but need not be receiving active treatment;¶~~
~~(g) That involves multiple treatments for restorative surgery or for a condition such as chemotherapy for cancer, physical therapy for arthritis, or dialysis for kidney disease that if not treated would likely result in incapacity of more than three days; or¶~~
~~(h) That involves any period of disability due to pregnancy, including childbirth or pregnancy termination, or a period of absence for prenatal care, including fertility or infertility treatment.¶~~
~~(23)~~ "Spouse" includes:¶
(a) Individuals in a marriage recognized under state law in the state in which the marriage was entered into;¶
(b) Individuals in a marriage validly performed in a foreign jurisdiction;¶
(c) Individuals in a common law marriage that was entered into in a state that recognizes such marriages; and¶
(d) Individuals who have lawfully established a civil union, domestic partnership or similar relationship under the laws of any state. Individuals described in this subsection are not required to obtain a marriage license, establish a record of marriage or solemnize their relationship.¶
(24<u>3</u>) "Unforeseeable leave" means ~~leave taken as a result of:¶~~
~~(a) An unexpected serious health condition of an employee or family member of an employee; or¶~~
~~(b) An unexpected illness, injury or condition of a child of the employee that requires home care;¶~~
~~(c) A premature birth or a placement for adoption or foster care the exact date of which cannot be previously determined with certainty; or¶~~
~~(d) The death of a family member~~<u>OFLA bereavement leave, child placement leave, pregnancy disability leave or leave taken as a result of an unexpected illness, injury or condition of a child of the employee that requires home care</u>.
Statutory/Other Authority: ORS 659A.805, ORS 651.060
Statutes/Other Implemented: ORS 659A.150 - 659A.186, ORS 659A.043, ORS 659A.046

ADOPT: 839-009-0215

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Adopts OFLA rule to address transition of job protections from OFLA to Paid Leave Oregon.

CHANGES TO RULE:

839-009-0215
OFLA: Leave Previously Protected by OFLA
(1) As used in this rule, "leave previously protected by OFLA" means leave:¶
(a) To which an eligible employee would be entitled under ORS 659A.150 to 659A.186 on June 30, 2024; and¶
(b) To which an eligible employee would not be entitled under ORS 659A.150 to 659A.186, on July 1, 2024.¶
(2) A covered employer may rescind a designation or approval of leave previously protected by OFLA that is scheduled to occur on or after July 1, 2024.¶
(3) A covered employer who has designated or approved leave previously protected by OFLA that is scheduled to occur on or after July 1, 2024:¶
(a) Must, as soon as practicable, notify the employee in writing, in the language the employer typically uses to communicate with the employee, that the leave is not protected by OFLA on and after July 1, 2024; and¶
(b) May not retaliate or in any way discriminate against the employee with respect to hire or tenure or any other term or condition of employment because the employee has inquired about the provisions of OFLA, submitted a request for OFLA leave, or invoked any provision of OFLA.¶
(4) A covered employer must provide written information to an employee that informs the employee of the ability to apply for benefits under ORS chapter 657B, including contact information for Paid Leave Oregon or the administrator of the employer's equivalent plan:¶
(a) Concurrently if the employer rescinds the employee's previous OFLA designation or approval, as described in section (2) of this rule; and¶
(b) As soon as practicable but within 14 calendar days of the employee providing the employer with information that, before July 1, 2024, would have been sufficient for the employer to provisionally designate the leave as leave previously protected by OFLA.¶
(5) A covered employer may comply with section (4) of this rule by providing the employee with the notice made available by the Director of the Employment Department described in ORS 657B.440, in the language the employer typically uses to communicate with the employee.¶
(6) This rule does not relieve an employer from the obligation to comply with other laws, including the Family and Medical Leave Act, the Americans with Disabilities Act, ORS 659A.103 to 659A.146 and 659A.147 and ORS 653.601 to 653.661, when the employer is notified of the employee's need for leave that was previously protected by OFLA.
Statutory/Other Authority: ORS 651.060, ORS 659A.805, Section 22, chapter 20, Oregon Laws 2024
Statutes/Other Implemented: ORS 659A.150 to 659A.186, Section 22, chapter 20, Oregon Laws 2024

AMEND: 839-009-0220

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends rule to clarify relationship between OFLA and other laws.

CHANGES TO RULE:

839-009-0220
OFLA: Relationship to Other Laws ¶

(1) Leave taken under FMLA counts as OFLA leave provided the employee is also eligible for OFLA leave.¶
(2) Provisions of OFLA will be construed to the extent possible in a manner that is consistent with any similar provisions of FMLA; however, employers subject to both OFLA and FMLA must apply in a given leave situation the provision that is more beneficial to the employee's circumstances.¶
(3) ~~When a covered employee takes leave under OFLA that also qualifies as family or medical leave taken pursuant to ORS chapter 657B, the provisions of ORS 659A.174 apply.~~An employer may not impair, by agreement or otherwise, the right of an employee on OFLA leave to utilize sick leave under the provisions of ORS 653.601 to 653.661.¶
(4) The provisions of ORS 657B.060 and 657B.070 apply during periods of time that include but are not limited to the application period described in OAR 471-070-1100. ¶
(45) A decision by the Director of the Employment Department, or a decision under an equivalent plan described in ORS 657B.210 to 657B.260, to deny family or medical leave under ORS chapter 657B is not a defense to the unlawful practice described in ORS 659A.183. A covered employer has an independent obligation to determine whether to deny or grant OFLA leave in accordance with ORS 659A.150 to 659A.186 and these rules.
Statutory/Other Authority: ORS 65~~9A.805~~1.060, ORS 65~~1.0609~~A.805
Statutes/Other Implemented: ORS 659A.805, ORS 659A.150 - 659A.186

AMEND: 839-009-0230

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends rule to conform administrative description of OFLA leave purposes to those described in chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0230
OFLA: Purposes for Taking Leave ¶

Eligible employees may take OFLA leave~~, including OFLA leave taken pursuant to ORS 657B.020,~~ for the purposes ~~commonly~~ referred to as ~~parental leave, serious health condition~~child placement leave, pregnancy disability leave, sick child leave, and ~~the death of a family member.¶~~
~~(1) Par~~bereavement leave.¶
(1) Child placement~~al~~ leave is leave taken ~~for the birth of the employee's child, to care for the employee's newborn, newly adopted or newly placed foster child under 18 years of age or for a newly adopted or newly placed foster child 18 years of age or older who is incapable of self-care because of a physical or mental impairment. It includes leave time to effectuate the legal process required for placement of a foster child or the adoption of a child.¶~~
~~(2) Serious health condition leave is leave taken:¶~~
~~(a) To provide care for a family member with a serious health condition as defined in OAR 839-009-0210; or¶~~
~~(b) To recover from or seek treatment for a serious health condition that renders an employee unable to perform at least one essential function of the employee's regular position.¶~~
~~(3~~under OFLA before January 1, 2025, to effectuate the legal process required for placement of a foster child or the adoption of a child.¶
(2) Pregnancy disability leave is leave taken by an employee for their own disability related to pregnancy, including pregnancy termination or childbirth, whether the disability occurs before, during or after the birth of the child, or for prenatal care, including fertility or infertility treatment.~~ Pregnancy disability leave is a form of serious health condition leave.~~¶
(4~~3~~) Sick child leave is leave taken to care for an employee's child suffering from an illness, injury, or condition that requires home care~~ but is not a serious health condition~~.¶
(a) Sick child leave includes ~~absenc~~leave to care for an employee's child whose school or child care provider has been closed in conjunction with a statewide public health emergency declared by a public health official.¶
(b) An employer is not required to grant OFLA leave for routine medical or dental appointments.¶
(~~5~~4) ~~L~~Bereavement leave is leave taken to deal with the death of a family member ~~i~~and includes leave taken to attend the funeral or alternative to a funeral of the family member, to make arrangements necessitated by the death of the family member, or to grieve the death of the family member.
Statutory/Other Authority: ORS 659A.805, ORS 651.060
Statutes/Other Implemented: ORS 659A.150 - 659A.186

AMEND: 839-009-0235

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends rule to conform OFLA leave year to ORS 659A.164 and chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0235
OFLA: Leave Year
(1) For purposes of this Division 9, "OFLA leave year" has the meaning given the phrase "one-year period" in ORS 659A.164.¶
(2) If a covered employer transitions from any other leave year applicable to OFLA to an OFLA leave year ~~of 52 consecutive weeks that begins on the Sunday immediately preceding the date on which family leave commences~~, all eligible employees of the covered employer must be provided with the full benefit of leave entitlement described in ORS 659A.150 to 659A.18~~62~~ at the beginning of the new OFLA leave year.
Statutory/Other Authority: ORS 651.060, ORS 659A.164, ORS 659A.805
Statutes/Other Implemented: ORS 659A.164

AMEND: 839-009-0240

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA rule to conform to chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0240
OFLA: Length of Leave and Other Conditions of OFLA Leave ¶

~~Except as specifically provided by ORS 657B.020:¶~~
~~(1~~(1)(a) An eligible employee is entitled to up to a total of 12 weeks of OFLA leave ~~within any one-year period.¶~~
~~(2) In addition to the 12 weeks of leave authorized by ORS 659A.162 (1), an eligible employee may take a total of 12 weeks of~~, for sick child leave and bereavement leave, within ~~the same~~an OFLA leave year ~~for an illness, injury or condition related to pregnancy or childbirth that disables the employee from performing any available job duties offered by the employer. The employee may use all or part of the 12.¶~~
(b) Notwithstanding subsection (a) of this section, an eligible employee is entitled to a total of two weeks of ~~l~~bereave ~~authorized by 659A.162(1) and all or part of the 12 weeks of pregnancy disability leave in any order. The employee need not exhaust either type of leave in order to use the other.¶~~
~~(3) An eligible employee taking the entire 12 weeks of OFLA leave authorized by ORS 659A.162 (1) for parental leave may take an additional 12 weeks of sick child~~ment leave upon the death of each family member of the employee within an OFLA leave year, except that the eligible employee may not take more than four weeks of bereavement leave within ~~the same~~an OFLA leave year. ~~If the employee uses less than 12 weeks of parental leave, however, no additional sick child leave is available, except that the balance of¶~~
(2) In addition to the 12 weeks of ~~OFLA~~ leave ~~authorized by ORS 659A.162 may be used for sick child leave or for any OFLA leave purpose.¶~~
~~(4) A~~described in section (1) of this rule, an eligible employee may take ~~up~~a to ~~36 weeks of OFLA leave in one leave year that includes up to~~tal of 12 weeks of OFLA pregnancy disability leave~~, 12 weeks of parental leave, and up to 12 weeks of sick child leave.¶~~
~~(5) An eligible employee may take up to 24 weeks of OFLA leave in one leave year under the following circumstances:¶~~
~~(a) The employee takes 12 weeks~~ within the same OFLA leave year. The employee may use all ~~of~~r par~~ental leave, followed by:¶~~
~~(b) Up to~~t of the 12 weeks of ~~sick child leave.¶~~
~~(6) An eligible employee may receive notice of the death of a family member by any means and from any source.¶~~
~~(7) Two or more eligible employees who are family members of each other as defined in OAR 839-009-0210, working for the same covered employer, may take OFLA leave at the same time with that covered employer for the same qualifying event only under the following circumstances:¶~~
~~(a) One eligible family member needs to care for another eligible family member who is suffering from a serious health condition;¶~~
~~(b) One eligible family member needs to care for a child suffering from a serious or non-serious health condition while another eligible family member is suffering from a serious health condition;~~leave described in section (1) of this rule and all or part of the 12 weeks of OFLA pregnancy disability leave in any order. The employee need not exhaust either type of leave in order to use the other.¶
(~~c~~3) ~~Two or more eligible family members are suffering from one or more serious health conditions;¶~~
~~(d) The employer allows family members to take concurrent leave; or¶~~
~~(e) The eligible family members are taking leave for the death of a family member pursuant to ORS 659A.159(1)(e) and OAR 839-009-0230(5).¶~~
~~(8) Unless the covered employer approves otherwise, parental leave shall be taken in one uninterrupted period, and shall be completed within 12 months of the birth, adoption or placement of the child. Exceptions shall be made:¶~~
~~(a) To allow intermittent parental leave to effectuate adoption or foster placement of a child. Parental leave taken to effectuate adoption or foster placement~~In addition to the 24 weeks of leave authorized by sections (1) and (2) of this rule, an eligible employee is entitled to a total of two weeks of ~~a~~ child ~~is part of the total amount of par~~placem~~ental~~ leave ~~available to the employee, but need not be taken in one, uninterrupted period with any remaining parental leave taken after the actual placement of the child.¶~~
~~(b) To allow parental leave to attend the birth of or give birth to the employee's child. Such leave need not be taken in one, uninterrupted period with any remaining parental leave taken after the birth of the child~~within an OFLA leave year. This section (3) of this rule does not apply on or after January 1, 2025.¶

(~~9~~4) The ~~birth,~~ adoption or foster placement of multiple children at one time entitles the employee to take only one ~~12~~two-week period of ~~par~~child placement~~al~~ leave.¶
~~(10~~ This section (4) of this rule does not apply on or after January 1, 2025.¶
(5) A covered employer need not grant sick child leave to an eligible employee if another family member of the child is willing and able to care for the child.¶
(~~11~~6) A covered employer may not reduce the amount of OFLA leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005.¶
(a) If an employee uses OFLA pregnancy disability leave for a workplace injury pending acceptance of a workers' compensation claim, upon acceptance of the claim any OFLA pregnancy disability leave used for the workplace injury must be restored to the employee. If the claim is denied, OFLA pregnancy disability leave will be deducted from the employee's entitlement.¶
(b) If a worker's compensation claim is first denied and then accepted, the employer must restore any OFLA pregnancy disability leave taken for the condition covered by worker's compensation in the leave year in which the worker's compensation claim is accepted.¶
(c) Notwithstanding this rule, the employer may reduce the amount of OFLA leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005 after the employee has refused a suitable offer of light duty or modified employment under ORS 659A.043 (3)-(a)-(D) or 659A.046(3)(d).¶
(d) An employee unable to work for an employer because of a disabling compensable injury arising out of and in the course of employment for that employer, but who is also employed by and able to work for another employer, may be eligible and qualify to use OFLA leave under the other employer.¶
(~~12~~7) For the purpose of intermittent leave, OFLA leave entitlement is calculated for an employee by multiplying the number of hours in the employee's normal~~ly~~ work~~s per~~ week by ~~12. (For example, an employee normally employed to work 30 hours per week is entitled to 12 times 30 hours, or a total of 360 hours OFLA intermittent leave; an employee normally employed to work 50 hours per week is entitled to 12 times 50 hours, or a total of 600 hours OFLA intermittent leave.)~~the number of weeks for which the employee is eligible for each category of OFLA.¶
(a) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 months worked prior to the beginning of the leave period must be used for calculating the employee's normal work week. ~~(For example, an employee working an average of 25 hours per week is entitled to 12 times 25 hours, or a total of 300 hours OFLA leave.)~~¶
(b) If an employee takes intermittent or reduced work schedule OFLA leave, only the actual number of hours of leave taken may be counted toward the ~~12 weeks of~~ OFLA leave to which the employee is entitled.¶
(~~13) A~~8) When an employee ~~who has previously qualified for and taken some portion of OFLA leave must requalify a~~requests OFLA leave, or when a covered employer acquires knowledge that an employee's leave may be for a purpose that constitutes OFLA leave, the employer must notify the employee of the employee's eligibility to take OFLA leave within five business days, absent extenuating circumstances. Whether an employee is an "eligible employee" as defined in OAR 839-009-0210 ~~each time the employee begins additional OFLA leave within the same leave year. Exceptions:¶~~
~~(a) An employee who has been granted OFLA leave for a qualifying serious health condition of the employee or family member need not requalify under~~is determined, and notice must be provided, at the commencement of the first instance of each purpose for leave listed in OAR 839-009-0240 during the OFLA leave year. If an employee is an "eligible employee" as defined in OAR 839-009-0210 for a purpose listed in OAR 839-009-02~~10 each time~~40, the employee ~~takes leave for the same individual and the same serious health condition during the same leave year.¶~~
~~(b) Except as limited by ORS 657B.020~~'s eligibility for that purpose does not change during the applicable 12-month period. In addition:¶
(~~A~~a) An eligible employee taking, in any order, some or all of 12 weeks of OFLA pregnancy disability leave and some or all of 12 weeks of OFLA leave for any other purpose, need not requalify under OAR 839-009-0210 each time ~~sh~~the employee takes OFLA leave within the same leave year.¶
(~~B~~b) An employee who has taken ~~12~~two weeks of OFLA ~~par~~child placement~~al~~ leave, need not requalify under OAR 839-009-0210 for up to an additional 12 weeks of leave within the same leave year when used for the purposes of OFLA sick child leave.¶
(c) An employee unable to work because of a disabling compensable injury as defined in ORS 656.005 need not requalify under OAR 839-009-0210 in order to use OFLA leave following a period the employee is off work due to the compensable injury.¶
(~~d~~9) ~~A~~When an employee~~ who has taken serious health condition leave to care for a family member who dies during the employee's serious health condition leave, need~~r is authorized by law to request additional information,

other than information that constitutes medical verification, to verify whether leave is OFLA qualifying, the employer may provide the employee with a written request for information. The written request must be provided within five business days after the date on which the employee requests OFLA leave, or on which the employer acquires knowledge that an employee's leave may be for an OFLA-qualifying reason. Absent extenuating circumstances, the employer must notify the employee whether or not the employee is eligible and qualifies to take OFLA leave within five business days of receiving the requested information. If an employer determines that an employee does not qualify for OFLA leave for the reason requested, the employer must notify the employee in writing that the employee does not requalify ~~under OAR 839-009-0210 to take leave for the death of that family member~~.¶
(10) When the written notice described in section (8) or (9) of this rule indicates that the employee does not qualify for OFLA leave, the notice must state that the employee is ineligible or that the reason for requested leave does not qualify for OFLA leave and at least one reason why the employee is not eligible or the reason does not qualify for leave.¶
(141) An exempt employee is a salaried executive, administrative or professional employee under the federal Fair Labor Standards Act ~~(see 29 CFR 541 through 541.315)~~ or the state minimum wage and overtime laws ~~(ORS chapters 652 and 653)~~.¶
(a) When OFLA leave is also covered by FMLA and the employee takes intermittent leave in blocks of less than one day, if done in accordance with 29 CFR 825.206, the employer may reduce the employee's salary for the part-day absence without the loss of the employee's exempt status in accordance with OAR 839-020-0004(3~~0~~)(a2).¶
(b) When OFLA leave is not covered by FMLA ~~(e.g., the employer has 25 to 49 employees, the leave is taken for a sick child, for the serious health condition of a parent-in-law, for the serious health condition of a registered domestic partner or for the serious health condition of a registered domestic partner's parents or for the death of a family member), and the employee takes intermittent leave in blocks of less than one day, an employer will jeopardize the employee's exempt status if the employer reduces the employee's salary for the part-day absence.¶~~
~~(15) The requirements of OFLA do not apply to any employer offering eligible employees a nondiscriminatory cafeteria plan, as defined by section 125 of the Internal Revenue Code of 1986, that provides as one of its options employee leave at least as generous as the leave required by OFLA.¶~~
~~(16~~, and the employee takes intermittent leave in blocks of less than one day, an employer will jeopardize the employee's exempt status if the employer reduces the employee's salary for the part-day absence.¶
(12) ORS 659A.150 to 659A.186 and these rules do not limit any right of an employee to ~~any leave that is similar to the leave described in 695A.159(1) and OAR 839-009-0230 and~~similar leave to which the employee may be entitled under any agreement between the employer and the employee, collective bargaining agreement or employer policy.¶
(173) When an eligible employee takes bereavement leave under ORS 659A.150 to 659A.186 to ~~care for, or to~~ deal with the death of~~,~~ a ~~family member who is related by affinity~~n individual related by blood or affinity whose close association with the eligible employee is the equivalent of a family relationship, the employer may require the employee to attest in writing that the employee and the other person have a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship. An employer that requires a written attestation must provide an attestation form to the employee. The form need not be notarized, must be in the language typically used by the employer to communicate with the employee and may include the following provisions:¶
I, (full name) _____, share a significant bond with (name of other person)_____ and they are like a family member to me.¶
~~¶~~
Any facts about your relationship can make it like a family. Common examples include:¶
(~~A~~a) Shared personal financial responsibility, including shared leases, common ownership of real or personal property, joint liability for bills or beneficiary designations;¶
(~~B~~b) Emergency contact designation of the employee by the other individual in the relationship or the emergency contact designation of the other individual in the relationship by the employee;¶
(~~C~~c) The expectation to provide care because of the relationship or the prior provision of care;¶
(~~D~~d) Cohabitation and its duration and purpose;¶
(~~E~~e) Geographic proximity; and¶
(~~F~~f) Other factors that demonstrate the existence of a family-like relationship.
Statutory/Other Authority: ORS 659A.805, ORS 651.060
Statutes/Other Implemented: ORS 659A.150 - 659A.186, ORS 659A.043, ORS 659A.046

AMEND: 839-009-0245

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA rule to conform to chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0245
OFLA: Intermittent Leave and Alternate Duty ¶

(1) An employer may transfer an employee on intermittent OFLA leave or a reduced work schedule into an alternate position with the same or different duties to accommodate the leave, provided the following exist:¶
(a) The employee accepts the transfer position voluntarily and without coercion;¶
(b) The transfer is temporary, lasts no longer than necessary to accommodate the leave and has equivalent pay and benefits;¶
(c) The transfer is compliant with applicable collective bargaining agreements, as well as with state and federal law, ~~providing~~including ORS 659A.146 and 659A.147 and all the employee protections found in FMLA regulations 29 CFR Part 825;¶
(d) Transfer to an alternate position is used only when there is no other reasonable option available that would allow the employee to use intermittent leave or reduced work schedule; and¶
(e) The transfer is not used to discourage the employee from taking intermittent or reduced work schedule leave, or to create a hardship for the employee.¶
(2) An employee transferred, as provided in section (1)~~(a) through (e)~~ of this rule, to an alternate position for the purpose of a reduced work schedule must be returned to the employee's former position when the employee notifies the employer that the employee is ready to return to the former position at the end of the alternate duty leave.¶
(3) OFLA leave time for an employee on intermittent leave or a reduced work schedule is the difference between the number of hours the employee normally works and the number of hours the employee actually works during the intermittent leave or reduced work schedule. When it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work during a shift, ~~such as when a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time,~~ the entire period of work from which the employee is forced to be absent is designated as OFLA leave and counts against the employee's OFLA entitlement.¶
(4) ~~Holidays or d~~Days in which the employer's business is not in operation are not counted toward intermittent or reduced work schedule OFLA leave.¶
(5) An employer may transfer an employee ~~recovering from a serious health condition~~ to an alternate position that accommodates ~~the serious health condition~~OFLA pregnancy disability leave provided:¶
(a) The employee accepts the position voluntarily and without coercion;¶
(b) The transfer is temporary, lasts no longer than necessary and has equivalent pay and benefits;¶
(c) The transfer is compliant with applicable collective bargaining agreements, as well as with state and federal law, ~~providing~~including ORS 659A.146 and 659A.147 and all the employee protections found in FMLA regulations 29 CFR Part 825; and¶
(d) The transfer is not used to discourage the employee from taking OFLA leave ~~for a serious health condition,~~ or to create a hardship for the employee.¶
(6) An employee is not on OFLA leave if the employee has been transferred - as provided in section (5)~~(a) through (d)~~ of this rule - to an alternate position for the purpose of alternate work duties that the employee is able to perform within the limitations of the employee's ~~own serious health condition~~pregnancy disability, but not requiring a reduced work week. An employee working in an alternate position retains the right to return to the employee's original position ~~unless all OFLA leave taken in that leave year plus the period of time worked in the alternate position exceed 12 weeks.¶~~
~~(7) An alternate position accommodating an employee's serious health cond~~at any time during the employee's OFLA leave. This section (6) does not impair the right of an employee to a reasonable accommodation or the application of any other state or federal law.¶
(7) An alternate position may result in the employee working fewer hours than the employee worked in the original position. The employee's OFLA leave is the difference between the number of hours the employee worked in the original position and the number of hours the employee actually works in the alternate position.¶
~~(8) Intermittent leave for school teachers is subject to the special rules in OAR 839-009-0290.~~
Statutory/Other Authority: ORS 65~~9A.805, 659A.162~~1.060, ORS 659A.162, ORS 659A.805

Statutes/Other Implemented: ORS 659A.150 - to 659A.186

AMEND: 839-009-0250

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA rule to conform to chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0250
OFLA: Notice by Employee; Designation by Employer; Notice by Employer Regarding Eligibility or Qualification ¶

(1) Except as otherwise described in this rule, a covered employer may require an eligible employee to give 30 days' written notice of the need for foreseeable leave, including an explanation of the need for leave, before starting ~~OFLA~~sick child leave. The employee is not required to specify that the request is for OFLA leave.¶
(2) When an employee is unable to give the employer 30 days' notice of the need for sick child leave but has some advance notice of the need for the leave, the employee must give the employer as much advance notice as is practicable.¶
(3) An employee able to give advance notice of the need to take ~~OFLA~~sick child leave must follow the employer's known, reasonable and customary procedures for requesting any kind of leave, absent unusual circumstances.¶
(4) When taking OFLA leave in an unforeseeable situation, an employee must give ~~verb~~oral or written notice within 24 hours before or after commencement of the leave. This notice may be given by any other person on behalf of an employee taking unforeseeable OFLA leave. The employer may require written notice by the employee within three days of the employee's return to work.¶
(5)(a) Except as otherwise provided in OAR 839-009-0260 and subsection (~~d~~e) of this section, an employer may request additional information to determine that a requested leave qualifies for designation as OFLA leave.¶
(b) The employer may provisionally designate an absence as OFLA leave until sufficient information is received to make a determination. ~~A covered employer who receives written notice from the Oregon Employment Department, or other verbal or written notice, that an eligible employee has applied for Paid Leave under ORS chapter 657B, has received sufficient notice to provisionally designate an absence as OFLA leave until sufficient information is received to make a determination; provided, however, that if the absence is determined to be other than OFLA leave, the eligible employee's leave entitlement will be restored.~~ An employee who calls in "sick" without providing further information will not be considered to have provided sufficient notice to trigger an employer's obligations under OFLA, unless the employer has reason to know the employee is attempting to invoke protected leave or the employer acquires knowledge that an employee's leave may be for an OFLA-qualifying reason.¶
(c) An employee on OFLA leave who needs to take more leave than originally authorized must give the employer reasonable notice prior to the end of the authorized leave, following the employer's known, reasonable and customary procedures for requesting any kind of leave. However, when an authorized period of OFLA leave has ended and an employee does not return to work, an employer having reason to believe the continuing absence may qualify as OFLA leave must request additional information, and may not treat a continuing absence as unauthorized unless requested information is not provided or does not support OFLA qualification.¶
(d) An eligible employee may receive notice of the death of a family member by any means and from any source.¶
(e) An employer may not request additional information to verify ~~l~~bereave ~~for the death of a family member~~ment leave, except the employer may require the use of an attestation form described in OAR 839-011-0240 when the family member is related by affinity.¶
(6) When an employee fails to give notice of foreseeable leave as required by sections (1) and (2), and (3):¶
(a) If the leave qualifies under OFLA only and not under FMLA, the employer may reduce the total period of unused OFLA leave by an amount no greater than the number of days of leave the employee has taken without providing timely notice of leave. This reduction of leave may not exceed three weeks in a one-year leave period; and the employer may subject the employee to disciplinary action under a uniformly applied policy or practice of the employer.¶
(b) If the leave qualifies under FMLA only, FMLA regulations apply~~: 29 CFR 825.302 (Employee Notice Requirements for Foreseeable FMLA Leave) and 29 CFR 825.304 (Employee Failure to Provide Notice). FMLA regulation 29 CFR 825.304 provides that an employer may delay coverage until up to 30 days after notice was received and the employer may take appropriate action under its internal rules and procedures for failure to follows its usual and customary notification rules, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave~~.¶
(c) If the leave qualifies under both OFLA and FMLA the employer may:¶
(A) Delay FMLA coverage until up to 30 days after notice was received as permitted by the FMLA regulations at 29 CFR 825.304 (this applies only to leave to which the employee is entitled under FMLA);¶

(B) Reduce the total period of unused OFLA leave by an amount no greater than the number of days of leave the employee has taken without providing timely notice of leave. This reduction of leave may not exceed three weeks in a one-year leave period ~~(see ORS 659A.165)~~. This applies only to leave to which the employee is entitled under OFLA; and¶
(C) In addition to actions permitted under (A) and (B), the employer may also take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking OFLA or FMLA leave.¶
(d) A reduction of OFLA leave under (6)(a) or (6)(c) ~~(B)~~ of this rule may not limit OFLA ~~l~~bereave ~~under ORS 659A.159(1)(e) and OAR 839-009-0230(5) for the death of a family member~~ment leave.¶
(7) An employer may not reduce an employee's available OFLA leave or take disciplinary action under (6)(a) or (c) of this rule unless the employer has posted the required Bureau of Labor and Industries Family Leave Act notice or the employer can otherwise establish that the employee had actual knowledge of the notice requirement.¶
(8) ~~If the qualifying purpose for which an eligible employee takes paid leave under ORS chapter 657B also constitutes a purpose for which OFLA can be taken, a covered employer may reduce the total period of leave described in 657B.020(2) and (3) by the number of days of paid leave taken.¶~~
~~(9) When an employer is authorized by law to request additional information, other than information that constitutes medical verification, to verify whether leave is OFLA qualifying, the employer may provide the employee with a written request for information. The written request must be provided within five business days of the date on which the employee requests OFLA leave, or on which the employer acquires knowledge that an employee's leave may be for an OFLA-qualifying reason. Within five business days of receiving the requested information, the employer must notify the employee whether or not the employee is eligible and qualifies to take OFLA leave absent extenuating circumstances. All OFLA absences for the same qualifying reason are considered a single leave event and employee qualification as to that reason for leave does not change during the applicable 12-month period unless the reason is no longer qualifying. If an employer determines that an employee does not qualify for OFLA leave for the reason requested, the employer must notify the employee in writing that the employee does not qualify.¶~~
~~(a) The written notice that the employee does not qualify must state that the employee is ineligible or the reason for requested leave does not qualify for OFLA leave and at least one reason why the employee is not eligible or the reason does not qualify for leave.¶~~
~~(b) If an employer determines that an employee does not qualify for OFLA leave for the reason requested because a medical verification is incomplete or insufficient, the written notice that the employee does not qualify must state what additional information is required to make the verification complete or sufficient, and the employee must be afforded a reasonable period of time to correct the deficiency.¶~~
~~(10)~~ An employee who has refused a suitable offer of light duty or modified employment under ORS 659A.043 ~~(3)(a)(D)~~ or 659A.046 ~~(3)(d)~~ and who otherwise is entitled to OFLA leave ~~under 659A.150 to 659A.186~~:¶
(a) Automatically commences a period of OFLA leave upon refusing the offer of employment; and¶
(b) Need not give notice to the employer that would otherwise be required ~~by this rule~~ that the employee is commencing a period of leave.¶
(~~11~~9) A covered employer may provide an OFLA leave request form. ~~An example of a form that includes information for determining eligibility for OFLA leave as well as leave covered by OFLA and FMLA is attached to this rule.~~
Statutory/Other Authority: ORS 65~~9A.805~~1.060, ORS 65~~1.060~~9A.805
Statutes/Other Implemented: ORS 659A.150-659A.186, ORS 659A.043, ORS 659A.046

AMEND: 839-009-0260

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA rule to conform to chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0260
OFLA: Medical Verification and Scheduling of Treatment ¶

(1) An employer may require an employee to provide medical verification of the need for OFLA leave, except that:¶
(a) An employer may not require medical verification for ~~par~~child placement~~al~~ leave, for ~~the death of a family member~~bereavement leave or for the need for sick child leave due to the closure of a child's school or child care provider as a result of a public health emergency.¶
(b) ~~If an~~Unless the employee is taking sick leave under ORS 653.601 to 653.661 concurrently with OFLA leave, an employer may request medical verification for sick child leave only after the employee has taken sick child leave on all or any part of three separate days during a leave year~~, the employer may only require medical verification from a health~~ for a purpose other than to care for a child who requires home care due to the closure of the child's school or child care provider ~~on~~as the ~~fourth day~~result or~~f~~ a~~ny subsequent use of sick child leave within that leave year.~~ public health emergency The opinion of the health care provider is binding, and the employer may not require the employee to obtain a second opinion.¶
(2) All requests for medical verification must be in writing and must state the consequences for failure to provide the requested medical verification.¶
(3)(a) The employer must pay the cost of any requested medical verification ~~not covered by insurance or another benefit plan, unless the~~.¶
(b) Notwithstanding subsection (a) of this section, the costs of medical verification for pregnancy disability leave may be paid:¶
(A) From health and welfare fringe benefit moneys contributed entirely by the employer; or¶
(B) By the employee if the medical verification is a component of a medical examination or health certificate ~~is~~ required pursuant to a collective bargaining agreement, state or federal statute or city or county ordinance.¶
(4) When an employer~~e~~ is require~~s eligible employees~~d to give advance written notice of foreseeable leave ~~and an eligible employee gives such notice~~, the employer may also require the employee to provide medical verification of the need for OFLA leave before the leave starts.¶
(5) When an employee commences unforeseeable OFLA leave without prior notice, the employee must provide medical verification within 15 days of the employer's request for verification.¶
(6) If an employer determines that a medical verification provided by an employee is incomplete or insufficient, the employer must provide written notice that states the verification is incomplete or insufficient and the additional information needed to make it complete or sufficient and must afford the employee a reasonable period of time to correct the deficiency.¶
(7) When an employee fails to respond to reasonable employer requests for medical verification of the employee's eligibility for foreseeable leave to determine whether the leave is OFLA qualifying, the employer may deny use of OFLA leave until complete or sufficient medical verification is received.¶
(8) An employer may not delay the use of OFLA leave when medical verification is not received before the commencement of unforeseeable leave. The employer may designate the leave as provisionally approved, subject to medical verification.¶
(9) If an employee submits medical verification signed by a health care provider, the employer may not directly request additional information from the employee or family member's health care provider. However, with permission from the employee or family member, a health care provider representing the employer may contact the employee or family member's health care provider to clarify or authenticate the medical verification.¶
(10) ~~An employer may not request subsequent medical verifications more often than every 30 days and then only in connection with the employee's absence except when:¶~~
~~(a) Circumstances described by the previous medical verification have changed significantly (e.g., the duration or frequency of absences, the severity of conditions, or complications); or¶~~
~~(b) The employer receives information that casts doubt upon the employee's stated reason for the absence.¶~~
~~(11) Upon request by the employee, the employer is required to provide the employee with a copy of any second and third medical opinions required under ORS 659A.168(1). Absent extenuating circumstances, the requested copies must be provided within five business days after the receipt of the employee's request.¶~~
~~(12) When possible, an employee must make a reasonable eff~~Except as provided in ORS 659A.171(4), an employer

may not request medical verification for leave after the employee has qualified for that leave. An employer may not require an employee to obtain a second or~~t t~~hird opinion. ~~o schedule medical treatment or supervision at times that will minimize disruption of the employer's operat~~
Statutory/Other Authority: ORS 651.060, ORS 659A.805
Statutes/Other Implemented: ORS 659A.150 - 659A.186

AMEND: 839-009-0265

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA rule to conform to chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0265
OFLA: Medical Verification in Languages Other than English ¶

(1) In circumstances in which an employee or family member needs to obtain medical verification in a foreign country, the employer shall accept a medical verification ~~as well as second and third opinions~~ from a health care provider who practices in that country.¶
(2) When a medical verification by a health care provider is in a language other than English, the employer may request that the employee provide a written translation of the verification.¶
(a) The employee's request for OFLA leave may not be denied on the basis of failure of a good faith effort to obtain translation of a medical verification.¶
(b) The employer may not deny the employee access to translation resources available to the employer (for instance, bilingual personnel or computer programs).¶
(c) The employer must request the translation as soon as is practicable upon learning that an employee's circumstances may result in a medical verification being issued in a language other than English.
Statutory/Other Authority: ORS 651.060, ORS 659A.805
Statutes/Other Implemented: ORS 659A.150 - 659A.186

AMEND: 839-009-0270

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA rule to conform to chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0270
OFLA: Job Protection ¶

(1) An employer must restore an employee returning from OFLA leave, including intermittent and alternat~~ive~~ duty leave, to the employee's former position if the job still exists, even if it has been filled during the employee's OFLA leave. The former position is the position held by the employee at the time OFLA leave began, regardless of whether the job has been renamed or reclassified. (For example, a delivery driver must be returned to the same route, at the same rate of pay and benefits, driving the same truck, delivering the same goods, on the same shift and working from the same location as when the driver started OFLA leave.)¶
(2) Any worker hired during an eligible employee's leave to perform the same work that the eligible employee performed before the leave was taken is a replacement worker. When the eligible employee notifies the employer that the employee is ready to return to work, the employer must give that employee the opportunity to work any hours that the replacement worker would otherwise have been scheduled to work.¶
(3) The employee is not entitled to return to the former position if the employee would have been bumped if OFLA leave had not been taken.¶
(4) If the position held by the employee at the time OFLA leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.¶
(a) An available position is a position that is vacant or not permanently filled.¶
(b) An equivalent position is a position that is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee's former job site, the employee may be restored to an equivalent position within 50 miles of the former job site.¶
(5) Unless the terms of a collective bargaining agreement, other agreement or the employer's policy provide otherwise:¶
(a) An employee on OFLA leave does not accrue seniority, production bonuses or other non-health-related benefits that would accrue while the employee is working;¶
(b) Benefits an employee was entitled to prior to starting OFLA leave must be restored in full upon the employee's return to work. The benefits do not have to be restored, however, if such benefits have been eliminated or changed for similarly situated employees;¶
(c) An employee has no greater right to a job or other employment benefits than if the employee had not taken OFLA leave; and¶
(d) An employee is subject to layoff the same as similarly situated employees not taking OFLA leave.¶
(6) During any OFLA leave, an employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.¶
(a) An employer continuing health or other insurance coverage for an employee on OFLA leave may require that the employee pay only the same share of health or other insurance premium during the leave that the employee paid prior to the leave.¶
(b) If an employee cannot or will not pay such costs, the employer may elect to discontinue benefit coverage, unless to do so would render the employer unable to restore the employee to full benefit coverage. If coverage lapses because an employee has not made required premium payments, upon the employee's return from OFLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.¶
(c) If the employer pays (directly or indirectly, voluntarily or as required by state or federal statute) any part of the employee's share of health or other insurance premium while an employee is on OFLA leave, the employer may deduct up to 10 percent of the employee's gross pay each pay period after the employee returns to work until the

amount is repaid.¶
(d) If an employee fails to return to work - unless the failure to return to work is because of a serious health condition ~~for which the employee would be entitled to OFLA leave~~under ORS Chapter 657B or another circumstance beyond the employee's control - the employer may recover the employee's share of benefits paid by the employer. The employer may use any legal means to collect the amount owed for the employee's share of benefits paid by the employer, including deducting the amount from the employee's final paycheck.¶
(7) An employer may require an employee to follow the employer's established leave policy regarding periodic reporting to the employer of the employee's current status.~~ Before restoring the employee to work after taking OFLA leave for the employee's own serious health condition, the employer may require the employee to present verification from the employee's health care provider that the employee is able to resume work, provided such requirement is applied pursuant to a uniformly applied practice or policy of the employer that is also applied to employees that have not taken protected leave.~~¶
(8) Where required by ORS 659A.112 to 659A.139 and ORS 659A.146 to 659A.148 or other law, employers must consider reasonable accommodations in determining whether an employee is able to resume work.¶
~~(a) Any medical verification required under this section must be paid for by the covered employer.¶~~
~~(b) The employer may not require the employee to obtain a second opinion.¶~~
(~~8~~9)(a) If an employee gives unequivocal notice of intent not to return to work from OFLA leave:¶
(b) The employee is entitled to complete the approved OFLA leave, providing that the original need for OFLA leave still exists. The employee remains entitled to all the rights and protections under OFLA, including but not limited to, the use of vacation, sick leave and health benefits pursuant to OAR 839-009-0270 and 839-009-0280, except that:¶
(A) The employer's obligations under OFLA to restore the employee's position and to restore benefits upon the completion of leave cease, except as required by federal COBRA law, 29 USC 1161 et seq.; and¶
(B) The employer is not required to hold a position vacant or available for the employee who gives unequivocal notice of intent not to return.¶
(~~9~~10) An employer may not use the provisions of this section as a subterfuge to avoid the employer's responsibilities under OFLA.
Statutory/Other Authority: ORS 651.060, ORS 659A.805
Statutes/Other Implemented: ORS 659A.150 - 659A.186

AMEND: 839-009-0280

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA rule to conform to Oregon law, including chapter 20, Oregon Laws 2024.

CHANGES TO RULE:

839-009-0280
OFLA: Use of ~~Pai~~Accrued Leave ¶

(1) Except as provided in this rule or the terms of a collective bargaining agreement, an agreement between the eligible employee and the covered employer, or an employer policy, OFLA leave is not required to be granted with pay.¶
(2) An employee eligible to take OFLA leave is entitled to use accrued paid sick leave, personal leave, vacation leave or any other paid leave that is offered in lieu of sick or vacation leave, during the period of OFLA leave. As used in this rule, accrued paid sick leave does not include disability insurance ~~or,~~ disability benefits or benefits provided under ORS chapter 657B.¶
(3) An employer may require an employee to use accrued paid leave during OFLA leave that would otherwise be unpaid, and may determine the order in which paid leave is to be used if to do so is consistent with a collective bargaining agreement or other written agreement between the eligible employee and the covered employer or an employer policy. The employer may exercise these prerogatives only if:¶
(a) Prior to the commencement of OFLA leave, the employer provides written notice to the employee that accrued paid leave is to be used during OFLA leave; or¶
(b) Within five business days of the employee's notice of unforeseeable leave, the employer provides written notice to the employee.¶
(4) An eligible employee or covered employer may choose to have the employee's OFLA leave run concurrently with a type of paid or unpaid leave provided by the employer and is not referenced in these rules, as provided or allowed under an employer policy, except that a covered employer may not reduce the amount of OFLA leave available to an eligible employee by any period the employee is unable to work because of a disabling compensable injury which entitles the employee to compensation from the covered employer. ~~See 659A.162(6) and ORS 656.005.~~
Statutory/Other Authority: ORS 651.060, ORS 659A.805
Statutes/Other Implemented: ORS 659A.150 - 659A.186

REPEAL: 839-009-0290

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Repeals OFLA rule applicable to teachers.

CHANGES TO RULE:

~~839-009-0290~~
~~OFLA: Special Rules for Public School Teachers~~
~~(1) The provisions of this section apply only to employees of a school district, employed principally as instructors in public kindergartens, elementary schools, secondary schools or education service districts.¶~~
~~(2) If a public school teacher requests foreseeable OFLA leave for a serious health condition of the employee or the employee's family member, and the teacher will be absent more than 20 percent of the total number of working days in the period during which the leave would occur, the employer may require the teacher to elect one of the following options:¶~~
~~(a) To take OFLA leave for one uninterrupted period of time to complete medical treatment. (School holidays and school vacation days are not counted as OFLA leave); or¶~~
~~(b) To transfer temporarily into an available alternative position that better accommodates periodic absences.¶~~
~~(3) If a teacher begins OFLA leave more than five weeks before the end of the academic term because of the teacher's own serious health condition, the employer may require the teacher to remain on leave until the end of the term if:¶~~
~~(a) The OFLA leave is at least three weeks long; and¶~~
~~(b) The teacher's return to work would occur within three weeks of the end of the term.¶~~
~~(4) If a teacher begins OFLA leave within five weeks of the end of the academic term for parental leave or the serious health condition of a family member, the employer may require the teacher to remain on OFLA leave through the end of the term if:¶~~
~~(a) The leave is at least two weeks long; and¶~~
~~(b) The teacher's return would occur within the last two weeks of the term.¶~~
~~(5) If a teacher begins OFLA leave within three weeks of the end of the academic term for parental leave or to care for a family member with a serious health condition and the leave is greater than five working days, the employer may require the teacher to remain on family leave until the end of the term.¶~~
~~(6) If a teacher takes OFLA leave to the end of the school year and continues the leave at the beginning of the next school term, the leave is consecutive rather than intermittent leave.¶~~
~~(a) The period between the end of the school term and the beginning of the next school term, when a teacher would not have been required to report for duty, is not counted against the teacher's OFLA leave entitlement.¶~~
~~(b) A teacher on OFLA leave at the end of the school term must be provided with the same benefits during the period between school terms that the teacher would normally receive if no OFLA leave were taken.¶~~
~~(7) Full-time employees covered by this rule, and who have been maintained on the payroll by a school district during 180 consecutive calendar days, are thereafter deemed to have been employed by that school district for an average of at least 25 hours per week during the 180 days immediately preceding the date any OFLA leave begins.¶~~
~~(8) If a teacher is required by the employer to remain on leave to the end of the academic term, only the period of leave the teacher requested can be charged against the teacher's OFLA leave entitlement.¶~~
~~(9) Nothing in these rules prohibits the employer from allowing the teacher to work as a substitute or in some other paid capacity during the weeks prior to the end of term under subsection (4) or (5) of this rule.~~
~~Statutory/Other Authority: ORS 659A.805~~
~~Statutes/Other Implemented: ORS 659A.150 - 659A.186~~

AMEND: 839-009-0300

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends OFLA rule to conform to ORS chapter 659A.

CHANGES TO RULE:

839-009-0300
OFLA: Postings ¶

(1) Each covered employer must display the Bureau of Labor and Industries Family Leave Act notice. The notice must be displayed in each building or worksite in an area that is accessible to and regularly frequented by employees. Failure to post the Family Leave Act notice is an unlawful ~~employment~~ practice as provided in ORS 659A.001~~(12)~~.¶
(2) Electronic posting of the Family Leave Act notice is not sufficient to satisfy posting requirements, but may supplement worksite posting.
Statutory/Other Authority: ORS 651.060, ORS 659A.805
Statutes/Other Implemented: ORS 659A.150 - 659A.186

AMEND: 839-014-0630

NOTICE FILED DATE: 05/08/2024

RULE SUMMARY: Amends rule to correct erroneous citation.

CHANGES TO RULE:

839-014-0630
Waiver from Telephone Requirement ¶

(1) An employer may request a waiver from the requirements of ORS 659A.~~1~~2253(3) and these rules. Prior to the granting of any request for waiver the employer must demonstrate to the Commissioner that:¶
(a) Compliance with the statute and rules would constitute an unreasonable hardship for the employer; and¶
(b) The employer meets any and all requirements of the Division for an emergency medical plan.¶
(2) Persons desiring a waiver, may apply to the Commissioner on a form prepared by the Bureau. The completed waiver application form shall be submitted to the Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, N.E., Bldg. E-1, Salem, OR 97305.¶
(3) Persons desiring to obtain a waiver must submit, with the application, a copy of the emergency medical plan, which meets the requirements of the rules of the Division.¶
(4) In determining what circumstances constitute an unreasonable hardship the Commissioner shall consider the following:¶
(a) Any circumstances presented by the employer in support of the application;¶
(b) The number of employees occupying the housing;¶
(c) The location of the housing;¶
(d) The length of time the housing is intended to be occupied;¶
(e) Any other relevant information.¶
(5) In considering the request for the waiver the Commissioner shall consider:¶
(a) The history of the employer in complying with the emergency medical plan;¶
(b) Any other relevant information.¶
(6) The Commissioner may grant the waiver request when the Commissioner determines that the provisions of section (1) of this rule are met. The Commissioner may specify any conditions on approval of the request. If the request is denied, the Commissioner shall state each reason for the denial.
Statutory/Other Authority: ORS ~~164, 165, 651, 658,~~651.060, ORS 659A.262, ORS 659A.2~~85(3), 962~~53
Statutes/Other Implemented: ORS 659A.2~~85(3)~~53

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

February 9, 2023

FIELD ASSISTANCE BULLETIN No. 2023-1

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Jessica Looman
Principal Deputy Administrator

SUBJECT: Telework Under the Fair Labor Standards Act and Family and Medical Leave Act

This Field Assistance Bulletin ("FAB") provides guidance to Wage and Hour Division (WHD) field staff regarding how to ensure workers who telework are paid properly under the Fair Labor Standards Act (FLSA), how to apply protections under the FLSA that provide reasonable break time for nursing employees to express milk while teleworking from their home or another location, and how to apply eligibility rules under the Family and Medical Leave Act (FMLA) when employees telework or work away from an employer's facility.

Telework and the FLSA

Background

The FLSA requires covered employers to pay nonexempt employees for all hours worked, including work performed in their home or otherwise away from the employer's premises or job site. *See* 29 C.F.R. § 785.11-.12. The Department's regulations in 29 C.F.R. Part 785 outline "the principles involved in determining what constitutes working time." 29 C.F.R. § 785.1. For example, the regulations explain that "hours worked" is not limited solely to time spent on active productive labor but may, for instance, include time spent waiting or on break. *See, e.g.*, 29 C.F.R. § 785.14; 29 C.F.R. § 785.18.

In general, an employee's workday on any particular day is the period between the time when the employee commences their first "principal activity" and the time on that day at which they cease such principal activity or activities. *See* 29 C.F.R. § 790.8 (Principal activities are activities which the employee is "employed to perform."). The workday may therefore be longer than the employee's scheduled shift, hours, or tour of duty. *See* Fact Sheet # 22: Hours Worked Under

the Fair Labor Standards Act (FLSA); 29 C.F.R. § 790.6. When it comes to breaks taken during the workday, the FLSA regulations explain that short breaks of twenty minutes or less are generally counted as compensable hours worked. *See* 29 C.F.R. § 785.18. Longer breaks "during which an employee is completely relieved from duty, and which are long enough to enable [the employee] to use the time effectively for [their] own purposes are not hours worked." 29 C.F.R. § 785.16. These principles apply regardless of whether the work is performed at the employer's worksite, at the employee's home, or at some other location away from the employer's worksite.

If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked regardless whether the employee works at the employer's location or teleworks from another location. 29 C.F.R. § 785.11-.12. An employer may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees' unscheduled hours of work by providing a reasonable reporting procedure for non-scheduled time and then paying employees for all reported hours of work, even hours not requested by the employer. *See* Field Assistance Bulletin No. 2020-5 for more information on tracking teleworking employees' hours of work.

Short Breaks of 20 Minutes or Less

Employees commonly take short breaks during the workday. Breaks of twenty minutes or less must be counted as hours worked. *See* 29 C.F.R. § 785.18. Whether teleworking at home or working at the employer's facility, employees often take short breaks to go to the bathroom, get a cup of coffee, stretch their legs, and other similar activities. By their very nature, such short breaks primarily benefit the employer by reducing employee fatigue and helping employees maintain focus and be more productive at work.

When employees take short breaks of 20 minutes or less, the employer must treat such breaks as compensable hours worked regardless of whether the employee works from home, the employer's worksite, or some other location that is not controlled by the employer.

Meal Breaks and Off Duty Time

Unlike short rest breaks of 20 minutes or less, bona fide meal breaks (typically 30 minutes or more) in which an employee is completely relieved from duty for the purposes of eating regular meals are not worktime. *See* 29 C.F.R. § 785.19. Similarly, breaks that are longer than 20 minutes and permit the employee to use the time effectively for their own purposes and during which the employee is completely relieved from duty are not hours worked. *See* 29 C.F.R. § 785.16.

To be completely relieved from duty, the employees must be told in advance that they may leave the job and they will not have to commence work until a specified hour has arrived. *See* 29 C.F.R. § 785.16. An employee may also be completely relieved from duty when the employer allows the employee to freely choose the hour at which they resume working and the time is long enough for the employees to effectively use for their own purposes.

> Example #1: Employee A works at a shared workspace not controlled by their employer and takes a break for lunch from 12:30 p.m. to 1:00 p.m. During this break, Employee A is interrupted by work phone calls, with each call lasting several minutes. Because the meal break period of 30 minutes is frequently interrupted by work phone calls, Employee

A would not be considered relieved of all duties and the meal break period would have to be counted as hours worked.

Example #2: Employee B works from home and is allowed flexibility to set their own schedule. Employee B starts works at 7:00 a.m., takes a one-hour break from 8:00 a.m. to 9:00 a.m. to get their children ready for school, and resumes work at 9:00 a.m. The period between 8:00 a.m. and 9:00 a.m. is not work time under the FLSA because Employee B is completely relieved from duty, chooses when to resume work, and is able to effectively use the time for their own purposes.

Example #3: Employee C teleworks from home and has an arrangement with their employer where Employee C works from 9:00 a.m. to 4:00 p.m., takes a three-hour break from 4:00 p.m. to 7:00 p.m., and returns to work at 7:00 p.m. and works until 8:00 p.m. Employee C is free to do whatever Employee C chooses during this three-hour break, including staying at home to make dinner and do laundry, for example. Under these circumstances, because Employee C is relieved from duty and is able to effectively use the period between 4:00 p.m. and 7:00 p.m. for their own purposes, that time is not work time under the FLSA.

In sum, bona fide meal breaks and periods where employees are completely relieved from duty and are able to effectively use the time for their own purposes are not hours worked under the FLSA. This is true regardless of the location from which employees perform their work.

Break Time for Pumping Breast Milk, and Privacy to Pump

The FLSA also requires that employers provide covered employees "reasonable break time for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk" and provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. § 218d(a).[1] These protections apply at the employee's worksite, including when an employee is teleworking from their home or another location.

For example, an employer must provide an appropriate place for an employee to pump breast milk when the employee is working at an off-site location, such as a client worksite. *See* Reasonable Break Time for Nursing Mothers, Request for Information ("RFI"), 75 Fed. Reg. 80,073, 80,077 (Dec. 21, 2010). Additionally, an employer must ensure the employee has a place to express breast milk that is "shielded from view." 29 U.S.C. § 218d(a)(2). This includes ensuring that an employee is free from observation by any employer provided or required video system, including a computer camera, security camera, or web conferencing platform, when they are expressing breast milk regardless of the location they are working from.

[1] On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023 into law, which includes the PUMP for Nursing Mothers Act ("PUMP Act"). Pub. L. No. 117-328, 136 Stat. 4459, 6093-97 (Dec. 29, 2022). The PUMP Act extended coverage to more employees, among other changes. The PUMP Act did not change the basic requirements under the FLSA that reasonable break time and space must be provided to employees for pumping breast milk.

The frequency and duration of the breaks that a nursing employee needs will vary depending on the individual situation. In most cases, an employer cannot deny the employee the right to take a needed break to pump breast milk.[2] Employers are not required under the FLSA to compensate nursing employees for breaks taken for the purpose of expressing milk.[3] However, when an employer provides compensated breaks, an employee who uses that break time to express milk must be compensated for the break. In addition, consistent with the FLSA's general requirement, if an employee is not completely relieved from duty during these breaks, the time must be compensated as work time. 29 U.S.C. § 218d(b). If a remote employee chooses to attend a video meeting or conference call – even if off camera – generally the employee in that case is not relieved from duty and, therefore, must be paid for that time.

Telework and the Family and Medical Leave Act

Background

The FMLA entitles eligible employees of covered employers to take job-protected leave, which may be unpaid or used concurrently with accrued paid leave, for specified family and medical reasons. In addition to providing job-protected family and medical leave, employers must also maintain any preexisting group health plan coverage for an employee on FMLA-protected leave under the same conditions that would apply if the employee had not taken leave. Once the leave period is concluded, the employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

Employee Eligibility

To use FMLA leave, an employee must work for a covered employer and be eligible for leave. Employees who telework are eligible for FMLA leave on the same basis as employees who report to any other worksite to perform their job. Employees are eligible for FMLA leave when they have worked for the employer for at least 12 months; have at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave[4]; and work at a location where the employer has at least 50 employees within 75 miles. 29 C.F.R. § 825.110(a).

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[2] The PUMP Act includes exemptions from the reasonable break time and space requirements for crewmembers of air carriers, and certain employees of rail carriers and motorcoach service operators. 29 U.S.C. § 218d(d)-(f). It also includes a limited exemption for employers of less than 50 employees if its requirements would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. § 218d(c); RFI, 75 Fed. Reg. at 80,077-78 (WHD considers the applicability of this stringent standard on a case-by-case basis).

[3] Compensation for such breaks may be required under state law.

[4] A special rule applies to the hours-of-service requirement for airline flight crew employees, including pilots, co-pilots, flight attendants, and flight engineers. *See* 29 C.F.R. § 825.801; *see* also Fact Sheet #28J: Special Rules for Airline Flight Crew Employees under the Family and Medical Leave Act.

The determination of whether an employee has been employed for at least 12 months and has at least the required hours of service is made as of the date FMLA leave is to start; the determination of whether at least 50 employees are employed at the employee's worksite, or within 75 miles, is made when the employee gives notice of the need for leave. 29 C.F.R. § 825.110(d) and (e).

For most employees, including employees who telework, the 1,250 hours of service requirement is determined according to the principles under the FLSA for determining compensable hours of work (*see* 29 C.F.R. Part 785). 29 C.F.R. § 825.110(c). If accurate records are not kept, the employer has the burden of showing that the employee has not met the hours-of-service requirement in order to claim the employee is not eligible for FMLA leave.

Employee's Worksite

To be eligible for FMLA leave, an employee must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. For FMLA eligibility purposes, the employee's personal residence is not a worksite. *See* 29 C.F.R. § 825.111(a)(2). When an employee works from home or otherwise teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made. Thus, if 50 employees are employed within 75 miles from the employer's worksite (the location to which the employee reports or from which their assignments are made), the employee meets that FMLA eligibility requirement.[5] The count of employees within 75 miles of a worksite includes all employees whose worksite is within that area, including employees who telework and report to or receive assignments from that worksite.

> Example #4: Employee A works for a department store as a customer service representative. Following a weather emergency, the store is temporarily closed to everyone except essential personnel and building maintenance staff. Employee A and her supervisor perform their duties by teleworking from their homes during the period the store is temporarily closed. For FMLA eligibility purposes, the store remains Employee A's and her supervisor's worksite.
>
> Example #5: Employee B works in data processing for an advertising company headquartered in a large city and teleworks from her home more than 75 miles away. Many of the employees in Employee B's department telework from different cities and states. All teleworking employees are assigned projects for data analysis from the manager who works at the company headquarters. Employee B's worksite, for FMLA eligibility determination, is the company's headquarters. The company's headquarters is

[5] The legislative history of the FMLA indicates that Congress intended the term "worksite" to be construed in the same manner as the term "single site of employment" under the Worker Adjustment and Retraining Notification Act ("WARN"), Pub. L. No. 100-379, § 2(a)(3)(B), 102 Stat. 890 (codified at 29 U.S.C. § 2101(a)(3)(B), and regulations under that Act (20 C.F.R. Part 639). *See* S. REP. 103-3, 23. For employees that do not have a fixed worksite, the legislative history specifically cites WARN Act regulatory language providing that their worksite should be construed to mean the site "to which they are assigned as their home base, from which their work is assigned, or to which they report." *Id.*

also, under the FMLA, the worksite for the data processors in Employee B's department who telework from different cities and states but report to and receive assignments from their manager at headquarters. There are 300 total employees who work at or within 75 miles of the company's headquarters. Thus, the employee is considered to be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite even though she herself does not work within 75 miles of the company headquarters.

Conclusion

Employees can have the flexibility of work from home, telework, or work away from premises managed or controlled by the employer and also remain covered by the protections of the FLSA and the FMLA.

Under the FLSA, employees who telework are entitled to compensation for all hours worked, for short rest breaks and, in qualifying circumstances, to take breaks to express breast milk free from intrusion and shielded from view. Protections under the FLSA apply equally to employees who telework as to employees working at an office, factory, construction site, retail outlet, or any other worksite location.

Under the FMLA, all hours worked are counted for purposes of determining an employee's FMLA eligibility when an employee teleworks from home consistently or in combination with working at another or various worksites. For FMLA eligibility, the determination of the worksite for an employee who teleworks is fact specific and will be based on factors, such as where the employee reports to work or the location where the employee's assignments are made.

Questions

Please address any questions regarding this FAB to the WHD National Office, Office of Policy, through appropriate channels.

Program Comparison

- Paid Leave Oregon
- Oregon Family Leave Act (OFLA)
- Family and Medical Leave Act (FMLA)
- Oregon Sick Leave

Paid Leave Oregon and the Oregon Bureau of Labor & Industries created this chart as a general program comparison. It is not intended to provide legal or financial advice and does not cover all possible exceptions. Each program has different qualifications and factors that determine eligibility.
Contact each agency directly to determine eligibility for their programs.

ELIGIBILITY REQUIREMENTS	Paid Leave Oregon	OFLA	FMLA	Oregon Sick Leave
Covered employers	**All employers except federal or Tribal governments**	**Employers with 25 or more employees**	**Employers with 50 or more employees and all public employers**	**All employees are eligible for protected unpaid time[1]**
Wages required to be eligible for leave	**$1,000 in wages during the base or alternate base year**	n/a	n/a	n/a
Required time worked for employer before taking leave and before job protection applies	**No work time requirement for Paid Leave benefits, but must have worked 90 days to have job protection**	**180 days[2]**	**12 months**	**90 days[3]**

[1] Employers who employ 10 or more employees (or 6 or more if the employer is located in the city of Portland) must provide paid sick leave.
[2] 30 days during a declared public health emergency.
[3] An employer may allow an employee to use sick leave prior to the 91st day of employment.

ELIGIBILITY REQUIREMENTS	Paid Leave Oregon	OFLA	FMLA	Oregon Sick Leave
Required hours worked for employer to be eligible for leave	n/a	**25 hors/week in past 180 days**	**12 months**	**1 sick time hour earned for every 30 hours worked**
Geographic requirement	n/a	n/a	**Location with 50 employees within 75 miles**	n/a

Eligibility requirement

Not a requirement

QUALIFYING PURPOSES	Paid Leave Oregon	OFLA	FMLA	Oregon Sick Leave
Family Leave				
Birth, adoption or foster placement (includes leave for the legal process before adoption or foster placement)	**Yes** *(Leave for the legal process before a foster placement or adoption will be covered beginning Jan. 1, 2025)*	**Yes** *(Up to 2 weeks of leave for the legal processes for placement of a child through adoption or foster care will be covered between July 1, 2024, through Dec. 31, 2024.)*	**Yes**	**Yes**
Family member's serious health condition *(family member definitions vary)*	**Yes**	**Yes** *(only for the employee's child, see sick child below)*	**Yes**	**Yes**
Medical Leave				
Person's own serious health condition	**Yes**	**Yes** *(only for a pregnancy disability)*	**Yes**	**Yes**
Safe Leave				

QUALIFYING PURPOSES	Paid Leave Oregon	OFLA	FMLA	Oregon Sick Leave
Domestic violence, sexual assault, harassment, bias, or stalking	**Yes**	**No** *Reasonable safety accommodations under ORS 659A may include leave.*	**No**	**Yes**
Other Leave Types				
Extended leave for a pregnancy* **In addition to leave for serious health condition*	**Yes**	**Yes**	**No**	**No**
Sick child leave	**Yes** *(only for a serious health condition)*	**Yes**	**No**	**Yes**
Military family leave	**No**	**Yes**	**Yes**	**No**
Bereavement leave	**No**	**Yes** *Up to 2 weeks per occurrence, 4 weeks per year*	**No**	**Yes**
Public health emergency	**No**	**Yes** Active public health emergency allows for sick child leave for school or child care closures.	**No**	**Yes**

Covered
Not Covered

LEAVE LENGTH AND BENEFIT PAYMENTS	Paid Leave Oregon	OFLA	FMLA	Oregon Sick Leave
Leave length *(most cases)*	**12 weeks in a one-year period**	**12 weeks in a one-year period**	**12 weeks in a one-year period**	**40 hours in a one-year period**

LEAVE LENGTH AND BENEFIT PAYMENTS	Paid Leave Oregon	OFLA	FMLA	Oregon Sick Leave
Maximum leave length *(for certain combinations of leave types)*	**14 weeks in a one-year period**	**24 weeks in a one-year period**	**26 weeks in a one-year period**	**Employers may cap use at 40 hours per year**
Payment	**Paid leave**	**Unpaid leave**	**Unpaid leave**	**Paid leave for employers with 10 or more employees** *(6 or more in Portland)*
Benefit amount	**Varies based on employee's average weekly wage. Up to 100% for lower-income employees.**	**n/a**	**n/a**	**100% of regular wages**

SELECT FEDERAL AND OREGON LEAVE LAWS[1]
(including significant Oregon amendments effective 7/1/24)

	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
Aim of Law	To provide PAID family, medical, and safe leave to Oregon employees through a payroll-contribution-funded and state-administered insurance program or equivalent plan.	To provide leave to employees for their own or a family member's serious health condition, for birth, adoption, or foster placement, or for certain military-related exigencies or caregiving.	To provide leave to employees for a child who needs home care, the death of a family member, pregnancy disability, or to effect child placement. [After 7/1/24, no longer for own or family member's serious health condition or birth, adoption or foster placement, except temp. child placement.]	To provide paid sick leave to employees.
Eligible Employee	All employees working in Oregon who have earned at least $1,000 in the prior year. NO PRIOR EMPLOYMENT DURATION OR HOURS OF WORK REQUIREMENT TO BE ELIGIBLE FOR BENEFITS (but must have worked for at least 90 days to have job protection upon return to work)	Must have been employed at least 12 months and worked at least 1,250 hours during 12-month period preceding date leave is to begin (approx. 25 hours/week). Special eligibility rules for flight crews (pilots, flight attendants): must have worked or been paid for at least 60% of the applicable total monthly guarantee and have worked or been paid for at least 504 hours during the previous 12 months.	Must have been employed more than 180 calendar days and worked an average of at least 25 hours/week over 180-day period.	All employees except: • those who receive paid sick time under federal law; • those who are in official work training or work-study programs; • railroad workers; • those employed by their parent, spouse or child; NOTE: former exemption for hiring hall workers, covered by CBA and multiemployer-employee trust or benefit plan no longer exists as of 1/1/23. Employees begin accruing (or get frontloaded) sick time immediately, but employer can require 90 days of employment before using sick leave. ***Bargain to use it sooner!***
Covered Employer	All employers with at least one employee working in Oregon (plus state and local government employees)	Employs 50 or more people within 75 miles (plus all government employers).	Employs 25 or more persons in Oregon (plus state and local government employers).	Employs 1 or more employees working anywhere in the state (plus state and local government employers).

[1] This chart does not include the Oregon Military Family Leave Act (OMFLA), the Oregon law providing Leave for Victims of Domestic Violence, Sexual Assault, Harassment, Bias or Stalking (although this is now also covered by PLO), or Oregon leave for crime victims to attend criminal proceedings.

	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
Amount of Leave	12 weeks per benefit year, plus 2 additional weeks for pregnancy/ childbirth related reasons for total of 14 weeks	12 weeks in a "leave year" for most types of FMLA-covered leave, except 26 weeks during a "single 12-month period" for Military Caregiver Leave.	• 12 weeks in a "leave year" to care for child who needs home care due to illness, injury or condition or due to closure of school or childcare due to public health emergency • up to 2 weeks per death of family member, not to exceed a total of 4 weeks in one year, which must be completed within 60 days of notice of death, and which counts against the 12-week entitlement for all OFLA leave. PLUS, additional 12 weeks for birth- or pregnancy-related disability (includes routine pre-natal care). PLUS, on temporary basis (7/1/24 – 12/31/24), 2 additional weeks to effectuate legal process for placement of foster child or adoption. [2024 SB 1515 eliminated leave for own serious health condition, family member's serious health condition, and birth, adoption or foster placement and also reduced maximum bereavement leave to four weeks per year (i.e. two deaths)]	At least one hour of sick time for every 30 hours worked or 1-1/3 hours for every 40 hours worked or must front-load at least 40 hours of sick leave at the beginning of the year. Must be **paid** sick leave if employer employs at least 10 employees anywhere in Oregon or if employs at least 6 employees at location in a city with a population greater than 500,000, i.e. Portland. Employers that employ fewer employees than these thresholds must provide unpaid sick leave at same rates as above. Employers can limit **annual** accrual and use to 40 hours. If employer uses accrual, employees can carry over up to 40 hours of unused sick time from one year to the next for a total accrual of 80 hours. No carry over is required if employer and employee (or union) mutually agree that employee will be paid for unused sick time at the end of the year or if employer frontloads 40 hours at beginning of new year. ***Bargain for higher accrual, use, and carryover limits!***
Reasons for Leave	Family Leave: (1) to care for and bond with a child during the first year after the birth, adoption, or foster placement or [beginning 1/1/25] to effectuate the legal process required for foster placement or adoption; (2) to care for a family member with a serious health condition. Medical Leave: leave necessary due to the employee's serious health condition.	• birth of child and to care for child following birth; • placement of child with employee for adoption or foster care; • care for family member (spouse, child under 18 or incapable of self-care, or parent) with serious health condition; • care for own serious health condition;	• care for sick child requiring home care (need not but can rise to level of "serious health condition"); • care for child requiring home care due to school or daycare closure as a result of public health emergency; • bereavement: to make arrangements necessitated by, to attend funeral/memorial service, or to grieve death of a family member;	• employee's own illness, injury or health condition, need for medical diagnosis, care or treatment, or need for preventative medical care; • care of a family member's illness, injury or health condition, care of family member who needs diagnosis, care or treatment or care of family member who needs preventative medical care; • any other reason that qualifies for OFLA leave;

	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
	Safe Leave: leave for survivors or parents of children survivors of sexual assault, domestic violence, harassment, stalking, or bias crimes [eff. 1/1/24, 2023 HB 3443], to seek legal or law enforcement assistance, to seek medical treatment for or to recover from injuries, to obtain counseling from a mental health provider, to obtain services from a victim services provider, or to relocate or take steps to secure an existing home.	• qualifying exigencies due to spouse, son, daughter or parent's active duty or impending call or order to active duty in the Armed Forces; • care for spouse, son, daughter, parent, or next of kin service member with serious injury or illness.	• illness, injury or conditions related to eligible employee's own pregnancy or childbirth that disables the employee from performing duties • only 7/1/24-12/31/24, to effectuate foster care placement or adoption [2024 SB 1515 eliminated leave for own serious health condition, family member's serious health condition, and birth, adoption or foster placement]	• any purpose under the leave for victims of domestic violence, sexual assault, harassment and stalking law; • to donate accrued sick time to another employee to use for a covered purpose if the employer has a donation policy ***(bargain it if you want it)***; • public health emergency
Leave/Benefit Year	The 52 consecutive weeks beginning on the Sunday immediately preceding the date on which the employee's leave begins.	• calendar year; • another fixed year (e.g. fiscal year); • rolling backward year (look to 12 months preceding leave to determine leave used and balance available); • measuring forward year (12 months following first day of leave used; resets after 12 months).	Effective 7/1/24, the OFLA leave year must be the same as PLO: the 52 weeks beginning on the Sunday immediately preceding the date on which the employee's leave begins. [2023 SB 999]	A "year" is any consecutive 12-month period (e.g. calendar year, fiscal year, from anniversary date, etc.).
Effect of Workplace Injury on Leave	Cannot collect PLO benefits while receiving workers compensation time loss benefits.	Time absent due to workers compensation injury counts against 12-week leave entitlement.	Time absent due to workers compensation injury does *not* count against 12-week leave entitlement.	N/A
Paid Versus Unpaid Leave ***MOST IMPORTANT PROVISION TO BARGAIN***!	Always paid, but benefit is typically lower than wage. Employee is entitled to use other accrued paid leave to supplement benefits up to full wage replacement. Employer may permit employees to use other accrued paid leave to exceed full wage replacement. Subject to CBA, employer can determine order in which accrued leave is used. [2024 SB 1515, Section 5]	Employee may elect or employer may require employee to substitute any form of paid leave (including compensatory leave), *consistent with employer's paid leave policy*. Subject to CBA, employer can choose order in which paid leave is used.	Employee may elect or employer may require employee to substitute any accrued paid sick leave, personal leave, vacation leave, or any other paid leave offered in lieu of vacation leave. Subject to CBA, employer can choose order in which paid leave is used.	Whether required sick leave is paid or unpaid depends on employer size/location. See Amount of Leave above.
Serious Health Condition	• An illness, injury, impairment or physical or mental condition that requires inpatient care;	An illness, injury, impairment or physical or mental condition that involves:	N/A	N/A

	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
	• An illness, disease or condition that poses an imminent danger of death, is terminal, or requires constant care; • Any period of disability due to pregnancy, or period of absence for prenatal care; • Any period of absence for the donation of a body part, organ or tissue, including preoperative or diagnostic services, surgery, post-op treatment and recovery. [2024 SB 1515 moved definition from OFLA to PFMLI statute.]	• inpatient care; • incapacity for more than three full consecutive calendar days, in-person treatment by a health care provider within 7 days of the first day of incapacity, plus either: - at least one more in-person treatment by a health care provider within 30 days of the first day of incapacity (unless extenuating circumstances exist); or - a regimen of continuing treatment under the supervision of a health care provider; • incapacity due to pregnancy or prenatal care; • incapacity or treatment due to a chronic serious health condition requiring at least two periodic visits to health care provider per year with episodic incapacity; • permanent or long-term incapacity; • multiple treatments (e.g. dialysis).	[2024 SB 1515 eliminated leave for employee's own or family member's serious health condition; Section 15 included a conforming amendment to remove the definition of "serious health condition" from the statute]	
Definition of Family Member	• Spouse or domestic partner; • Child or child's spouse or domestic partner; • Parent or parent's spouse or domestic partner; • Sibling or stepsibling or their spouse or domestic partner; • Grandparent or grandparent's spouse or domestic partner; • Grandchild or grandchild's spouse or domestic partner; • Any individual related by blood or affinity whose close association with a covered individual is the equivalent of a family relationship.	Spouse, minor child, adult disabled child, parent (or one standing in the place of a parent or child).	Same as PLO as of 9/3/23 [2023 SB 999]	
Employee Notice to Employer	If leave is foreseeable, 30 days.	If leave is foreseeable, 30 days unless not practicable. If	If leave is foreseeable, 30 days, or as much advance notice as is practicable. If unforeseeable, employee (or	Employer may require employee to comply with employer's usual and customary notice and procedural

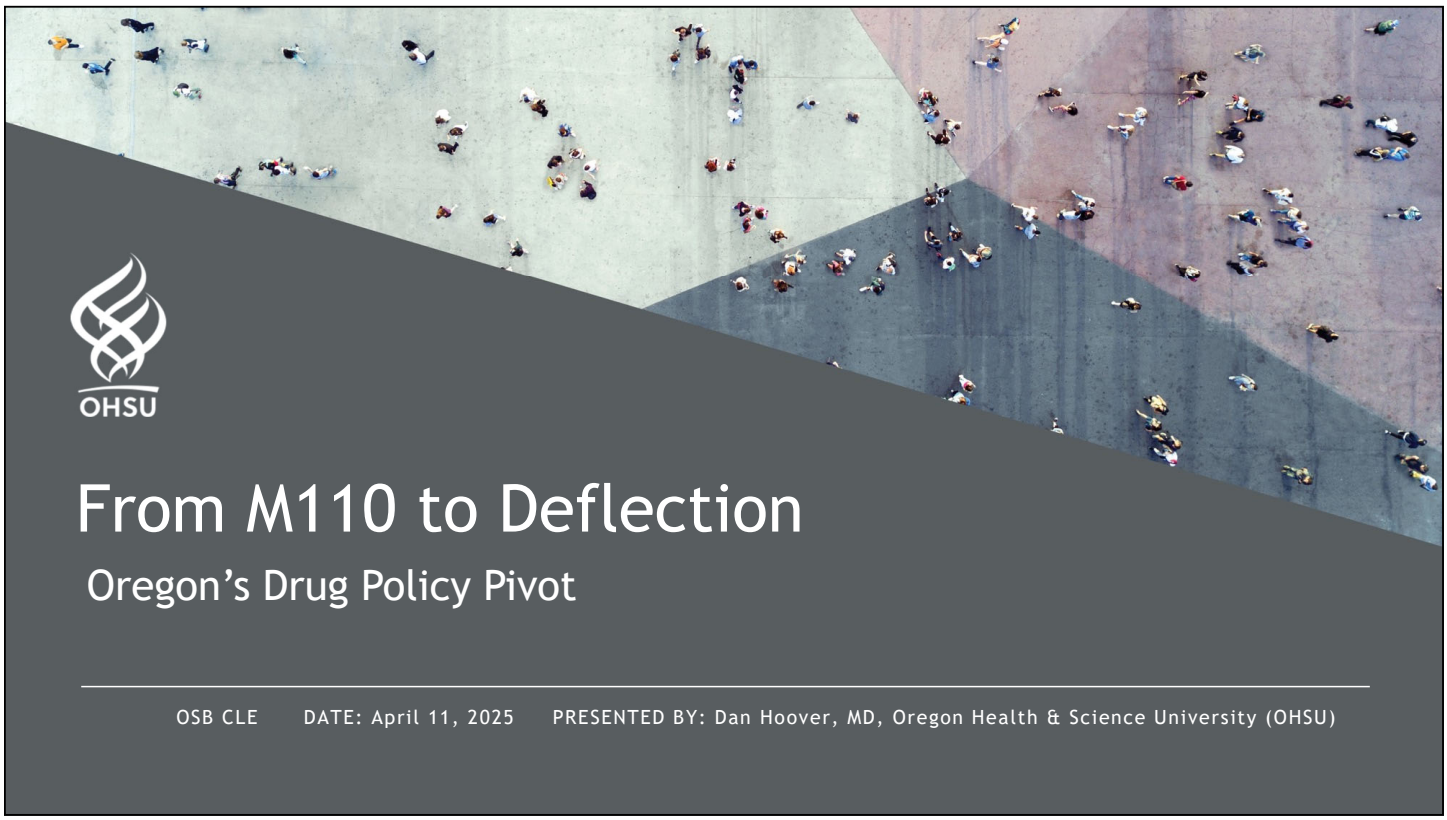
	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
	If leave is unforeseeable, verbal within 24 hours, written within 3 days.	unforeseeable, as much notice as is practicable. Notice can be given by someone on employee's behalf if employee is unable to provide notice. Employee need not specifically mention FMLA first time, but if seeking leave for reason employer has previously granted FMLA leave, then employee must specifically mention qualifying reason or FMLA.	someone on employee's behalf) must provide notice 24 hours before or after leave begins, and employer may also require written notice within 3 days after employee returns to work. Employee is *not* required to specify that request is for OFLA leave (even for reason employer has previously granted OFLA leave).	requirements for absences or requesting time off if they do not interfere with use of sick leave. If need to use sick leave is foreseeable, employer may require reasonable advance notice of intent to use, not to exceed 10 days prior or as soon as otherwise practicable. Employee must make reasonable attempt to schedule use of sick time in manner that does not unduly disrupt employer's operations.
Certification	OED rules provide for methods of verifying need for all leave. For serious health condition verification, can use FMLA or PLO form, but will be processed faster with PLO form.	Employer may require medical certification of serious health condition and need for leave. Employee has 15 calendar days from employer's request to provide it. If returned certification is incomplete or insufficient, employer can ask employee to cure defect within 7 calendar days. Failure to cure may result in denied FMLA leave. If employer has reason to doubt the validity of certification, can get 2nd and 3rd opinions at employer's expense. Periodic recertifications are permitted for ongoing conditions, but 2nd and 3rd opinions are not permitted on recertifications. Employer can require fitness-for-duty certification upon return to work.	Employer can seek medical certification of sick child leave (but only if employee has taken sick child leave on 3 separate days during a leave year) and pregnancy disability leave. Can seek verification of closure of school or day care, including name of school or provider, statement that no other family member is willing and able to care for child, and, if child is older than 14, statement that special circumstances exist requiring home care. If leave is foreseeable, must provide before leave commences; if not employee has 15 days from employer's request to provide it. No 2nd or 3rd opinions. Employer must pay employee's out-of-pocket costs for any required medical verification.	Employer may require verification from a health care provider (or certification pursuant to DV victim law) of need for sick time if employee takes **more than** 3 consecutive scheduled workdays of sick time or if the employer suspects employee is abusing sick time. Employee has 15 calendar days after request to provide verification. Employer must pay any reasonable costs for providing verification, including lost wages and out-of-pocket medical expenses. Nature of illness or details related to DV, SA, H, S may not be required.

	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
Employer Notice to Employee of Eligibility and Qualification for Leave	N/A	*Eligibility Notice*: Absent extenuating circumstances, employer must notify employee orally or in writing within 5 business days of acquiring knowledge that leave may be FMLA-qualifying whether employee is eligible for leave. If ineligible, must explain why. *Rights and Responsibilities Notice*: Employer must provide written notice that leave will count against FMLA entitlement, applicable 12-month period, certification requirements, rules regarding substitution of paid leave, any obligation to make benefit premium contributions, right to maintenance of benefits, and job restoration rights. *Designation Notice*: Within 5 business days of determining leave is being taken for FMLA-qualifying reason (e.g. after receiving certification), employer must provide written notice whether leave will be counted as FMLA leave. If employer will require fitness-for-duty certification upon return to work, must provide notice of that requirement in designation notice or must be in handbook/ policy.	Absent extenuating circumstances, employer must notify employee within 5 business days of acquiring knowledge that leave may be for OFLA-qualifying reason whether employee is eligible and qualifies for OFLA leave. Denial must be in writing with explanation.	Employer must provide written notification to employee at least quarterly of the amount of accrued and unused sick time available for use. Pay stub notice is sufficient.
Maintenance of Health Insurance During Leave	Group health plan coverage must be maintained during leave subject to regular employer/employee premium contributions.	Group health plan coverage must be maintained during leave subject to regular employer/employee premium contributions (as long as employee returns to work before expiration of leave or is unable to do so).	Group health plan coverage must be maintained during leave subject to regular employer/employee premium contributions.	Statute and rules are silent, but health insurance is presumably maintained during paid sick leave.

	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
Temporary Transfer During Intermittent Leave or Reduced Schedule	N/A	If need for intermittent leave or reduced schedule is foreseeable, employer may require employee to transfer temporarily, during the period of intermittent or reduced schedule leave, to an available alternative position with equivalent pay and benefits (but not duties) for which the employee is qualified and which better accommodates recurring leave. Employer cannot transfer in order to discourage use of leave or work hardship on employee (e.g. cannot transfer day shift employee to graveyard shift).	Employer may transfer to alternate position only if: • employee accepts transfer voluntarily and without coercion; • transfer is temporary, lasts no longer than necessary; •alternate position has equivalent pay and benefits; • transfer complies with applicable collective bargaining agreement; • transfer is used only when there is no other reasonable option available; and • transfer is not used to discourage intermittent leave or reduced schedule or to create hardship for employee.	Statute and rules are silent.
Special Rules for K-12 Teachers or Instructional Employees	N/A	"Instructional employees" (includes teachers, coaches, driving instructors, some SPED assistants, but not counselors, psychologists, curriculum specialists, other classified employees). If instructional employee needs intermittent or reduced schedule leave for more than 20% of total workdays over period of leave, employer may require employee to either: • take leave uninterrupted for duration not longer than planned duration of need for leave (all of which counts against FMLA entitlement); or • transfer temporarily to available alternative position for which employee is qualified and which has equivalent pay and benefits. If instructional employee begins leave more than 5 weeks before the end of a term, employer can require them to take leave through end of term if leave will last at least 3	After 7/1/24, only if "teacher" commences bereavement leave during 3 weeks prior to end of term and duration of leave is greater than 5 workdays can employer require continuation on leave through end of term. [2024 SB 1515, §18]	**N/A**

	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
		weeks and employee would return to work during 3-week period before end of term. If instructional employee begins leave during 3-week period before end of term for parental leave or care for family member, and leave will last more than 5 work days, employer can require employee to continue leave through end of term. When required to take leave to end of term, only period of leave until employee is ready and able to return to work counts against FMLA entitlement, and employer must still continue group health benefits.		
Right to Return to Job	If employed for at least 90 consecutive calendar days: right to return to former position. If the position has been eliminated (not merely renamed or reclassified): Large employers (25 or more employees) must restore to available, equivalent position within 50 mile radius, and shall offer the one closest to the employee's former job site. Small employers can restore to different position, but with the same pay/benefits and similar working conditions.	To same position held when leave began or to equivalent position with equivalent pay, benefits, and other terms and conditions of employment (e.g. OT opportunities, shift, duties). Employer can require fitness-for-duty certification as condition of return to work, provided notice of this requirement was provided with designation notice, requirement is uniformly applied, and certification is limited to condition that caused need for leave. No 2nd or 3rd opinions are allowed on fitness-for-duty certifications. Employer can seek clarification or authentication, but may not delay return to work while does so.	To same position held when leave began or, if position has been eliminated for legitimate business reasons, to equivalent position.	There are no specific return to work provisions, but it is unlawful to deny, interfere with, restrain, fail to pay for, retaliate, or in any way discriminate against an employee because the employee has inquired about, requested, or used sick leave.
Attendance Bonuses	N/A	Bonuses based on attendance may be denied to employees on FMLA leave to the same extent they would	Bonuses based on attendance may not be denied to employees based on use of protected OFLA leave.	Employers may not apply an absence control policy that counts covered sick

	PAID LEAVE OREGON (PLO)/PAID FAMILY & MEDICAL LEAVE INSURANCE (PFMLI)	FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)	OREGON FAMILY LEAVE ACT (OFLA)	OREGON PAID SICK LEAVE LAW
		be denied to employees on other types of leave.		time absences as an absence that may result in an adverse employment action.
Enforcement	OED (claims) BOLI (discrimination/job protection)	Wage and Hour Division of the U.S. Department of Labor (USDOL) complaint or civil suit within 2 years (or 3 years if willful violation).	Oregon Bureau of Labor and Industries (BOLI) complaint or civil suit within 1 year of violation.	Oregon Bureau of Labor and Industries (BOLI) complaint or civil suit within 1 year of violation.
Remedies	Civil and criminal penalties for employer failure to pay contributions, file reports, or maintain equivalent plan. Discrimination/job protection: (1) Equitable relief (e.g. reinstatement); (2) Lost wages and benefits; (3) Attorney fees and costs; (4) Compensatory damages.	(1) Equitable relief (e.g. reinstatement); (2) Monetary losses, including lost wages, benefits, or other actual monetary losses); (3) "Liquidated damages" equal to monetary losses, unless employer acted in good faith; (4) Attorney fees and costs.	(1) Equitable relief (e.g. reinstatement); (2) Lost wages and benefits; (3) Attorney fees and costs.	(1) Equitable relief (e.g. reinstatement); (2) Lost wages and benefits; (3) attorney fees and costs.



From M110 to Deflection

Oregon's Drug Policy Pivot

OSB CLE DATE: April 11, 2025 PRESENTED BY: Dan Hoover, MD, Oregon Health & Science University (OHSU)

Disclosures

- No financial conflicts of interest

Outline

1. M110 Overview
2. Officer Intervention *Deflection*
3. Fentanyl and Medications

Relevant Funding / Professional Background

Addiction Medicine Physician, Educator, Researcher

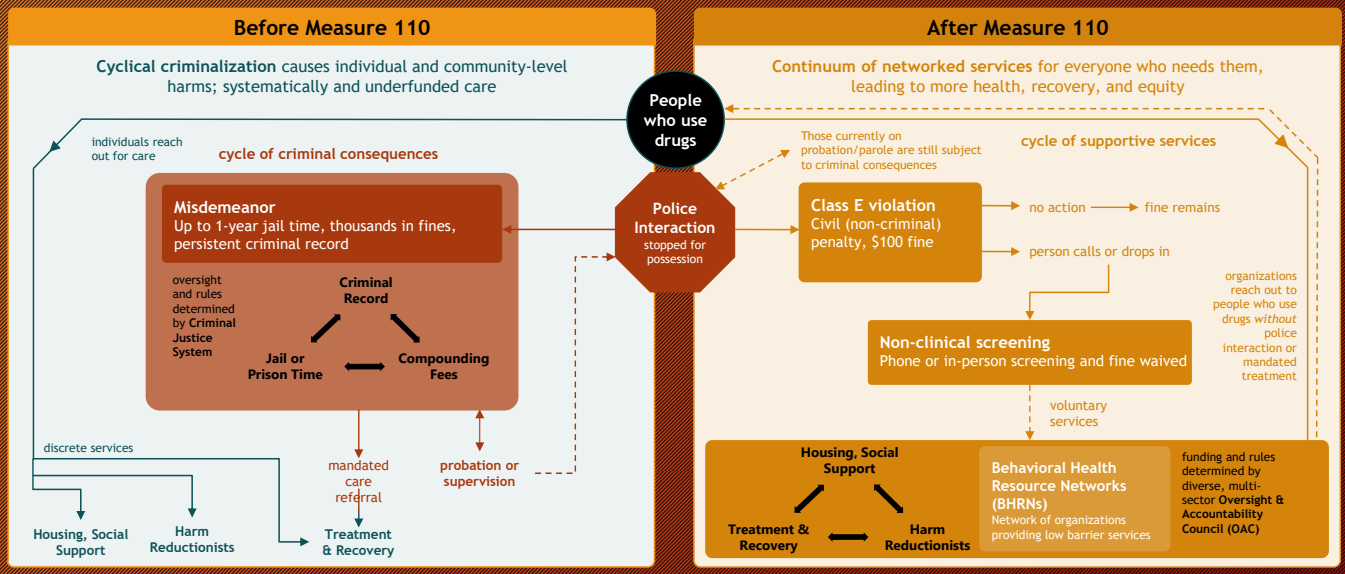
2022 Fletcher Group: Implementing M110 grant networks

2023 Research Triangle Institute: M110 peer support workers

2024 Oregon Criminal Justice Commission: Director of OHSU's deflection implementation technical assistance

What did M110 set out to accomplish?

Introduction to the M110 Model



Good, D., Leichtling, G., Pustejovsky, S. (2023). *Oregon Decriminalizes Drugs: A State-level Process Evaluation of Early Implementation.* Comagine Health and Vital Strategies.

Why create an alternative services systems? Behavioral Health Resources Networks (BHRNs)

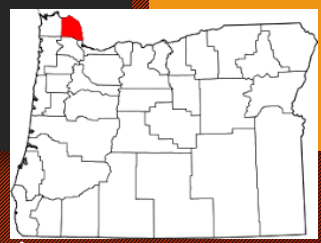
Behavioral Health Resource Networks (BHRNs)

- Grant funding model – flexible
- Looking for a more equitable approach
- Desire to emphasize culturally specific care
  - 47 applications funded!
- Fund non-medically-insured services
  - Harm reduction
  - Recovery housing
  - Peer support

Top Expenditures:
#1 Recovery Peer Support
#2 Housing Services

https://sos.oregon.gov/audits/Documents/2023-39.pdf

BHRN Services Framework

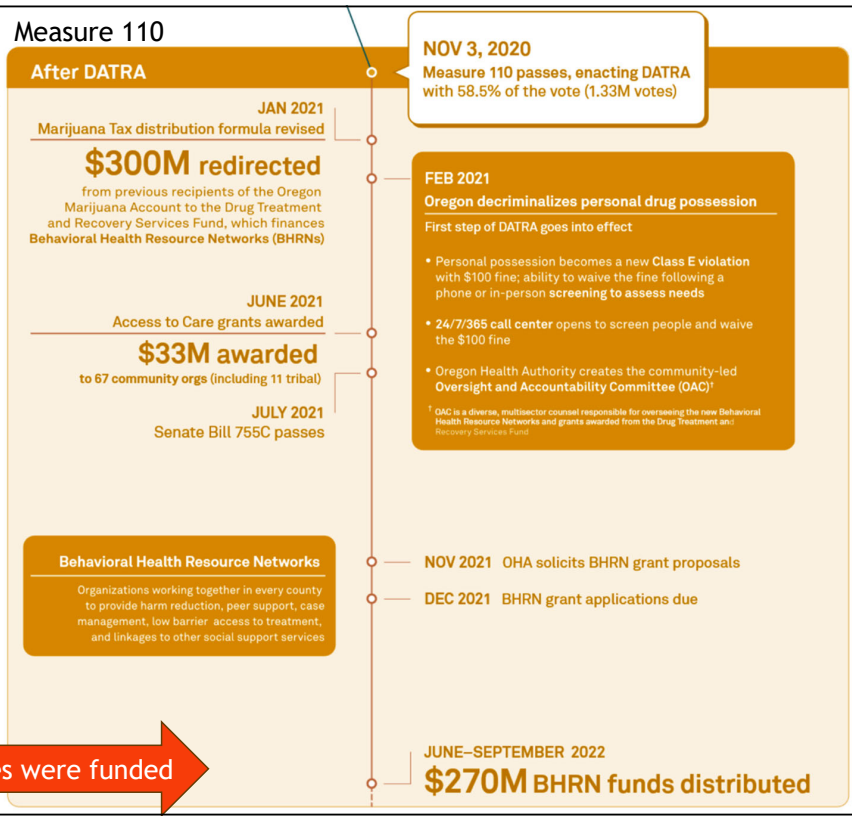


- Example of agencies / services funded for Columbia County
- Agencies asked to partner together to provide the whole continuum
- Implementing a new network was slow and arduous

County/BHRN Partners	Screening Assessments	Comp BH Needs Assessment	Peer Support/ Mentoring	Harm Reduction Intervention	Housing Services	Substance Use Treatment	Supported Employment
Columbia							
Boulder Care Provider Group, P.A.			✓			✓	
Columbia Community Mental Health	✓	✓	✓	✓		✓	✓
Iron Tribe Network			✓		✓		
Medicine Wheel Recovery	✓	✓	✓			✓	
Youth ERA			✓				

Why were the results not great?

Defelonization 2017



Long lag until most services were funded

Services delays crippled M110 rollout

First, grant contracting delays.
Then, grant spending delays.

Spending lagged due to poor availability of workforce and housing.

Oregon Secretary of State | Report 2023-39 | December 2023

E-Violation "M110 Tickets" Failed

- Law Enforcement left out of implementation planning
- Absent warm handoff to services
- 200 citations / month generated 10 calls / month (5% rate)

The ticket-incentivized connections for M110 did not work

Oregon Secretary of State | Report 2023-39 | December 2023

Overdose in Oregon

A synthetic modeling study showed M110 not the cause of increased OD (Joshi)

Portland State University: OD's correlate to fentanyl, not M110 passage (Henderson)

M110 decrim occurred simultaneous to supply saturation by fentanyl (Zoorob)

Joshi, S., Rivera, B.D., Cerdá, M., Guy, G.P., Strahan, A., Wheelock, H., Davis, C.S., 2023. One-Year Association of Drug Possession Law Change With Fatal Drug Overdose in Oregon and Washington. JAMA Psychiatry 80, 1277.. https://doi.org/10.1001/jamapsychiatry.2023.3416

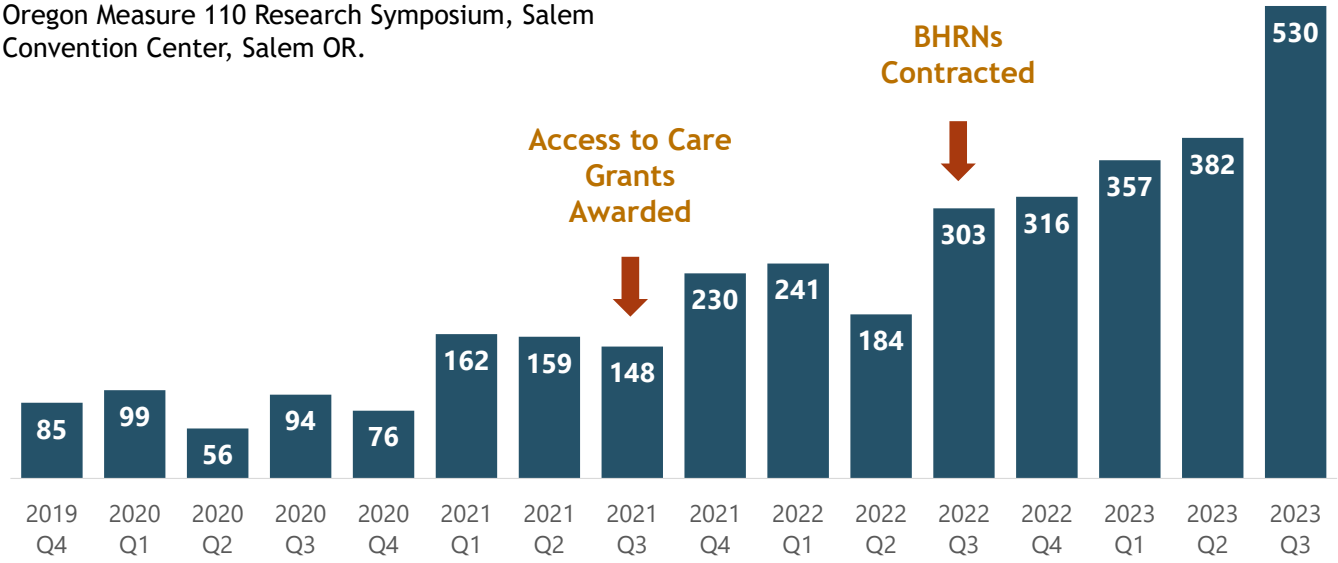
Henderson, Kelsey S.; Campbell, Christopher; and Renauer, Brian, "Key Points in Preparation for Oregon Legislative Session (2024): Examining the Multifaceted Impacts of Drug Decriminalization on Public Safety, Law Enforcement, and Prosecutorial Discretion" (2023). Criminology and Criminal Justice Faculty Publications and Presentations. 118.
https://pdxscholar.library.pdx.edu/ccj_fac/118

Zoorob MJ, Park JN, Kral AH, Lambdin BH, Del Pozo B. Drug Decriminalization, Fentanyl, and Fatal Overdoses in Oregon. JAMA Netw Open. 2024 Sep 3;7(9):e2431612. doi: 10.1001/jamanetworkopen.2024.31612. Erratum in: JAMA Netw Open. 2024 Oct 1;7(10):e2443755. doi: 10.1001/jamanetworkopen.2024.43755. PMID: 39235814; PMCID: PMC11378001.

(Not great) But were there any good results?

Recovery Peers Certified by Quarter

Hoover, D. B. (2024). Measure 110 Facilitated Expansion and Diversification of Oregon's Peer Recovery Workforce. Oregon Measure 110 Research Symposium, Salem Convention Center, Salem OR.



M110 Peer Interviews Summary

Characteristics of Peer Work

- Intense dedication and workloads
- Peers problem-solve with limited resources
- **Peers build affinity with people that over time facilitates change**

Problem Solving Service Gaps

- Limited housing, withdrawal management and residential treatment
- **Peers stay in contact when services are hard to access**
- Peers offer alternatives

Ways to Support Peer Work

- Adequate staffing to reduce caseloads
- Funding for training and certification
- Skills/career advancement and leadership roles
- Community, networking

Comagine Health

Hoover, D. B. and A. Cooke (2024). Measure 110 and Peer Workforce: Responding to the needs of People Who Use Drugs in Oregon. Oregon Conference on Opioids + Other Drugs, Pain + Addiction Treatment (OPAT) , Sunriver Resort Conference Center, Sunriver OR.

RTI INTERNATIONAL

Also

Increase in culturally specific SUD resources

Naloxone distribution helped stem the tide of ODs

Recovery peers substantially contribute to HB4002 deflection now

Leahy, J. (2024). Save Lives Oregon: Hope, healing & health through harm reduction. Oregon Measure 110 Research Symposium, Salem Convention Center, Salem OR, RTI International.

Coffin, P. O., et al. (2022). "Modeling of overdose and naloxone distribution in the setting of fentanyl compared to heroin." Drug Alcohol Depend **236**: 109478.

In 2024, HB 4002 _____ M110 services

* stopped
* decreased funding to
* transferred governance for
* did not change

All carrot,
No stick!



Poor access
No handoff!

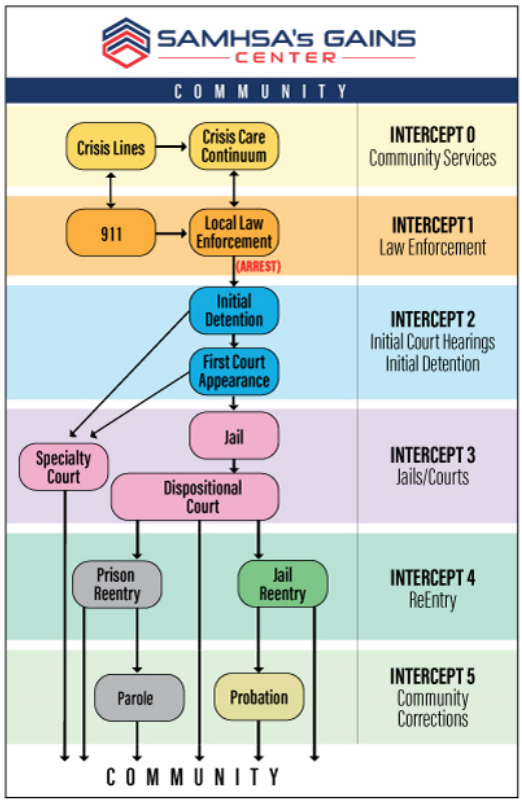


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2. Officer Intervention Deflection

Diversion





Deflection

NEW



OHSU

Deflection Pathways

5 Deflection Pathways
1. Self-Referral Setting: An individual voluntarily initiates contact with a first responder agency (police, fire, or EMS) for a treatment referral.
2. Active Outreach Setting: proactive outreach - no call for service. Outreach team may include a clinician and/or recovery peer.
3. Naloxone Plus Setting: post-overdose A first responder or program partner outreaches post-overdose to engage and provide links to harm reduction and OUD treatment.
4. Officer/First Responder Prevention During routine activities such as patrol or call for service, a first responder conducts engagement and provides treatment referrals.
5. Officer Intervention: Setting: officer patrol or call for service, **potential charges** Deflection: charges are held in abeyance until treatment and/or a social service plan is successfully completed.



COSSUP source

OHSU

HB 4002 Encouraged Officer Intervention Deflection

Setting: officer patrol or call for service, **potential charges**
Deflection: charges are held in abeyance until treatment and/or a social service plan is successfully completed.



Variety of mechanisms; always pre-filing

COSSUP source

OHSU

Officers and Deflection

M110

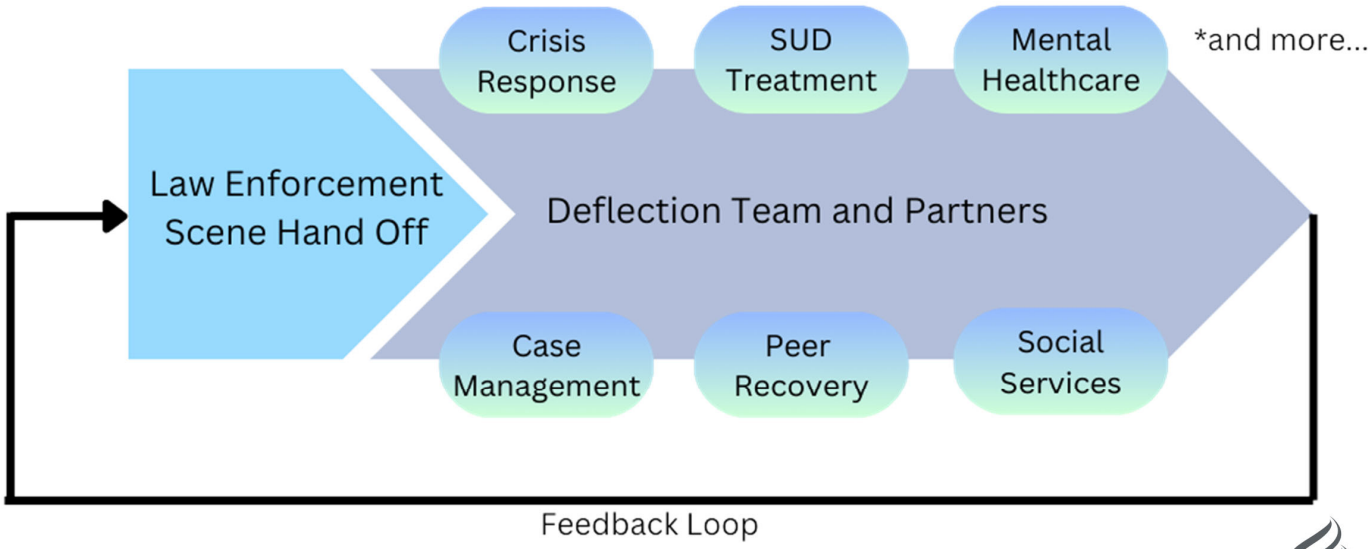
- Designed without Law Enforcement
- Officer work not valued
- Never a warm handoff
- M110 violations were ignored

Deflection

- Designed with & for Law Enforcement
- Officer connections are valuable
- Warm handoffs change trajectories
- Misdemeanor may incentivize treatment

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Schematic of a HB4002 Deflection Program



Concept credit: Jac Charlier, Executive Director, Police Treatment and Community Collaborative (PTACC)

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Variety Across Oregon

Each county was given the flexibility to develop their own program utilizing local resources:

- Who is eligible vs who will be excluded?
- What co-charges are allowed?
- What is success enough?



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Example: Clatsop County



- County-wide access to the program
- Engagement plan:
  - Regional warm handoff at scene
  - Regional police dropoff to Clatsop BH Rapid Access Clinic
  - Otherwise: 72-hour citation to appear to clinic
  - Contingency management rewards
- Deflection team includes
  - Coordinator within Sheriff's Office
  - Certified recovery peer and CADC counselor, employed at Clatsop Behavioral Health

OHSU

Example: Multnomah County

- County-wide access to the program by police and sheriff's office
- Engagement plan:
  - Transport to Pathways Center
  - Warm handoff via 4th Dimension & VOA peers
  - Participant-directed care management plan
- Deflection team includes
  - Coordinator within County Behavioral Health
  - Multiple peer agencies and police agencies
  - Referrals to treatment, harm reduction, culturally-specific



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Deflection Quality and Success



- **Warm Handoff**
  - Different than M110
- **Case management** and relentless engagement by deflection team
- **Access to partner services:**
  - Counseling Treatment
  - Transitional housing
  - Peer Support
  - Inpatient Treatment
  - Medications



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The DA and Deflection

- DA participation is vital in developing governing documents for deflection and protocols for officers*
  - Which charges are eligible?
- Goal is to offload the system; this is not drug court lite
- <u>The DA should not be asked to review every deflection</u>

*LEAD and TASC-Center for Health and Justice approach

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Deflection Wins!

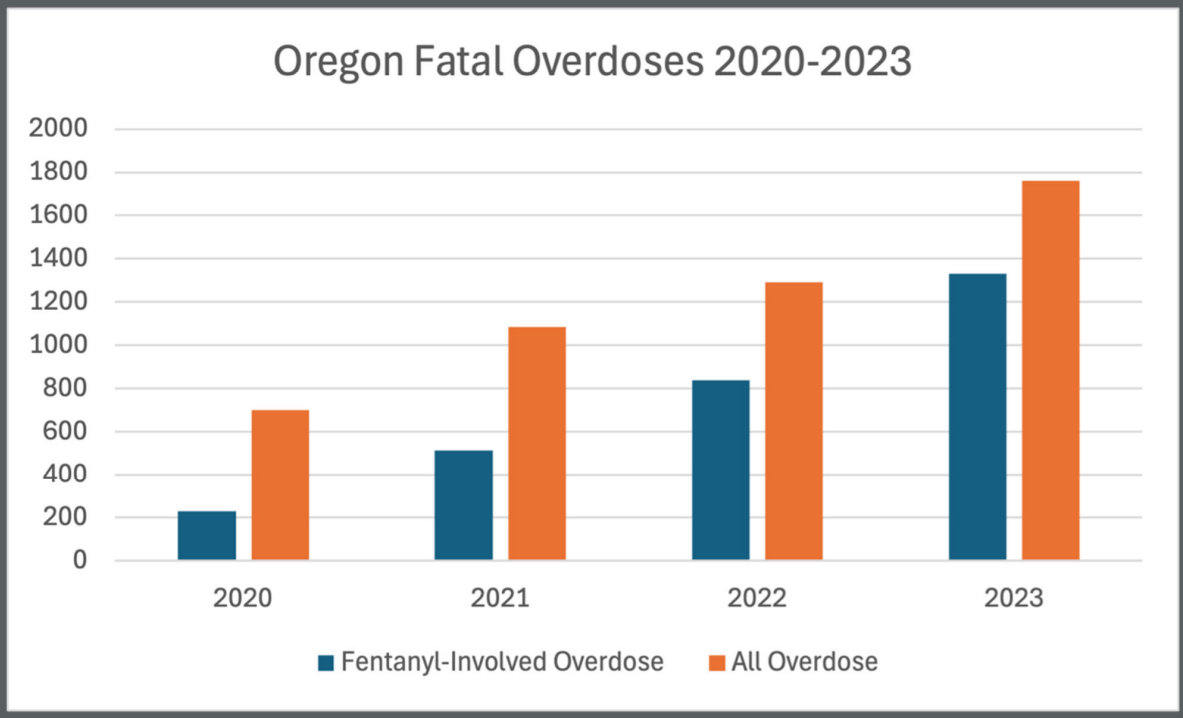
"Within two hours, we had that individual engaged in medication-assisted treatment, signed up for outpatient treatment with Best Care," Lair said. "We had him in detox that Sunday, two days later. He is now in sober housing."



https://ktvz.com/news/crime-courts/2024/09/19/amazing-deschutes-county-treatment-services-seeing-successful-start-to-measure-110-reforms-deflection-program/

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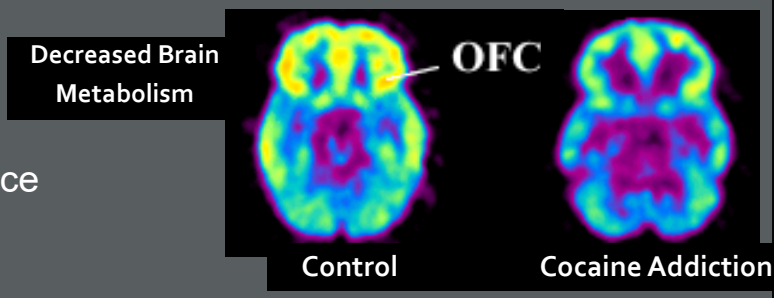


3/1/25 https://oregoninjurydata.shinyapps.io/overdose/

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Chronic Brain Disease

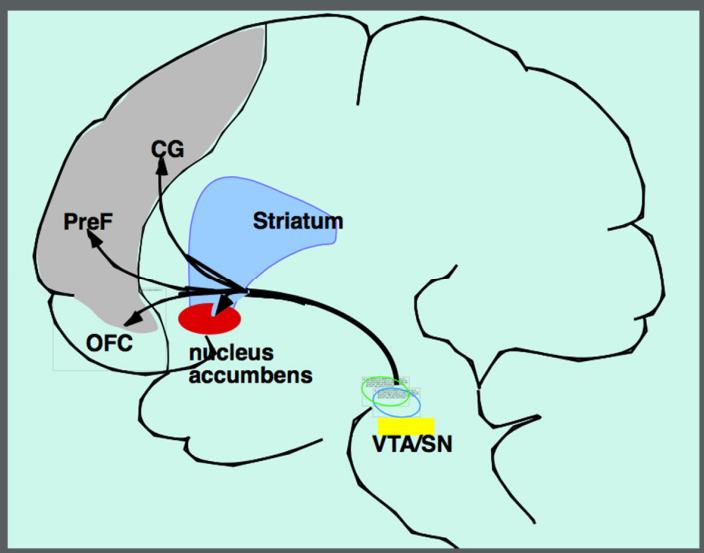


- Outdated view:
  - moral failing, bad choice
- Modern, evidence-based view:
  - Genetic and environmental factors
  - Structural and functional disruption of motivation, reward, inhibition
  - Drug use becomes an automatic, compulsive behavior (addiction)

Hall, Lancet 2015
Koob, Neuropsychopharm 2001
Volkow et al. *Neuroimage* 2013

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Dysregulation → "hard wiring" → loss of control



- Prefrontal cortex helps determine the risks and benefits of behaviors and make **rational** choices.
- Repeated activation → impaired regulation by the front of the brain. Primitive brain regions dominate.

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The brakes are disconnected

Medication for OUD

Three medications for OUD: "M"-OUD

- Medication assisted treatment (MAT)
- Medication for addiction treatment (still MAT)
- Medication supported recovery (MSR)
- Medication for OUD (MOUD)

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Three medications for OUD: "M"-OUD

"Bupe"

Partial opioid
- Buprenorphine *Subutex / Suboxone*

Full opioid
- Methadone

Month-long-acting Opioid antagonist
- ER-Naltrexone *Vivitrol*



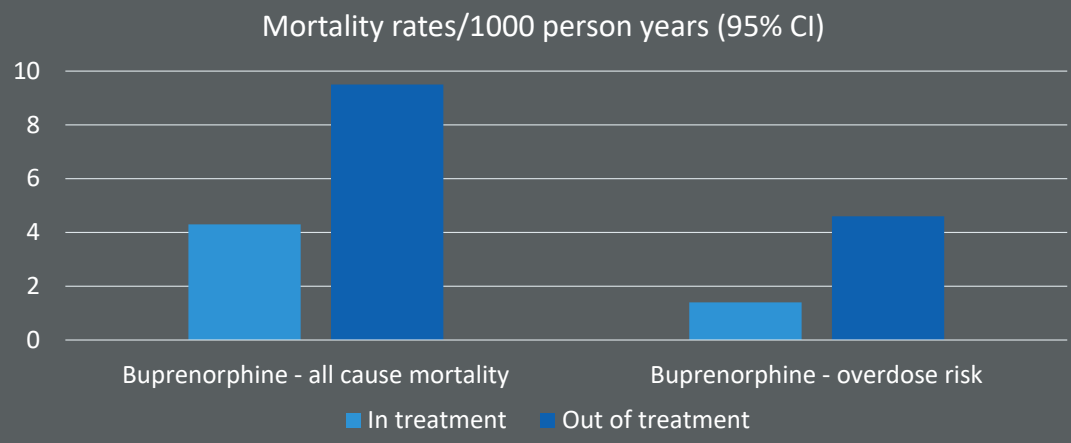
Rapid short-acting opioid antagonist

Naloxone – not MOUD

opioid reversal agent

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Community MOUD Outcomes



Mortality Risk during and after opioid substitution treatment: systematic review and meta-analysis of cohort studies. Sordo, et al. BMJ 2017.

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Incarceration & MOUD

MOUD started pre-release

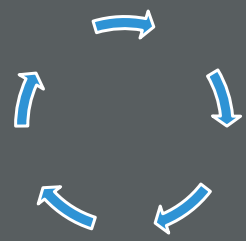
- Reduced illicit opioid use after release
- Reduced IV drug use
- Reduced Overdose (Lim)

Moore, K. E., et al. (2019). "Effectiveness of medication assisted treatment for opioid use in prison and jail settings: A meta-analysis and systematic review." Journal of Substance Abuse Treatment **99**: 32-43.

Lim, S., et al. (2023). "Association between jail-based methadone or buprenorphine treatment for opioid use disorder and overdose mortality after release from New York City jails 2011–17." Addiction **118**(3): 459-467.

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Recidivism Outcomes



Jail with Buprenorphine program outperformed

- Reduced reincarceration (21% vs 39%)
- Reduce re-arraignment (36% vs 47%)

Methods:

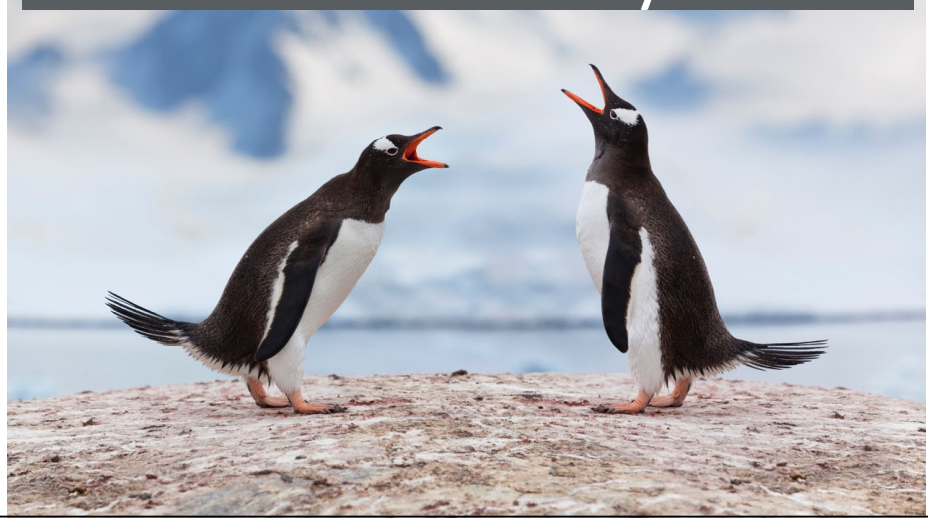
- Comparison of 2 neighboring Massachusetts County Jails
- 469 AICs with Opioid Use Disorder
- 1-year follow-up after release

Evans, E. A., et al. (2022). "Recidivism and mortality after in-jail buprenorphine treatment for opioid use disorder." Drug Alcohol Depend **231**: 109254.

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Is MOUD accessible within/without of the Criminal Justice System?

All carrot,
No stick!



Poor access
No handoff!

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MOUD take-aways

- Support with your institutional culture
- Help clients access MOUD
- The CJC is operating a jail-MOUD grant program

Supplemental Slides

M110 and Decrim Resources

- Portland City Club Interview Debriefing of Portugal Trip
  - https://www.youtube.com/watch?v=cHyS5-vFNn4
- OHA M110 page and dashboards
  - https://www.oregon.gov/oha/hsd/amh/pages/measure110.aspx
- Oregon Secretary of State M110 Audits
  - https://sos.oregon.gov/audits/Documents/2023-03.pdf
  - https://sos.oregon.gov/audits/Documents/2023-39.pdf
- 1/2024 - RTI M110 Research Symposium
  - https://www.rti.org/event/oregons-ballot-measure-110-symposium

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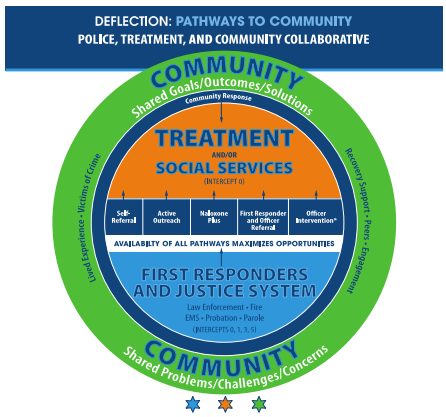
BJA Deflection References and Resources

- https://www.cossup.org/Topics/LEFR/Deflection
- https://bja.ojp.gov/library/publications/report-national-survey-assess-first-responder-deflection-programs-response

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National Deflection Resource: PTACC

[Police, Treatment and Community Collaborative]



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National Deflection Resource: LEAD

[Webpage] [Download Toolkit]

LEAD SUPPORT BUREAU
Law Enforcement Assisted Diversion
Let Everyone Advance with Dignity

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Thank You

hooverda@ohsu.edu

Oregon Behavioral Health Deflection Program

Oregon State Bar | Criminal Justice Alternative Outcomes

April 11, 2025

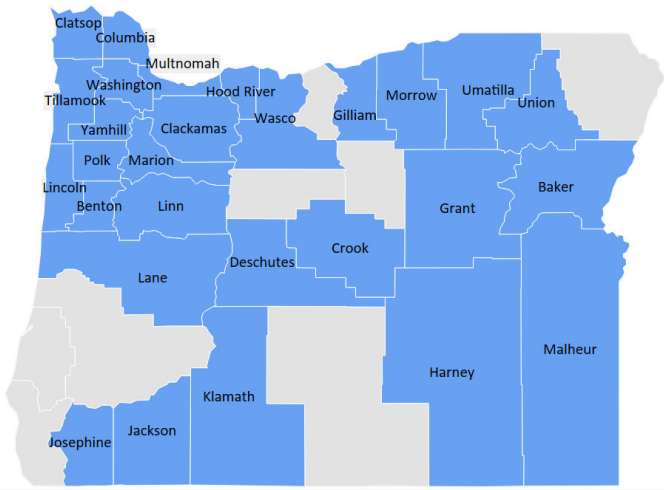
Kaysea Beck
Behavioral Health Program Manager

Behavioral Health Deflection (BHD) Grant

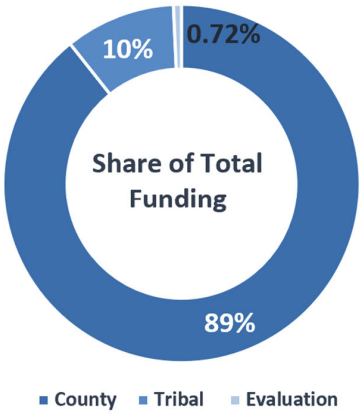
HB 4002 (2024)

- Created the grant program and capitalized it with $20,708,200 to be awarded via formula grants.
- 27 programs, representing 28 counties, applied for BHD program funding in 2024.
- 26 programs are currently operational.

Behavioral Health Deflection Grant Counties



2024 BHD Funding Breakdown



Total Available Funding: $20,708,200

Evaluation Funding:	Total Tribal Funding Set Aside
0.72%	**$2,070,819**



2024 BHD County Funding Table

Final Formula Allocations Per County/Consortium					
Baker:	$ 150,000	Harney:	$ 150,000	Marion:	$1,472,711
Benton:	$ 258,430	Hood River/Wasco:	$ 304,150	Morrow:	$ 150,000
Clackamas:	$1,060,853	Jackson:	$1,281,288	Multnomah:	$4,313,852
Clatsop:	$ 453,888	Josephine:	$ 788,274	Polk:	$ 239,314
Columbia:	$ 264,572	Klamath:	$ 412,114	Tillamook:	$ 163,548
Crook:	$ 150,000	Lane:	$2,120,517	Umatilla:	$ 390,303
Deschutes:	$ 844,514	Lincoln:	$ 341,256	Union:	$ 150,000
Gilliam:	$ 150,000	Linn:	$ 531,486	Washington:	$1,504,885
Grant:	$ 150,000	Malheur:	$ 150,000	Yamhill:	$ 541,450

BHD Grant Requirements

HB 4002 (2024)

- Provided each recipient flexibility to develop and implement programming to address local priorities, dynamics and resources.
- Required partnerships between (at minimum):
  - District attorney;
  - Law enforcement agency;
  - Community mental health program; and
  - Provider from a Behavioral Health Resource Network.
- Required the establishment of a program coordinator.
- Required tracking and reporting data.

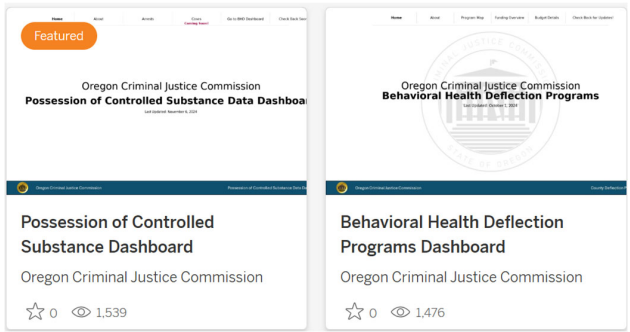


CJC Dashboards

- Link to CJC's main dashboard page: https://public.tableau.com/app/profile/cjcdashboards/

Or

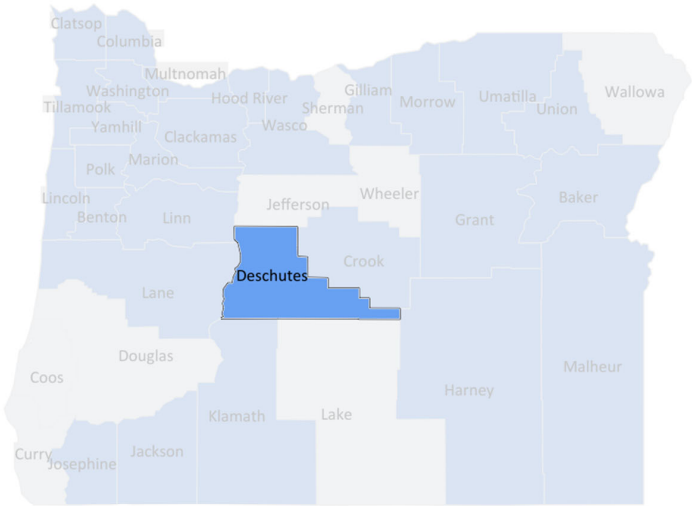
- Navigate to oregon.gov/CJC and click Dashboards in the top blue row





Oregon Criminal Justice Commission
Behavioral Health Deflection Programs

Last Updated: March 24, 2025



* Counties that chose not to apply for funding will show $0.

BHD Program
No BHD Program

Please select a county on the map to view details....

Deschutes County

Program Details

Coordinating Agency: Deschutes County Sheriff's Office
Agency Contact: Neil Marchington, Deputy
Contact Address: 63333 US-20, Bend, OR 97703
Formula: $844,514

Program Partners

Behavioral Health Resource Network	BestCare, Ideal Option
Community Mental Health Program	BestCare
District Attorney's Office	Deschutes County District Attorney
Law Enforcement	Bend, Sunriver, Black Butte and Redmond Police Departments, the Deschutes County Sheriff's Office, the US Forest Service, and the Oregon State Police

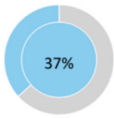
Select a county...

Statewide All

The information displayed here is pulled directly from county application budget projection sheets. Categories are used to organize budget line items for each application and are based on common requirements and expenditures for county BHD programs. Categorization is current as of September, 2024 and may be modified in the future if county BHD program spending patterns are altered.

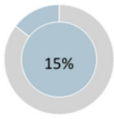
Click on circles or bars to view budget items..

Build: $6,623,569
County and community partner expenses related to building and maintaining an integrated program, including program coordinators, supplies and equipment, and training.



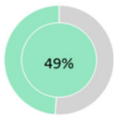
- Coordinators
- Supplies & Support
- Training & Travel

Deliver: $2,634,741
Expenses supporting county and system efforts to initiate deflection services. This includes supplies and personnel supporting district attorneys, law enforcement agencies, and other county partners.



- District Attorney
- Law Enforcement
- Court & County Internal Partners

Serve: $8,843,314
Materials and services directly at the point of contact with the client. This includes peer mentors and healthcare providers, housing or shelter assistance, and other support that helps remove barriers.



- Treatment
- Housing
- Other Client Support

$0 $5,000,000 $10,000,000

Home | About | Program Map | Funding Overview | **Budget Details** | Go to PCS Dashboard

Select a county...

Statewide All

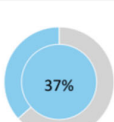
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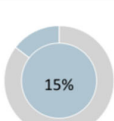
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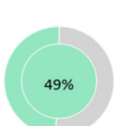
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- Supplies & Support
- Training & Travel



- District Attorney
- Law Enforcement
- Court & County Internal Partners



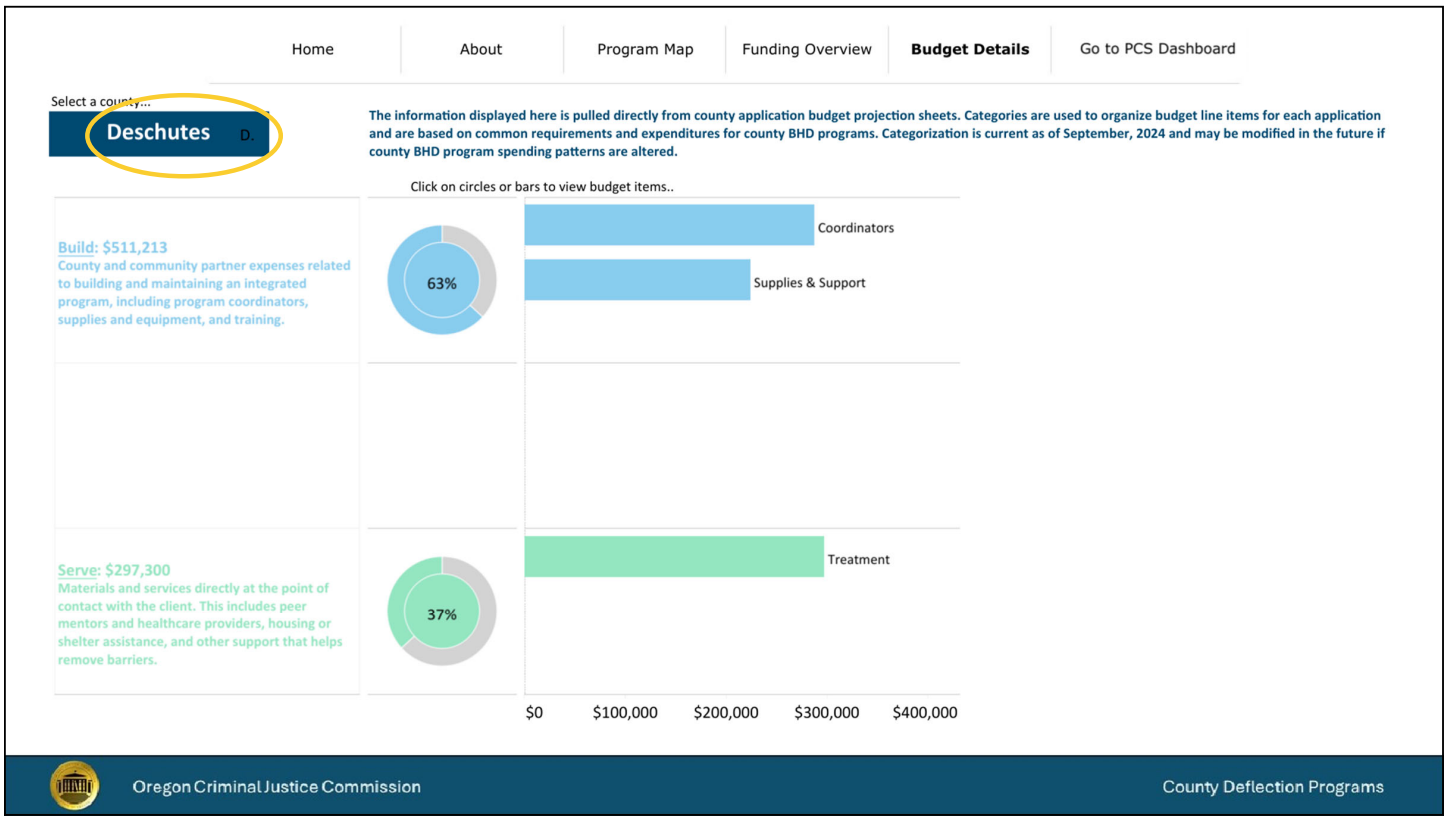
- Treatment
- Housing
- Other Client Support

$0 $5,000,000 $10,000,000

Budget Line Items for Direct Client Services: Treatment

Baker	ndn deflection cadc
Benton	case manager
	service provider low risk
	service provider moderate high risk
Clackamas	sub recipient to loveone
Clatsop	deflection recovery ally (clatshop behavioral healthcare)
	transportation to inpatient treatment
Deschutes	lead peer case mgr (bc)
	lead peer case mgr (io)
	narcan
Gilliam	care coordinator
	equipment
	peer navigator
	program supervisor
	supplies
Grant	medication
	peer navigator
	vehicle
Hood River	peer navigator
Jackson	outreach, engagement, and treatment services local providers to be identified
	peer navigator team addictions recovery center, inc. (arc)

Oregon Criminal Justice Commission County Deflection Programs



BHD Program Administration

- Applicants have taken several different approaches to assigning of an administrative home for their deflection programs.
- Several programs have reported changes in their administrative homes since their original application and/or implementation.

Deflection Program Coordinating Agencies		
Coordinating Agency	**Num**	**Pct**
Behavioral Health Entity	8	29.6%
Sheriff's Office	8	29.6%
Community Corrections	3	11.1%
County Administration	4	14.8%
District Attorney's Office	4	14.8%

As of January 2025

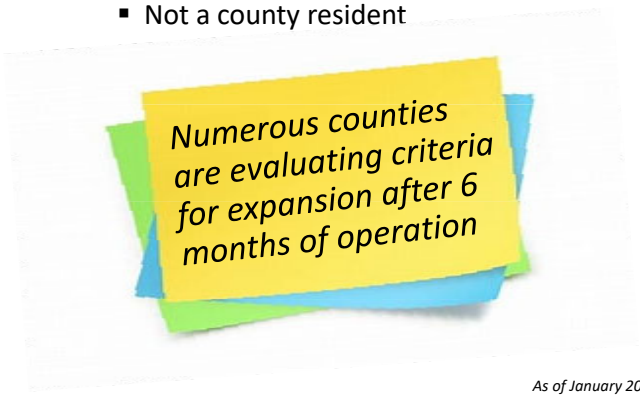
BHD Eligibility Criteria

Criminal Charge

- PCS-U/PCS Only:
  9 counties specifically define their eligible population to include only those individuals suspected of, or charged with, a PCS or PCS-U charge(s)
- PCS and Other Crimes:
  18 counties will include individuals suspected of or charged with other crimes
  - For example: loitering, misdo theft, misdo property destruction, prostitution, trespassing, and other "quality of life" crimes

Common Disqualifiers

- History of violence or sex crimes
- Currently on supervision
- Not a county resident



As of January 2025

BHD Program Breakdown

County	Officer Intervention	Social Referral	MC/CR Team	BH Center
Baker	X		X	X
Benton	X			
Clackamas	X	X		
Clatsop	X	X	X	
Columbia	X			
Crook	X			
Deschutes	X			
Gilliam	X		X	
Grant	X		X	
Harney	X		X	
Hood River/ Wasco	X		X	
Jackson	X			
Josephine	X			X
Klamath	X	X		

County	Officer Intervention	Social Referral	MC/CR Team	BH Center
Lane	X	X	X	
Lincoln	X		X	
Linn	X		X	X
Malheur	X		X	
Marion	X		X	
Morrow	X			
Multnomah	X			X
Polk	X	X		
Tillamook	X			
Umatilla	X			
Union	X			
Washington	X			
Yamhill	X			
TOTAL	**27**	**5**	**11**	**4**

As of January 2025

Deflection Best Practices

- Pursuant to HB 4002, CJC contracted with OHSU/PSU SPH to conduct a study to determine best practices for deflection programs.
- Subsequently, a report examining national best practices through the lens of contextual factors specific to Oregon was published on April 1, 2025.
- The report is available on CJC's publications webpage: oregon.gov/CJC/SAC/Pages/Publications

OHSU | Portland State University | SCHOOL OF PUBLIC HEALTH

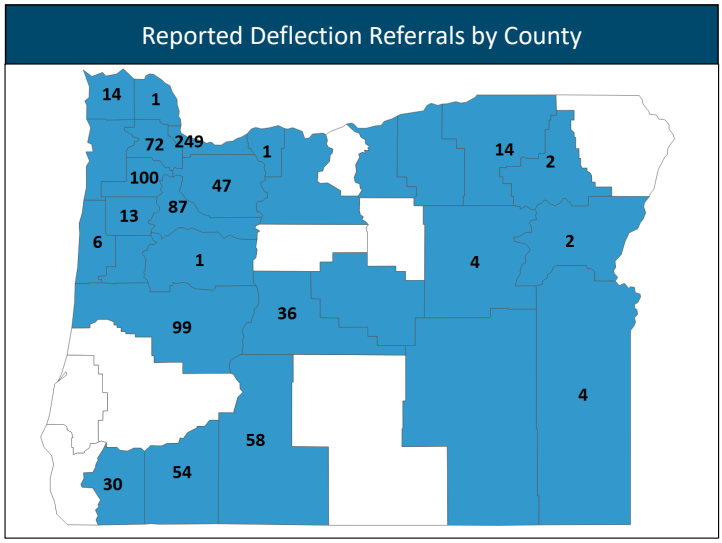
Deflection Data

Deflection counties must report deflection data to the CJC via the REDCap data system maintained by OHSU-PSU SPH.

- Grantees are expected to report monthly

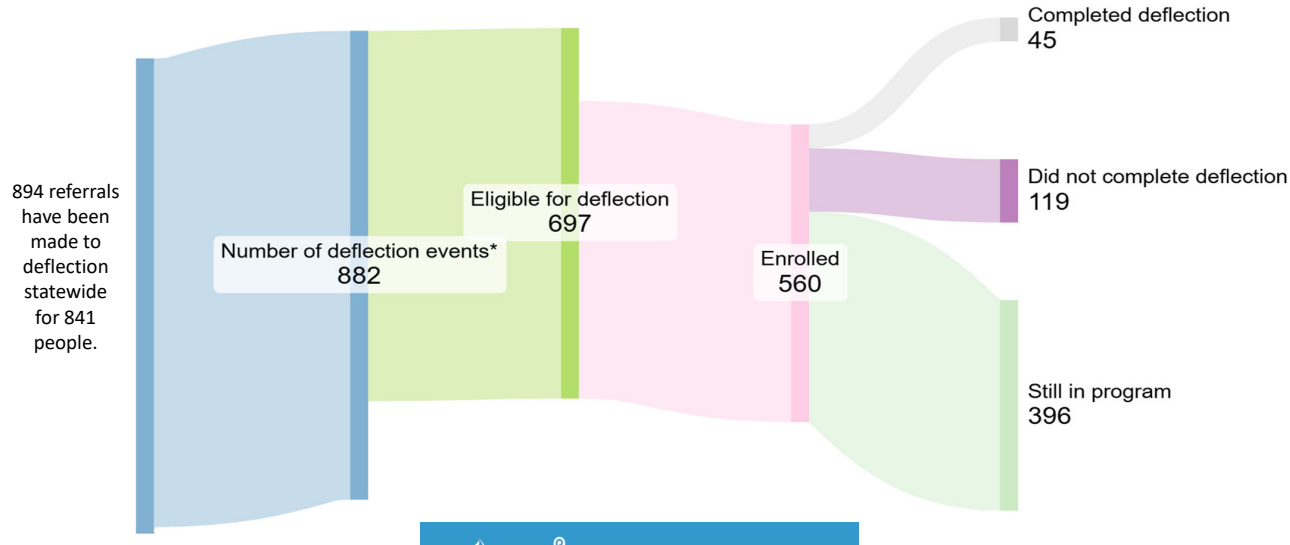
894 referrals have been made to deflection statewide for 841 people.

- 809 people have one referral
- 25 people with two referrals
- Five people with three referrals
- Two with four referrals



As of 3/3/2025

Deflection Data



OHSU | Portland State University | SCHOOL OF PUBLIC HEALTH

As of 3/3/2025



Oregon Criminal Justice Commission

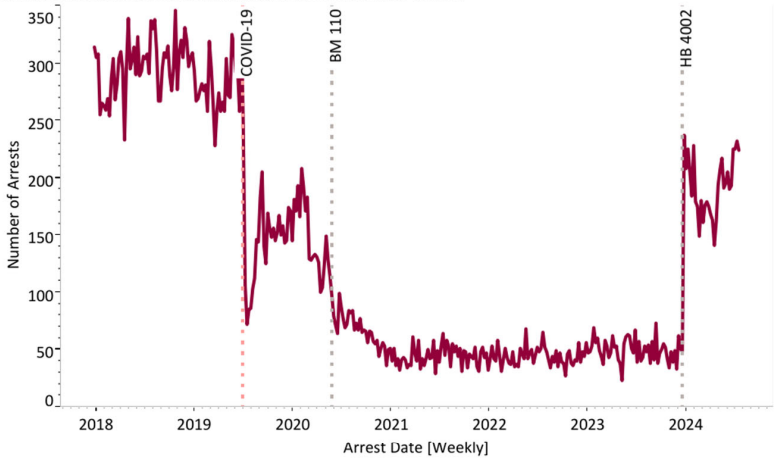
Possession of Controlled Substance Data Dashboard

Last Updated: April 1, 2025

Home | About | **Arrests** | Cases | Supervision | Go to BHD Dashboard

Weekly Fingerprinted Possession of Controlled Substance Arrests

Different types of drug possession cannot always be differentiated in the data; this chart includes *all* instances of an arrest for PCS (user amount, substantial quantity, and commercial drug offenses). For more information, please see the 'About' tab above.



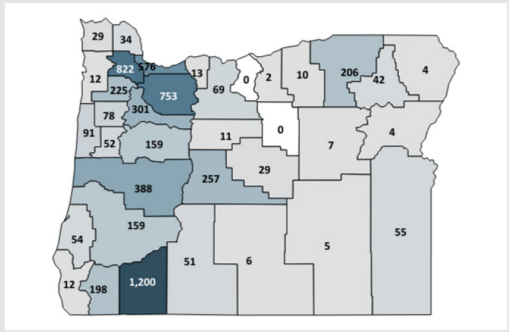
To view arrests with only PCS or arrests that include other charges, toggle the options below.
All

September 1, 2024 to April 1, 2025

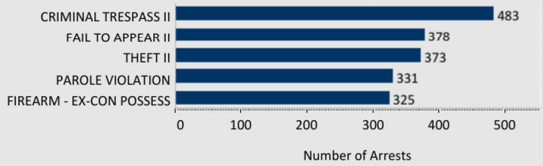
5,916 Total PCS Arrests

Total PCS Arrests by County

Mouse over counties to view agency counts



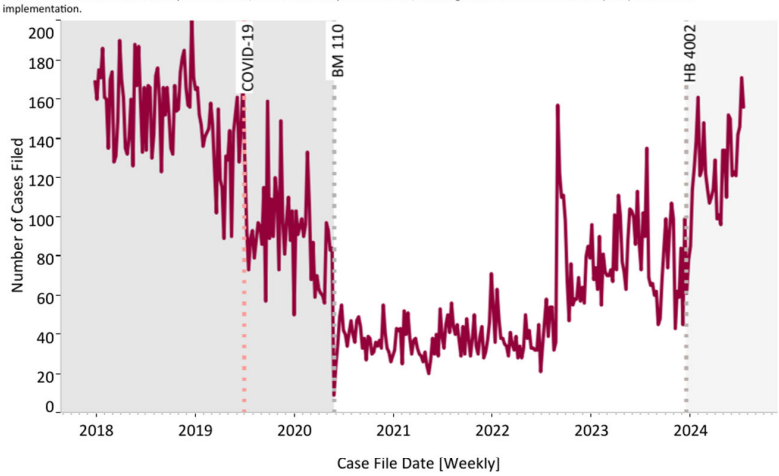
Most Common Additional Charges on PCS Arrests



Home | About | Arrests | **Cases** | Supervision | Go to BHD Dashboard

Weekly Cases Filed for User-Quantity Possession of Controlled Substances

Data includes class A misdemeanors prior to BM110, class E violations prior to HB4002, and drug-enforcement misdemeanors (DEM) after HB4002 implementation.



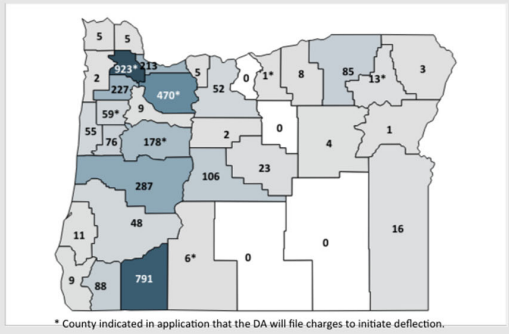
To view cases with only PCS or cases that include other charges, toggle the options below.
All

September 1, 2024 to March 31, 2025

3,781 Cases Filed with Drug-Enforcement Misdemeanor (DEM) Charge

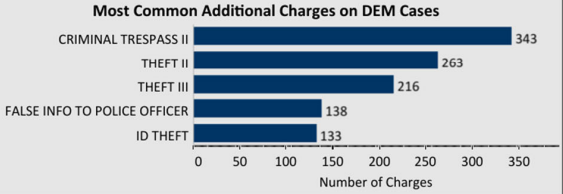
Cases by County

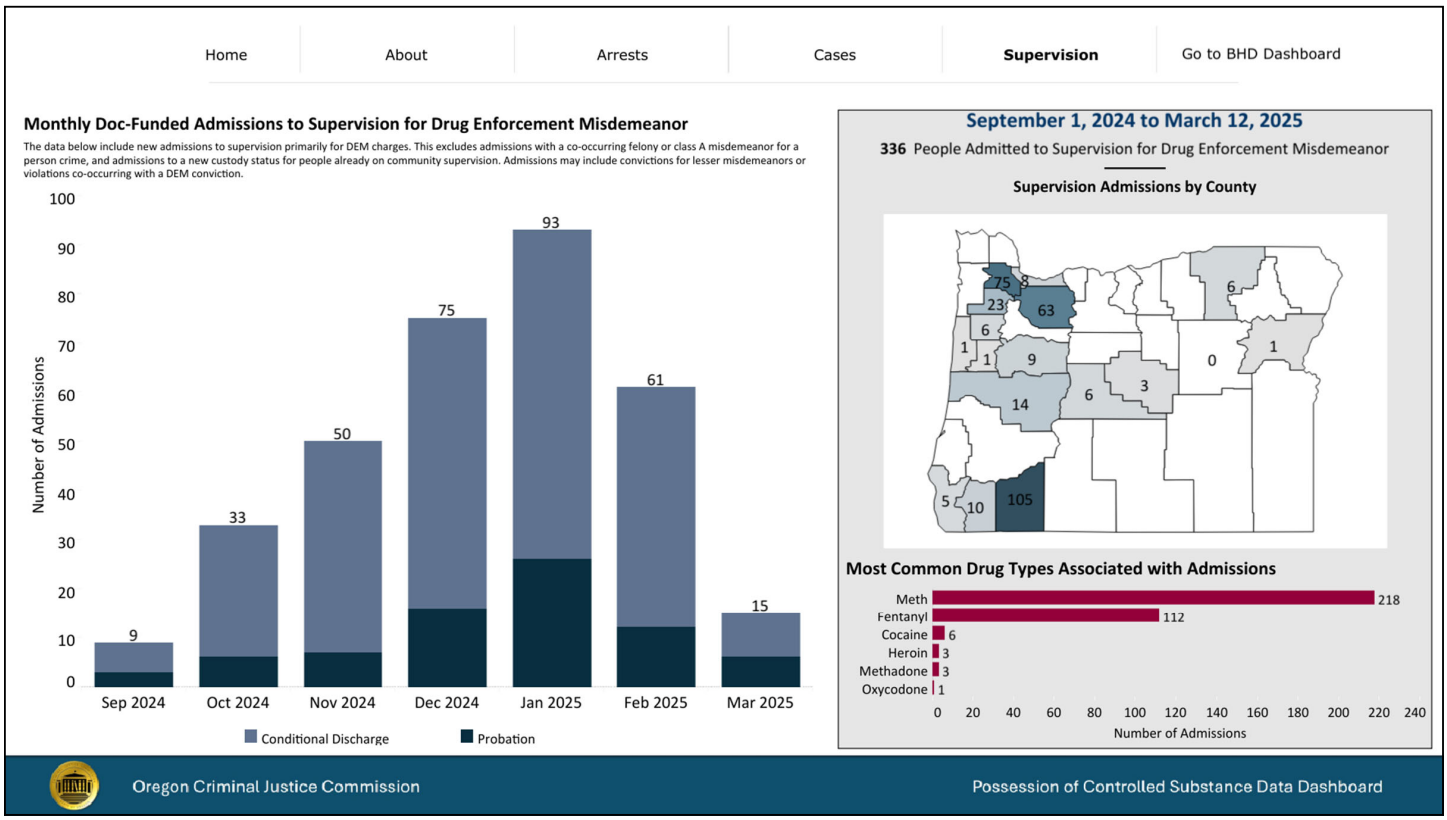
Mouse over counties to view agency counts



* County indicated in application that the DA will file charges to initiate deflection.

Most Common Additional Charges on DEM Cases







Questions?



Contact:

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Feedback?

Dr. Dan Hoover, MD, *Assistant Professor of Medicine, OHSU, Portland*

Dr. Hoover specializes in the care of persons with substance use disorders, including withdrawal management services, medication to support recovery, and complex care coordination. Dr. Hoover chose this field to help expand access to life-saving medications to treat opioid use disorder and to advocate for better community care and outcomes for persons who use substances. He enjoys forming deep relationships with his patients and partnering alongside them on the profound, personal, and spiritual journey of recovery. His academic interests include education and dissemination of best practices for substance use care, and substance use care within the criminal justice system.

Kaysea Beck, *Oregon Criminal Justice Commission, Salem*

Kaysea Beck is the Behavioral Health Program Manager at the Oregon Criminal Justice Commission, where she leads the planning, coordination, and analysis of the Commission's efforts in grant programming at the nexus of behavioral health and criminal justice. As an experienced program manager, she works collaboratively with system and community partners to ensure that effective, evidence-based practices are incorporated into policy implementation across Oregon. Kaysea first joined the Commission in 2021 as an analyst to administer the Improving People's Access to Community-Based Treatments, Supports, and Services (IMPACTS) grant program. Today, she oversees all behavioral health related initiatives for the CJC, including Oregon's new Behavioral Health Deflection (BHD) grant program. Prior to joining the Commission, Kaysea worked as a paralegal at the State of Oregon's public defense appellate section and, before that, at a private immigration law firm. She holds a BS in psychology from the University of Oregon and is passionate about public service. When she's not working to advance programs and policies that promote better outcomes for individuals and communities in Oregon, you will likely find her at the coast spending time with family, cup of coffee in hand.

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Responding to President Trump's Second Term

Legal Issues for Northwest Government Entities and Organizations

Presented by Jamie Lisagor and Anita Khandelwal

April 25, 2025

Immigration Considerations

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8 U.S.C. § 1373 and Local Government

8 U.S.C. § 1373 forbids prohibiting, or in any way restricting, any government entity or official from communicating with the INS about the citizenship or immigration status.

1. **Does not *require* an agency to share information** about anyone's citizenship or immigration status with federal authorities
2. **Does not require an agency *to collect* information** about citizenship or immigration status
3. **Applies only to the sharing of information about citizenship or immigration status**. It does not prohibit agencies from adopting a privacy policy of non-disclosure of *other types of information* to federal immigration authorities.
   - K-12 schools are generally prohibited from releasing student information or records to other entities, including the federal government, without a warrant (FERPA).

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"Sensitive Locations" Policy

Under a 2011 Department of Homeland Security memorandum, federal immigration enforcement operations were not supposed to occur at schools or other "sensitive locations."

- Trump has signed an Executive Order retracting the sensitive locations policy
- Arrests now allowed at sensitive locations such as churches and schools
- ICE guidance also provides for arrests at courthouses: ICE officers or agents may conduct civil immigration enforcement actions in or near courthouses when they have credible information that leads them to believe the targeted alien(s) is or will be present at a specific location, and where such action is not precluded by laws imposed by the jurisdiction in which the civil immigration enforcement action will take place.

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Responding to Federal Immigration Authorities

Important considerations:

- Privacy laws may prohibit local governments from providing information in response to requests from federal immigration authorities.
- Local agencies should be familiar with applicable provisions in the Public Records Act that exempt personal information from disclosure.
- Verify the requester's identity; requiring verification of the requester's role and identity does not violate 8 U.S.C. § 1373.
- Whether you are required to comply with a demand from federal immigration authorities will depend on the circumstances, and you should consult an attorney.

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ICE's Right to Enter Premises and Schools

In general, federal immigration authorities can enter the public areas of a business or other building or facility. Immigration and Customs Enforcement (ICE) must have a warrant signed by a judge to enter non-public areas.

- ICE routinely presents Department of Homeland Security Forms I-200 and I-205 entitled "warrant for arrest" or "warrant of removal/deportation", or ICE detainer form 247A.
  - These do not comply with the warrant requirement for a permissible search of nonpublic areas under the Fourth Amendment.

Schools should:

- Consider designating a staff member who is trained in what to do in the event that a child's parents or caregivers are unexpectedly detained
- Ensure students' emergency contact information is kept up to date

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ICE Warrants vs. Judicial Warrants



Source: ICE.gov



Source: USCourts.gov

Staff should be trained to identify the difference so they can respond appropriately should immigration officers come to their offices.

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Courts

- Or. Rev. Stat. Ann. § 181A.82 prohibits most arrests pursuant to ICE warrants in courthouses. It provides that an "individual may not be subject to civil arrest without a judicial warrant or judicial order when the individual is in a court facility," and that "an individual who . . is a party or potential witness, or family or household member of a party or potential witness, may not be subject to civil arrest while going to, remaining at or returning from the court proceeding" without a judicial warrant.
- It is *possible* that ICE officers will be less likely to make arrests pursuant to ICE (i.e. administrative) warrants in or near courthouses to avoid litigation, though ICE's update guidance indicates a willingness conduct arrests at courtshouses.

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Jails

- Jails should continue to not honor ICE detainers;
  - Multiple federal courts have ruled that a state or local jurisdiction's compliance with immigration detainers, in the absence of a warrant or an independent basis for detention (probable cause of crime), violates the Fourth Amendment to the U.S. Constitution and could subject the state or local jurisdiction to civil liability for the resulting harm.
- Many jails have courtrooms in them. Individuals in pre-trial custody are there only for the purpose of going to court—the ORS related to individuals going to and coming from court may have implications for ICE officers seeking to enforce detainers in jail.
- To the extent that areas of the jail are open to the public, immigration officers can enter those areas.

Jails

Practical Suggestions:

- Ensure robust access to video visitations.
  - Family members who are undocumented may fear coming to the jail to visit in person.
- Have written policies for when/if the jail will consent to allowing ICE to enter areas closed to the public.

Public Entity Offices Open to Public

- Because these offices are open to the public, there is no basis to exclude ICE officers.

Practical Suggestions:

- Public-facing offices should have designated staff to be alerted in the event that ICE is present in the office.
- Offices should also have policies articulating if/when they will consent to ICE entering non-public areas.
- Public entities should maximize the individual's ability to engage with the public entity via remote mechanisms.

Note: the legislation related to courts creates a one-mile buffer; since many public entities are adjacent to courthouses, this may make ICE less likely to attempt arrests in these areas.

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Sanctuary Cities

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Executive Order 14159

- “The Attorney General and the Secretary of Homeland Security shall, to the maximum extent possible under law, evaluate and undertake any lawful actions to ensure that so-called "sanctuary" jurisdictions, which seek to interfere with the lawful exercise of Federal law enforcement operations, do not receive access to Federal funds. Further, the Attorney General and the Secretary of Homeland Security shall evaluate and undertake any other lawful actions, criminal or civil, that they deem warranted based on any such juridiction's practices that interfere with the enforcement of Federal law.”
- EO contains both a restriction on funding (contained in sentence one) and an enforcement directive (contained in sentence two) against jurisdictions they deem “sanctuary jurisdictions.”
- The funding restriction in the Order requires the Attorney General and DHS Secretary to withhold all “Federal funds” from sanctuary jurisdictions “to the maximum extent permissible by law.”

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Bove Memo (implementing the EO)

- Deputy Attorney General Bove issued a memorandum to all DOJ employees entitled “Interim Policy Changes Regarding Charging, Sentencing, And Immigration Enforcement”
- Memo states that DOJ’s position is that “[t]he Supremacy Clause and other authorities require state and local actors to comply with the Executive Branch’s immigration enforcement initiatives.”
- States DOJ’s view that state and local actors violate federal law if they “fail[] to comply with lawful immigration-related commands and requests
- Concludes that jurisdictions with laws that “prohibit[] disclosures of information to federal authorities engaged in immigration-enforcement activities” “threaten to impede Executive Branch immigration initiatives” and “threaten public safety and national security.”

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Pending Litigation

- The City of Portland, King County (represented by Pacifica Law Group), and a number of other cities have sued to challenge the validity of the EO
- They allege violations of the:
  - 10th Amendment anti-commandeering doctrine, which prohibits the the Federal Government from compelling States to implement, by legislation or executive action, federal regulatory programs.
  - Separation of powers (by withholding funds from sanctuary cities, executive is encroaching on legislature's funding authority)
  - Due Process (the orders are so vague it is unclear what is prohibited)
  - Violation of the APA because an agency (DOJ) is engaged in arbitrary and capricious acts

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Prior Sanctuary City EO 13,768

- Declared that sanctuary jurisdictions were jurisdictions that "willfully violate Federal law in an attempt to shield aliens from removal from the United States."
- The Executive Order directed the Attorney General and Secretary of Homeland Security that any jurisdictions "that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.
- The Attorney General was further directed to "take appropriate enforcement action against any entity that violates 8 U.S.C. § 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.
- That order was successfully challenged in *Cnty. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201 (N.D. Case 3:25-cv-01350, and the Ninth Circuit affirmed the grant of a preliminary injunction. The court entered a permanent injunction and the appeal of that injunction was dismissed as moot.

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Diversity, Equity, and Inclusion Initiatives

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Current State of the Law on DEI Initiatives

- *Students for Fair Admissions*, 2023 case where U.S. Supreme Court struck down race-based admissions processes at Harvard and the University of North Carolina
  - Decision focused on lack of measurable objectives in admission process
- But in *Allen v. Milligan*, the Court upheld a key provision of the Voting Rights Act that allows race-conscious government action as a remedy to unlawful discrimination
- The decisions suggested that race-based programs and benefits likely violate the Equal Protection Clause, unless persuasively justified
- Led to legal challenges to various diversity programs and trainings, including locally
  - Claim against Seattle regarding mandatory DEI training
- Courts in other states have held that DEI training did not create a hostile work environment, *Young v. Colorado Dep't of Corr.*, 94 F.4th 1242, 1253 (10th Cir. 2024)

Current State of the Law on DEI Programs

- DEI programs by local government that give a preference or benefit to legally protected groups (e.g., race, gender) typically raise significant legal issues.
- Many types of DEI programs and policies remain lawful under current law, when thoughtfully designed. A few examples:
  - Expanding outreach to broaden candidate pools
  - Creating mentorship and coaching programs that are open to all
  - Conducting employee education open to all
  - Auditing programs and processes to remove bias
  - Advocacy to promote lawful DEI



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DEI Executive Orders

"Ending Illegal Discrimination and Restoring Merit-Based Opportunity"

- No clear definition of DEI, but EO's specific actions directed to "illegal preferences and discrimination."
- AG must submit a report by mid-May with recommendations "to encourage the private sector to end illegal discrimination and preferences, including DEI," and a "strategic enforcement plan" identifying:
  - The "most egregious and discriminatory DEI practitioners in each sector of concern"
  - From each agency, up to 9 potential "civil compliance investigations" of publicly traded corporations, large nonprofits, foundations with $500m+ assets, state or local bar or medical associations, and higher education institutions with $1b+ endowment.
  - Potential litigation and regulatory action.
- Federal contracts/awards must include anti-DEI provisions.

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DEI Executive Orders

"Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government"

- Establishes federal policy to recognize two "unchangeable" sexes, male and female.
- AG must issue guidance "to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces" and prioritize enforcement.

"Ending Radical and Wasteful Government DEI Programs and Preferencing"

- Terminates all federal DEI programs and policies.



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Takeaways on DEI Executive Orders

- DEI Executive Orders do not require immediate action
- Local government entities may consider identifying those programs that receive federal funding to plan for alternatives if those programs will face a loss of that funding.
- Local governments may be required to certify that they "does not operate any programs promoting DEI that violate applicable federal anti-discrimination laws." Local government should be very cautious before signing any certifications.
- Self-audit of DEI programs
  - ✓ Identify internal and external DEI programs and policies
  - ✓ Assess legal risk under current law with legal counsel
  - ✓ Brainstorm alternatives/mitigation for higher risk activities



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Federal Funding

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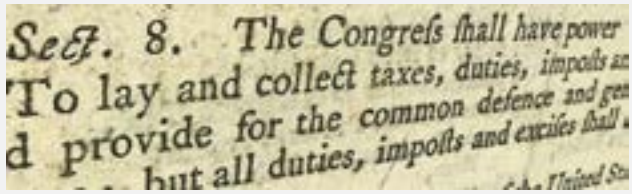
Use of funds to coerce local government action?

Answer depends on two parts of the U.S. Constitution

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

- Congress's enumerated powers under Article I
- Relevant here, **Article I, Section 8's** spending clause, which grants Congress the power to collect taxes and "provide for the common Defence and general Welfare…"


Sect. 8. The Congress shall have power
To lay and collect taxes, duties, imposts a
d provide for the common defence and ge
but all duties, imposts and excises shall

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Anti-Commandeering Doctrine

10th Amendment's anti-commandeering doctrine

- Federal government cannot coerce state or local government action
- But under spending clause, the federal government can use monetary incentives

Anti-Commandeering Cases

- 1992 decision was the first to label the "anti-commandeering doctrine"

  New York v. United States, 505 U.S. 144 (1992)
- 1997 decision holding the Brady Act unconstitutional under the anti-commandeering doctrine

  Printz v. U.S., 521 U.S. 898 (1997)

Guardrails on Funding Coercion

Congress can put conditions on funds so long as they are:

- For the general welfare;
- Unambiguous;
- Related to a federal purpose;
- Pursuing goals that are not independently unconstitutional; and
- Not coercive.

South Dakota v. Dole, 483 U.S. 203, 207-08, 211 (1987).

Affordable Care Act was example – threatened to remove Medicaid funding from states that did not comply.

- Court concluded this was "a gun to the head" of states, and so was unduly coercive.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)

Executive Orders and Separation of Powers Issues

Spending clause and anti-commandeering cases deal with laws passed by Congress.

- Potentially different issues presented by congressional act vs. Executive Order
- When Trump issued an executive order regarding withholding federal grants from "sanctuary jurisdictions" in his previous term, multiple federal judges concluded that there were separation of powers issues with the executive branch exercising spending clause powers.

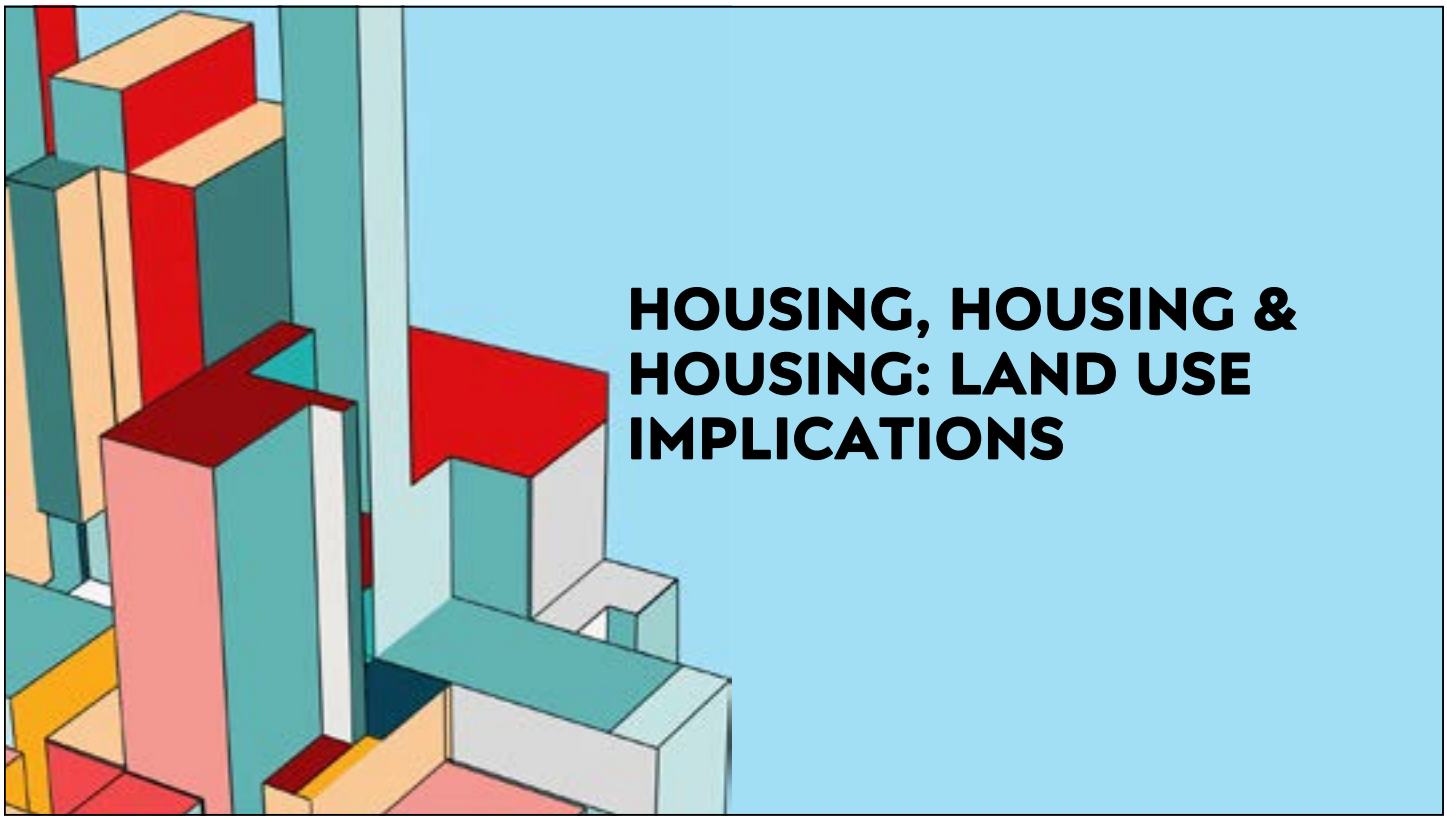
See, e.g., *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) ("Because Congress did not authorize withholding of funds, the Executive Order violates the constitutional principle of the Separation of Powers.").

Attorney Contact Information

For advice and support, please contact the below individuals or any member of the Pacifica team.

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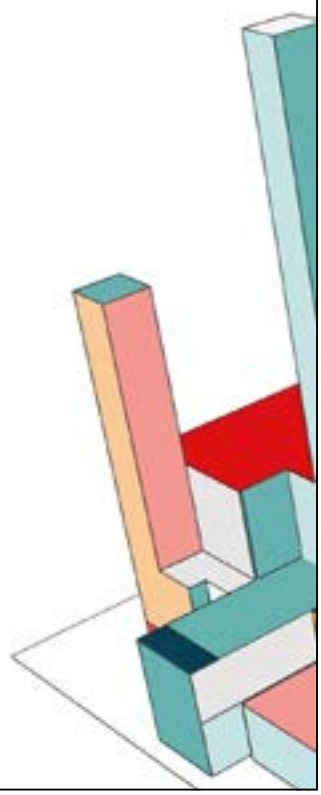
Anita Khandelwal
Anita.Khandelwal@pacificalawgroup.com

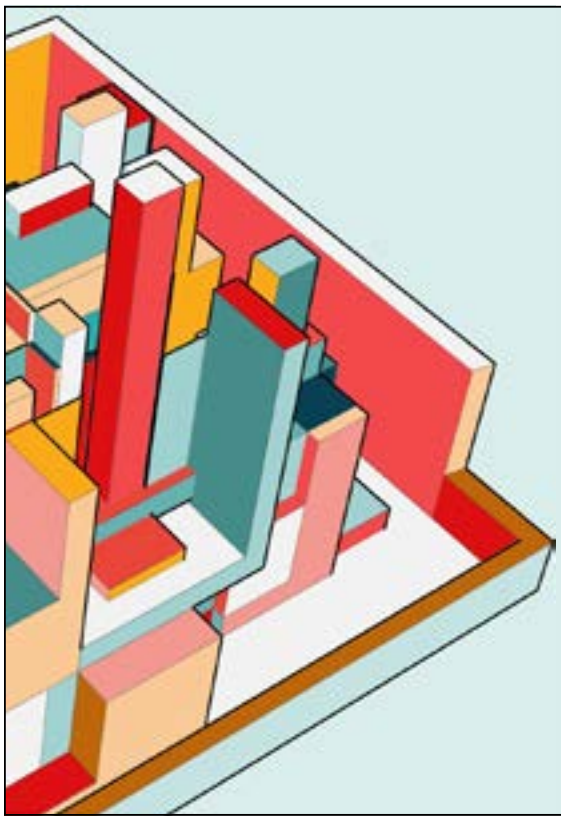


HOUSING, HOUSING & HOUSING: LAND USE IMPLICATIONS

AGENDA

- HB 4063 (2024) – House Housing Package
- SB 1537 (2024) - Governor's Housing Package
- HB 4026 (2024) - UGB Expansions/Referenda
- CFEC Litigation and Implementation
- Oregon Housing Needs Analysis (OHNA)
- Housing Production Strategies (HPS)



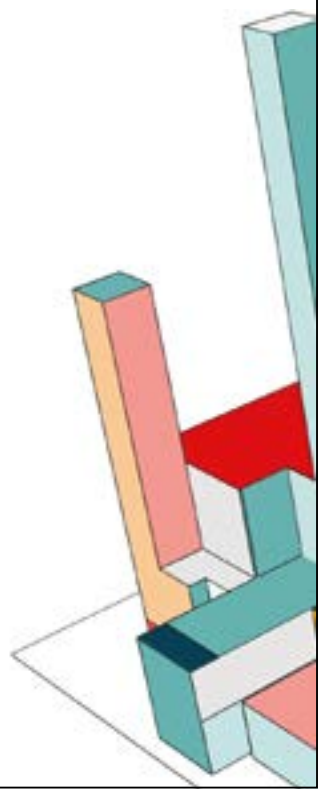


HB 4063 – HOUSE HOUSING PACKAGE

- Opting In to New Housing and Development Regulations
- Middle Housing Land Partitions
- Technical Fixes

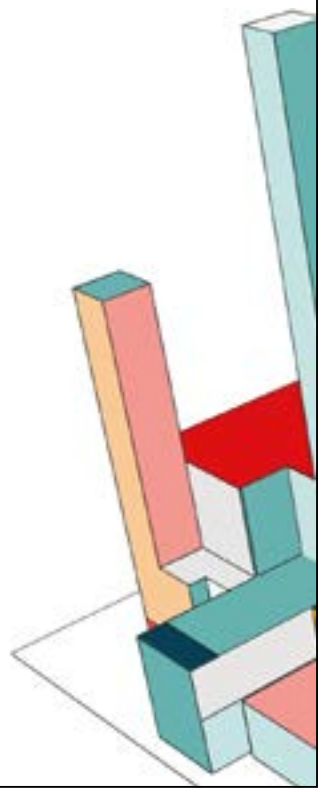
HB 4063 – OPTING IN TO NEW HOUSING AND DEVELOPMENT REGULATIONS

- Background: the "Goalpost Rule" in ORS 227.178
  - Requires that evaluation of a land use application is based on the standards and criteria in effect at the time the application was submitted
  - Applies if the application was complete when submitted or is made complete within 180 days after submission
- HB 4063 allows developers to opt in to standards and criteria that went into effect *after* the application was submitted
- Aligns with many cities' existing practices



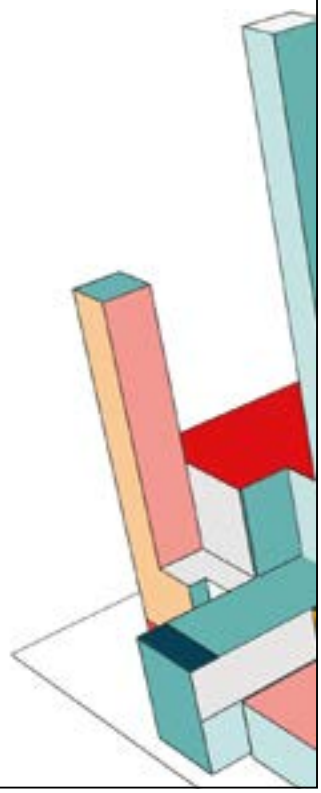
HB 4063 – OPTING IN TO NEW HOUSING AND DEVELOPMENT REGULATIONS

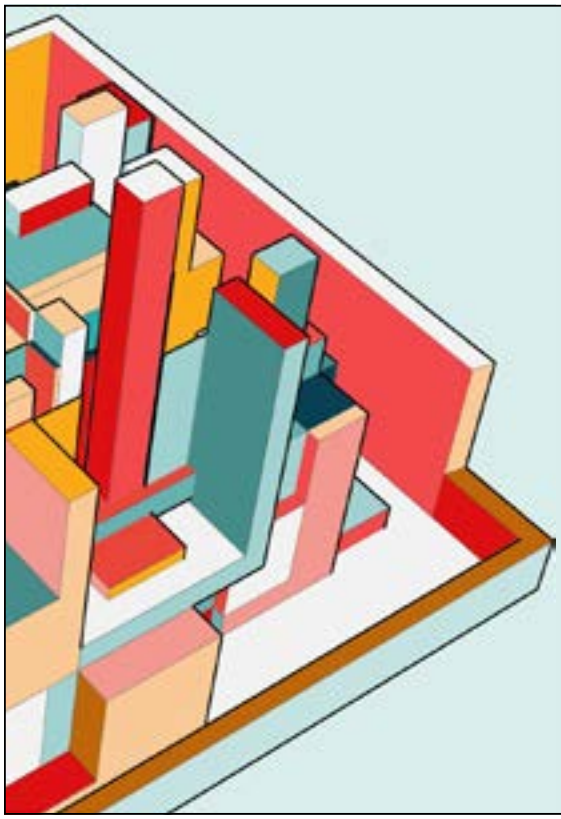
- Only applies to applications relating to development of housing
- Standards and criteria must be in effect at time of opt-in request
- Completeness review and decision timelines (e.g. 120 days) start over as if a new application were submitted at time of the opt-in request
- City *may* reject the request if:
    - It has already issued public notice of the application
    - The developer has previously made an opt-in request
- City may not require applicant to:
    - Pay a fee, except to cover additional costs incurred with request
    - Submit a new application or duplicative information. May still require changes or additional information necessary for the request.
    - Repeat processes or hearings inapplicable to the change in standards or criteria



HB 4063 – MIDDLE HOUSING LAND PARTITIONS

- Addresses lack of clarity regarding applicable procedures when an owner of a property wishes to:
    - Partition the property to create up to three parcels, at least one of which is vacant
    - Further divide the resulting vacant parcels via middle housing land division partition into not more than three parcels each
    - Within the same calendar year (usual limit of 3 parcels in one calendar year via partition)
- Typically would occur with a property with an existing home, where owner wishes to develop the vacant portion of the property with middle housing
- Now: Owner may use a regular partition process for the first land division, and then a middle housing land division partition process for the second round of divisions, all within the same calendar year



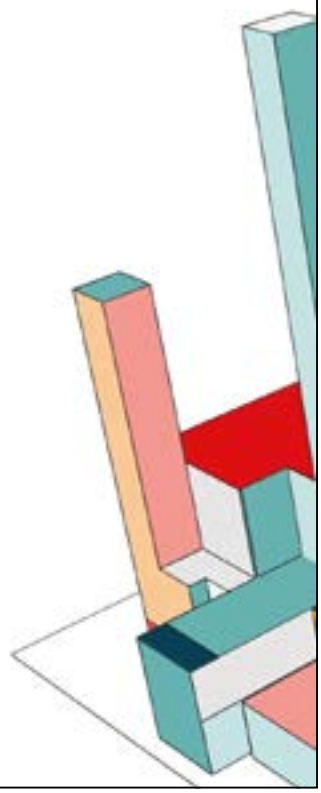


SB 1537 – GOVERNOR'S HOUSING PACKAGE

- Housing Accountability and Production Office (HAPO)
- Attorney Fees for Needed Housing Appeals
- Infrastructure for Housing
- Mandatory Adjustments
- Limited Land Use Decisions
- One-Time UGB Expansions

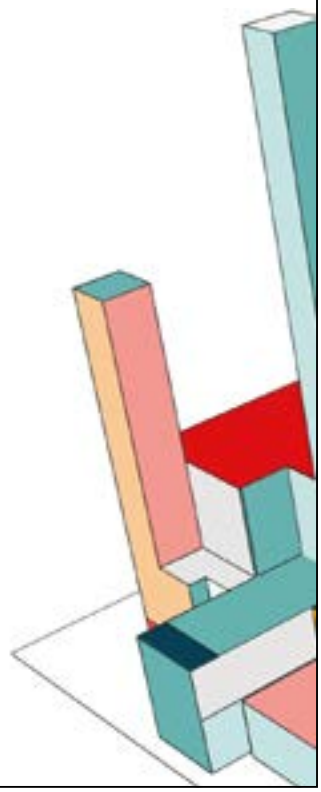
SB 1537 – HOUSING ACCOUNTABILITY AND PRODUCTION OFFICE (HAPO)

- Joint office of DLCD and DCBS
- Mission: To provide technical assistance regarding, and enforcement of, housing laws, and encourage development of housing. Services will include grants, model codes, mediation, coordinating state agencies, etc.
- Enforcement (effective July 1, 2025):
  - For specific developments, complaints only from developer
  - For general complaints, DLCD or anyone within jurisdiction
  - Investigation ends if developer appeals to LUBA or initiates litigation. Does not apply to "general" complaints.
  - If violation is found, HAPO issues warning to city. City can voluntarily enter mediation, compliance agreement, adopt model code, etc. to resolve issue. Assistance funding to these cities is prioritized.
  - Otherwise, HAPO can seek LCDC enforcement order or court order.



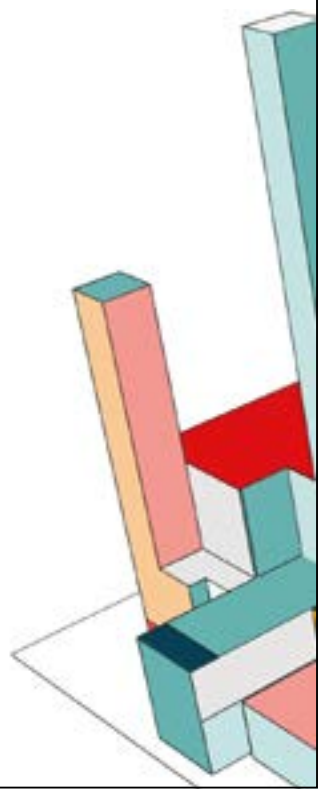
SB 1537 – ATTORNEY FEES FOR NEEDED HOUSING APPEALS

- Clarifies eligibility for attorney fees at LUBA in housing cases to ensure it includes the local government who approved the application if LUBA affirms the decision
- Applies to applications for affordable housing and to applications for any type of housing within a UGB
- Includes prelitigation legal expenses for processing the application



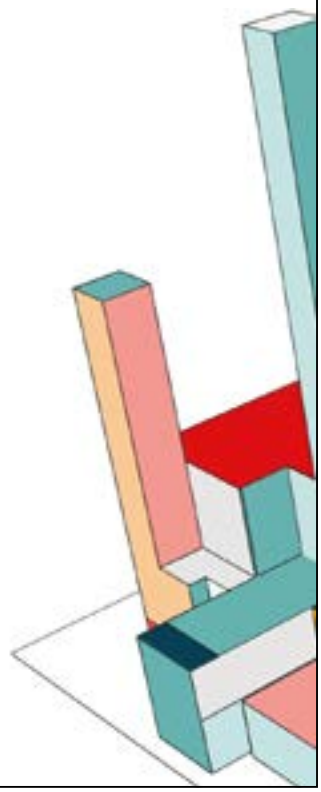
SB 1537 – INFRASTRUCTURE FOR HOUSING

- Creates Housing Infrastructure Support Fund and allocates $3M
    - Oregon Business Development Department to use these funds to support municipal infrastructure planning related to production of housing.
- Creates Housing Project Revolving Loan program
    - Allows cities to create a program to provide grants to developers in connection with developing affordable housing
    - Housing and Community Services Department loans money to cities; cities provide grants to developers
    - Developers repay via tax increment on the housing project
    - Optional, but very prescriptive (8 pages in bill)



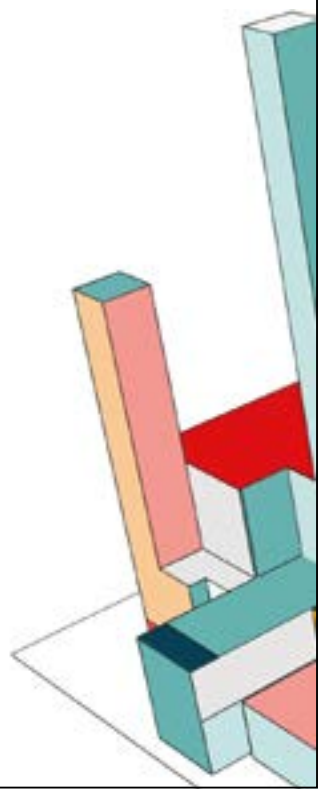
SB 1537 – MANDATORY ADJUSTMENTS

- Effective January 1, 2025. Sunsets January 2, 2032.
- Cities will be required to allow up to 10 adjustments to certain specified land use regulations in applications for development of housing.
- Exemption process if local government has its own program that does the same thing



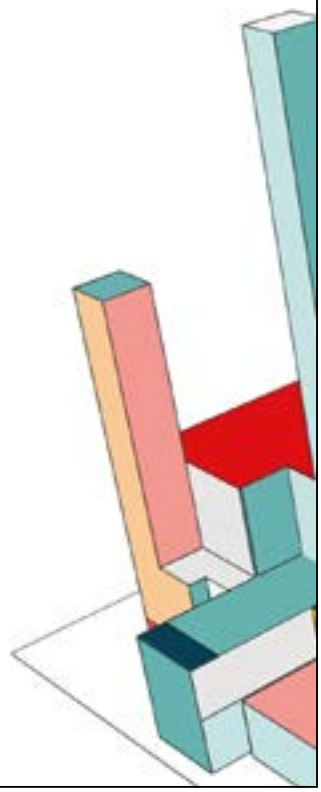
SB 1537 – MANDATORY ADJUSTMENTS

- In order to qualify, a developer has to "state" (not show) that it meets one of several criteria relating to affordability, etc., but which includes:
    - "The adjustments will enable development of housing that is not otherwise feasible due to cost or delay resulting from the unadjusted land use regulations."
- Other requirements:
    - The development is of net new housing units in new construction projects
    - The residential development is for densities not less than those required under section 55 (3)(a)(C) of this 2024 Act:
        - 17 units per net residential acre within the Metro UGB
        - 10 units per net residential acre in a city >30,000
        - 6 units per net residential acre in a city 2,500 - 30,000
        - 5 units per net residential acre in a city <2,500



SB 1537 – MANDATORY ADJUSTMENTS

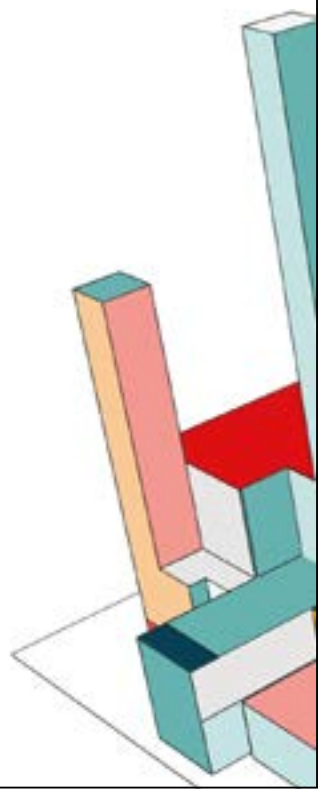
- Long list of qualifying regulation types includes:
    - Side or rear setbacks, for an adjustment of not more than 10 percent.
    - Minimum lot sizes, not more than a 10 percent adjustment, and including not more than a 10 percent adjustment to lot widths or depths.
    - Parking minimums
    - Building lot coverage requirements for up to a 10 percent adjustment.
    - Façade materials, color, or pattern
    - Façade articulation
    - Roof forms and materials
    - Requirements for balconies and porches
    - Many more



SB 1537 – MANDATORY ADJUSTMENTS

A few interesting ones to discuss:

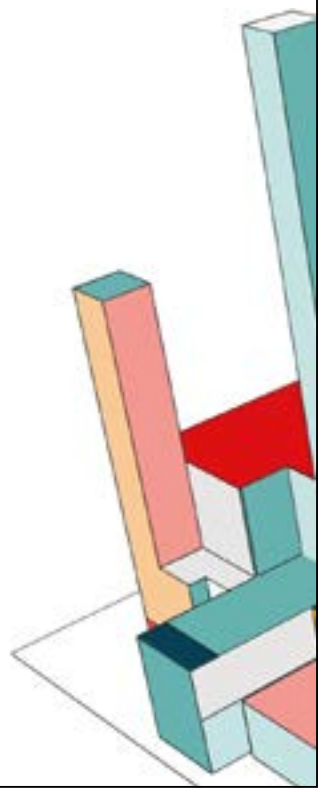
- For uses other than cottage clusters, as defined in ORS 197A.420 (1)(c)(D), building height maximums that:
    - Are in addition to existing applicable height bonuses, if any; and
    - Are not more than an increase of the greater of:
    - One story; or
    - A 20 percent increase to base zone height with rounding consistent with methodology outlined in city code, if any.
- Unit density maximums, not more than an amount necessary to account for other adjustments under this section



SB 1537 – MANDATORY ADJUSTMENTS

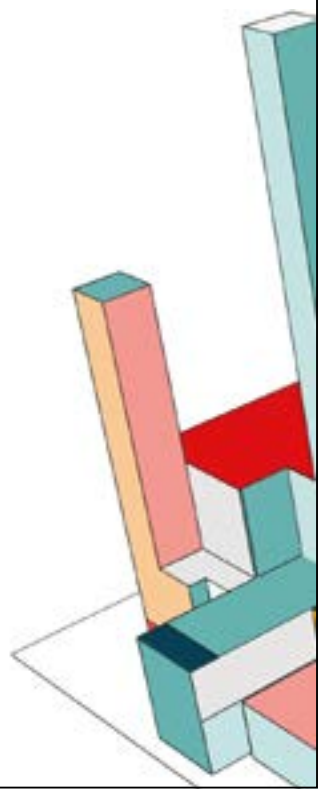
A few interesting ones to discuss:

- Prohibitions, for the ground floor of a mixed-use building, against:
    - Residential uses except for one face of the building that faces the street and is within 20 feet of the street; and
    - Nonresidential active uses that support the residential uses of the building, including lobbies, day care, passenger loading, community rooms, exercise facilities, offices, activity spaces or live-work spaces, except for active uses in specifically and clearly defined mixed use areas or commercial corridors designated by local governments.
- For manufactured dwelling parks, middle housing as defined in ORS 197A.420, multi family housing and mixed-use residential… Building orientation requirements, not including transit street orientation requirements



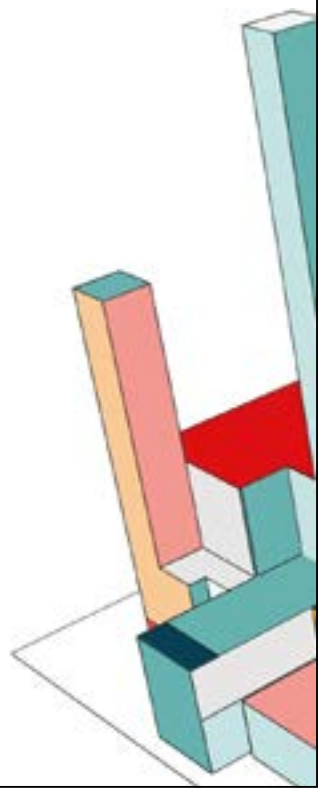
SB 1537 – MANDATORY ADJUSTMENTS

- How to count to ten?
    - "Adjustment" means a deviation from an existing land use regulation.
    - The application requests not more than 10 distinct adjustments to development standards as provided in this section.
    - A "distinct adjustment" means... An adjustment to one of the development standards listed... where each discrete adjustment to a listed development standard that includes multiple component standards must be counted as an individual adjustment.



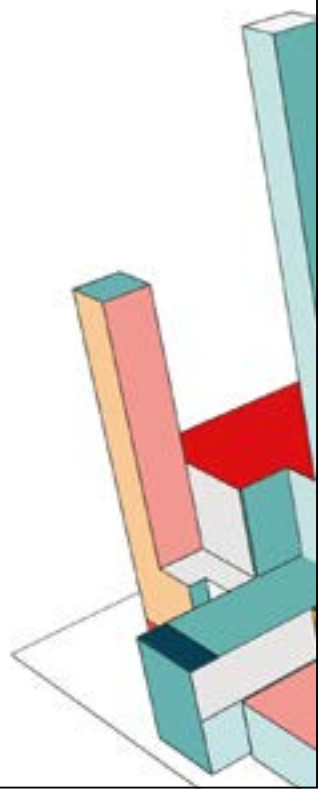
SB 1537 – MANDATORY ADJUSTMENTS

- Exceptions:
    - Regulations related to accessibility, affordability, fire ingress or egress, safety, local tree codes, hazardous or contaminated site clean-up, wildlife protection, or statewide land use planning goals relating to natural resources, natural hazards, the Willamette River Greenway, estuarine resources, coastal shorelands, beaches and dunes or ocean resources
    - Requirements related to the implementation of fire or building codes, federal or state air, water quality or surface, ground or stormwater requirements, or requirements of any federal, state or local law other than a land use regulation.
    - "A complete waiver of land use regulations or any changes beyond the explicitly requested and allowed adjustments"



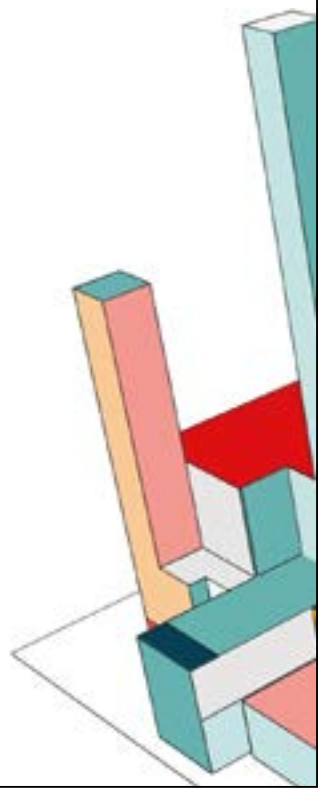
SB 1537 – MANDATORY ADJUSTMENTS

- Process:
    - Adjustment decisions are a limited land use decision
    - Only the applicant can appeal
    - No notice of the decision is required if the application is denied, other than notice to the applicant
    - Cities can apply an existing compliant process, develop a new compliant process, or apply the statutes directly



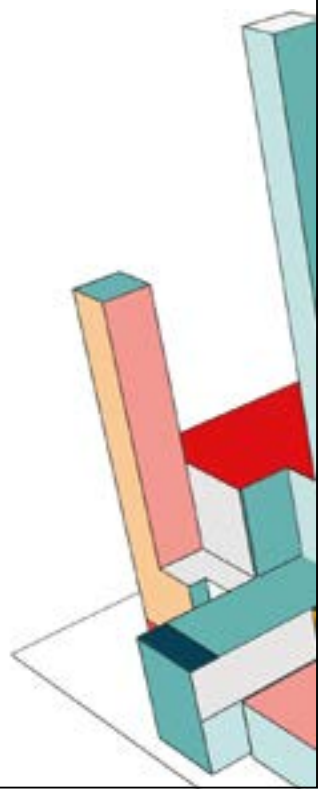
SB 1537 – LIMITED LAND USE DECISIONS

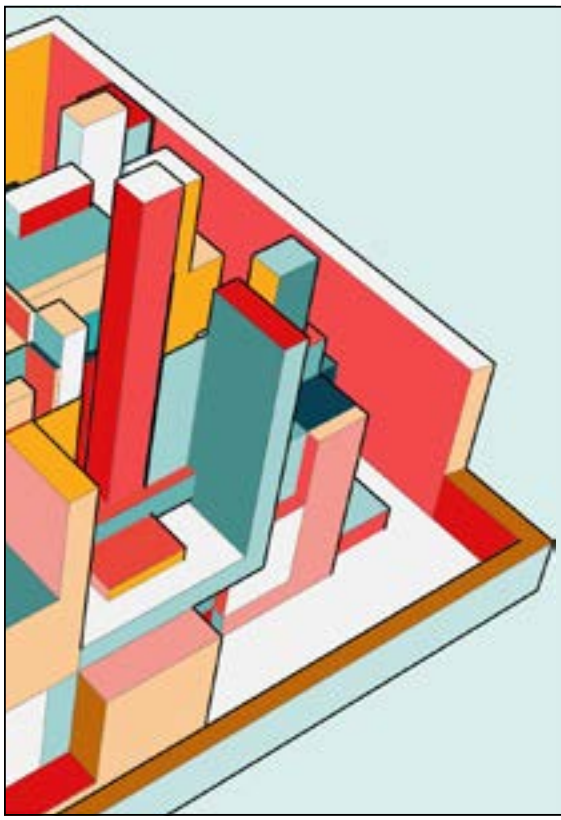
- Adds to the definition of limited land use decisions:
    - The approval or denial of an application for a replat.
    - The approval or denial of an application for a property line adjustment.
    - The approval or denial of an application for an extension, alteration or expansion of a nonconforming use.
- Makes the process in ORS 197.195 fully mandatory for limited land use decisions, except when the decision qualifies as ministerial, and clarifies that it may be applied directly
- Effective January 1, 2025



SB 1537 – ONE-TIME UGB EXPANSIONS

- Allows for one-time UGB expansions
    - For a city with a population of 25,000 or greater, up to100 net residential acres
    - For a city with a population of less than 25,000, up to 50 net residential acres
- Many other criteria that may make it difficult to use in practice



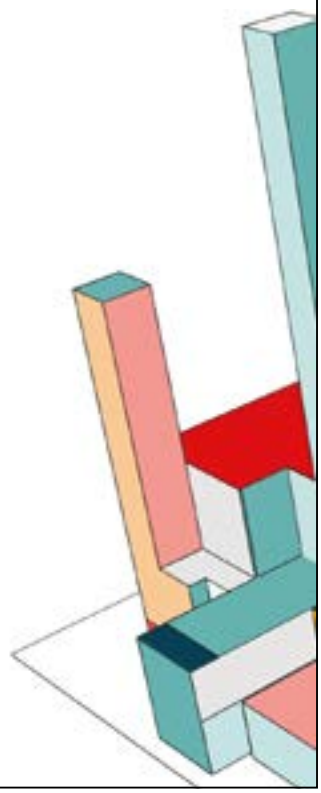


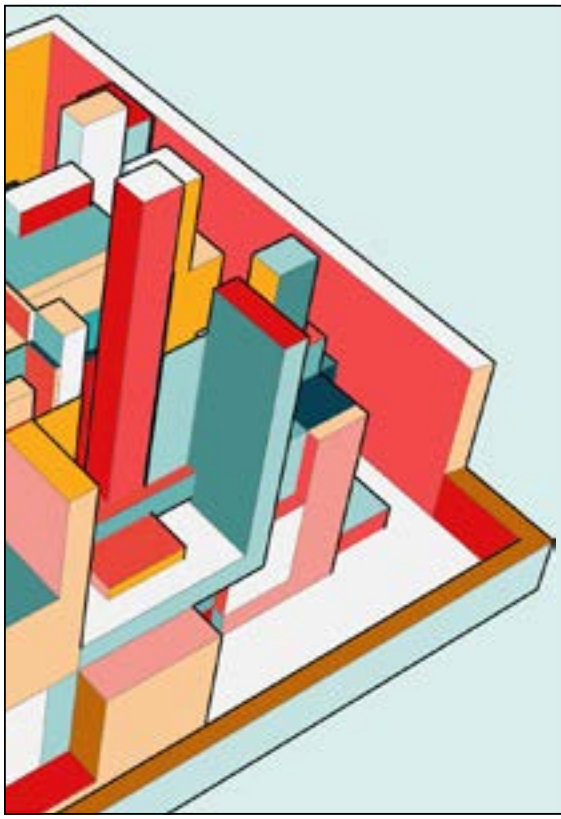
HB 4026

UGB Expansions/Referendum

HB 4026 – UGB EXPANSIONS/REFERENDUM

- The following city decisions under ORS 197.626 are not subject to referendum petition:
    - An amendment of an urban growth boundary by a city with a population of 2,500 or more within its urban growth boundary that adds more than 50 acres to the area within the urban growth boundary;
    - A designation of an area as an urban reserve under ORS 197A.230 to 197A.250 by a metropolitan service district or by a city with a population of 2,500 or more within its urban growth boundary;
    - An amendment of the boundary of an urban reserve to add more than 50 acres to the urban reserve by a city with a population of 2,500 or more within its urban growth boundary;
- Retroactive to decisions made on or after January 1, 2023





CLIMATE FRIENDLY AND EQUITABLE COMMUNITIES (CFEC)

CITY OF CORNELIUS V. DLCD

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

CITY OF CORNELIUS,
City of Forest Grove, City of Grants Pass,
City of Happy Valley, City of Hillsboro, City of Keizer,
City of Medford, City of Oregon City, City of Sherwood,
City of Springfield, City of Troutdale, City of Tualatin,
City of Wood Village, Marion County,
Oregon Home Builders Association,
Oregon Business & Industry Association,
Oregon Realtors, and Oregon Trucking Associations, Inc.,
Petitioners,
v.
DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT and
the Land Conservation and Development Commission,
Respondents.
A180037 (Control), A180153

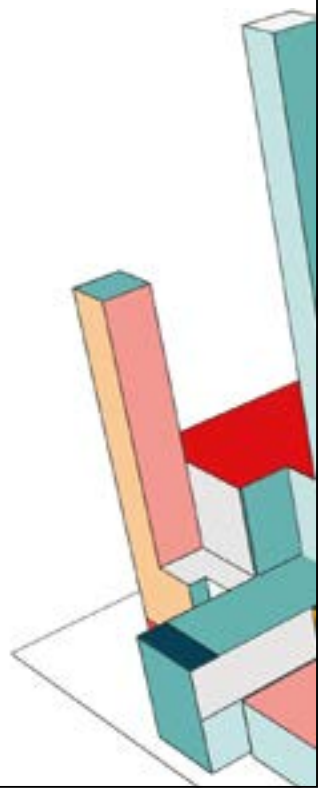
Argued and submitted July 12, 2023.

David O. Bechtold argued the cause for petitioners City of Cornelius, City of Forest Grove, City of Grants Pass, City of Happy Valley, City of Hillsboro, City of Keizer, City of Medford, City of Oregon City, City of Sherwood, City of Springfield, City of Troutdale, City of Tualatin, City of Wood Village, and Marion County. Also on the briefs were Greg A. Hibbard and Northwest Resource Law PLLC.

J. Aaron Landau argued the cause for petitioners Oregon Home Builders Association, Oregon Business & Industry Association, Oregon Realtors, and Oregon Trucking

CFEC LITIGATION

- A group of cities and counties filed a facial challenge to the Climate Friendly and Equitable Communities (CFEC) administrative rules adopted by the Land Conservation and Development Commission
- Separately, a group of industry representatives also filed a challenge to the CFEC rules.
- The challenges were consolidated
- The Court of Appeals rejected petitioners' omnibus challenge of the entirety of the CFEC rules, but upheld challenges to two specific rules.



CFEC LITIGATION

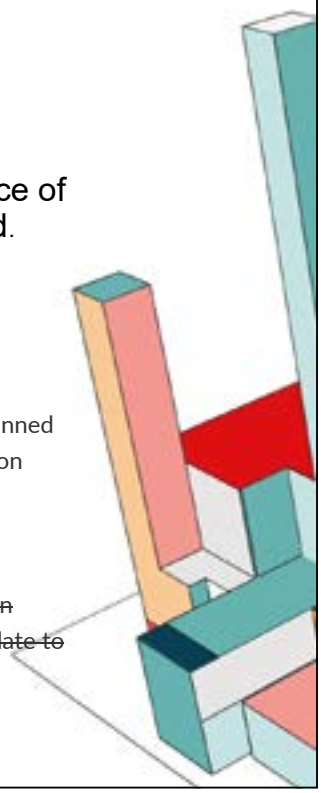
The Court of Appeals determined that LCDC did not provide sufficient notice of the subject matter of OAR 660-012-0830(1)(c); therefore, the rule is invalid.

660-012-0830
Enhanced Review of Select Roadway Projects

(1) Cities and counties shall review and may authorize certain proposed facilities to be included as a planned project or unconstrained project in any part of the local comprehensive plan, including the transportation system plan.

***

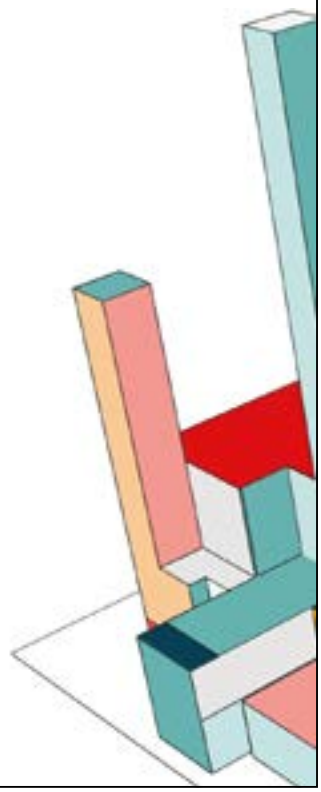
~~(c) To retain a proposed facility that is included in an existing acknowledged plan adopted as provided in OAR 660-012-0015, a city or county shall review that facility under this rule at the time of a major update to its transportation system plan.~~



CFEC LITIGATION

The Court of Appeals determined that LCDC exceeded its statutory enforcement authority in enacting OAR 660-012-0920(7)(c), which would have allowed LCDC to invalidate previously acknowledged local transportation system plans.

The Court of Appeals determined that LCDC does not have the statutory authority to invalidate a previously acknowledged transportation system plan; therefore, OAR 660-012-0920(7)(c) exceeded LCDC's statutory authority and is invalid.



CFEC LITIGATION

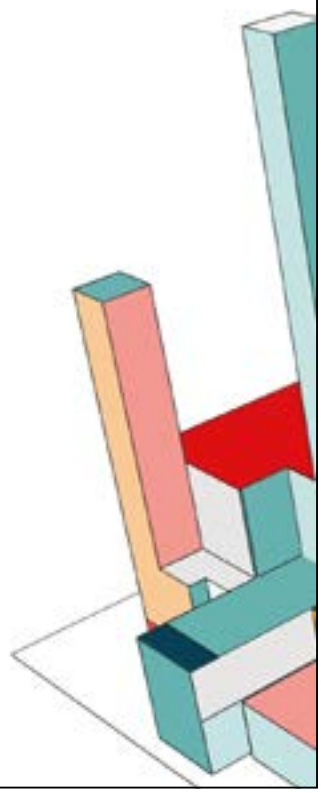
660-012-0920
Compliance Hearings

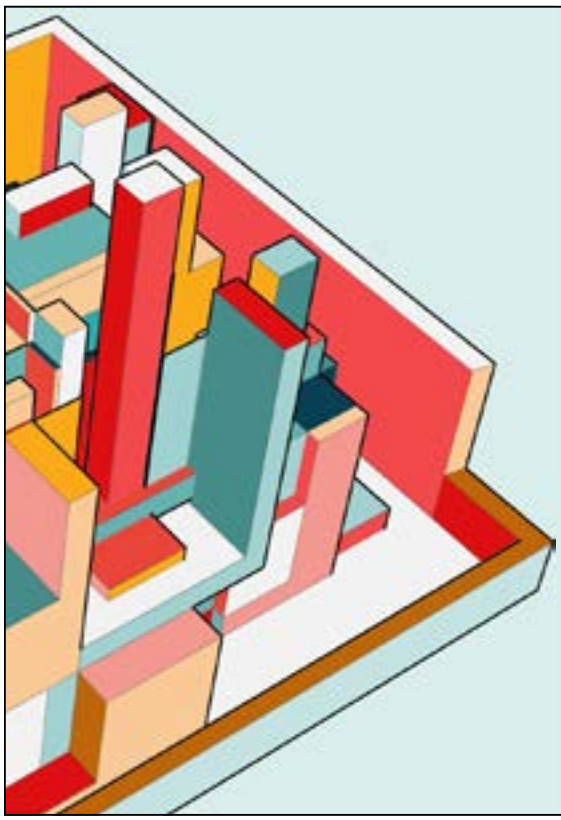
***

(7) If the commission finds a city, a county, or Metro out of compliance with the requirements of this division, the commission may use any authority granted to commission, including but not limited to the actions below.

***

~~(c) Issue an order to invalidate the acknowledgement of local transportation system plans that are not consistent with an approved Land use and Transportation Scenario Plan; and~~





OREGON HOUSING NEEDS ANALYSIS

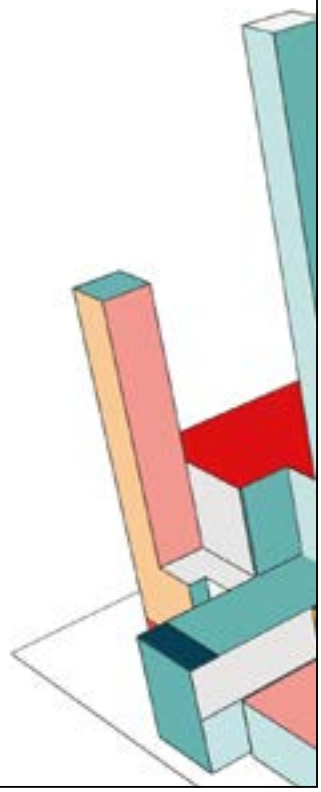
OHNA

The OHNA is a new way of looking at housing need in Oregon. It establishes a statewide methodology for determining overall housing need over a 20-year planning period. Those need calculations are then used to set housing production targets for local jurisdictions.

The OHNA's methodology incorporates historic housing underproduction and housing need for people experiencing homelessness and uses regional incomes to project housing need by income level. Previously, housing needs analyses were based on past development trends which often undercounted need.

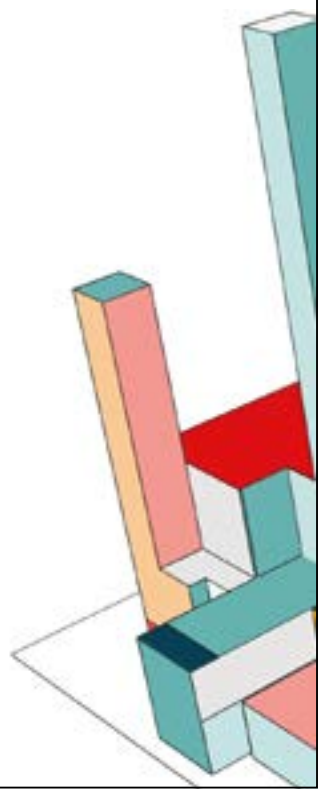
OHNA

- The OHNA methodology allocates a share of regional demand to each community based on income, access to jobs, and population st that the state and local governments can collectively begin to address chronic underproduction and geographic inequity on a regional scale.
- The State has said that it will not expect jurisdictions to hit their targets exactly in each cycle. However, if it is clear that a jurisdiction's production is much lower than in regional or market-based peers, there are likely locally specific development barriers that the jurisdiction must address.



OHNA

- Needed Housing (20-year housing need). For each city and county and for the state as a whole, the OHNA will provide estimates of housing need for 20 years, by income range. These estimates will replace the 20-year projection of housing need currently completed locally by cities in housing capacity analyses.
- The OHNA will also establish local housing production targets for cities over 10,000. These targets set a baseline by which the state regularly tracks and evaluates progress on housing production.

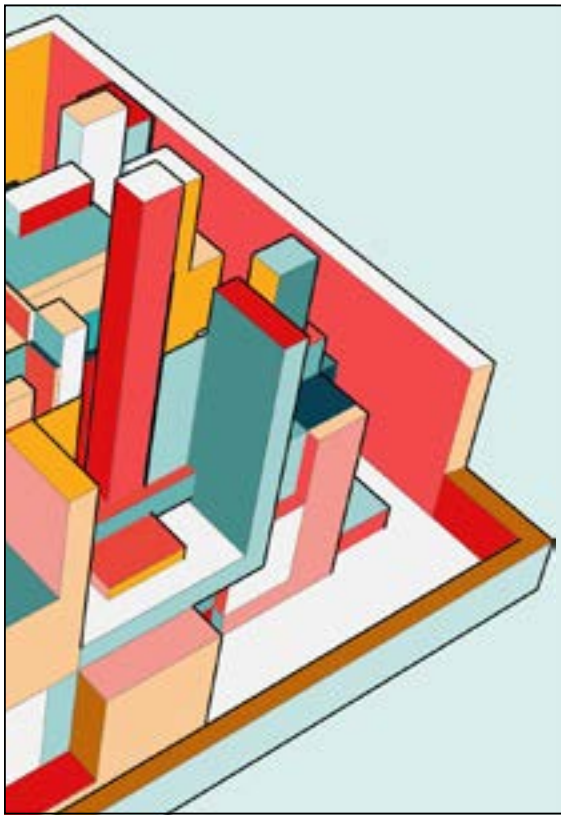


OHNA

The initial OHNA and allocation of housing need to jurisdictions must be complete by January 1, 2025.

Rulemaking is currently happening.

Stay tuned.

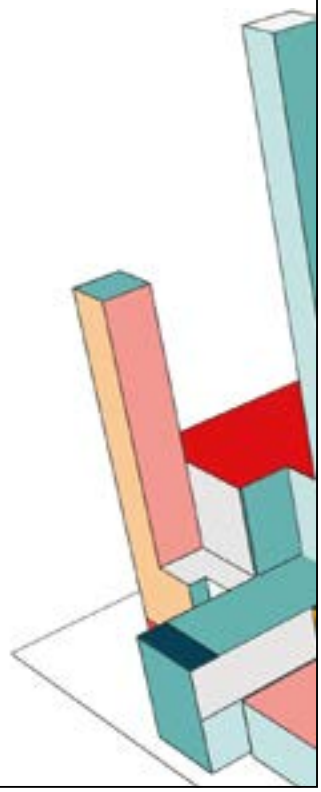


HOUSING PRODUCTION STRATEGIES

HPS

Cities with a population of 10,000 or more must adopt a housing production strategy within a year of the city's deadline for completion of a housing capacity analysis.

LCDC recently adopted deadlines for cities to complete their housing capacity analyses. *See* Exhibit A to OAR 660-008-0040.



HPS

197A.100 Housing production strategy.

***

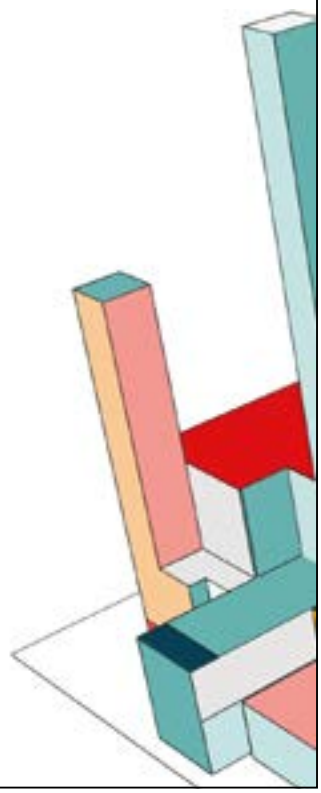
(2) A housing production strategy must include a list of specific actions, including the adoption of measures and policies, that the city shall undertake to promote:

(a) The development of needed housing;

(b) The development and maintenance of housing that is of diverse housing types, high-quality, affordable and accessible;

(c) Housing with access to economic opportunities, services and amenities; and

(d) Affirmatively furthering fair housing.



HPS

Needed Housing:

Housing by affordability level, type, characteristics and location that is necessary to accommodate the city's allocated housing need over the 20-year planning period.



HPS



Needed Housing Affordability Levels

- <30% AMI
- 30-60% AMI
- 60-80% AMI
- 80-120% AMI
- Over 120% AMI),

HPS

Needed Housing Types:

- Detached single-family
- Middle Housing
- Multi-unit
- Government assisted housing
- Mobile homes and manufactured dwellings
- Housing for agricultural workers
- Housing for people with disabilities
- Housing for older persons
- Housing for college students (if relevant)
- Single room occupancies



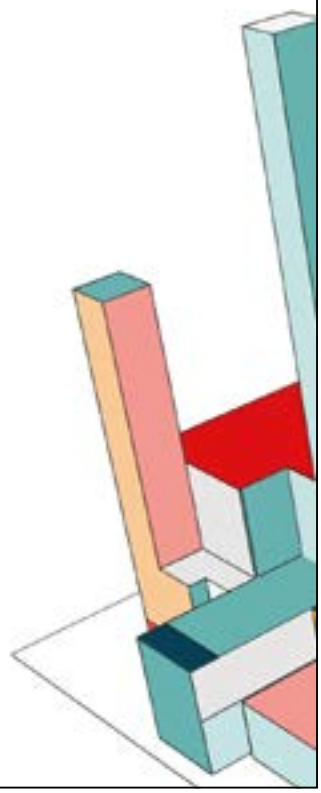
HPS

197A.100 Housing production strategy.

(4) Actions proposed in a city's housing production strategy shall include clear deadlines by which the city expects to undertake the action.

***

(e) For each action the city includes in its housing production strategy:
(A) The schedule for its adoption;
(B) The schedule for its implementation;
(C) Its expected magnitude of impact on the development of needed housing; and
(D) The time frame over which it is expected to impact needed housing.



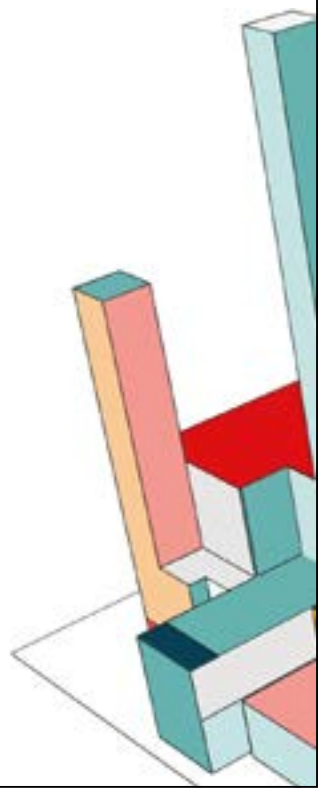
HPS

197A.100 Housing production strategy.

(7) The adoption of a housing production strategy is not a land use decision and is not subject to appeal or review except as provided in ORS 197A.103 [approval by DLCD].

***

(9) As used in this section, "affirmatively furthering fair housing" means meaningful actions that, when taken together, address significant disparities in housing needs and access to opportunity and replace segregated living patterns with truly integrated and balanced living patterns to transform racially and ethnically concentrated areas of poverty into areas of opportunity and foster and maintain compliance with civil rights and fair housing laws.



Category A	Zoning and Code Changes	These are strategies that a jurisdiction can take to proactively encourage needed housing production through zoning and code modifications. These strategies may also include regulations to ensure housing goals are met.
Category B	Reduce Regulatory Impediments	These strategies address known impediments to providing needed housing. These include but are not limited to zoning, permitting, and infrastructure impediments.
Category C	Financial Incentives	These are a list of financial incentives that jurisdictions can give to developers to encourage them to produce needed housing.
Category D	Financial Resources	These are a list of resources or programs at the local, state and federal level that can provide money for housing projects. The majority of these resources are intended to provide money for affordable housing projects.
Category E	Tax Exemption and Abatement	These are a list of tax exemption and abatement programs that are intended to encourage developers to produce housing.
Category F	Land, Acquisition, Lease, and Partnerships	These are strategies that secure land for needed housing, unlock the value of land for housing, and/or create partnerships that will catalyze housing developments.
Category Z	Custom Options	Any other Housing Production Strategy not listed in Categories A through F that the jurisdiction wishes to implement will be outlined in this section and numbered accordingly.

Equitable Outcomes Note: Some of the strategies may not create an overall housing production increase however, they do increase or maintain housing for a specific affordability target or population.
Caution Note: Jurisdictions should be careful when picking strategies to ensure that housing strategies together in their aggregate do not work to suppress the overall supply of housing of stiffle housing production.

THANK YOU

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Enrolled
House Bill 4063

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CHAPTER .....

AN ACT

Relating to housing; creating new provisions; amending ORS 92.031, 92.305, 92.325, 92.425, 184.451, 184.453, 184.455, 197.320, 197.480, 197.492, 197.522, 197A.015, 197A.018, 197A.025, 197A.210, 197A.215, 197A.300, 197A.302, 197A.325, 197A.335, 197A.348, 197A.362, 215.427, 227.178, 307.674, 307.681 and 696.805; and prescribing an effective date.

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

NEEDED HOUSING PLANNING IN UNINCORPORATED METRO

SECTION 1. ORS 197A.015 is amended to read:

197A.015. As used in [*ORS 197.475 to 197.493 and ORS chapter 197A*] **this chapter**:

(1) "Allocated housing need" means the housing need allocated to a city under ORS 184.453 (2) as segmented by income level under ORS 184.453 (4).

(2) "Buildable lands" means lands in urban and urbanizable areas that are suitable, available and necessary for the development of needed housing over a 20-year planning period, including both vacant land and developed land likely to be redeveloped.

(3) "City" and "city with a population of 10,000 or greater" includes, regardless of size[,]**:**

(a) Any city within Tillamook County and the communities of Barview/Twin Rocks/Watseco, Cloverdale, Hebo, Neahkahnie, Neskowin, Netarts, Oceanside and Pacific City/Woods[.]**; and**

(b) A county with respect to its jurisdiction over Metro urban unincorporated lands.

(4) "Development-ready lands" means buildable lands that are likely to support the production of housing during the period of their housing production target under ORS 184.455 (1) because the lands are:

(a) Currently annexed and zoned to allow housing through clear and objective standards and procedures;

(b) Readily served through adjacent public facilities or identified for the near-term provision of public facilities through an adopted capital improvement plan; and

(c) Not encumbered by any applicable local, state or federal protective regulations or have appropriate entitlements to prepare the land for development.

(5) "Government assisted housing" means housing that is financed in whole or part by either a federal or state housing agency or a housing authority as defined in ORS 456.005, or housing that is occupied by a tenant or tenants who benefit from rent supplements or housing vouchers provided by either a federal or state housing agency or a local housing authority.

(6) "Housing capacity" means the number of needed housing units that can be developed on buildable lands within the 20-year planning period based on the land's comprehensive plan designation and capacity for housing development and redevelopment.

(7) "Housing production strategy" means a strategy adopted by a local government to promote housing production under ORS 197A.100.

(8) "Manufactured dwelling," "manufactured dwelling park," "manufactured home" and "mobile home park" have the meanings given those terms in ORS 446.003.

(9) "Metro urban unincorporated lands" means lands within the Metro urban growth boundary that are identified by the county as:

(a) Not within a city;

(b) Zoned for urban development;

(c) Within the boundaries of a sanitary district or sanitary authority formed under ORS chapter 450 or a district formed for the purposes of sewage works under ORS chapter 451;

(d) Within the service boundaries of a water provider with a water system subject to regulation as described in ORS 448.119; and

(e) Not zoned with a designation that maintains the land's potential for future urbanization.

[*(9)*] **(10)** "Periodic review" means the process and procedures as set forth in ORS 197.628 to 197.651.

[*(10)*] **(11)** "Prefabricated structure" means a prefabricated structure, as defined in ORS 455.010, that is relocatable, more than eight and one-half feet wide and designed for use as a single-family dwelling.

SECTION 2. Sections 3 and 4 of this 2024 Act are added to and made a part of ORS chapter 197A.

SECTION 3. (1) As used in this section, "Metro urbanizable lands" means lands within the Metro urban growth boundary that is not within a city and is not Metro urban unincorporated land.

(2) In fulfilling a requirement to comply with this chapter, a local government may plan for the appropriate urbanization of Metro urbanizable lands, by using methods including adjacent urbanizable lands:

(a) In an intergovernmental agreement;

(b) In a housing production strategy, housing coordination strategy or corrective action plan under ORS 197A.100, 197A.365 or 197A.372; or

(c) To accommodate needed housing identified in an analysis of housing capacity under ORS 197A.335 or 197A.350.

(3) Except as may be explicitly delegated in an intergovernmental agreement, counties are solely responsible for complying with this chapter with respect to Metro urban unincorporated lands that are within their jurisdiction.

SECTION 4. As part of its agency request budget, as described in ORS 291.206, for the biennium beginning July 1, 2025, the Department of Land Conservation and Development shall include one or more requests for appropriations to the department to implement this chapter and statewide land use planning goals related to housing and urbanization within Metro urban unincorporated lands by providing technical and financial support to:

(1) Counties to amend their comprehensive plans, land use regulations and procedures and to implement land use planning; and

(2) Local governments and special districts to plan for adequate infrastructure and to support development-readiness for housing.

SECTION 5. ORS 184.451 is amended to read:

184.451. (1) There is established within the Oregon Department of Administrative Services the Oregon Housing Needs Analysis. The purposes of the Oregon Housing Needs Analysis are to further the:

(a) Production of housing to meet the need of Oregonians at all levels of affordability; and

(b) Production of housing in a way that creates more housing choice by affirmatively furthering fair housing, as defined in ORS 197A.100.

(2) The Oregon Housing Needs Analysis consists of three components as follows:

(a) The annual statewide housing analysis under ORS 184.453 (1);

(b) The allocated housing need under ORS 184.453 (2); and

(c) The housing production targets under ORS 184.455.

(3) Actions taken by the department under ORS 184.451 to 184.455 are not subject to ORS 197.180 and are not land use decisions.

(4) The Department of Land Conservation and Development and the Housing and Community Services Department:

(a) Shall assist the Oregon Department of Administrative Services with its duties under ORS 184.451 to 184.455.

(b) May study and recommend methodological changes to the Oregon Department of Administrative Services to improve the Oregon Housing Needs Analysis' functions and suitability for its purposes under subsection (1) of this section. The departments shall solicit written and oral public testimony to inform their recommendations.

(5) As used in ORS 184.451 to 184.455, "city" [*or*] **and** "city with a population of 10,000 or greater" [*includes cities, as defined in ORS 197A.015, and urban unincorporated communities in Metro, as defined in ORS 197.015*] **have the meanings given those terms in ORS 197A.015**.

SECTION 6. ORS 184.453 is amended to read:

184.453. (1) On an annual basis the Oregon Department of Administrative Services shall conduct a statewide housing analysis. The analysis must be conducted statewide and segmented into regions as determined by the department. The analysis shall estimate factors including, but not limited to:

(a) Projected needed housing units over the next 20 years;

(b) Current housing underproduction;

(c) Housing units needed for people experiencing homelessness; and

(d) Housing units projected to be converted into vacation homes or second homes during the next 20 years.

(2) At the time the department performs the housing analysis under subsection (1) of this section, the department shall allocate a housing need for each city. **For Metro urban unincorporated lands, as defined in ORS 197A.015, the department shall make one allocation for each county in Metro.**

(3) In making an allocation under subsection (2) of this section, the department shall consider:

(a) The forecasted population growth under ORS 195.033 or 195.036;

(b) The forecasted regional job growth;

(c) An equitable statewide distribution of housing for income levels described in subsection (4) of this section;

(d) The estimates made under subsection (1) of this section;

(e) For cities within Metro, the needed housing projected under ORS 197A.348 (2); and

(f) The purpose of the Oregon Housing Needs Analysis under ORS 184.451 (1).

(4) In estimating and allocating housing need under this section, the department shall segment need by the following income levels:

(a) Housing affordable to households making less than 30 percent of median family income;

(b) Housing affordable to households making 30 percent or more and less than 60 percent of median family income;

(c) Housing affordable to households making 60 percent or more and less than 80 percent of median family income;

(d) Housing affordable to households making 80 percent or more and less than 120 percent of median family income; and

(e) Housing affordable to households making 120 percent or more of median family income.

OPTING IN TO AMENDED HOUSING

SECTION 7. ORS 215.427 is amended to read:

215.427. (1) Except as provided in subsections (3), (5) and (10) of this section, for land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete, except as provided in subsections (3), (5) and (10) of this section.

(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section and ORS 197A.470 upon receipt by the governing body or its designee of:

(a) All of the missing information;

(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

(c) Written notice from the applicant that none of the missing information will be provided.

(3)(a) If the application was complete when first submitted or the applicant submits additional information[*, as described in subsection (2) of this section,*] within 180 days of the date the application was first submitted [*and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251*], approval or denial of the application [*shall be based*] **must be based:**

(A) Upon the standards and criteria that were applicable at the time the application was first submitted[.]**; or**

(B) For an application relating to development of housing, upon the request of the applicant, those standards and criteria that are operative at the time of the request.

(b) If an applicant requests review under different standards as provided in paragraph (a)(B) of this subsection:

(A) For the purposes of this section, any applicable timelines for completeness review and final decisions restart as if a new application were submitted on the date of the request;

(B) For the purposes of this section and ORS 197A.470 the application is not deemed complete until:

(i) The county determines that additional information is not required under subsection (2) of this section; or

(ii) The applicant makes a submission under subsection (2) of this section in response to a county's request;

(C) A county may deny a request under paragraph (a)(B) of this subsection if:

(i) The county has issued a public notice of the application; or

(ii) A request under paragraph (a)(B) of this subsection was previously made; and

(D) The county may not require that the applicant:

(i) Pay a fee, except to cover additional costs incurred by the county to accommodate the request;

(ii) Submit a new application or duplicative information, unless information resubmittal is required because the request affects or changes information in other locations in the application or additional narrative is required to understand the request in context; or

(iii) Repeat redundant processes or hearings that are inapplicable to the change in standards or criteria.

[*(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable*

at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.]

(4) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

(a) All of the missing information;

(b) Some of the missing information and written notice that no other information will be provided; or

(c) Written notice that none of the missing information will be provided.

(5) The period set in subsection (1) of this section or the 100-day period set in ORS 197A.470 may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (10) of this section for mediation, may not exceed 215 days.

(6) The period set in subsection (1) of this section applies:

(a) Only to decisions wholly within the authority and control of the governing body of the county; and

(b) Unless the parties have agreed to mediation as described in subsection (10) of this section or ORS 197.319 (2)(b).

(7) Notwithstanding subsection (6) of this section, the period set in subsection (1) of this section and the 100-day period set in ORS 197A.470 do not apply to:

(a) A decision of the county making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610; or

(b) A decision of a county involving an application for the development of residential structures within an urban growth boundary, where the county has tentatively approved the application and extends these periods by no more than seven days in order to assure the sufficiency of its final order.

(8) Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

(9) A county may not compel an applicant to waive the period set in subsection (1) of this section or to waive the provisions of subsection (8) of this section or ORS 197A.470 or 215.429 as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.

(10) The periods set forth in subsections (1) and (5) of this section and ORS 197A.470 may be extended by up to 90 additional days, if the applicant and the county agree that a dispute concerning the application will be mediated.

SECTION 8. ORS 227.178 is amended to read:

227.178. (1) Except as provided in subsections (3), (5) and (11) of this section, the governing body of a city or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete.

(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing

information. The application shall be deemed complete for the purpose of subsection (1) of this section or ORS 197A.470 upon receipt by the governing body or its designee of:

(a) All of the missing information;

(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

(c) Written notice from the applicant that none of the missing information will be provided.

(3)(a) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted [*and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251*], approval or denial of the application [*shall*] **must** be based**:**

(A) Upon the standards and criteria that were applicable at the time the application was first submitted[.]**; or**

(B) For an application relating to development of housing, upon the request of the applicant, those standards and criteria that are operative at the time of the request.

(b) If an applicant requests review under different standards as provided in paragraph (a)(B) of this subsection:

(A) For the purposes of this section, any applicable timelines for completeness review and final decisions restart as if a new application were submitted on the date of the request;

(B) For the purposes of this section and ORS 197A.470 the application is not deemed complete until:

(i) The city determines that additional information is not required under subsection (2) of this section; or

(ii) The applicant makes a submission under subsection (2) of this section in response to a city's request;

(C) A city may deny a request under paragraph (a)(B) of this subsection if:

(i) The city has issued a public notice of the application; or

(ii) A request under paragraph (a)(B) of this subsection was previously made; and

(D) The city may not require that the applicant:

(i) Pay a fee, except to cover additional costs incurred by the city to accommodate the request;

(ii) Submit a new application or duplicative information, unless information resubmittal is required because the request affects or changes information in other locations in the application or additional narrative is required to understand the request in context; or

(iii) Repeat redundant processes or hearings that are inapplicable to the change in standards or criteria.

[*(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.*]

(4) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

(a) All of the missing information;

(b) Some of the missing information and written notice that no other information will be provided; or

(c) Written notice that none of the missing information will be provided.

(5) The 120-day period set in subsection (1) of this section or the 100-day period set in ORS 197A.470 may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (11) of this section for mediation, may not exceed 245 days.

(6) The 120-day period set in subsection (1) of this section applies:

(a) Only to decisions wholly within the authority and control of the governing body of the city; and

(b) Unless the parties have agreed to mediation as described in subsection (11) of this section or ORS 197.319 (2)(b).

(7) Notwithstanding subsection (6) of this section, the 120-day period set in subsection (1) of this section and the 100-day period set in ORS 197A.470 do not apply to:

(a) A decision of the city making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610; or

(b) A decision of a city involving an application for the development of residential structures within an urban growth boundary, where the city has tentatively approved the application and extends these periods by no more than seven days in order to assure the sufficiency of its final order.

(8) Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the city or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete, the city shall refund to the applicant, subject to the provisions of subsection (9) of this section, either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

(9)(a) To obtain a refund under subsection (8) of this section, the applicant may either:

(A) Submit a written request for payment, either by mail or in person, to the city or its designee; or

(B) Include the amount claimed in a mandamus petition filed under ORS 227.179. The court shall award an amount owed under this section in its final order on the petition.

(b) Within seven calendar days of receiving a request for a refund, the city or its designee shall determine the amount of any refund owed. Payment, or notice that no payment is due, shall be made to the applicant within 30 calendar days of receiving the request. Any amount due and not paid within 30 calendar days of receipt of the request shall be subject to interest charges at the rate of one percent per month, or a portion thereof.

(c) If payment due under paragraph (b) of this subsection is not paid within 120 days after the city or its designee receives the refund request, the applicant may file an action for recovery of the unpaid refund. In an action brought by a person under this paragraph, the court shall award to a prevailing applicant, in addition to the relief provided in this section, reasonable attorney fees and costs at trial and on appeal. If the city or its designee prevails, the court shall award reasonable attorney fees and costs at trial and on appeal if the court finds the petition to be frivolous.

(10) A city may not compel an applicant to waive the 120-day period set in subsection (1) of this section or to waive the provisions of subsection (8) of this section or ORS 197A.470 or 227.179 as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.

(11) The periods set forth in subsections (1) and (5) of this section and ORS 197A.470 may be extended by up to 90 additional days, if the applicant and the city agree that a dispute concerning the application will be mediated.

REALTOR REJECTION OF DOCUMENTS

SECTION 9. ORS 696.805 is amended to read:

696.805. (1) A real estate licensee who acts under a listing agreement with the seller acts as the seller's agent only.

(2) A seller's agent owes the seller, other principals and the principals' agents involved in a real estate transaction the following affirmative duties:

(a) To deal honestly and in good faith;

(b) To present all written offers, written notices and other written communications to and from the parties in a timely manner without regard to whether the property is subject to a contract for sale or the buyer is already a party to a contract to purchase; and

(c) To disclose material facts known by the seller's agent and not apparent or readily ascertainable to a party.

(3) A seller's agent owes the seller involved in a real estate transaction the following affirmative duties:

(a) To exercise reasonable care and diligence;

(b) To account in a timely manner for money and property received from or on behalf of the seller;

(c) To be loyal to the seller by not taking action that is adverse or detrimental to the seller's interest in a transaction;

(d) To disclose in a timely manner to the seller any conflict of interest, existing or contemplated;

(e) To advise the seller to seek expert advice on matters related to the transaction that are beyond the agent's expertise;

(f) To maintain confidential information from or about the seller except under subpoena or court order, even after termination of the agency relationship; and

(g) Unless agreed otherwise in writing, to make a continuous, good faith effort to find a buyer for the property, except that a seller's agent is not required to seek additional offers to purchase the property while the property is subject to a contract for sale.

(4) A seller's agent may show properties owned by another seller to a prospective buyer and may list competing properties for sale without breaching any affirmative duty to the seller.

(5) Except as provided in subsection (3)(g) of this section, an affirmative duty may not be waived.

(6) Nothing in this section implies a duty to investigate matters that are outside the scope of the real estate licensee's expertise, including but not limited to investigation of the condition of property, the legal status of the title or the owner's past conformance with law, unless the licensee or the licensee's agent agrees in writing to investigate a matter.

[*(7) In order to help a seller avoid selecting a buyer based on the buyer's race, color, religion, sex, sexual orientation, national origin, marital status or familial status as prohibited by the Fair Housing Act (42 U.S.C. 3601 et seq.), a seller's agent shall reject any communication other than customary documents in a real estate transaction, including photographs, provided by a buyer.*]

MIDDLE HOUSING PARTITIONS

SECTION 10. ORS 92.031 is amended to read:

92.031. (1) As used in this section, "middle housing land division" means a partition or subdivision of a lot or parcel on which the development of middle housing is allowed under ORS 197A.420 (2) or (3).

(2) A city or county shall approve a tentative plan for a middle housing land division if the application includes:

(a) A proposal for development of middle housing in compliance with the Oregon residential specialty code and land use regulations applicable to the original lot or parcel allowed under ORS 197A.420 (5);

(b) Separate utilities for each dwelling unit;

(c) Proposed easements necessary for each dwelling unit on the plan for:

(A) Locating, accessing, replacing and servicing all utilities;

(B) Pedestrian access from each dwelling unit to a private or public road;

(C) Any common use areas or shared building elements;

(D) Any dedicated driveways or parking; and

(E) Any dedicated common area;

(d) Exactly one dwelling unit on each resulting lot or parcel, except for lots, parcels or tracts used as common areas; and

(e) Evidence demonstrating how buildings or structures on a resulting lot or parcel will comply with applicable building codes provisions relating to new property lines and, notwithstanding the creation of new lots or parcels, how structures or buildings located on the newly created lots or parcels will comply with the Oregon residential specialty code.

(3) A city or county may add conditions to the approval of a tentative plan for a middle housing land division to:

(a) Prohibit the further division of the resulting lots or parcels.

(b) Require that a notation appear on the final plat indicating that the approval was given under this section.

(4) In reviewing an application for a middle housing land division, a city or county:

(a) Shall apply the procedures under ORS 197.360 to 197.380.

(b) May require street frontage improvements where a resulting lot or parcel abuts the street consistent with land use regulations implementing ORS 197A.420.

(c) May not subject an application to approval criteria except as provided in this section, including that a lot or parcel require driveways, vehicle access, parking or minimum or maximum street frontage.

(d) May not subject the application to procedures, ordinances or regulations adopted under ORS 92.044 or 92.046 that are inconsistent with this section or ORS 197.360 to 197.380.

(e) May allow the submission of an application for a middle housing land division at the same time as the submission of an application for building permits for the middle housing.

(f) May require the dedication of right of way if the original parcel did not previously provide a dedication.

(5) The type of middle housing developed on the original parcel is not altered by a middle housing land division.

(6) Notwithstanding ORS 197A.425 (1), a city or county is not required to allow an accessory dwelling unit on a lot or parcel resulting from a middle housing land division.

(7) Notwithstanding any other provision of ORS 92.010 to 92.192, within the same calendar year as an original partition, a city or county may allow one of the resulting vacant parcels to be further divided into not more than three parcels through a middle housing land division, provided that:

(a) The original partition was not a middle housing land division; and

(b) The original parcel or parcels not divided will not be part of the resulting partition plat for the middle housing land division.

[*(7)*] **(8)** The tentative approval of a middle housing land division is void if and only if a final subdivision or partition plat is not approved within three years of the tentative approval. Nothing in this section or ORS 197.360 to 197.380 prohibits a city or county from requiring a final plat before issuing building permits.

SECTION 11. ORS 92.325 is amended to read:

92.325. [*(1) Except as provided in subsection (2) of this section, no person shall*] **A person may not** sell or lease any subdivided lands or series partitioned lands without having complied with all the applicable provisions of ORS 92.305 to 92.495[.]

[*(2) With respect to a developer, chapter 643, Oregon Laws 1975, applies only to a developer who acquires a lot, parcel or interest in a subdivision or series partition for which a public report has been issued after September 13, 1975, and a developer who acquires a lot or parcel in a subdivision for which a revised public report has been issued under ORS 92.410.*]

[*(3) Except as otherwise provided in paragraph (g) of this subsection,*] **except that:**

(1) ORS 92.305 to 92.495 do not apply to the sale or leasing of:

(a) Apartments or similar space within an apartment building;

(b) Cemetery lots, parcels or units in Oregon;

(c) Subdivided lands and series partitioned lands in Oregon that are not in unit ownership or being developed as unit ownerships created under ORS chapter 100, to be used for residential purposes and that qualify under ORS 92.337;

(d) Property submitted to the provisions of ORS chapter 100;

(e) Subdivided lands and series partitioned lands in Oregon expressly zoned for and limited in use to nonresidential industrial or nonresidential commercial purposes;

(f) Lands in this state sold by lots or parcels of not less than 160 acres each;

(g) Timeshares regulated or otherwise exempt under ORS 94.803 and 94.807 to 94.945;

[*(h) Subdivided and series partitioned lands in a city or county which, at the time tentative approval of a subdivision plat and each partition map for those lands is given under ORS 92.040 or an ordinance adopted under ORS 92.046, has a comprehensive plan and implementing ordinances that have been acknowledged under ORS 197.251. The subdivider or series partitioner of such lands shall comply with ORS 92.425, 92.427, 92.430, 92.433, 92.460 and 92.485 in the sale or leasing of such lands; or*]

[*(i)*] **(h)** Mobile home or manufactured dwelling parks, as defined in ORS 446.003, located in Oregon[.]**;**

(i) Planned community subdivision of manufactured dwellings or mobile homes created under ORS 92.830 to 92.845;

(j) Lots or parcels created from an expedited land division under ORS 197.360; or

(k) Lots or parcels created from a middle housing land division under ORS 92.031.

(2) The subdivider or series partitioner of subdivided and series partitioned lands in a city or county which, at the time tentative approval of a subdivision plat and each partition map for those lands is given under ORS 92.040 or an ordinance adopted under ORS 92.046, has a comprehensive plan and implementing ordinances that have been acknowledged under ORS 197.251 must only comply with ORS 92.425, 92.427, 92.430, 92.433, 92.460 and 92.485 in the sale or leasing of such lands.

SECTION 12. ORS 92.305 is amended to read:

92.305. As used in ORS 92.305 to 92.495:

(1) "Blanket encumbrance" means a trust deed or mortgage or any other lien or encumbrance, mechanic's lien or otherwise, securing or evidencing the payment of money and affecting more than one interest in subdivided or series partitioned land, or an agreement affecting more than one such lot, parcel or interest by which the subdivider, series partitioner or developer holds such subdivision or series partition under an option, contract to sell or trust agreement.

(2) "Commissioner" means the Real Estate Commissioner.

(3)**(a)** [*Except as otherwise provided in ORS 92.325 (2),*] "Developer" means a person who purchases a lot, parcel or interest in a subdivision or series partition that does not have a single family residential dwelling or duplex thereon to construct a single family residential dwelling or duplex on the lot, parcel or interest and to resell the lot, parcel or interest and the dwelling or duplex for eventual residential use purposes. "Developer" also includes a person who purchases a lot, parcel or other interest in a subdivision or series partition that does not have a single family residential dwelling or duplex thereon for resale to another person.

(b) "Developer" does not mean a "developer" as that term is defined in ORS 100.005.

(4)**(a)** "Interest" includes a lot or parcel, and a share, undivided interest or membership which includes the right to occupy the land overnight, and lessee's interest in land for more than three years or less than three years if the interest may be renewed under the terms of the lease for a total period more than three years.

(b) "Interest" does not include any interest in a condominium as that term is defined in ORS 100.005 or any security interest under a land sales contract, trust deed or mortgage. "Interest" does not include divisions of land created by lien foreclosures or foreclosures of recorded contracts for the sale of real property.

(5) "Negotiate" means any activity preliminary to the execution of a binding agreement for the sale or lease of land in a subdivision or series partition, including but not limited to advertising, solicitation and promotion of the sale or lease of such land.

(6) "Lot," "parcel" and "partition" have the meaning given those terms in ORS 92.010.

(7) "Person" includes a natural person, a domestic or foreign corporation, a partnership, an association, a joint stock company, a trust and any unincorporated organization. As used in [*ORS 92.305 to 92.495*] **this subsection,** the term "trust" includes a common law or business trust, but does not include a private trust or a trust created or appointed under or by virtue of any last will and testament, or by a court.

(8) "Real property sales contract" means an agreement wherein one party agrees to lease or to convey title to real property to another party upon the satisfaction of specified conditions set forth in the contract.

(9) "Sale" or "lease" includes every disposition or transfer of land in a subdivision or a series partition, or an interest or estate therein, by a subdivider or series partitioner or a developer, or their agents, including the offering of such property as a prize or gift when a monetary charge or consideration for whatever purpose is required by the subdivider, series partitioner or developer or their agents.

(10) "Series partitioned lands" and "series partition" mean a series of partitions of land located within this state resulting in the creation of four or more parcels over a period of more than one calendar year.

(11) "Series partitioner" means any person who causes land to be series partitioned into a series partition, or who undertakes to develop a series partition, but does not include a public agency or officer authorized by law to make partitions.

(12)**(a)** "Subdivided lands" and "subdivision" mean improved or unimproved land or lands divided, or created into interests or sold under an agreement to be subsequently divided or created into interests, for the purpose of sale or lease, whether immediate or future, into 11 or more undivided interests or four or more other interests. "Subdivided lands" and "subdivision" include but are not limited to a subdivision of land located within this state subject to an ordinance adopted under ORS 92.044 and do not include series partitioned lands.

(b) "Subdivided lands" and "subdivision" do not mean property submitted to ORS 100.005 to 100.910 or property located outside this state which has been committed to the condominium form of ownership in accordance with the laws of the jurisdiction within which the property is located.

(13) "Subdivider" means any person who causes land to be subdivided into a subdivision, or who undertakes to develop a subdivision, but does not include a public agency or officer authorized by law to make subdivisions.

SECTION 13. ORS 92.425 is amended to read:

92.425. (1) No lot, parcel or interest in a subdivision or series partition shall be sold by a subdivider, series partitioner or developer by means of a land sale contract unless a collection escrow is established within this state with a person or firm authorized to receive escrows under the laws of this state and all of the following are deposited in the escrow:

(a) A copy of the title report or abstract, as it relates to the property being sold.

(b) The original sales document or an executed copy thereof relating to the purchase of real property in the subdivision or series partition clearly setting forth the legal description of the property being purchased, the principal amount of the encumbrance outstanding at the date of the sales document and the terms of the document.

(c) A commitment to give a partial release for the lot, parcel or other interest being sold from the terms and provisions of any blanket encumbrance as described in ORS 92.305 (1). Except as otherwise provided in subsection (4) of this section, the commitment shall be in a form satisfactory to the Real Estate Commissioner.

(d) A commitment to give a release of any other lien or encumbrance existing against such lot, parcel or other interest being sold as revealed by such title report. Except as otherwise provided in subsection (4) of this section, the commitment shall be in a form satisfactory to the commissioner.

(e) A warranty or bargain and sale deed in good and sufficient form conveying merchantable and marketable title to the purchaser of such lot, parcel or other interest.

(2) The subdivider, series partitioner or developer shall submit written authorization allowing the commissioner to inspect all escrow deposits established pursuant to subsection (1) of this section.

(3) In lieu of the procedures provided in subsection (1) of this section, the subdivider, series partitioner or developer shall conform to such alternative requirement or method which the commissioner may deem acceptable to carry into effect the intent and provisions of this section.

(4) The requirements of subsection (1)(c) and (d) of this section relating to use of a commitment form acceptable to the commissioner and the provisions of subsection (2) of this section shall not apply to subdivided or series partitioned lands described by ORS 92.325 [*(3)(h)*] **(2)**.

NOTE: Sections 14 through 24 were deleted by amendment. Subsequent sections were not renumbered.

SINGLE-UNIT HOUSING PROPERTY TAX EXCEPTION APPROVAL

SECTION 25. ORS 307.674 is amended to read:

307.674. (1) The city shall approve or deny an application filed under ORS 307.667 within 180 days after receipt of the application. An application not acted upon within 180 days shall be deemed approved.

[*(2) Final action upon an application by the city shall be in the form of an ordinance or resolution that shall contain the owner's name and address, a description of the structure that is the subject of the application that includes either the legal description of the property or the assessor's property account number and the specific conditions upon which the approval of the application is based.*]

[*(3)*] **(2)(a)** Following approval and on or before the deadline set forth in ORS 307.512, the city shall [*file with the county assessor and*] send **a notice of approval** to the owner [*at the last-known address of the owner a copy of the ordinance or resolution approving the application*]. The [*copy shall contain or be accompanied by a notice explaining*] **notice shall explain** the grounds for possible termination of the exemption prior to the end of the exemption period or thereafter, and the effects of termination.

(b) In addition, **on or before the deadline set forth in ORS 307.512,** the city shall file with the county assessor a document listing [*the same information otherwise required to be in an ordinance or resolution under subsection (2) of this section, as to each application deemed approved under subsection (1) of this section*] **the owner's name and address, a description of the structure that is the subject of the application that includes either the legal description of the property or the assessor's property account number and the specific conditions upon which the approval of the application is based**.

[*(4)*] **(3)** If the application is denied, the city shall state in writing the reasons for denial and send notice of denial to the applicant at the last-known address of the applicant within 10 days after the denial. The notice shall inform the applicant of the right to appeal under ORS 307.687.

[*(5)*] **(4)(a)** The city, after consultation with the county assessor, shall establish an application fee in an amount sufficient to cover the cost to be incurred by the city and the assessor in administering ORS 307.651 to 307.687.

(b) The application fee shall be paid to the city at the time the application for exemption is filed.

(c) If the application is approved, the city shall pay the application fee to the county assessor for deposit in the county general fund, after first deducting that portion of the fee attributable to its own administrative costs in processing the application.

(d) If the application is denied, the city shall retain that portion of the application fee attributable to its own administrative costs and shall refund the balance to the applicant.

SECTION 26. The amendments to ORS 307.674 by section 25 of this 2024 Act apply to applications approved on or after the effective date of this 2024 Act.

SECTION 27. ORS 307.681 is amended to read:

307.681. (1)**(a)** Except as provided in ORS 307.684, if, after an application has been approved under ORS 307.674, the city finds that any provision of ORS 307.651 to 307.687 is not being complied with, or any provision required by the city pursuant to ORS 307.651 to 307.687 is not being complied with, the city shall give notice to the owner, mailed to the owner's last-known address, of the proposed termination of the exemption.

(b) The notice shall state the reasons for the proposed termination and shall require the owner to appear at a specified time, not less than 20 days after mailing the notice, to show cause, if any, why the exemption should not be terminated.

(2)**(a)** If the owner fails to show cause why the exemption should not be terminated, **within 10 days following such failure,** the city shall [*adopt an ordinance or resolution stating its findings and terminating the exemption. A copy of the ordinance or resolution*] **give notice to the owner stating its findings terminating the exemption.**

(b) A copy of the notice shall be filed with the county assessor [*and a copy sent to the owner at the owner's last-known address within 10 days after its adoption*].

SECTION 28. The amendments to ORS 307.681 by section 27 of this 2024 Act apply to notices to owners given under ORS 307.681 (1) on or after the effective date of this 2024 Act.

HOUSE BILL 2001 (2023) TECHNICAL FIXES

SECTION 29. ORS 184.455 is amended to read:

184.455. (1) The Oregon Department of Administrative Services shall allocate housing production targets to each city with a population of 10,000 or greater and to each unincorporated urbanized area within the Metro urban growth boundary. Housing production targets shall describe the proportion of the allocated housing need that the department determines should be produced by for-profit, nonprofit and public builders in each city within six years for a city or urbanized area inside Metro and within eight years for a city or urbanized area outside Metro.

(2) The housing production targets must be separated into:

(a) A total target; and

(b) A target segmented by each income level in ORS 184.453 (4).

(3) In establishing housing production targets under this section, the department:

(a) May include a proportion of the allocated housing need to accommodate people experiencing homelessness and housing underproduction within a city greater than the proportion of the 20-year period; **and**

[*(b) Is not required to consider allocation of needed housing by Metro under ORS 197A.348 or 197A.350; and*]

[*(c)*] **(b)** Shall coordinate the allocation of the targets with a schedule developed by the Department of Land Conservation and Development for requiring housing production strategies under ORS 197A.100.

SECTION 30. ORS 197.320, as amended by section 16, chapter 13, Oregon Laws 2023, and section 11, chapter 326, Oregon Laws 2023, is amended to read:

197.320. The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions or actions into compliance with the goals, acknowledged comprehensive plan provisions, land use regulations, housing production strategy or housing acceleration agreements if the commission has good cause to believe:

(1) A comprehensive plan or land use regulation adopted by a local government not on a compliance schedule is not in compliance with the goals by the date set in ORS 197.245 or 197.250 for such compliance.

(2) A plan, program, rule or regulation affecting land use adopted by a state agency or special district is not in compliance with the goals by the date set in ORS 197.245 or 197.250 for such compliance.

(3) A local government is not making satisfactory progress toward performance of its compliance schedule.

(4) A state agency is not making satisfactory progress in carrying out its coordination agreement or the requirements of ORS 197.180.

(5) A local government has no comprehensive plan or land use regulation and is not on a compliance schedule directed to developing the plan or regulation.

(6) A local government has engaged in a pattern or practice of decision-making that violates an acknowledged comprehensive plan or land use regulation. In making its determination under this subsection, the commission shall determine whether there is evidence in the record to support the decisions made. The commission shall not judge the issue solely upon adequacy of the findings in support of the decisions.

(7) A local government has failed to comply with a commission order entered under ORS 197.644.

(8) A special district has engaged in a pattern or practice of decision-making that violates an acknowledged comprehensive plan or cooperative agreement adopted pursuant to ORS 197.020.

(9) A special district is not making satisfactory progress toward performance of its obligations under ORS chapters 195, 197 and 197A.

(10) A local government's approval standards, special conditions on approval of specific development proposals or procedures for approval do not comply with ORS 197A.400 (1) or (3).

(11) A local government is not making satisfactory progress toward meeting its obligations under ORS 195.065.

(12) A local government within the jurisdiction of a metropolitan service district has failed to make changes to the comprehensive plan or land use regulations to comply with the regional framework plan of the district or has engaged in a pattern or practice of decision-making that violates a requirement of the regional framework plan.

(13) A city with a population of 10,000 or greater**, as defined in ORS 197A.015,** that:

(a) Has a pattern or practice of violating housing-related statutes or implementing policies that create unreasonable cost or delay to the production of housing as described in ORS 197A.400 (1);

(b) Has a pattern or practice of creating adverse disparate impacts to state or federal protected classes or inhibiting equitable access to housing choice, as described in ORS 197A.100 (2)(b) to (d);

(c) Has failed to enter into a housing acceleration agreement as required under ORS 197A.130 (6); or

(d) Has materially breached a term of a housing acceleration agreement under ORS 197A.130 (8), including a failure to meet the timeline for performance under ORS 197A.130 (8)(a)(A).

SECTION 31. ORS 197.522 is amended to read:

197.522. (1) As used in this section:

(a) "Needed housing" has the meaning given that term in ORS [*197A.015*] **197A.018**.

(b) "Partition" has the meaning given that term in ORS 92.010.

(c) "Permit" means a permit as defined in ORS 215.402 and a permit as defined in ORS 227.160.

(d) "Subdivision" has the meaning given that term in ORS 92.010.

(2) A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land for needed housing that is consistent with the comprehensive plan and applicable land use regulations.

(3) If an application is inconsistent with the comprehensive plan and applicable land use regulations, the local government, prior to making a final decision on the application, shall allow the applicant to offer an amendment or to propose conditions of approval that would make the application consistent with the plan and applicable regulations. If an applicant seeks to amend the application or propose conditions of approval:

(a) A county may extend the time limitation under ORS 215.427 for final action by the governing body of a county on an application for needed housing and may set forth a new time limitation for final action on the consideration of future amendments or proposals.

(b) A city may extend the time limitation under ORS 227.178 for final action by the governing body of a city on an application for needed housing and may set forth a new time limitation for final action on the consideration of future amendments or proposals.

(4) A local government shall deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through amendments to the application or the imposition of reasonable conditions of approval.

SECTION 32. ORS 197.186, 197.200, 197.475, 197.478, 197.480, 197.485, 197.488, 197.490, 197.746, 197.748, 197.752, 197.754 and 197.756 are added to and made a part of ORS chapter 197A.

SECTION 33. ORS 197.480 is amended to read:

197.480. (1) Each city and county governing body shall provide for mobile home or manufactured dwelling parks as an allowed use:

(a) By zoning ordinance and by comprehensive plan designation on buildable lands within urban growth boundaries; and

(b) In areas planned and zoned for a residential density of six to 12 units per acre sufficient to accommodate the need established pursuant to subsections (2) and (3) of this section.

(2) A city or county shall establish a projection of need for mobile home or manufactured dwelling parks based on:

(a) Population projections;

(b) Household income levels;

(c) Housing market trends of the region; and

(d) An inventory of mobile home or manufactured dwelling parks sited in areas planned and zoned or generally used for commercial, industrial or high density residential development.

(3) The inventory required by subsection (2)(d) and subsection (4) of this section shall establish the need for areas to be planned and zoned to accommodate the potential displacement of the inventoried mobile home or manufactured dwelling parks.

(4) Notwithstanding the provisions of subsection (1) of this section, a city or county within Metro, shall inventory the mobile home or manufactured dwelling parks sited in areas planned and zoned or generally used for commercial, industrial or high density residential development.

(5)(a) A city or county may establish clear and objective criteria and standards for the placement and design of mobile home or manufactured dwelling parks.

(b) If a city or county requires a hearing before approval of a mobile home or manufactured dwelling park, application of the criteria and standards adopted pursuant to paragraph (a) of this subsection shall be the sole issue to be determined at the hearing.

(c) No criteria or standards established under paragraph (a) of this subsection may be adopted which would preclude the development of mobile home or manufactured dwelling parks within the intent of ORS 197.475 to [*197.493*] **197.490**.

SECTION 34. ORS 197A.348 is amended to read:

197A.348. (1) As used in ORS 197A.350 and this section, "needed housing" means all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a. "Needed housing" includes the following housing types:

(a) Attached and detached single-family housing, middle housing types as described in ORS 197A.420 and multiple family housing for both owner and renter occupancy;

(b) Government assisted housing;

(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to [*197.493*] **197.490**;

(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions;

(e) Agriculture workforce housing; and

(f) Single room occupancies as defined in ORS 197A.430.

(2) For the purpose of estimating housing needs, as described in ORS 197A.350 (3)(b), Metro shall adopt findings and perform an analysis that estimates each of the following factors:

(a) Projected needed housing units over the next 20 years;

(b) Current housing underproduction;

(c) Housing units needed for people experiencing homelessness; and

(d) Housing units projected to be converted into vacation homes or second homes during the next 20 years.

(3) Metro shall make the estimate described in subsection (2) of this section using a shorter time period than since the last review under ORS 197A.350 (2)(a)(B) if Metro finds that the shorter time period will provide more accurate and reliable data related to housing need. The shorter time period may not be less than three years.

(4) Metro shall use data from a wider geographic area or use a time period longer than the time period described in subsection (2) of this section if the analysis of a wider geographic area or the use of a longer time period will provide more accurate, complete and reliable data relating to trends affecting housing need than an analysis performed pursuant to subsection (2) of this section. Metro must clearly describe the geographic area, time frame and source of data used in an estimate performed under this subsection.

(5) Subsection (1)(a) and (d) of this section does not apply to a city with a population of less than 2,500.

(6) Metro may take an exception under ORS 197.732 to the definition of "needed housing" in subsection (1) of this section in the same manner that an exception may be taken under the goals.

SECTION 35. ORS 197.492 is amended to read:

197.492. As used in this section and ORS 197.493:

(1) "Manufactured dwelling park" and "mobile home park" have the meanings given those terms in ORS 446.003.

[*(1)*] **(2)** "Recreational vehicle" has the meaning given that term in ORS 174.101.

[*(2)*] **(3)** "Recreational vehicle park":

(a) Means a place where two or more recreational vehicles are located within 500 feet of one another on a lot, tract or parcel of land under common ownership and having as its primary purpose:

(A) The renting of space and related facilities for a charge or fee; or

(B) The provision of space for free in connection with securing the patronage of a person.

(b) Does not mean:

(A) An area designated only for picnicking or overnight camping; or

(B) A manufactured dwelling park or mobile home park.

SECTION 36. ORS 197A.018 is amended to read:

197A.018. (1) As used in ORS chapter 197A, and except as provided in subsection (2) of this section:

(a) "Needed housing" means housing by affordability level, as described in ORS 184.453 (4), type, characteristics and location that is necessary to accommodate the city's allocated housing need over the 20-year planning period in effect when the city's housing capacity is determined.

(b) "Needed housing" includes the following housing types:

(A) Detached single-family housing, middle housing types as described in ORS 197A.420 and multifamily housing that is owned or rented;

(B) Government assisted housing;

(C) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to [*197.493*] **197.490**;

(D) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions;

(E) Housing for agricultural workers;

(F) Housing for individuals with a variety of disabilities, related to mobility or communications**,** that require accessibility features;

(G) Housing for older persons, as defined in ORS 659A.421;

(H) Housing for college or university students, if relevant to the region; and

(I) Single room occupancies as defined in ORS 197A.430.

(2) Subsection (1)(b)(A) and (D) of this section does not apply to:

(a) A city with a population of less than 2,500.

(b) A county with a population of less than 15,000.

(3) At the time that a city is required to inventory its buildable lands under ORS 197A.270 **(2)**, 197A.280 **(2)** or 197A.335 (1), the city shall determine its needed housing under this section.

(4) In determining needed housing the city must demonstrate that the projected housing types, characteristics and locations are:

(a) Attainable for the allocated housing need by income, including consideration of publicly supported housing;

(b) Appropriately responsive to current and projected market trends; and

(c) Responsive to the factors in ORS 197A.100 (2)(b) to (d).

SECTION 37. ORS 197A.210 is amended to read:

197A.210. (1) At the time that a city is required to inventory its buildable lands under ORS 197A.270 **(2)**, 197A.280 **(2)** or 197A.335 (1), the city shall inventory its development-ready lands.

(2) If the total housing production target is greater than the housing capacity of development-ready lands, the local government shall take any actions in ORS 197A.100 (3) that demonstrably prepare lands for development or redevelopment or increase the housing capacity of existing development-ready lands.

SECTION 38. ORS 197A.025 is amended to read:

197A.025. (1) In adopting rules under ORS chapter 197A and statewide planning goals relating to housing or urbanization, or administering the rules or statutes, the Land Conservation and Development Commission and Department of Land Conservation and Development shall be guided by the following principles:

(a) Housing that is safe, accessible and affordable in the community of their choice should be available to every Oregonian.

(b) Building enough equitable housing must be a top priority.

(c) The development and implementation of the housing production strategy should be the focal point by which the department collaborates with local governments to address and eliminate local barriers to housing production.

(d) Expertise, technical assistance, model ordinances and other tools and resources to address housing production should be provided to local governments, using cooperative planning tools embodied in ORS 197A.103 and 197A.130, but not to the exclusion of the expedient use of enforcement authority, including compliance orders under ORS 197.319 to 197.335.

(e) Housing production should support fair and equitable housing outcomes, environmental justice, climate resilience and access to opportunity.

(f) Housing production should not be undermined by litigation, regulatory uncertainty or repetitive or unnecessary procedures.

(g) Local governments, to the greatest extent possible, should take actions within their control to facilitate the production of housing to meet housing production targets under ORS 184.455.

(2) Each public body, as defined in ORS 174.109, shall use its authority to remove barriers to, and to create pathways for, the development of needed housing and shall collaborate with the department and local governments to identify and implement strategies to support housing production where there is insufficient housing production and choice.

(3) In adopting rules implementing ORS chapter 197A and statewide land use goals relating to housing and urbanization, the commission may approve a range of methodologies, policy options or assumptions that a local government may adopt in determining:

(a) Needed housing;

(b) Housing production strategies or housing coordination strategies;

(c) Buildable lands or housing capacity;

(d) Amendments to urban growth boundaries, including under ORS 197A.215, 197A.270 (5)(a), 197A.285**, 197A.300** to 197A.325, 197A.350 (6)(a) and 197A.362; or

(e) Adoption or amendments to urban reserves or rural reserves under ORS 197A.230 to 197A.250.

SECTION 39. ORS 197A.215 is amended to read:

197A.215. (1) A local government may make a land use decision to approve an application to remove a lot or parcel from within an urban growth boundary if:

(a) The application is submitted by the owner of the lot or parcel;

(b)(A) The lot or parcel is adjacent to the edge of the urban growth boundary; or

(B) The lot or parcel is adjacent to another lot or parcel that is removed under this section;

(c) The lot or parcel is assessed under ORS 308A.050 to 308A.128 for its value for farm use;

(d) The lot or parcel is not within the boundaries of a city; and

(e) The lot or parcel is not included in an area identified for urban services under ORS 197.754.

(2) A local government, in deciding whether to approve an application under subsection (1) of this section, shall consider:

(a) The projected costs and other consequences of extending urban services to the affected lot or parcel;

(b) The potential value in the investment of providing urban services to the affected lot or parcel;

(c) Any requirement for expanding the urban growth boundary in other areas to compensate for any loss in buildable lands; and

(d) The projected costs and other consequences of providing urban services to other areas brought in under an expanded urban growth boundary.

(3)(a) Land that is removed from within an urban growth boundary pursuant to an application approved under this section shall be removed from any inventory of buildable lands maintained by the local government.

(b) A local government that approves an application under this section shall either expand the urban growth boundary to compensate for any resulting reduction in available buildable lands or increase the development capacity of the remaining supply of buildable lands consistent with ORS 197A.270, 197A.280, 197A.285**, 197A.300** to 197A.325 or 197A.350 (6).

SECTION 40. ORS 197A.300 is amended to read:

197A.300. As used in ORS [*197A.285*] **197A.300** to 197A.325, "serviceable" means, with respect to land, that:

(1) Adequate sewer, water and transportation capacity for planned urban development is available or can be either provided or made subject to committed financing; or

(2) Committed financing can be in place to provide adequate sewer, water and transportation capacity for planned urban development.

SECTION 41. ORS 197A.302 is amended to read:

197A.302. The purpose of ORS [*197A.285*] **197A.300** to 197A.325 is to direct the Land Conservation and Development Commission to develop and adopt simplified methods for a city that is outside Metro to evaluate or amend the urban growth boundary of the city. The commission should design the methods to:

(1) Become, as a result of reduced costs, complexity and time, the methods that are used by most cities with growing populations to manage the urban growth boundaries of the cities;

(2) Encourage, to the extent practicable given market conditions, the development of urban areas in which individuals desire to live and work and that are increasingly efficient in terms of land uses and in terms of public facilities and services;

(3) Encourage the conservation of important farm and forest lands, particularly lands that are needed to sustain agricultural and forest products industries;

(4) Encourage cities to increase the development capacity within the urban growth boundaries of the cities;

(5) Encourage the provision of an adequate supply of serviceable land that is planned for needed urban residential and industrial development; and

(6) Assist residents in understanding the major local government decisions that are likely to determine the form of a city's growth.

SECTION 42. ORS 197A.325 is amended to read:

197A.325. (1) Notwithstanding ORS 197.626, when a city evaluates or amends the urban growth boundary of the city pursuant to ORS 197A.310 or 197A.312, the Land Use Board of Appeals has jurisdiction for review of a final decision of the city.

(2) The board shall review the final decision of the city under ORS 197A.285 **and 197A.300** to 197A.325 as provided in ORS 197.805 to 197.855, except that:

(a) In circumstances in which the Land Conservation and Development Commission has specified by rule a number or a range of numbers that the city may use:

(A) The city is not required to adopt findings to support the use of the number or a number within the range of numbers; and

(B) The board's review of the number may determine only that the city has used a number that is allowed by the rule.

(b) The board shall affirm an interpretation by a local government of its comprehensive plan or land use regulations unless that interpretation is clearly erroneous.

(3) Notwithstanding ORS 197.628 and 197.629, when a city evaluates or amends the urban growth boundary of the city pursuant to ORS 197A.310 or 197A.312, the city is not required to commence or complete periodic review. The commission shall, by rule, specify alternate means to ensure that the comprehensive plan and land use regulations of the city comply with the statewide land use planning goals and are updated over time to reflect changing conditions and needs.

SECTION 43. ORS 197A.335 is amended to read:

197A.335. (1) At least once every six years, by a date scheduled by the Land Conservation and Development Commission, a city that is within Metro and has a population of 10,000 or greater shall[*:*]

[*(a)*] **determine its needed housing under ORS 197A.018 and** inventory the supply of buildable lands within the city and determine the housing capacity of the buildable lands**.**[*; and*]

[*(b) Conduct an analysis of the city's existing and projected needed housing under statewide planning goals and rules related to housing by type, mix, affordability and density range to determine the number of units and amount of land needed for each needed housing type under ORS 197A.018 for the next 20 years.*]

(2) The housing capacity determination and the needed housing analysis conducted under this section must be adopted as part of the city's comprehensive plan no later than one year after completion of the needed housing analysis.

(3) If the housing capacity and needed housing analysis conducted under this section demonstrates a housing need, the city shall amend its comprehensive plan or land use regulations or take actions to update or implement its housing production strategy to include new measures that demonstrably increase the likelihood that development of needed housing will occur for the type, mix, affordability and densities sufficient to accommodate needed housing for the next 20 years.

SECTION 44. ORS 197A.362 is amended to read:

197A.362. (1) Metro shall complete the inventory, determination and analysis required under ORS 197A.350 (3) not later than six years after completion of the previous inventory, determination and analysis.

(2)(a) Metro shall take such action as necessary under ORS 197A.350 (6)(a) to accommodate one-half of a 20-year buildable land supply determined under ORS 197A.350 (3) within one year of completing the analysis.

(b) Metro shall take all final action under ORS 197A.350 (6)(a) necessary to accommodate a 20-year buildable land supply determined under ORS 197A.350 (3) within two years of completing the analysis.

(c) [*The metropolitan service district*] **Metro** shall take action under ORS 197A.350 (6)(b), within one year after the analysis required under ORS 197A.350 (3)(b) is completed, to provide sufficient buildable land within the urban growth boundary to accommodate the estimated housing needs for 20 years from the time the actions are completed.

(d) [*The metropolitan service district*] **Metro** shall consider and adopt new measures that the governing body deems appropriate under ORS 197A.350 (6)(b).

(3) The commission may grant an extension to the time limits of subsection (2) of this section if the Director of the Department of Land Conservation and Development determines that [*the metropolitan service district*] **Metro** has provided good cause for failing to meet the time limits.

(4)(a) Metro shall establish a process to expand the urban growth boundary to accommodate a need for land for a public school that cannot reasonably be accommodated within the existing urban growth boundary. Metro shall design the process to:

(A) Accommodate a need that must be accommodated between periodic analyses of urban growth boundary capacity required by subsection (1) of this section; and

(B) Provide for a final decision on a proposal to expand the urban growth boundary within four months after submission of a complete application by a large school district as defined in ORS 195.110.

(b) At the request of a large school district, Metro shall assist the district to identify school sites required by the school facility planning process described in ORS 195.110. A need for a public school is a specific type of identified land need under ORS 197A.355 (3).

(5) At least three years after completing its most recent demonstration of sufficient buildable lands under ORS 197A.350, Metro may, on a single occasion, revise the determination and analysis required as part of the demonstration for the purpose of considering an amendment to [*the*] Metro's urban growth boundary, provided:

(a) One or more cities within Metro have proposed a development that would require expansion of the urban growth boundary;

(b) The city or cities proposing the development have provided evidence to Metro that the proposed development would provide additional needed housing to the needed housing included in the most recent determination and analysis;

(c) The location chosen for the proposed development is adjacent to the city proposing the development; and

(d) The location chosen for the proposed development is located within an area designated and acknowledged as an urban reserve.

(6)(a) If Metro, after revising its most recent determination and analysis pursuant to subsection (5) of this section, concludes that an expansion of its urban growth boundary is warranted, Metro may take action to expand its urban growth boundary in one or more locations to accommodate the proposed development, provided the urban growth boundary expansion does not exceed a total of 1,000 acres.

(b) If Metro expands its urban growth boundary under this subsection, Metro:

(A) Must adopt the urban growth boundary expansion not more than four years after completing its most recent demonstration of sufficient buildable lands under ORS 197A.350; and

(B) Is exempt from the boundary location requirements described in the statewide land use planning goals relating to urbanization.

CAPTIONS

SECTION 45. **The unit captions used in this 2024 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2024 Act.**

EFFECTIVE DATE

SECTION 46. **This 2024 Act takes effect on the 91st day after the date on which the 2024 regular session of the Eighty-second Legislative Assembly adjourns sine die.**

Passed by House February 20, 2024

Repassed by House March 6, 2024

.....
Timothy G. Sekerak, Chief Clerk of House

.....
Dan Rayfield, Speaker of House

Passed by Senate March 5, 2024

.....
Rob Wagner, President of Senate

Received by Governor:

.....M.,....., 2024

Approved:

.....M.,....., 2024

.....
Tina Kotek, Governor

Filed in Office of Secretary of State:

.....M.,....., 2024

.....
LaVonne Griffin-Valade, Secretary of State

Enrolled
Senate Bill 1537

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Governor Tina Kotek for Office of the Governor)

CHAPTER .....

AN ACT

Relating to housing; creating new provisions; amending ORS 183.471, 197.015, 197.195, 197.335, 197.843, 215.427, 227.178 and 455.770; and prescribing an effective date.

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

HOUSING ACCOUNTABILITY AND PRODUCTION OFFICE

SECTION 1. Housing Accountability and Production Office. (1) The Department of Land Conservation and Development and the Department of Consumer and Business Services shall enter into an interagency agreement to establish and administer the Housing Accountability and Production Office.

(2) The Housing Accountability and Production Office shall:

(a) Provide technical assistance, including assistance through grants, to local governments to:

(A) Comply with housing laws;

(B) Reduce permitting and land use barriers to housing production; and

(C) Support reliable and effective implementation of local procedures and standards relating to the approval of residential development projects.

(b) Serve as a resource, which includes providing responses to requests for technical assistance with complying with housing laws, to:

(A) Local governments, as defined in ORS 174.116; and

(B) Applicants for land use and building permits for residential development who are experiencing permitting and land use barriers related to housing production.

(c) Investigate and respond to complaints of violations of housing laws under section 2 of this 2024 Act.

(d) Establish best practices related to model codes, typical drawings and specifications as described in ORS 455.062, procedures and practices by which local governments may comply with housing laws.

(e) Provide optional mediation of active disputes relating to housing laws between a local government and applicants for land use and building permits for residential development, including mediation under ORS 197.860.

(f) Coordinate agencies that are involved in the housing development process, including, but not limited to, the Department of Land Conservation and Development, Department of

Consumer and Business Services, Housing and Community Services Department and Oregon Business Development Department, to enable the agencies to support local governments and applicants for land use and building permits for residential development by identifying state agency technical and financial resources that can address identified housing development and feasibility barriers.

(g) Establish policy and funding priorities for state agency resources and programs for the purpose of addressing barriers to housing production, including, but not limited to, making recommendations for moneys needed for the purposes of section 35 of this 2024 Act.

(3) The Land Conservation and Development Commission and the Department of Consumer and Business Services shall coordinate in adopting, amending or repealing rules for:

(a) Carrying out the respective responsibilities of the departments and the office under sections 1 to 5 of this 2024 Act.

(b) Model codes, development plans, procedures and practices by which local governments may comply with housing laws.

(c) Establishing standards by which complaints are investigated and pursued.

(4) The office shall prioritize assisting local governments in voluntarily undertaking changes to come into compliance with housing laws.

(5) As used in sections 1 to 5 of this 2024 Act:

(a) "Housing law" means ORS chapter 197A and ORS 92.010 to 92.192, 92.830 to 92.845, 197.360 to 197.380, 197.475 to 197.493, 197.505 to 197.540, 197.660 to 197.670, 197.748, 215.402 to 215.438, 227.160 to 227.186, 455.148, 455.150, 455.152, 455.153, 455.156, 455.157, 455.165, 455.170, 455.175, 455.180, 455.185 to 455.198, 455.200, 455.202 to 455.208, 455.210, 455.220, 455.465 and 455.467 and administrative rules implementing those laws, to the extent that the law or rule imposes a mandatory duty on a local government or its officers, employees or agents and the application of the law or rule applies to residential development or pertains to a permit for a residential use or a division of land for residential purposes.

(b) "Residential" includes mixed-use residential development.

SECTION 2. Office responses to violations of housing laws. (1) The Housing Accountability and Production Office shall establish a form or format through which the office receives allegations of local governments' violations of housing laws that impact housing production. For complaints that relate to a specific development project, the office may receive complaints only from the project applicant. For complaints not related to a specific development project, the office may receive complaints from any person within the local government's jurisdiction or the Department of Land Conservation and Development or the Department of Consumer and Business Services.

(2)(a) Except as provided in paragraph (c) of this subsection, the office shall investigate suspected violations of housing laws or violations credibly alleged under subsection (1) of this section.

(b) The office shall develop consistent procedures to evaluate and determine the credibility of alleged violations of housing laws.

(c) If a complainant has filed a notice of appeal with the Land Use Board of Appeals or has initiated private litigation regarding any aspect of the application decision that was alleged to have been the subject of the housing law violation, the office may not further participate in the specific complaint or its appeal, except for:

(A) Providing agency briefs, including briefs under ORS 197.830 (8), to the board or the court;

(B) Providing technical assistance to the local government unrelated to the resolution of the specific complaint; or

(C) Mediation at the request of the local government and complainant, including mediation under ORS 197.860.

(3)(a) If the office has a reasonable basis to conclude that a violation was or is being committed, the office shall deliver written warning notice to the local government specifying

the violation and any authority under this section that the office intends to invoke if the violation continues or is not remedied. The notice must include an invitation to address or remedy the suspected violation through mediation, the execution of a compliance agreement to voluntarily remedy the situation, the adoption of suitable model codes developed by the office under section 1 (3)(b) of this 2024 Act or other remedies suitable to the specific violation.

(b) The office shall prioritize technical assistance funding to local governments that agree to comply with housing laws under this subsection.

(c) A determination by the office is not a legislative, judicial or quasi-judicial decision.

(4) No earlier than 60 days after a warning notice is delivered under subsection (3) of this section, the office may:

(a) Initiate a request for an enforcement order of the Land Conservation and Development Commission by delivering a notice of request under section 3 (3) of this 2024 Act.

(b) Seek a court order against a local government as described under ORS 455.160 (3) without being adversely affected or serving the demand as described in ORS 455.160 (2).

(c) Notwithstanding ORS 197.090 (2)(b) to (e), participate in and seek review of a matter under ORS 197.090 (2)(a) that pertains to housing laws without the notice or consent of the commission. No less than once every two years, the office shall report to the commission on the matters in which the office participated under this paragraph.

(d) Except regarding matters under the exclusive jurisdiction of the Land Use Board of Appeals, apply to a circuit court for an order compelling compliance with any housing law. If the court finds that the defendant is not complying with a housing law, the court may grant an injunction requiring compliance.

(5) The office may not, in the name of the office, exercise the authority of the Department of Land Conservation and Development under ORS 197A.130.

(6) The office shall send notice to each complainant under subsection (1) of this section at the time that the office:

(a) Takes any action under subsection (3) or (4) of this section; or

(b) Has determined that it will not take further actions or make further investigations.

(7) The actions authorized of the office under this section are in addition to and may be exercised in conjunction with any other investigative or enforcement authority that may be exercised by the Department of Land Conservation and Development, the Land Conservation and Development Commission or the Department of Consumer and Business Services.

(8) Nothing in this section:

(a) Amends the jurisdiction of the Land Use Board of Appeals or of a circuit court;

(b) Creates a new cause of action; or

(c) Tolls or extends:

(A) The statute of limitations for any claim; or

(B) The deadline for any appeal or other action.

SECTION 3. Office enforcement orders. (1) The Housing Accountability and Production Office may request an enforcement order under section 2 (4)(a) of this 2024 Act requiring that a local government take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions or actions into compliance with a housing law, except for a housing law that pertains to the state building code or the administration of the code.

(2) Except as otherwise provided in this section, a request for an enforcement order by the office is subject to the applicable provisions of ORS 197.335 and ORS chapter 183 and is not subject to ORS 197.319, 197.324 or 197.328.

(3) The office shall make a request for an enforcement order under this section by delivering a notice to the local government that states the grounds for initiation and summarizes the procedures for the enforcement order proceeding along with a copy of the notice

to the Land Conservation and Development Commission. A decision of the office to initiate an enforcement order is not subject to appeal.

(4) After receiving notice of an enforcement order request under subsection (3) of this section, the local government shall deliver a notice to an affected applicant, if any, in substantially the following form:

NOTICE: The Housing Accountability and Production Office has found good cause for an enforcement proceeding against _____ (name of local government). An enforcement order may be adopted that could limit, prohibit or require the application of specified criteria to any action authorized by this decision but not applied for until after the adoption of the enforcement order. Future applications for building permits or time extensions may be affected.

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(5) Within 14 days after receipt by the commission of the notice under subsection (3) of this section, the Director of the Department of Land Conservation and Development shall assign the enforcement order proceedings to a hearings officer who is:

(a) An administrative law judge assigned under ORS 183.635; or

(b) A hearings officer randomly selected from a pool of officers appointed by the commission to review proceedings initiated under this section.

(6) The hearings officer shall schedule a contested case hearing within 60 days of the delivery of the notice to the commission under subsection (3) of this section.

(7)(a) The hearings officer shall prepare a proposed enforcement order or order of dismissal, including recommended findings and conclusions of law.

(b) A proposed enforcement order may require the local government to take any necessary action to comply with housing laws that is suitable to address the basis for the proposed enforcement order, including requiring the adoption or application of suitable models that have been developed by the office under section 1 (3)(b) of this 2024 Act.

(c) The hearings officer must issue and serve the proposed enforcement order on the office and all parties to the hearing within 30 days of the date the record closed.

(8)(a) The proposed enforcement order becomes a final order of the commission 14 days after service on the office and all parties to the hearing, unless the office or a party to the hearing appeals the proposed enforcement order to the commission prior to the proposed enforcement order becoming final.

(b) If the proposed enforcement order is appealed, the commission shall consider the matter at:

(A) Its next regularly scheduled meeting; or

(B) If the appeal is made 45 or fewer days prior to the next regularly scheduled meeting, at the following regularly scheduled meeting or a special meeting held earlier.

(9) The commission shall affirm, affirm with modifications or reverse the proposed enforcement order. The commission shall issue a final order no later than 30 days after the meeting at which it considered the matter.

(10) The commission may adopt rules administering this section, including rules related to standing, preserving issues for commission review or other provisions concerning the commission's scope and standard for review of proposed enforcement orders under this section.

SECTION 4. Housing Accountability and Production Office Fund. (1) The Housing Accountability and Production Office Fund is established in the State Treasury, separate and distinct from the General Fund.

(2) The Housing Accountability and Production Office Fund consists of moneys appropriated, allocated, deposited or transferred to the fund by the Legislative Assembly or otherwise.

(3) Interest earned by the fund shall be credited to the fund.

(4) Moneys in the fund are continuously appropriated to the Department of Land Conservation and Development to administer the fund, to operate the Housing Accountability and Production Office and to implement sections 1 to 5 of this 2024 Act.

SECTION 5. Reporting. On or before September 15, 2026, the Housing Accountability and Production Office shall:

(1) Contract with one or more organizations possessing relevant expertise to produce a report identifying improvements in the local building plan review approval, design review approval, land use, zoning and permitting processes, including but not limited to plan review approval timelines, process efficiency, local best practices and other ways to accelerate and improve the efficiency of the development process for construction, with a focus on increasing housing production.

(2) Produce a report based on a study by the office of state and local timelines and standards related to public works and building permit application review and develop recommendations for changes to reduce complexity, delay or costs that inhibit housing production, including an evaluation of their effect on the feasibility of varying housing types and affordability levels.

(3) Produce a report summarizing state agency plans, policies and programs related to reducing or eliminating regulatory barriers to the production of housing. The report must also include recommendations on how state agencies may prioritize resources and programs to increase housing production.

(4) Provide the reports under subsections (1) to (3) of this section to one or more appropriate interim committees of the Legislative Assembly in the manner provided in ORS 192.245.

SECTION 6. Sunset. Section 5 of this 2024 Act is repealed on January 2, 2027.

SECTION 7. Operative and applicable dates. (1) Sections 2 and 3 of this 2024 Act become operative on July 1, 2025.

(2) Sections 2 and 3 of this 2024 Act apply only to violations of housing laws occurring on or after July 1, 2025.

(3) The Department of Land Conservation and Development and Department of Consumer and Business Services may take any action before the operative date specified in subsection (1) of this section that is necessary for the departments or the Housing Accountability and Production Office to exercise, on and after the operative date, all of the duties, functions and powers conferred by sections 1 to 5, 35, 39 and 46 of this 2024 Act.

OPTING IN TO AMENDED HOUSING REGULATIONS

SECTION 8. ORS 215.427 is amended to read:

215.427. (1) Except as provided in subsections (3), (5) and (10) of this section, for land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete, except as provided in subsections (3), (5) and (10) of this section.

(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing

information. The application shall be deemed complete for the purpose of subsection (1) of this section and ORS 197A.470 upon receipt by the governing body or its designee of:

(a) All of the missing information;

(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

(c) Written notice from the applicant that none of the missing information will be provided.

(3)(a) If the application was complete when first submitted or the applicant submits additional information[*, as described in subsection (2) of this section,*] within 180 days of the date the application was first submitted [*and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251*], approval or denial of the application [*shall be based*] **must be based:**

(A) Upon the standards and criteria that were applicable at the time the application was first submitted[.]**; or**

(B) For an application relating to development of housing, upon the request of the applicant, those standards and criteria that are operative at the time of the request.

(b) If an applicant requests review under different standards as provided in paragraph (a)(B) of this subsection:

(A) For the purposes of this section, any applicable timelines for completeness review and final decisions restart as if a new application were submitted on the date of the request;

(B) For the purposes of this section and ORS 197A.470 the application is not deemed complete until:

(i) The county determines that additional information is not required under subsection (2) of this section; or

(ii) The applicant makes a submission under subsection (2) of this section in response to a county's request;

(C) A county may deny a request under paragraph (a)(B) of this subsection if:

(i) The county has issued a public notice of the application; or

(ii) A request under paragraph (a)(B) of this subsection was previously made; and

(D) The county may not require that the applicant:

(i) Pay a fee, except to cover additional costs incurred by the county to accommodate the request;

(ii) Submit a new application or duplicative information, unless information resubmittal is required because the request affects or changes information in other locations in the application or additional narrative is required to understand the request in context; or

(iii) Repeat redundant processes or hearings that are inapplicable to the change in standards or criteria.

[*(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.*]

(4) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

(a) All of the missing information;

(b) Some of the missing information and written notice that no other information will be provided; or

(c) Written notice that none of the missing information will be provided.

(5) The period set in subsection (1) of this section or the 100-day period set in ORS 197A.470 may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (10) of this section for mediation, may not exceed 215 days.

(6) The period set in subsection (1) of this section applies:

(a) Only to decisions wholly within the authority and control of the governing body of the county; and

(b) Unless the parties have agreed to mediation as described in subsection (10) of this section or ORS 197.319 (2)(b).

(7) Notwithstanding subsection (6) of this section, the period set in subsection (1) of this section and the 100-day period set in ORS 197A.470 do not apply to:

(a) A decision of the county making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610; or

(b) A decision of a county involving an application for the development of residential structures within an urban growth boundary, where the county has tentatively approved the application and extends these periods by no more than seven days in order to assure the sufficiency of its final order.

(8) Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

(9) A county may not compel an applicant to waive the period set in subsection (1) of this section or to waive the provisions of subsection (8) of this section or ORS 197A.470 or 215.429 as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.

(10) The periods set forth in subsections (1) and (5) of this section and ORS 197A.470 may be extended by up to 90 additional days, if the applicant and the county agree that a dispute concerning the application will be mediated.

SECTION 9. ORS 227.178 is amended to read:

227.178. (1) Except as provided in subsections (3), (5) and (11) of this section, the governing body of a city or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete.

(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section or ORS 197A.470 upon receipt by the governing body or its designee of:

(a) All of the missing information;

(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

(c) Written notice from the applicant that none of the missing information will be provided.

(3)(a) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted [*and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251*], approval or denial of the application [*shall*] **must** be based**:**

(A) Upon the standards and criteria that were applicable at the time the application was first submitted[.]**; or**

(B) For an application relating to development of housing, upon the request of the applicant, those standards and criteria that are operative at the time of the request.

(b) If an applicant requests review under different standards as provided in paragraph (a)(B) of this subsection:

(A) For the purposes of this section, any applicable timelines for completeness review and final decisions restart as if a new application were submitted on the date of the request;

(B) For the purposes of this section and ORS 197A.470 the application is not deemed complete until:

(i) The city determines that additional information is not required under subsection (2) of this section; or

(ii) The applicant makes a submission under subsection (2) of this section in response to a city's request;

(C) A city may deny a request under paragraph (a)(B) of this subsection if:

(i) The city has issued a public notice of the application; or

(ii) A request under paragraph (a)(B) of this subsection was previously made; and

(D) The city may not require that the applicant:

(i) Pay a fee, except to cover additional costs incurred by the city to accommodate the request;

(ii) Submit a new application or duplicative information, unless information resubmittal is required because the request affects or changes information in other locations in the application or additional narrative is required to understand the request in context; or

(iii) Repeat redundant processes or hearings that are inapplicable to the change in standards or criteria.

[*(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.*]

(4) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

(a) All of the missing information;

(b) Some of the missing information and written notice that no other information will be provided; or

(c) Written notice that none of the missing information will be provided.

(5) The 120-day period set in subsection (1) of this section or the 100-day period set in ORS 197A.470 may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (11) of this section for mediation, may not exceed 245 days.

(6) The 120-day period set in subsection (1) of this section applies:

(a) Only to decisions wholly within the authority and control of the governing body of the city; and

(b) Unless the parties have agreed to mediation as described in subsection (11) of this section or ORS 197.319 (2)(b).

(7) Notwithstanding subsection (6) of this section, the 120-day period set in subsection (1) of this section and the 100-day period set in ORS 197A.470 do not apply to:

(a) A decision of the city making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610; or

(b) A decision of a city involving an application for the development of residential structures within an urban growth boundary, where the city has tentatively approved the application and extends these periods by no more than seven days in order to assure the sufficiency of its final order.

(8) Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the city or its designee does not take final action on an application for a permit,

limited land use decision or zone change within 120 days after the application is deemed complete, the city shall refund to the applicant, subject to the provisions of subsection (9) of this section, either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

(9)(a) To obtain a refund under subsection (8) of this section, the applicant may either:

(A) Submit a written request for payment, either by mail or in person, to the city or its designee; or

(B) Include the amount claimed in a mandamus petition filed under ORS 227.179. The court shall award an amount owed under this section in its final order on the petition.

(b) Within seven calendar days of receiving a request for a refund, the city or its designee shall determine the amount of any refund owed. Payment, or notice that no payment is due, shall be made to the applicant within 30 calendar days of receiving the request. Any amount due and not paid within 30 calendar days of receipt of the request shall be subject to interest charges at the rate of one percent per month, or a portion thereof.

(c) If payment due under paragraph (b) of this subsection is not paid within 120 days after the city or its designee receives the refund request, the applicant may file an action for recovery of the unpaid refund. In an action brought by a person under this paragraph, the court shall award to a prevailing applicant, in addition to the relief provided in this section, reasonable attorney fees and costs at trial and on appeal. If the city or its designee prevails, the court shall award reasonable attorney fees and costs at trial and on appeal if the court finds the petition to be frivolous.

(10) A city may not compel an applicant to waive the 120-day period set in subsection (1) of this section or to waive the provisions of subsection (8) of this section or ORS 197A.470 or 227.179 as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.

(11) The periods set forth in subsections (1) and (5) of this section and ORS 197A.470 may be extended by up to 90 additional days, if the applicant and the city agree that a dispute concerning the application will be mediated.

ATTORNEY FEES FOR NEEDED HOUSING CHALLENGES

SECTION 10. ORS 197.843 is amended to read:

197.843. (1) The Land Use Board of Appeals shall award attorney fees to**:**

(a) An applicant whose application is only for the development of affordable housing[*, as defined in ORS 197A.445, or publicly supported housing, as defined in ORS 456.250*], if the board [*affirms a quasi-judicial land use decision approving the application or*] reverses a quasi-judicial land use decision denying the application[.]**;**

(b) An applicant whose application is only for the development of housing and was approved by the local government, if the board affirms the decision; and

(c) The local government that approved a quasi-judicial land use decision described in paragraph (b) of this subsection.

(2) For housing other than affordable housing, the attorney fees specified in subsection (1)(b) and (c) of this section apply only within urban growth boundaries.

[*(2)*] **(3)** A party who was awarded attorney fees under this section or ORS 197.850 shall repay the fees plus any interest from the time of the judgment if the property upon which the fees are based is developed for a use other than [*affordable*] **the proposed** housing.

[*(3)*] **(4)** As used in this section:

[*(a) "Applicant" includes:*]

[*(A) An applicant with a funding reservation agreement with a public funder for the purpose of developing publicly supported housing;*]

[*(B) A housing authority, as defined in ORS 456.005;*]

[*(C) A qualified housing sponsor, as defined in ORS 456.548;*]

[*(D) A religious nonprofit corporation;*]

[*(E) A public benefit nonprofit corporation whose primary purpose is the development of affordable housing; and*]

[*(F) A local government that approved the application of an applicant described in this paragraph.*]

(a) "Affordable housing" means affordable housing, as defined in ORS 197A.445, or publicly supported housing, as defined in ORS 456.250.

(b) "Attorney fees" includes prelitigation legal expenses, including preparing **and processing** the application and supporting the application in local land use hearings or proceedings.

SECTION 11. Operative and applicable dates. (1) The amendments to ORS 197.843 by section 10 of this 2024 Act become operative on January 1, 2025.

(2) The amendments to ORS 197.843 by section 10 of this 2024 Act apply to decisions for which a notice of intent to appeal under ORS 197.830 is filed on or after January 1, 2025.

INFRASTRUCTURE SUPPORTING HOUSING PRODUCTION

SECTION 12. Sections 13 and 14 of this 2024 Act are added to and made a part of ORS chapter 285A.

SECTION 13. Capacity and support for infrastructure planning. The Oregon Business Development Department shall provide capacity and support for infrastructure planning to municipalities to enable them to plan and finance infrastructure for water, sewers and sanitation, stormwater and transportation consistent with opportunities to produce housing units at densities defined in section 55 (3)(a)(C) of this 2024 Act. "Capacity and support" includes assistance with local financing opportunities, state and federal grant navigation, writing, review and administration, resource sharing, regional collaboration support and technical support, including engineering and design assistance and other capacity or support as the department may designate by rule.

SECTION 14. Housing Infrastructure Support Fund. (1) The Housing Infrastructure Support Fund is established in the State Treasury, separate and distinct from the General Fund.

(2) The Housing Infrastructure Support Fund consists of moneys appropriated, allocated, deposited or transferred to the fund by the Legislative Assembly or otherwise.

(3) Interest earned by the fund shall be credited to the fund.

(4) Moneys in the fund are continuously appropriated to the Oregon Business Development Department to administer the fund and to implement section 13 of this 2024 Act.

SECTION 15. Sunset. (1) Sections 13 and 14 of this 2024 Act are repealed on January 2, 2030.

(2) Any unobligated moneys in the Housing Infrastructure Support Fund on January 2, 2030, must be transferred to the General Fund for general governmental purposes.

SECTION 16. Infrastructure recommendation and reporting. (1) On or before December 31, 2024, the Department of Land Conservation and Development, in consultation with the Housing and Community Services Department, the Oregon Business Development Department and other agencies that fund and support local infrastructure projects, shall submit a report to an appropriate interim committee of the Legislative Assembly in the manner provided in ORS 192.245 that includes a list of key considerations and metrics the Legislative Assembly could use to evaluate, screen and prioritize proposed local infrastructure projects that facilitate and support housing within an urban growth boundary.

(2) The Department of Land Conservation and Development shall facilitate an engagement process with local governments, tribal nations, the development community, housing advocates, conservation groups, property owners, community partners and other interested parties to inform the list of key considerations and metrics.

NOTE: Sections 17 through 23 were deleted by amendment. Subsequent sections were not renumbered.

HOUSING PROJECT REVOLVING LOANS

SECTION 24. As used in sections 24 to 35 of this 2024 Act:

(1) "Assessor," "tax collector" and "treasurer" mean the individual filling that county office so named or any county officer performing the functions of the office under another name.

(2) "County tax officers" and "tax officers" mean the assessor, tax collector and treasurer of a county.

(3) "Eligible costs" means the following costs associated with an eligible housing project:

(a) Infrastructure costs, including, but not limited to, system development charges;

(b) Predevelopment costs;

(c) Construction costs; and

(d) Land write-downs.

(4) "Eligible housing project" means a project to construct housing, or to convert a building from a nonresidential use to housing, that is:

(a) Affordable to households with low income or moderate income as those terms are defined in ORS 458.610;

(b) If for-sale property, a single-family dwelling, middle housing as defined in ORS 197A.420 or a multifamily dwelling that is affordable as described in paragraph (a) of this subsection continuously from initial sale for a period, to be established by the Housing and Community Services Department and the sponsoring jurisdiction, of not less than the term of the loan related to the for-sale property; or

(c) If rental property:

(A)(i) Middle housing as defined in ORS 197A.420;

(ii) A multifamily dwelling;

(iii) An accessory dwelling unit as defined in ORS 215.501; or

(iv) Any other form of affordable housing or moderate income housing; and

(B) Rented at a monthly rate that is affordable to households with an annual income not greater than 120 percent of the area median income, such affordability to be maintained for a period, to be established by the department and the sponsoring jurisdiction, of not less than the term of the loan related to the rental property.

(5) "Eligible housing project property" means the taxable real and personal property constituting the improvements of an eligible housing project.

(6) "Fee payer" means, for any property tax year, the person responsible for paying ad valorem property taxes on eligible housing project property to which a grant awarded under section 29 of this 2024 Act relates.

(7) "Fire district taxes" means property taxes levied by fire districts within whose territory all or a portion of eligible housing project property is located.

(8) "Nonexempt property" means property other than eligible housing project property in the tax account that includes eligible housing project property.

(9) "Nonexempt taxes" means the ad valorem property taxes assessed on nonexempt property.

(10) "Sponsoring jurisdiction" means:

(a)(A) A city with respect to eligible housing projects located within the city boundaries; or

(B) A county with respect to eligible housing projects located in urban unincorporated areas of the county; or

(b) The governing body of a city or county described in paragraph (a) of this subsection.

SECTION 25. (1)(a) A sponsoring jurisdiction may adopt by ordinance or resolution a program under which the sponsoring jurisdiction awards grants to developers for eligible costs.

(b) Before adopting the program, the sponsoring jurisdiction shall consult with the governing body of any city or county with territory inside the boundaries of the sponsoring jurisdiction.

(2) The ordinance or resolution shall set forth:

(a) The kinds of eligible housing projects for which a developer may seek a grant under the program; and

(b) Any eligibility requirements to be imposed on projects and developers in addition to those required under sections 24 to 35 of this 2024 Act.

(3) A grant award:

(a) Shall be in the amount determined under section 26 (3) of this 2024 Act; and

(b) May include reimbursement for eligible costs incurred for up to 12 months preceding the date on which the eligible housing project received local site approval.

(4) Eligible housing project property for which a developer receives a grant for eligible costs may not be granted any exemption, partial exemption or special assessment of ad valorem property taxes other than the exemption granted under section 30 of this 2024 Act.

(5) A sponsoring jurisdiction may amend an ordinance or resolution adopted pursuant to this section at any time. The amendments shall apply only to applications submitted under section 26 of this 2024 Act on or after the effective date of the ordinance or resolution.

SECTION 26. (1)(a) A sponsoring jurisdiction that adopts a grant program pursuant to section 25 of this 2024 Act shall prescribe an application process, including forms and deadlines, by which a developer may apply for a grant with respect to an eligible housing project.

(b) An application for a grant must include, at a minimum:

(A) A description of the eligible housing project;

(B) A detailed explanation of the affordability of the eligible housing project;

(C) An itemized description of the eligible costs for which the grant is sought;

(D) The proposed schedule for completion of the eligible housing project;

(E) A project pro forma demonstrating that the project would not be economically feasible but for receipt of the grant moneys; and

(F) Any other information, documentation or attestation that the sponsoring jurisdiction considers necessary or convenient for the application review process.

(c)(A) The project pro forma under paragraph (b)(E) of this subsection shall be on a form provided to the sponsoring jurisdiction by the Housing and Community Services Department and made available to grant applicants.

(B) The department may enter into an agreement with a third party to develop the project pro forma template.

(2)(a) The review of an application under this section shall be completed within 90 days following the receipt of the application by the sponsoring jurisdiction.

(b) Notwithstanding paragraph (a) of this subsection:

(A) The sponsoring jurisdiction may in its sole discretion extend the review process beyond 90 days if the volume of applications would make timely completion of the review process unlikely.

(B) The sponsoring jurisdiction may consult with a developer about the developer's application, and the developer, after the consultation, may amend the application on or before a deadline set by the sponsoring jurisdiction.

(3) The sponsoring jurisdiction shall:

(a) Review each application;

(b) Request that the county tax officers provide to the sponsoring jurisdiction the amounts determined under section 27 of this 2024 Act;

(c) Set the term of the loan that will fund the grant award for a period not to exceed the greater of:

(A) Ten years following July 1 of the first property tax year for which the completed eligible housing project property is estimated to be taken into account; or

(B) If agreed upon by the sponsoring jurisdiction and the department, the period required for the loan principal and fees to be repaid in full;

(d) Set the amount of the grant that may be awarded to the developer under section 29 (2) of this 2024 Act by multiplying the increment determined under section 27 (1)(c) of this 2024 Act by the term of the loan; and

(e)(A) Provisionally approve the application as submitted;

(B) Provisionally approve the application on terms other than those requested in the application; or

(C) Reject the application.

(4)(a) The sponsoring jurisdiction shall forward provisionally approved applications to the Housing and Community Services Department.

(b) The department shall review the provisionally approved applications for completeness, including, but not limited to, the completeness of the project pro forma submitted with the application under subsection (1)(b)(E) of this section and the amounts computed under section 27 (1) of this 2024 Act and notify the sponsoring jurisdiction of its determination.

(5)(a) If the department has determined that a provisionally approved application is incomplete, the sponsoring jurisdiction may:

(A) Consult with the applicant developer and reconsider the provisionally approved application after the applicant revises it; or

(B) Reject the provisionally approved application.

(b) If the department has determined that a provisionally approved application is complete, the approval shall be final.

(c) The sponsoring jurisdiction shall notify each applicant and the department of the final approval or rejection of an application and the amount of the grant award.

(d) The rejection of an application and the amount of a grant award may not be appealed, but a developer may reapply for a grant at any time within the applicable deadlines of the grant program for the same or another eligible housing project.

(6) Upon request by a sponsoring jurisdiction, the department may assist the sponsoring jurisdiction with, or perform on behalf of the sponsoring jurisdiction, any duty required under this section.

SECTION 27. (1) Upon request of the sponsoring jurisdiction under section 26 (3)(b) of this 2024 Act, the assessor of the county in which is located the eligible housing project to which an application being reviewed under section 26 of this 2024 Act relates shall:

(a) Using the last certified assessment roll for the property tax year in which the application is received under section 26 of this 2024 Act:

(A) Determine the amount of property taxes assessed against all tax accounts that include the eligible housing project property; and

(B) Subtract the amount of operating taxes as defined in ORS 310.055 and local option taxes as defined in ORS 310.202 levied by fire districts from the amount determined under subparagraph (A) of this paragraph.

(b) For the first property tax year for which the completed eligible housing project property is estimated to be taken into account:

(A) Determine the estimated amount of property taxes that will be assessed against all tax accounts that include the eligible housing project property; and

(B) Subtract the estimated amount of operating taxes and local option taxes levied by fire districts from the amount determined under subparagraph (A) of this paragraph.

(c) Determine the amount of the increment that results from subtracting the amount determined under subsection (1)(a) of this section from the amount determined under subsection (1)(b) of this section.

(2) As soon as practicable after determining amounts under this section, the county tax officers shall provide written notice to the sponsoring jurisdiction of the amounts.

SECTION 28. (1)(a) The Housing and Community Services Department shall develop a program to make loans to sponsoring jurisdictions to fund grants awarded under the sponsoring jurisdiction's grant program adopted pursuant to section 25 of this 2024 Act.

(b) The loans shall be interest free for the term set by the sponsoring jurisdiction under section 26 (3)(c) of this 2024 Act.

(2) For each application approved under section 26 (5)(b) of this 2024 Act, the Housing and Community Services Department shall:

(a) Enter into a loan agreement with the sponsoring jurisdiction for a payment in an amount equal to the total of:

(A) Loan proceeds in an amount equal to the grant award for the application set under section 26 (3)(d) of this 2024 Act; and

(B) The administrative costs set forth in subsection (3) of this section; and

(b) Pay to the sponsoring jurisdiction the total amount set forth in paragraph (a) of this subsection out of the Housing Project Revolving Loan Fund established under section 35 of this 2024 Act.

(3) The administrative costs referred to in subsection (2)(a)(B) of this section are:

(a) An amount not greater than five percent of the loan proceeds to reimburse the sponsoring jurisdiction for the costs of administering the grant program, other than the costs of tax administration; and

(b) An amount equal to one percent of the loan proceeds to be transferred to the county in which the sponsoring jurisdiction is situated to reimburse the county for the costs of the tax administration of the grant program by the county tax officers.

(4) The Housing and Community Services Department may assign any and all loan amounts made under this section to the Department of Revenue for collection as provided in ORS 293.250.

(5) The Housing and Community Services Department may:

(a) Consult with the Oregon Business Development Department about any of the powers and duties conferred on the Housing and Community Services Department by sections 24 to 35 of this 2024 Act; and

(b) Adopt any rule it considers necessary or convenient for the administration of sections 24 to 35 of this 2024 Act by the Housing and Community Services Department.

SECTION 29. (1) Upon entering into a loan agreement with the Housing and Community Services Department under section 28 of this 2024 Act, a sponsoring jurisdiction shall offer a grant agreement to each developer whose application was approved under section 26 (5)(b) of this 2024 Act.

(2) The grant agreement shall:

(a) Include a grant award in the amount set under section 26 (3)(d) of this 2024 Act; and

(b) Contain terms that:

(A) Are required under sections 24 to 35 of this 2024 Act or the ordinance or resolution adopted by the sponsoring jurisdiction pursuant to section 25 of this 2024 Act.

(B) Do not conflict with sections 24 to 35 of this 2024 Act or the ordinance or resolution adopted by the sponsoring jurisdiction pursuant to section 25 of this 2024 Act.

(3) Upon entering into a grant agreement with a developer, a sponsoring jurisdiction shall adopt an ordinance or resolution setting forth the details of the eligible housing project that is the subject of the agreement, including but not limited to:

(a) A description of the eligible housing project;

(b) An itemized description of the eligible costs;

(c) The amount and terms of the grant award;

(d) Written notice that the eligible housing project property is exempt from property taxation in accordance with section 30 of this 2024 Act; and

(e) A statement declaring that the grant has been awarded in response to the housing needs of communities within the sponsoring jurisdiction.

(4) Unless otherwise specified in the grant agreement, as soon as practicable after the ordinance or resolution required under subsection (3) of this section becomes effective, the sponsoring jurisdiction shall distribute the loan proceeds received from the department under section 28 (2)(a)(A) of this 2024 Act to the developer as the grant moneys awarded under this section.

(5) The sponsoring jurisdiction shall forward to the tax officers of the county in which the eligible housing project is located a copy of the grant agreement, the ordinance or resolution and any other material the sponsoring jurisdiction considers necessary for the tax officers to perform their duties under sections 24 to 35 of this 2024 Act or the ordinance or resolution.

(6) Upon request, the department may assist the sponsoring jurisdiction with, or perform on behalf of the sponsoring jurisdiction, any duty required under this section.

SECTION 30. (1) Upon receipt of the copy of a grant agreement and ordinance or resolution from the sponsoring jurisdiction under section 29 (5) of this 2024 Act, the assessor of the county in which eligible housing project property is located shall:

(a) Exempt the eligible housing project property in accordance with this section;

(b) Assess and tax the nonexempt property in the tax account as other similar property is assessed and taxed; and

(c) Submit a written report to the sponsoring jurisdiction setting forth the assessor's estimate of the amount of:

(A) The real market value of the exempt eligible housing project property; and

(B) The property taxes on the exempt eligible housing project property that would have been collected if the property were not exempt.

(2)(a) The exemption shall first apply to the first property tax year that begins after completion of the eligible housing project to which the grant relates.

(b) The eligible housing project property shall be disqualified from the exemption on the earliest of:

(A) July 1 of the property tax year immediately succeeding the date on which the fee payment obligation under section 32 of this 2024 Act that relates to the eligible housing project is repaid in full;

(B) The date on which the annual fee imposed on the fee payer under section 32 of this 2024 Act becomes delinquent;

(C) The date on which foreclosure proceedings are commenced as provided by law for delinquent nonexempt taxes assessed with respect to the tax account that includes the eligible housing project; or

(D) The date on which a condition specified in section 33 (1) of this 2024 Act occurs.

(c) After the eligible housing project property has been disqualified from the exemption under this subsection, the property shall be assessed and taxed as other similar property is assessed and taxed.

(3) For each tax year that the eligible housing project property is exempt from taxation, the assessor shall enter a notation on the assessment roll stating:

(a) That the property is exempt under this section; and

(b) The presumptive number of property tax years for which the exemption is granted, which shall be the term of the loan agreement relating to the eligible housing project set under section 26 (3)(c) of this 2024 Act.

SECTION 31. **(1) Repayment of loans made under section 28 of this 2024 Act shall begin, in accordance with section 32 of this 2024 Act, after completion of the eligible housing project funded by the grant to which the loan relates.**

(2)(a) The sponsoring jurisdiction shall determine the date of completion of an eligible housing project.

(b)(A) If an eligible housing project is completed before July 1 of the assessment year, repayment shall begin with the property tax year that begins on July 1 of the assessment year.

(B) If an eligible housing project is completed on or after July 1 of the assessment year, repayment shall begin with the property tax year that begins on July 1 of the succeeding assessment year.

(c) After determining the date of completion under paragraph (a) of this subsection, the sponsoring jurisdiction shall notify the Housing and Community Services Department and the county tax officers of the determination.

(3) A loan shall remain outstanding until repaid in full.

SECTION 32. **(1) The fee payer for eligible housing project property that has been granted exemption under section 30 of this 2024 Act shall pay an annual fee for the term that shall be the presumptive number of years for which the property is granted exemption under section 30 (3)(b) of this 2024 Act.**

(2)(a) The amount of the fee for the first property tax year in which repayment of the loan is due under section 31 (1) of this 2024 Act shall equal the total of:

(A) The portion of the increment determined under section 27 (1)(c) of this 2024 Act that is attributable to the eligible housing project property to which the fee relates; and

(B) The administrative costs described in section 28 (3) of this 2024 Act divided by the term of the grant agreement entered into under section 29 of this 2024 Act.

(b) For each subsequent property tax year, the amount of the fee shall be 103 percent of the amount of the fee for the preceding property tax year.

(3)(a) Not later than July 15 of each property tax year during the term of the fee obligation, the sponsoring jurisdiction shall certify to the assessor each fee amount that became due under this section on or after July 16 of the previous property tax year from fee payers with respect to eligible housing projects located in the sponsoring jurisdiction.

(b) The assessor shall place each fee amount on the assessment and tax rolls of the county and notify:

(A) The sponsoring jurisdiction of each fee amount and the aggregate of all fee amounts imposed with respect to eligible housing project property located in the sponsoring jurisdiction.

(B) The Housing and Community Services Department of each fee amount and the aggregate of all fee amounts with respect to all eligible housing project property located in the county.

(4)(a) The assessor shall include on the tax statement of each tax account that includes exempt eligible housing project property the amount of the fee imposed on the fee payer with respect to the eligible housing project property.

(b) The fee shall be collected and enforced in the same manner as ad valorem property taxes, including nonexempt taxes, are collected and enforced.

(5)(a) For each property tax year in which a fee is payable under this section, the treasurer shall:

(A) Estimate the amount of operating taxes as defined in ORS 310.055 and local option taxes as defined in ORS 310.202 levied by fire districts that would have been collected on eligible housing project property if the property were not exempt;

(B) Distribute out of the fee moneys the amounts determined under subparagraph (A) of this paragraph to the respective fire districts when other ad valorem property taxes are distributed under ORS 311.395; and

(C) Transfer the net fee moneys to the Housing and Community Services Department for deposit in the Housing Project Revolving Loan Fund established under section 35 of this 2024 Act in repayment of the loans to which the fees relate.

(b) Nonexempt taxes shall be distributed in the same manner as other ad valorem property taxes are distributed.

(6) Any person with an interest in the eligible housing project property on the date on which any fee amount becomes due shall be jointly and severally liable for payment of the fee amount.

(7) Any loan amounts that have not been repaid when the fee payer has discharged its obligations in full under this section remain the obligation of the sponsoring jurisdiction that obtained the loan from the department under section 28 of this 2024 Act.

(8) Any fee amounts collected in excess of the loan amount shall be distributed in the same manner as other ad valorem property taxes are distributed.

SECTION 33. (1)(a) A developer that received a grant award under section 29 of this 2024 Act shall become liable for immediate payment of any outstanding annual fee payments imposed under section 32 of this 2024 Act for the entire term of the fee if:

(A) The developer has not completed the eligible housing project within three years following the date on which the grant moneys were distributed to the developer;

(B) The eligible housing project changes substantially from the project for which the developer's application was approved such that the project would not have been eligible for the grant; or

(C) The developer has not complied with a requirement specified in the grant agreement.

(b) The sponsoring jurisdiction may, in its sole discretion, extend the date on which the eligible housing project must be completed.

(2) If the sponsoring jurisdiction discovers that a developer willfully made a false statement or misrepresentation or willfully failed to report a material fact to obtain a grant with respect to an eligible housing project, the sponsoring jurisdiction may impose on the developer a penalty not to exceed 20 percent of the amount of the grant so obtained, plus any applicable interest and fees associated with the costs of collection.

(3) Any amounts imposed under subsection (1) or (2) of this section shall be a lien on the eligible housing project property and the nonexempt property in the tax account.

(4) The sponsoring jurisdiction shall provide written notice of any amounts that become due under subsections (1) and (2) of this section to the county tax officers and the Housing and Community Services Department.

(5)(a) Any and all amounts required to be paid under this section shall be considered to be liquidated and delinquent, and the Housing and Community Services Department shall assign such amounts to the Department of Revenue for collection as provided in ORS 293.250.

(b) Amounts collected under this subsection shall be deposited, net of any collection charges, in the Housing Project Revolving Loan Fund established under section 35 of this 2024 Act.

SECTION 34. (1) Not later than June 30 of each year in which a grant agreement entered into under section 29 of this 2024 Act is in effect, a developer that is party to the agreement shall submit a report to the sponsoring jurisdiction in which the eligible housing project is located that contains:

(a) The status of the construction or conversion of the eligible housing project property, including an estimate of the date of completion;

(b) An itemized description of the uses of the grant moneys; and

(c) Any information the sponsoring jurisdiction considers important for evaluating the eligible housing project and the developer's performance under the terms of the grant agreement.

(2) Not later than August 15 of each year, each sponsoring jurisdiction shall submit to the Housing and Community Services Department a report containing such information re-

lating to eligible housing projects within the sponsoring jurisdiction as the department requires.

(3)(a) Not later than November 15 of each year, the department shall submit, in the manner required under ORS 192.245, a report to the interim committees of the Legislative Assembly related to housing.

(b) The report shall set forth in detail:

(A) The information received from sponsoring jurisdictions under subsection (2) of this section;

(B) The status of the repayment of all outstanding loans made under section 28 of this 2024 Act and of the payment of all fees imposed under section 32 of this 2024 Act and all amounts imposed under section 33 of this 2024 Act; and

(C) The cumulative experience of the program developed and implemented under sections 24 to 35 of this 2024 Act.

(c) The report may include recommendations for legislation.

SECTION 35. (1) The Housing Project Revolving Loan Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the Housing Project Revolving Loan Fund shall be credited to the fund.

(2) Moneys in the fund may be invested as provided by ORS 293.701 to 293.857, and the earnings from the investments shall be credited to the fund.

(3) Moneys in the Housing Project Revolving Loan Fund shall consist of:

(a) Amounts appropriated or otherwise transferred or credited to the fund by the Legislative Assembly;

(b) Net fee moneys transferred under section 32 of this 2024 Act;

(c) Amounts deposited in the fund under section 33 of this 2024 Act;

(d) Interest and other earnings received on moneys in the fund; and

(e) Other moneys or proceeds of property from any public or private source that are transferred, donated or otherwise credited to the fund.

(4) Moneys in the Housing Project Revolving Loan Fund are continuously appropriated to the Housing and Community Services Department for the purpose of paying amounts determined under section 28 of this 2024 Act.

(5) Moneys in the Housing Project Revolving Loan Fund at the end of a biennium shall be retained in the fund and used for the purposes set forth in subsection (4) of this section.

SECTION 36. (1) The Housing and Community Services Department shall have developed and begun operating the loan program that the department is required to develop under section 28 of this 2024 Act, including regional trainings and outreach for jurisdictional partners, no later than June 30, 2025.

(2) In the first two years in which the loan program is operating, the department may not expend an amount in excess of two-thirds of the moneys appropriated to the department for the purpose under section 62 of this 2024 Act.

HOUSING LAND USE ADJUSTMENTS

SECTION 37. Sections 38 to 41 of this 2024 Act are added to and made a part of ORS chapter 197A.

SECTION 38. Mandatory adjustment to housing development standards. (1) As used in sections 38 to 41 of this 2024 Act:

(a) "Adjustment" means a deviation from an existing land use regulation.

(b) "Adjustment" does not include:

(A) A request to allow a use of property not otherwise permissible under applicable zoning requirements;

(B) Deviations from land use regulations or requirements related to accessibility, affordability, fire ingress or egress, safety, local tree codes, hazardous or contaminated site

clean-up, wildlife protection, or statewide land use planning goals relating to natural resources, natural hazards, the Willamette River Greenway, estuarine resources, coastal shorelands, beaches and dunes or ocean resources;

(C) A complete waiver of land use regulations or any changes beyond the explicitly requested and allowed adjustments; or

(D) Deviations to requirements related to the implementation of fire or building codes, federal or state air, water quality or surface, ground or stormwater requirements, or requirements of any federal, state or local law other than a land use regulation.

(2) Except as provided in section 39 of this 2024 Act, a local government shall grant a request for an adjustment in an application to develop housing as provided in this section. An application qualifies for an adjustment under this section only if the following conditions are met:

(a) The application is for a building permit or a quasi-judicial, limited or ministerial land use decision;

(b) The development is on lands zoned to allow for residential uses, including mixed-use residential;

(c) The residential development is for densities not less than those required under section 55 (3)(a)(C) of this 2024 Act;

(d) The development is within an urban growth boundary, not including lands that have not been annexed by a city;

(e) The development is of net new housing units in new construction projects, including:

(A) Single-family or multifamily;

(B) Mixed-use residential where at least 75 percent of the developed floor area will be used for residential uses;

(C) Manufactured dwelling parks;

(D) Accessory dwelling units; or

(E) Middle housing as defined in ORS 197A.420;

(f) The application requests not more than 10 distinct adjustments to development standards as provided in this section. A "distinct adjustment" means:

(A) An adjustment to one of the development standards listed in subsection (4) of this section where each discrete adjustment to a listed development standard that includes multiple component standards must be counted as an individual adjustment; or

(B) An adjustment to one of the development standards listed in subsection (5) of this section where each discrete adjustment to a listed development standard that includes multiple component standards must be counted as an individual adjustment; and

(g) The application states how at least one of the following criteria apply:

(A) The adjustments will enable development of housing that is not otherwise feasible due to cost or delay resulting from the unadjusted land use regulations;

(B) The adjustments will enable development of housing that reduces the sale or rental prices per residential unit;

(C) The adjustments will increase the number of housing units within the application;

(D) All of the units in the application are subject to an affordable housing covenant as described in ORS 456.270 to 456.295, making them affordable to moderate income households as defined in ORS 456.270 for a minimum of 30 years;

(E) At least 20 percent of the units in the application are subject to an affordable housing covenant as described in ORS 456.270 to 456.295, making them affordable to low income households as defined in ORS 456.270 for a minimum of 60 years;

(F) The adjustments will enable the provision of accessibility or visitability features in housing units that are not otherwise feasible due to cost or delay resulting from the unadjusted land use regulations; or

(G) All of the units in the application are subject to a zero equity, limited equity, or shared equity ownership model including resident-owned cooperatives and community land

trusts making them affordable to moderate income households as described in ORS 456.270 to 456.295 for a period of 90 years.

(3) A decision on an application for an adjustment made under this section is a limited land use decision. Only the applicant may appeal the decision. No notice of the decision is required if the application is denied, other than notice to the applicant. In implementing this subsection, a local government may:

(a) Use an existing process, or develop and apply a new process, that complies with the requirements of this subsection; or

(b) Directly apply the process set forth in this subsection.

(4) A local government shall grant an adjustment to the following development standards:

(a) Side or rear setbacks, for an adjustment of not more than 10 percent.

(b) For an individual development project, the common area, open space or area that must be landscaped on the same lot or parcel as the proposed housing, for a reduction of not more than 25 percent.

(c) Parking minimums.

(d) Minimum lot sizes, not more than a 10 percent adjustment, and including not more than a 10 percent adjustment to lot widths or depths.

(e) Maximum lot sizes, not more than a 10 percent adjustment, including not more than a 10 percent adjustment to lot width or depths and only if the adjustment results in:

(A) More dwelling units than would be allowed without the adjustment; and

(B) No reduction in density below the minimum applicable density.

(f) Building lot coverage requirements for up to a 10 percent adjustment.

(g) For manufactured dwelling parks, middle housing as defined in ORS 197A.420, multi-family housing and mixed-use residential housing:

(A) Requirements for bicycle parking that establish:

(i) The minimum number of spaces for use by the residents of the project, provided the application includes at least one-half space per residential unit; or

(ii) The location of the spaces, provided that lockable, covered bicycle parking spaces are within or adjacent to the residential development;

(B) For uses other than cottage clusters, as defined in ORS 197A.420 (1)(c)(D), building height maximums that:

(i) Are in addition to existing applicable height bonuses, if any; and

(ii) Are not more than an increase of the greater of:

(I) One story; or

(II) A 20 percent increase to base zone height with rounding consistent with methodology outlined in city code, if any;

(C) Unit density maximums, not more than an amount necessary to account for other adjustments under this section; and

(D) Prohibitions, for the ground floor of a mixed-use building, against:

(i) Residential uses except for one face of the building that faces the street and is within 20 feet of the street; and

(ii) Nonresidential active uses that support the residential uses of the building, including lobbies, day care, passenger loading, community rooms, exercise facilities, offices, activity spaces or live-work spaces, except for active uses in specifically and clearly defined mixed use areas or commercial corridors designated by local governments.

(5) A local government shall grant an adjustment to design standards that regulate:

(a) Facade materials, color or pattern.

(b) Facade articulation.

(c) Roof forms and materials.

(d) Entry and garage door materials.

(e) Garage door orientation, unless the building is adjacent to or across from a school or public park.

(f) Window materials, except for bird-safe glazing requirements.

(g) Total window area, for up to a 30 percent adjustment, provided the application includes at least 12 percent of the total facade as window area.

(h) For manufactured dwelling parks, middle housing as defined in ORS 197A.420, multifamily housing and mixed-use residential:

(A) Building orientation requirements, not including transit street orientation requirements.

(B) Building height transition requirements, not more than a 50 percent adjustment from the base zone.

(C) Requirements for balconies and porches.

(D) Requirements for recesses and offsets.

SECTION 39. Mandatory adjustments exemption process. (1) A local government may apply to the Housing Accountability and Production Office for an exemption to section 38 of this 2024 Act only as provided in this section. After the application is made, section 38 of this 2024 Act does not apply to the applicant until the office denies the application or revokes the exemption.

(2) To qualify for an exemption under this section, the local government must demonstrate that:

(a) The local government reviews requested design and development adjustments for all applications for the development of housing that are under the jurisdiction of that local government;

(b) All listed development and design adjustments under section 38 (4) and (5) of this 2024 Act are eligible for an adjustment under the local government's process; and

(c)(A) Within the previous 5 years the city has approved 90 percent of received adjustment requests; or

(B) The adjustment process is flexible and accommodates project needs as demonstrated by testimonials of housing developers who have utilized the adjustment process within the previous five years.

(3) Upon receipt of an application under this section, the office shall allow for public comment on the application for a period of no less than 45 days. The office shall enter a final order on the adjustment exemption within 120 days of receiving the application. The approval of an application may not be appealed.

(4) In approving an exemption, the office may establish conditions of approval requiring that the city demonstrate that it continues to meet the criteria under subsection (2) of this section.

(5) Local governments with an approved or pending exemption under this section shall clearly and consistently notify applicants, including prospective applicants seeking to request an adjustment, that are engaged in housing development:

(a) That the local government is employing a local process in lieu of section 38 of this 2024 Act;

(b) Of the development and design standards for which an applicant may request an adjustment in a housing development application; and

(c) Of the applicable criteria for the adjustment application.

(6) In response to a complaint and following an investigation, the office may issue an order revoking an exemption issued under this section if the office determines that the local government is:

(a) Not approving adjustments as required by the local process or the terms of the exemption;

(b) Engaging in a pattern or practice of violating housing-related statutes or implementing policies that create unreasonable cost or delays to housing production under ORS 197.320 (13)(a); or

(c) Failing to comply with conditions of approval adopted under subsection (4) of this section.

SECTION 40. Temporary exemption authority. Before January 1, 2025, notwithstanding section 39 of this 2024 Act:

(1) Cities may deliver applications for exemption under section 39 of this 2024 Act to the Department of Land Conservation and Development; and

(2) The Department of Land Conservation and Development may perform any action that the Housing Accountability and Production Office may take under section 39 of this 2024 Act. Decisions and actions of the department under this section are binding on the office.

SECTION 41. Reporting. (1) A city required to provide a report under ORS 197A.110 shall include as part of that report information reasonably requested from the Department of Land Conservation and Development on residential development produced through approvals of adjustments granted under section 38 of this 2024 Act. The department may not develop a separate process for collecting this data or otherwise place an undue burden on local governments.

(2) On or before September 15 of each even-numbered year, the department shall provide a report to an interim committee of the Legislative Assembly related to housing in the manner provided in ORS 192.245 on the data collected under subsection (1) of this section. The committee shall invite the League of Oregon Cities to provide feedback on the report and the efficacy of section 38 of this 2024 Act.

SECTION 42. Operative date. Sections 38 to 41 of this 2024 Act become operative on January 1, 2025.

SECTION 43. Sunset. Sections 38 to 41 of this 2024 Act are repealed on January 2, 2032.

LIMITED LAND USE DECISIONS

SECTION 44. ORS 197.015 is amended to read:

197.015. As used in ORS chapters 195, 196, 197 and 197A, unless the context requires otherwise:

(1) "Acknowledgment" means a commission order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with the goals or certifies that Metro land use planning goals and objectives, Metro regional framework plan, amendments to Metro planning goals and objectives or amendments to the Metro regional framework plan comply with the goals.

(2) "Board" means the Land Use Board of Appeals.

(3) "Carport" means a stationary structure consisting of a roof with its supports and not more than one wall, or storage cabinet substituting for a wall, and used for sheltering a motor vehicle.

(4) "Commission" means the Land Conservation and Development Commission.

(5) "Comprehensive plan" means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. "Comprehensive" means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. "General nature" means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is "coordinated" when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. "Land" includes water, both surface and subsurface, and the air.

(6) "Department" means the Department of Land Conservation and Development.

(7) "Director" means the Director of the Department of Land Conservation and Development.

(8) "Goals" means the mandatory statewide land use planning standards adopted by the commission pursuant to ORS chapters 195, 196, 197 and 197A.

(9) "Guidelines" means suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals. Guidelines are advisory and do not limit state agencies, cities, counties and special districts to a single approach.

(10) "Land use decision":

(a) Includes:

(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

(i) The goals;

(ii) A comprehensive plan provision;

(iii) A land use regulation; or

(iv) A new land use regulation;

(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals; or

(C) A decision of a county planning commission made under ORS 433.763;

(b) Does not include a decision of a local government:

(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;

(B) That approves or denies a building permit issued under clear and objective land use standards;

(C) That is a limited land use decision;

(D) That determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations;

(E) That is an expedited land division as described in ORS 197.360;

(F) That approves, pursuant to ORS 480.450 (7), the siting, installation, maintenance or removal of a liquefied petroleum gas container or receptacle regulated exclusively by the State Fire Marshal under ORS 480.410 to 480.460;

(G) That approves or denies approval of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan; or

(H) That a proposed state agency action subject to ORS 197.180 (1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if:

(i) The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action;

(ii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or

(iii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan;

(c) Does not include a decision by a school district to close a school;

(d) Does not include, except as provided in ORS 215.213 (13)(c) or 215.283 (6)(c), authorization of an outdoor mass gathering as defined in ORS 433.735, or other gathering of fewer than 3,000 persons that is not anticipated to continue for more than 120 hours in any three-month period; and

(e) Does not include:

(A) A writ of mandamus issued by a circuit court in accordance with ORS 215.429 or 227.179;

(B) Any local decision or action taken on an application subject to ORS 215.427 or 227.178 after a petition for a writ of mandamus has been filed under ORS 215.429 or 227.179; or

(C) A state agency action subject to ORS 197.180 (1), if:

(i) The local government with land use jurisdiction over a use or activity that would be authorized, funded or undertaken by the state agency as a result of the state agency action has already made a land use decision approving the use or activity; or

(ii) A use or activity that would be authorized, funded or undertaken by the state agency as a result of the state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan.

(11) "Land use regulation" means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.

(12)**(a)** "Limited land use decision"[*:*]

[*(a)*] means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).

(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.

(C) The approval or denial of an application for a replat.

(D) The approval or denial of an application for a property line adjustment.

(E) The approval or denial of an application for an extension, alteration or expansion of a nonconforming use.

(b) **"Limited land use decision"** does not mean a final decision made by a local government pertaining to a site within an urban growth boundary that concerns approval or denial of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan.

(13) "Local government" means any city, county or Metro or an association of local governments performing land use planning functions under ORS 195.025.

(14) "Metro" means a metropolitan service district organized under ORS chapter 268.

(15) "Metro planning goals and objectives" means the land use goals and objectives that Metro may adopt under ORS 268.380 (1)(a). The goals and objectives do not constitute a comprehensive plan.

(16) "Metro regional framework plan" means the regional framework plan required by the 1992 Metro Charter or its separate components. Neither the regional framework plan nor its individual components constitute a comprehensive plan.

(17) "New land use regulation" means a land use regulation other than an amendment to an acknowledged land use regulation adopted by a local government that already has a comprehensive plan and land regulations acknowledged under ORS 197.251.

(18) "Person" means any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind. The Land Conservation and Development Commission or its designee is considered a person for purposes of appeal under ORS chapters 195, 197 and 197A.

(19) "Special district" means any unit of local government, other than a city, county, Metro or an association of local governments performing land use planning functions under ORS 195.025, authorized and regulated by statute and includes but is not limited to water control districts, domestic water associations and water cooperatives, irrigation districts, port districts, regional air quality control authorities, fire districts, school districts, hospital districts, mass transit districts and sanitary districts.

(20) "Urban growth boundary" means an acknowledged urban growth boundary contained in a city or county comprehensive plan or adopted by Metro under ORS 268.390 (3).

(21) "Urban unincorporated community" means an area designated in a county's acknowledged comprehensive plan as an urban unincorporated community after December 5, 1994.

(22) "Voluntary association of local governments" means a regional planning agency in this state officially designated by the Governor pursuant to the federal Office of Management and Budget Circular A-95 as a regional clearinghouse.

(23) "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration that are sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

SECTION 45. ORS 197.195 is amended to read:

197.195. (1) A limited land use decision shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. Such a decision may include conditions authorized by law. Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision.

(2) A limited land use decision is not subject to the requirements of ORS 197.797.

(3) A limited land use decision is subject to the requirements of paragraphs (a) to (c) of this subsection.

(a) In making a limited land use decision, the local government shall follow the applicable procedures contained within its acknowledged comprehensive plan and land use regulations and other applicable legal requirements.

(b) For limited land use decisions, the local government shall provide written notice to owners of property within 100 feet of the entire contiguous site for which the application is made. The list shall be compiled from the most recent property tax assessment roll. For purposes of review, this requirement shall be deemed met when the local government can provide an affidavit or other certification that such notice was given. Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(c) The notice and procedures used by local government shall:

(A) Provide a 14-day period for submission of written comments prior to the decision;

(B) State that issues which may provide the basis for an appeal to the Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;

(C) List, by commonly used citation, the applicable criteria for the decision;

(D) Set forth the street address or other easily understood geographical reference to the subject property;

(E) State the place, date and time that comments are due;

(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;

(G) Include the name and phone number of a local government contact person;

(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and

(I) Briefly summarize the local decision making process for the limited land use decision being made.

(4) Approval or denial of a limited land use decision shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.

(5) A local government may provide for a hearing before the local government on appeal of a limited land use decision under this section. The hearing may be limited to the record developed pursuant to the initial hearing under subsection (3) of this section or may allow for the introduction

of additional testimony or evidence. A hearing on appeal that allows the introduction of additional testimony or evidence shall comply with the requirements of ORS 197.797. Written notice of the decision rendered on appeal shall be given to all parties who appeared, either orally or in writing, before the hearing. The notice of decision shall include an explanation of the rights of each party to appeal the decision.

(6) A city shall apply the procedures in this section, and only the procedures in this section, to a limited land use decision, even if the city has not incorporated limited land use decisions into land use regulations, as required by ORS 197.646 (3), except that a limited land use decision that is made under land use standards that do not require interpretation or the exercise of policy or legal judgment may be made by city staff using a ministerial process.

SECTION 45a. Section 46 of this 2024 Act is added to and made a part of ORS chapter 197.

SECTION 46. Applicability of limited land use decision to housing development. (1) The Housing Accountability and Production Office may approve a hardship exemption or time extension to ORS 197.195 (6), during which time ORS 197.195 (6) does not apply to decisions by a local government.

(2) The office may grant an exemption or time extension only if the local government demonstrates that a substantial hardship would result from the increased costs or staff capacity needed to implement procedures as required under ORS 197.195 (6).

(3) The office shall review exemption or time extension requests under the deadlines provided in section 39 (3) of this 2024 Act.

SECTION 47. Sunset. Section 46 of this 2024 Act is repealed on January 2, 2032.

SECTION 47a. Operative date. Section 46 of this 2024 Act and the amendments to ORS 197.015 and 197.195 by sections 44 and 45 of this 2024 Act become operative on January 1, 2025.

ONE-TIME SITE ADDITIONS TO URBAN GROWTH BOUNDARIES

SECTION 48. Sections 49 to 59 of this 2024 Act are added to and made a part of ORS chapter 197A.

SECTION 49. Definitions. As used in sections 49 to 59 of this 2024 Act:

(1) "Net residential acre" means an acre of residentially designated buildable land, not including rights of way for streets, roads or utilities or areas not designated for development due to natural resource protections or environmental constraints.

(2) "Site" means a lot or parcel or contiguous lots or parcels, or both, with or without common ownership.

SECTION 50. City addition of sites outside of Metro. (1) Notwithstanding any other provision of ORS chapter 197A, a city outside of Metro may add a site to the city's urban growth boundary under sections 49 to 59 of this 2024 Act, if:

(a) The site is adjacent to the existing urban growth boundary of the city or is separated from the existing urban growth boundary by only a street or road;

(b) The site is:

(A) Designated as an urban reserve under ORS 197A.230 to 197A.250, including a site whose designation is adopted under ORS 197.652 to 197.658;

(B) Designated as nonresource land; or

(C) Subject to an acknowledged exception to a statewide land use planning goal relating to farmland or forestland;

(c) The city has not previously adopted an urban growth boundary amendment or exchange under sections 49 to 59 of this 2024 Act;

(d) The city has demonstrated a need for the addition under section 52 of this 2024 Act;

(e) The city has requested and received an application as required under sections 53 and 54 of this 2024 Act;

(f) The total acreage of the site:

(A) For a city with a population of 25,000 or greater, does not exceed 100 net residential acres; or

(B) For a city with a population of less than 25,000, does not exceed 50 net residential acres; and

(g)(A) The city has adopted a binding conceptual plan for the site that satisfies the requirements of section 55 of this 2024 Act; or

(B) The added site does not exceed 15 net residential acres and satisfies the requirements of section 56 of this 2024 Act.

(2) A county shall approve an amendment to an urban growth boundary made under this section that complies with sections 49 to 59 of this 2024 Act and shall cooperate with a city to facilitate the coordination of functions under ORS 195.020 to facilitate the city's annexation and the development of the site. The county's decision is not a land use decision.

(3) Notwithstanding ORS 197.626, an action by a local government under sections 49 to 59 of this 2024 Act is not a land use decision as defined in ORS 197.015.

SECTION 51. Petition for additions of sites to Metro urban growth boundary. (1) A city within Metro may petition Metro to add a site within the Metro urban growth boundary if the site:

(a) Satisfies the requirements of section 50 (1) of this 2024 Act; and

(b) Is designated as an urban reserve.

(2)(a) Within 120 days of receiving a petition under this section, Metro shall determine whether the site would substantially comply with the applicable provisions of sections 49 to 59 of this 2024 Act.

(b) If Metro determines that a petition does not substantially comply, Metro shall:

(A) Notify the city of deficiencies in the petition, specifying sufficient detail to allow the city to remedy any deficiency in a subsequent resubmittal; and

(B) Allow the city to amend its conceptual plan and resubmit it as a petition to Metro under this section.

(c) If Metro determines that a petition does comply, notwithstanding any other provision of ORS chapter 197A, Metro shall adopt amendments to its urban growth boundary to include the site in the petition, unless the amendment would result in more than 300 total net residential acres added under this subsection.

(3) If the net residential acres included in petitions that Metro determines are in compliance on or before July 1, 2025, total less than 300 net residential acres, Metro shall adopt amendments to its urban growth boundary under subsection (2)(c) of this section:

(a) On or before November 1, 2025, for all petitions deemed compliant on or before July 1, 2025; or

(b) Within 120 days after a petition is deemed compliant after July 1, 2025, in the order in which the petitions are received.

(4) If the net residential acres included in petitions that Metro determines are in compliance on or before July 1, 2025, total 300 or more net residential acres, on or before January 1, 2027, Metro shall adopt amendments to its urban growth boundary under subsection (2)(c) of this section to include the sites in those petitions that Metro determines will:

(a) Best comply with the provisions of section 55 of this 2024 Act; and

(b) Maximize the development of needed housing.

(5) Metro may not conduct a hearing to review or select petitions or adopt amendments to its urban growth boundary under this section.

SECTION 52. City demonstration of need. A city may not add, or petition to add, a site under sections 49 to 59 of this 2024 Act, unless:

(1) The city has demonstrated a need for additional land based on the following factors:

(a)(A) In the previous 20 years there have been no urban growth boundary expansions for residential use adopted by a city or by Metro in a location adjacent to the city; and

(B) The city does not have within the existing urban growth boundary an undeveloped, contiguous tract that is zoned for residential use that is larger than 20 net residential acres; or

(b) Within urban growth boundary expansion areas for residential use adopted by the city over the previous 20 years, or by Metro in locations adjacent to the city, 75 percent of the lands either:

(A) Are developed; or

(B) Have an acknowledged comprehensive plan with land use designations in preparation for annexation and have a public facilities plan and associated financing plan.

(2) The city has demonstrated a need for affordable housing, based on:

(a) Having a greater percentage of severely cost-burdened households than the average for this state based on the Comprehensive Housing Affordability Strategy data from the United States Department of Housing and Urban Development; or

(b) At least 25 percent of the renter households in the city being severely rent burdened as indicated under the most recent housing equity indicator data under ORS 456.602 (2)(g).

SECTION 53. City solicitation of site applications. (1) Before a city may select a site for inclusion within the city's or Metro's urban growth boundary under sections 49 to 59 of this 2024 Act, a city must provide public notice that includes:

(a) The city's intention to select a site for inclusion within the city's urban growth boundary.

(b) Each basis under which the city has determined that it qualifies to include a site under section 52 of this section.

(c) A deadline for submission of applications under this section that is at least 45 days following the date of the notice.

(d) A description of the information, form and format required of an application, including the requirements of section 55 (2) of this 2024 Act.

(2) A copy of the notice of intent under this section must be provided to:

(a) Each county in which the city resides;

(b) Each special district providing urban services within the city's urban growth boundary;

(c) The Department of Land Conservation and Development; and

(d) Metro, if the city is within Metro.

SECTION 54. City review of site applications. (1) After the deadline for submission of applications established under section 55 of this 2024 Act, the city shall:

(a) Review applications filed for compliance with sections 49 to 59 of this 2024 Act.

(b) For each completed application that complies with sections 49 to 59 of this 2024 Act, provide notice to the residents of the proposed site area who were not signatories to the application.

(c) Provide opportunities for public participation in selecting a site, including, at least:

(A) One public comment period;

(B)(i) One meeting of the city's planning commission at which public testimony is considered;

(ii) One meeting of the city's council at which public testimony is considered; or

(iii) One public open house; and

(C) Notice on the city's website or published in a paper of record at least 14 days before:

(i) A meeting under subparagraph (B) of this paragraph; and

(ii) The beginning of a comment period under subparagraph (A) of this paragraph.

(d) Consult with, request necessary information from and provide the opportunity for written comment from:

(A) The owners of each lot or parcel within the site;

(B) If the city does not currently exercise land use jurisdiction over the entire site, the governing body of each county with land use jurisdiction over the site;

(C) Any special district that provides urban services to the site; and

(D) Any public or private utility that provides utilities to the site.

(2) An application filed under this section must:

(a) Be completed for each property owner or group of property owners that are proposing an urban growth boundary amendment under sections 49 to 59 of this 2024 Act;

(b) Be in writing in a form and format as required by the city;

(c) Specify the lots or parcels that are the subject of the application;

(d) Be signed by all owners of lots or parcels included within the application; and

(e) Include each owner's signed consent to annexation of the properties if the site is added to the urban growth boundary.

(3) If the city has received approval from all property owners of such lands, in writing in a form and format specified by the city, the governing body of the city may select an application and the city shall adopt a conceptual plan as described in section 55 of this 2024 Act for all or a portion of the lands contained within the application.

(4) A conceptual plan adopted under subsection (3) of this section must include findings identifying reasons for inclusion of lands within the conceptual plan and reasons why lands, if any, submitted as part of an application that was partially approved were not included within the conceptual plan.

SECTION 55. Conceptual plan for added sites. (1) As used in this section:

(a) "Affordable units" means residential units described in subsection (3)(f)(A) or (4) of this section.

(b) "Market rate units" means residential units other than affordable units.

(2) Before adopting an urban growth boundary amendment under section 50 of this 2024 Act or petitioning Metro under section 51 of this 2024 Act, for a site larger than 15 net residential acres, a city shall adopt a binding conceptual plan as an amendment to its comprehensive plan.

(3) The conceptual plan must:

(a) Establish the total net residential acres within the site and must require for those residential areas:

(A) A diversity of housing types and sizes, including middle housing, accessible housing and other needed housing;

(B) That the development will be on lands zoned for residential or mixed-use residential uses; and

(C) The development will be built at net residential densities not less than:

(i) Seventeen dwelling units per net residential acre if sited within the Metro urban growth boundary;

(ii) Ten units per net residential acre if sited in a city with a population of 30,000 or greater;

(iii) Six units per net residential acre if sited in a city with a population of 2,500 or greater and less than 30,000; or

(iv) Five units per net residential acre if sited in a city with a population less than 2,500;

(b) Designate within the site:

(A) Recreation and open space lands; and

(B) Lands for commercial uses, either separate or as a mixed use, that:

(i) Primarily serve the immediate surrounding housing;

(ii) Provide goods and services at a smaller scale than provided on typical lands zoned for commercial use; and

(iii) Are provided at the minimum amount necessary to support and integrate viable commercial and residential uses;

(c) If the city has a population of 5,000 or greater, include a transportation network for the site that provides diverse transportation options, including walking, bicycling and transit use if public transit services are available, as well as sufficient connectivity to existing and

planned transportation network facilities as shown in the local government's transportation system plan as defined in Land Conservation and Development Commission rules;

(d) Demonstrate that protective measures will be applied to the site consistent with the statewide land use planning goals for:

(A) Open spaces, scenic and historic areas or natural resources;

(B) Air, water and land resources quality;

(C) Areas subject to natural hazards;

(D) The Willamette River Greenway;

(E) Estuarine resources;

(F) Coast shorelands; or

(G) Beaches and dunes;

(e) Include a binding agreement among the city, each owner within the site and any other necessary public or private utility provider, local government or district, as defined in ORS 195.060, or combination of local governments and districts that the site will be served with all necessary urban services as defined in ORS 195.065, or an equivalent assurance; and

(f) Include requirements that ensure that:

(A) At least 30 percent of the residential units are subject to affordability restrictions, including but not limited to affordable housing covenants, as described in ORS 456.270 to 456.295, that require for a period of not less than 60 years that the units be:

(i) Available for rent, with or without government assistance, by households with an income of 80 percent or less of the area median income as defined in ORS 456.270; or

(ii) Available for purchase, with or without government assistance, by households with an income of 130 percent or less of the area median income;

(B) The construction of all affordable units has commenced before the city issues certificates of occupancy to the last 15 percent of market rate units;

(C) All common areas and amenities are equally available to residents of affordable units and of market rate units and properties designated for affordable units are dispersed throughout the site; and

(D) The requirement for affordable housing units is recorded before the building permits are issued for any property within the site, and the requirements contain financial penalties for noncompliance.

(4) A city may require greater affordability requirements for residential units than are required under subsection (3)(f)(A) of this section, provided that the city significantly and proportionally offsets development costs related to:

(a) Permits or fees;

(b) System development charges;

(c) Property taxes; or

(d) Land acquisition and predevelopment costs.

SECTION 56. Alternative for small additions. (1) A city that intends to add 15 net residential acres or less is not required to adopt a conceptual plan under section 55 of this 2024 Act if the city has entered into:

(a) Enforceable and recordable agreements with each landowner of a property within the site to ensure that the site will comply with the affordability requirements described in section 55 (3)(f) of this 2024 Act; and

(b) A binding agreement with each owner within the site and any other necessary public or private utility provider, local government or district, as defined in ORS 195.060, or combination of local governments and districts to ensure that the site will be served with all necessary urban services as defined in ORS 195.065.

(2) This section does not apply to a city within Metro.

SECTION 57. Department approval of site additions. (1) Within 21 days after the adoption of an amendment to an urban growth boundary or the adoption or amendment of a conceptual plan under sections 49 to 59 of this 2024 Act, and the approval by a county if required

under section 50 (2) of this 2024 Act, the conceptual plan or amendment must be submitted to the Department of Land Conservation and Development for review. The submission must be made by:

(a) The city, for an amendment under section 50 or 58 of this 2024 Act; or

(b) Metro, for an amendment under section 51 or 58 of this 2024 Act.

(2) Within 60 days after receiving a submittal under subsection (1) of this section, the department shall:

(a) Review the submittal for compliance with the provisions of sections 49 to 59 of this 2024 Act.

(b)(A) If the submittal substantially complies with the provisions of sections 49 to 59 of this 2024 Act, issue an order approving the submittal; or

(B) If the submittal does not substantially comply with the provisions of sections 49 to 59 of this 2024 Act, issue an order remanding the submittal to the city or to Metro with a specific determination of deficiencies in the submittal and with sufficient detail to identify a specific remedy for any deficiency in a subsequent resubmittal.

(3) If a conceptual plan is remanded to Metro under subsection (2)(b) of this section:

(a) The department shall notify the city; and

(b) The city may amend its conceptual plan and resubmit a petition to Metro under section 51 of this 2024 Act.

(4) Judicial review of the department's order:

(a) Must be as a review of orders other than a contested case under ORS 183.484; and

(b) May be initiated only by the city or an owner of a proposed site.

(5) Following the approval of a submittal under this section, a local government must include the added lands in any future inventory of buildable lands or determination of housing capacity under ORS 197A.270, 197A.280, 197A.335 or 197A.350.

SECTION 58. Alternative urban growth boundary land exchange. (1) In lieu of amending its urban growth boundary under any other process provided by sections 49 to 59 of this 2024 Act, Metro or a city outside of Metro may amend its urban growth boundary to add one or more sites described in section 51 (1)(a) and (b) of this 2024 Act to the urban growth boundary and to remove one or more tracts of land from the urban growth boundary as provided in this section.

(2) The acreage of the added site and removed lands must be roughly equivalent.

(3) The removed lands must have been zoned for residential uses.

(4) The added site must be zoned for residential uses at the same or greater density than the removed lands.

(5)(a) Except as provided in paragraph (b) of this subsection, land may be removed from an urban growth boundary under this section without landowner consent.

(b) A landowner may not appeal the removal of the landowner's land from an urban growth boundary under this section unless the landowner agrees to enter into a recorded agreement with Metro or the city in which the landowner would consent to annexation and development of the land within 20 years if the land remains in the urban growth boundary.

(6) Review of an exchange of lands made under this section may only be made by:

(a) For cities outside of Metro, the county as provided in section 50 (2) of this 2024 Act and by the Department of Land Conservation and Development, subject to judicial review, as provided in section 57 of this 2024 Act; or

(b) For Metro, the Department of Land Conservation and Development, subject to judicial review, as provided in section 57 of this 2024 Act.

(7) Sections 50 (1)(d) to (g), 52, 53, 54, 55 and 56 of this 2024 Act do not apply to a site addition made under this section.

SECTION 59. Reporting on added sites. A city for which an amendment was made to an urban growth boundary and approved under sections 49 to 59 of this 2024 Act shall submit a

report describing the status of development within the included area to the Department of Land Conservation and Development every two years until:

(1) January 2, 2033; or

(2) The city determines that development consistent with the acknowledged conceptual plan is deemed complete.

SECTION 60. Sunset. Sections 49 to 59 of this 2024 Act are repealed on January 2, 2033.

APPROPRIATIONS

SECTION 61. Appropriation and expenditure limitation to Department of Land Conservation and Development. (1) In addition to and not in lieu of any other appropriation, there is appropriated to the Department of Land Conservation and Development, for the biennium ending June 30, 2025, out of the General Fund, the amount of $5,629,017, for deposit into the Housing Accountability and Production Office Fund, established under section 4 of this 2024 Act, to take any action to implement sections 1 to 5, 16, 38 to 41, 46 and 49 to 59 of this 2024 Act and the amendments to ORS 183.471, 197.015, 197.195, 197.335, 215.427 and 227.178 by sections 8, 9, 44, 45, 64 and 65 of this 2024 Act.

(2) In addition to and not in lieu of any other appropriation, there is appropriated to the Department of Land Conservation and Development, for the biennium ending June 30, 2025, out of the General Fund, the amount of $5,000,000, for deposit into the Housing Accountability and Production Office Fund, established under section 4 of this 2024 Act, for the Housing Accountability and Production Office, established under section 1 of this 2024 Act, to provide technical assistance, including grants, under section 1 (2) of this 2024 Act and to provide required studies under section 5 of this 2024 Act.

(3) Notwithstanding any other law limiting expenditures, the amount of $10,629,017 is established for the biennium ending June 30, 2025, as the maximum amount for payment of expenses by the Department of Land Conservation and Development from the Housing Accountability and Production Office Fund established under section 4 of this 2024 Act.

SECTION 62. Appropriation and expenditure limitation to Housing and Community Services Department. (1) In addition to and not in lieu of any other appropriation, there is appropriated to the Housing and Community Services Department, for the biennium ending June 30, 2025, out of the General Fund, the amount of $75,000,000, for deposit into the Housing Project Revolving Loan Fund established under section 35 of this 2024 Act.

(2) Notwithstanding any other provision of law, the General Fund appropriation made to the Housing and Community Services Department by section 1, chapter 390, Oregon Laws 2023, for the biennium ending June 30, 2025, is increased by $878,071 for administrative expenses related to the Housing Project Revolving Loan Fund established under section 35 of this 2024 Act.

(3) Notwithstanding any other law limiting expenditures, the amount of $24,750,000 is established for the biennium ending June 30, 2025, as the maximum amount for payment of expenses by the Housing and Community Services Department from the Housing Project Revolving Loan Fund established under section 35 of this 2024 Act.

SECTION 63. Appropriation and expenditure limitation to Oregon Business Development Department. (1) In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Business Development Department, for the biennium ending June 30, 2025, out of the General Fund, the amount of $3,000,000, for deposit into the Housing Infrastructure Support Fund established under section 14 of this 2024 Act.

(2) Notwithstanding any other law limiting expenditures, the amount of $3,000,000 is established for the biennium ending June 30, 2025, as the maximum amount for payment of expenses by the Oregon Business Development Department from the Housing Infrastructure Support Fund established under section 14 of this 2024 Act.

SECTION 63a. Expenditure limitation to Department of Consumer and Business Services. Notwithstanding any other law limiting expenditures, the limitation on expenditures established by section 1 (6), chapter 354, Oregon Laws 2023, for the biennium ending June 30, 2025, as the maximum limit for payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding lottery funds and federal funds, collected or received by the Department of Consumer and Business Services, for Building Codes Division, is increased by $296,944, to support operations of the Housing Accountability and Production Office established under section 1 of this 2024 Act.

CONFORMING AMENDMENTS

SECTION 64. ORS 197.335, as amended by section 17, chapter 13, Oregon Laws 2023, is amended to read:

197.335. (1) [*An order issued under ORS 197.328 and the copy of the order mailed*] **The Land Conservation and Development Commission shall mail a copy of an enforcement order** to the local government, state agency or special district**. An order** must set forth:

(a) The nature of the noncompliance, including, but not limited to, the contents of the comprehensive plan or land use regulation, if any, of a local government that do not comply with the goals or the contents of a plan, program or regulation affecting land use adopted by a state agency or special district that do not comply with the goals. In the case of a pattern or practice of decision-making, the order must specify the decision-making that constitutes the pattern or practice, including specific provisions the [*Land Conservation and Development*] commission believes are being misapplied.

(b) The specific lands, if any, within a local government for which the existing plan or land use regulation, if any, does not comply with the goals.

(c) The corrective action decided upon by the commission, including the specific requirements, with which the local government, state agency or special district must comply. In the case of a pattern or practice of decision-making, the commission may require revisions to the comprehensive plan, land use regulations or local procedures which the commission believes are necessary to correct the pattern or practice. Notwithstanding the provisions of this section, except as provided in subsection (3)(c) of this section, an enforcement order does not affect:

(A) Land use applications filed with a local government prior to the date of adoption of the enforcement order unless specifically identified by the order;

(B) Land use approvals issued by a local government prior to the date of adoption of the enforcement order; or

(C) The time limit for exercising land use approvals issued by a local government prior to the date of adoption of the enforcement order.

(2) Judicial review of a final order of the commission is governed by the provisions of ORS chapter 183 applicable to contested cases except as otherwise stated in this section. The commission's final order must include a clear statement of findings which set forth the basis for the order. Where a petition to review the order has been filed in the Court of Appeals, the commission shall transmit to the court the entire administrative record of the proceeding under review. Notwithstanding ORS 183.482 (3) relating to a stay of enforcement of an agency order, an appellate court, before it may stay an order of the commission, shall give due consideration to the public interest in the continued enforcement of the commission's order and may consider testimony or affidavits thereon. Upon review, an appellate court may affirm, reverse, modify or remand the order. The court shall reverse, modify or remand the order only if it finds:

(a) The order to be unlawful in substance or procedure, but an error in procedure is not cause for reversal, modification or remand unless the court finds that substantial rights of any party were prejudiced thereby;

(b) The order to be unconstitutional;

(c) The order is invalid because it exceeds the statutory authority of the agency; or

(d) The order is not supported by substantial evidence in the whole record.

(3)(a) If the commission finds that in the interim period during which a local government, state agency or special district would be bringing itself into compliance with the commission's order [*under ORS 197.320 or subsection (2) of this section*] it would be contrary to the public interest in the conservation or sound development of land to allow the continuation of some or all categories of land use decisions or limited land use decisions, it shall, as part of its order, limit, prohibit or require the approval by the local government of applications for subdivisions, partitions, building permits, limited land use decisions or land use decisions until the plan, land use regulation or subsequent land use decisions and limited land use decisions are brought into compliance. The commission may issue an order that requires review of local decisions by a hearings officer or the Department of Land Conservation and Development before the local decision becomes final.

(b) Any requirement under this subsection may be imposed only if the commission finds that the activity, if continued, aggravates the goal, comprehensive plan or land use regulation violation and that the requirement is necessary to correct the violation.

(c) The limitations on enforcement orders under subsection (1)(c)(B) of this section do not affect the commission's authority to limit, prohibit or require application of specified criteria to subsequent land use decisions involving land use approvals issued by a local government prior to the date of adoption of the enforcement order.

(4) As part of its order [*under ORS 197.320 or subsection (2) of this section*], the commission may withhold grant funds from the local government to which the order is directed. As part of an order issued under this section, the commission may notify the officer responsible for disbursing state-shared revenues to withhold that portion of state-shared revenues to which the local government is entitled under ORS 221.770, 323.455, 366.762 and 366.800 and ORS chapter 471 which represents the amount of state planning grant moneys previously provided the local government by the commission. The officer responsible for disbursing state-shared revenues shall withhold state-shared revenues as outlined in this section and shall release funds to the local government or department when notified to so do by the commission or its designee. The commission may retain a portion of the withheld revenues to cover costs of providing services incurred under the order, including use of a hearings officer or staff resources to monitor land use decisions and limited land use decisions or conduct hearings. The remainder of the funds withheld under this provision shall be released to the local government upon completion of requirements of the [*commission*] **enforcement** order.

(5)(a) As part of its order under this section, the commission may notify the officer responsible for disbursing funds from any grant or loan made by a state agency to withhold such funds from a special district to which the order is directed. The officer responsible for disbursing funds shall withhold funds as outlined in this section and shall release funds to the special district or department when notified to do so by the commission.

(b) The commission may retain a portion of the funds withheld to cover costs of providing services incurred under the order, including use of a hearings officer or staff resources to monitor land use decisions and limited land use decisions or conduct hearings. The remainder of the funds withheld under this provision shall be released to the special district upon completion of the requirements of the commission order.

(6) As part of its order under this section, upon finding a city failed to comply with ORS 197.320 (13), the commission may, consistent with the principles in ORS 197A.130 (1), require the city to:

(a) Comply with the housing acceleration agreement under ORS 197A.130 (6).

(b) Take specific actions that are part of the city's housing production strategy under ORS 197A.100.

(c) Impose appropriate models that have been developed by department, including model ordinances, procedures, actions or anti-displacement measures.

(d) Reduce maximum timelines for review of needed housing or specific types of housing or affordability levels, [*including*] through ministerial approval or any other expedited existing approval process.

(e) Take specific actions to waive or amend local ordinances.

(f) Forfeit grant funds under subsection (4) of this section.

(7) The commission may institute actions or proceedings for legal or equitable remedies in the Circuit Court for Marion County or in the circuit court for the county to which the [*commission's*] order is directed or within which all or a portion of the applicable city is located to enforce compliance with the provisions of any order issued under this section or to restrain violations thereof. Such actions or proceedings may be instituted without the necessity of prior agency notice, hearing [*and*] **or** order on an alleged violation.

(8) As used in this section, "enforcement order" or "order" means an order issued under ORS 197.320 or section 3 of this 2024 Act as may be modified on appeal under subsection (2) of this section.

SECTION 65. ORS 183.471 is amended to read:

183.471. (1) When an agency issues a final order in a contested case, the agency shall maintain the final order in a digital format that:

(a) Identifies the final order by the date it was issued;

(b) Is suitable for indexing and searching; and

(c) Preserves the textual attributes of the document, including the manner in which the document is paginated and any boldfaced, italicized or underlined writing in the document.

(2) The Oregon State Bar may request that an agency provide the Oregon State Bar, or its designee, with electronic copies of final orders issued by the agency in contested cases. The request must be in writing. No later than 30 days after receiving the request, the agency, subject to ORS 192.338, 192.345 and 192.355, shall provide the Oregon State Bar, or its designee, with an electronic copy of all final orders identified in the request.

(3) Notwithstanding ORS 192.324, an agency may not charge a fee for the first two requests submitted under this section in a calendar year. For any subsequent request, an agency may impose a fee in accordance with ORS 192.324 to reimburse the agency for the actual costs of complying with the request.

(4) For purposes of this section, a final order entered in a contested case by an administrative law judge under ORS 183.625 (3) is a final order issued by the agency that authorized the administrative law judge to conduct the hearing.

(5) This section does not apply to final orders by default issued under ORS 183.417 (3) or to final orders issued in contested cases by:

(a) The Department of Revenue;

(b) The State Board of Parole and Post-Prison Supervision;

(c) The Department of Corrections;

(d) The Employment Relations Board;

(e) The Public Utility Commission of Oregon;

(f) The Oregon Health Authority;

(g) The Land Conservation and Development Commission**, except for enforcement orders under section 3 of this 2024 Act**;

(h) The Land Use Board of Appeals;

(i) The Division of Child Support of the Department of Justice;

(j) The Department of Transportation, if the final order relates to the suspension, revocation or cancellation of identification cards, vehicle registrations, vehicle titles or driving privileges or to the assessment of taxes or stipulated settlements in the regulation of vehicle related businesses;

(k) The Employment Department or the Employment Appeals Board, if the final order relates to benefits as defined in ORS 657.010;

(L) The Employment Department, if the final order relates to an assessment of unemployment tax for which a hearing was not held;

(m) The Employment Department, if the final order relates to:

(A) Benefits, as defined in ORS 657B.010;

(B) Employer and employee contributions under ORS 657B.150 for which a hearing was not held;

(C) Employer-offered benefit plans approved under ORS 657B.210 or terminated under ORS 657B.220; or

(D) Employer assistance grants under ORS 657B.200; or

(n) The Department of Human Services, if the final order was not related to licensing or certification.

SECTION 66. ORS 455.770 is amended to read:

455.770. (1) In addition to any other authority and power granted to the Director of the Department of Consumer and Business Services under ORS 446.003 to 446.200, 446.225 to 446.285, 446.395 to 446.420, 479.510 to 479.945, 479.995 and 480.510 to 480.670 and this chapter and ORS chapters 447, 460 and 693 **and sections 1 to 5 of this 2024 Act**, with respect to municipalities, building officials and inspectors, if the director has reason to believe that there is a failure to enforce or a violation of any provision of the state building code or ORS 446.003 to 446.200, 446.225 to 446.285, 446.395 to 446.420, 479.510 to 479.945, 479.995 or 480.510 to 480.670 or this chapter or ORS chapter 447, 460 or 693 or any rule adopted under those statutes, the director may:

(a) Examine building code activities of the municipality;

(b) Take sworn testimony; and

(c) With the authorization of the Office of the Attorney General, subpoena persons and records to obtain testimony on official actions that were taken or omitted or to obtain documents otherwise subject to public inspection under ORS 192.311 to 192.478.

(2) The investigative authority authorized in subsection (1) of this section covers the violation or omission by a municipality related to enforcement of codes or administrative rules, certification of inspectors or financial transactions dealing with permit fees and surcharges under any of the following circumstances when:

(a) The duties are clearly established by law, rule or agreement;

(b) The duty involves procedures for which the means and methods are clearly established by law, rule or agreement; or

(c) The duty is described by clear performance standards.

(3) Prior to starting an investigation under subsection (1) of this section, the director shall notify the municipality in writing setting forth the allegation and the rules or statutes pertaining to the allegation and give the municipality 30 days to respond to the allegation. If the municipality does not satisfy the director's concerns, the director may then commence an investigation.

(4) If the Department of Consumer and Business Services or the director directs corrective action[*, the following shall be done*]:

(a) The corrective action [*shall*] **must** be in writing and served on the building official and the chief executive officers of all municipalities affected;

(b) The corrective action [*shall*] **must** identify the facts and law relied upon for the required action; and

(c) A reasonable time [*shall*] **must** be provided to the municipality for compliance.

(5) The director may revoke any authority of the municipality to administer any part of the state building code or ORS 446.003 to 446.200, 446.225 to 446.285, 446.395 to 446.420, 479.510 to 479.945, 479.995 or 480.510 to 480.670 or this chapter or ORS chapter 447, 460 or 693 or any rule adopted under those statutes if the director determines after a hearing conducted under ORS 183.413 to 183.497 that:

(a) All of the requirements of this section and ORS 455.775 and 455.895 were met; and

(b) The municipality did not comply with the corrective action required.

CAPTIONS

SECTION 67. The unit and section captions used in this 2024 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2024 Act.

EFFECTIVE DATE

SECTION 68. This 2024 Act takes effect on the 91st day after the date on which the 2024 regular session of the Eighty-second Legislative Assembly adjourns sine die.

Passed by Senate February 29, 2024

.....
Obadiah Rutledge, Secretary of Senate

.....
Rob Wagner, President of Senate

Passed by House March 4, 2024

.....
Dan Rayfield, Speaker of House

Received by Governor:

.....M.,....., 2024

Approved:

.....M.,....., 2024

.....
Tina Kotek, Governor

Filed in Office of Secretary of State:

.....M.,....., 2024

.....
LaVonne Griffin-Valade, Secretary of State

Enrolled
House Bill 4026

Introduced and printed pursuant to House Rule 12.00. Presession filed (at the request of House Interim Committee on Rules for Representative Julie Fahey)

CHAPTER .....

AN ACT

Relating to elections; creating new provisions; amending ORS 197.626; and declaring an emergency.

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

SECTION 1. ORS 197.626 is amended to read:

197.626. (1) A local government shall submit for review and the Land Conservation and Development Commission shall review the following final land use decisions in the manner provided for review of a work task under ORS 197.633 and subject to subsection (3) of this section:

(a) An amendment of an urban growth boundary by a metropolitan service district that adds more than 100 acres to the area within its urban growth boundary;

(b) An amendment of an urban growth boundary by a city with a population of 2,500 or more within its urban growth boundary that adds more than 50 acres to the area within the urban growth boundary;

(c) A designation of an area as an urban reserve under ORS 197A.230 to 197A.250 by a metropolitan service district or by a city with a population of 2,500 or more within its urban growth boundary;

(d) An amendment of the boundary of an urban reserve by a metropolitan service district;

(e) An amendment of the boundary of an urban reserve to add more than 50 acres to the urban reserve by a city with a population of 2,500 or more within its urban growth boundary; and

(f) A designation or an amendment to the designation of a rural reserve under ORS 197A.230 to 197A.250 by a county, in coordination with a metropolitan service district, and the amendment of the designation.

(2) When the commission reviews a final land use decision of a metropolitan service district under subsection (1)(a), (c), (d) or (f) of this section, the commission shall issue a final order in writing within 180 days after the commission votes whether to approve the decision.

(3) When reviewing an amendment of an urban growth boundary under subsection (1)(b) of this section and ORS chapter 197A:

(a) At the request of and in coordination with the city, the Director of the Department of Land Conservation and Development shall parse work tasks in a manner that allows the Department of Land Conservation and Development to issue final orders approving or remanding sequential phases required for completion of the work tasks, including a final order approving:

(A) An inventory of buildable lands and an opportunities analysis under a goal relating to economic activities or an inventory of buildable lands and a needs analysis under a goal relating to housing needs.

(B) An estimation of the land need under a goal relating to economic activities.

(C) Any response to the department regarding approval of the estimation of land need, including changes proposed to comprehensive plan designations or land use zones.

(b)(A) The director shall take action on each sequential phase of a work task described in paragraph (a) of this subsection not later than 90 days after the local government submits the phase for review, unless the local government waives the 90-day deadline or the commission grants the director an extension.

(B) If the director does not take action within the time period required by subparagraph (A) of this paragraph, the sequential phase of the work task is deemed approved.

(c) The director may approve or remand a sequential phase of a work task or refer the phase of the work task to the commission for a decision. A decision by the director to approve or remand a phase of the work task may be appealed to the commission.

(d) The director shall provide a letter to the local government certifying the approval of each sequential phase of a work task, unless an interested party has filed a timely objection to the phase of the work task consistent with administrative rules for conducting periodic review.

(4) A final order of the commission under this section may be appealed to the Court of Appeals in the manner described in ORS 197.650 and 197.651.

(5) A local government determination described in subsection (1) of this section is not subject to being referred to voters by referendum petition and is reviewable exclusively under this section.

SECTION 2. The amendments to ORS 197.626 by section 1 of this 2024 Act apply to all local government determinations described in ORS 197.626 (1) made on or after January 1, 2023.

SECTION 3. This 2024 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2024 Act takes effect on its passage.

Passed by House February 29, 2024

.....
Timothy G. Sekerak, Chief Clerk of House

.....
Dan Rayfield, Speaker of House

Passed by Senate March 7, 2024

.....
Rob Wagner, President of Senate

Received by Governor:

.....M.,....., 2024

Approved:

.....M.,....., 2024

.....
Tina Kotek, Governor

Filed in Office of Secretary of State:

.....M.,....., 2024

.....
LaVonne Griffin-Valade, Secretary of State

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

CITY OF CORNELIUS,
City of Forest Grove, City of Grants Pass,
City of Happy Valley, City of Hillsboro, City of Keizer,
City of Medford, City of Oregon City, City of Sherwood,
City of Springfield, City of Troutdale, City of Tualatin,
City of Wood Village, Marion County,
Oregon Home Builders Association,
Oregon Business & Industry Association,
Oregon Realtors, and Oregon Trucking Associations, Inc.,
Petitioners,

v.

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT and
the Land Conservation and Development Commission,
Respondents.

A180037 (Control), A180153

Argued and submitted July 12, 2023.

David O. Bechtold argued the cause for petitioners City of Cornelius, City of Forest Grove, City of Grants Pass, City of Happy Valley, City of Hillsboro, City of Keizer, City of Medford, City of Oregon City, City of Sherwood, City of Springfield, City of Troutdale, City of Tualatin, City of Wood Village, and Marion County. Also on the briefs were Greg A. Hibbard and Northwest Resource Law PLLC.

J. Aaron Landau argued the cause for petitioners Oregon Home Builders Association, Oregon Business & Industry Association, Oregon Realtors, and Oregon Trucking Associations, Inc. Also on the briefs were Julian Marrs and Harrang Long P.C.

Robert M. Wilsey, Assistant Attorney General, argued the cause for respondents. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Stephen L. Madkour and Thomas A. Carr filed the brief *amici curiae* for Clackamas County and Washington County.

Steven G. Liday filed the brief *amicus curiae* for the League of Oregon Cities. Also on the brief were William L. Rasmussen and Miller Nash LLP.

Before Ortega, Presiding Judge, and Powers, Judge, and Hellman, Judge.

ORTEGA, P. J.

OAR 660-012-0830(1)(c) and OAR 660-012-0920(7)(c) held invalid; otherwise, CFEC rules held valid.

ORTEGA, P. J.

This consolidated proceeding involves rule challenges under ORS 183.400 asserted by two sets of petitioners—13 Oregon cities and Marion County (city petitioners), and Oregon Home Builders Association, Oregon Business & Industry Association, Oregon Realtors, and Oregon Trucking Associations, Inc. (industry petitioners) (collectively, petitioners).[1] Petitioners challenge the validity of an entire package of 89 administrative rules, some of which are new rules and some of which are amendments to existing rules, adopted by the Land Conservation and Development Commission (LCDC). That package of 89 rules is known as the Climate-Friendly and Equitable Communities rules (CFEC rules). Petitioners raise various challenges, arguing both that LCDC failed to comply with applicable rulemaking procedures and that LCDC exceeded its statutory authority in enacting the CFEC rules. Petitioners argue that those deficiencies require that we invalidate the entire package of CFEC rules. We reject those omnibus challenges as explained below. Alternatively, city petitioners bring individual challenges to two of the CFEC rules—OAR 660-012-0830(1)(c) and OAR 660-012-0920(7)(c). We agree with city petitioners as to those two rules. LCDC did not provide sufficient notice of the subject matter of OAR 660-012-0830(1)(c) and LCDC exceeded its statutory authority in enacting OAR 660-012-0920(7)(c). As a result, we hold those two rules invalid, but otherwise hold that the remaining CFEC rules are valid.

The CFEC rules represent the culmination of a process that started in 2020 after then-Governor Brown issued Executive Order 20-04, directing state agencies to take action to reduce greenhouse gas emissions. After working with the Department of Land Conservation and Development (DLCD) to define the scope of rulemaking, LCDC initiated the rulemaking process in September 2020

[1] Clackamas County and Washington County filed an *amici* brief in support of city petitioners' challenge to LCDC's statutory authority to enact the rules. We do not address that brief in our opinion because it raises issues that we cannot consider in a rule challenge under ORS 183.400. The League of Oregon Cities filed an *amicus* brief also in support of city petitioners' challenge to LCDC's statutory authority. We discuss that briefing in our analysis of that issue.

with a rulemaking charge to DLCD to draft rules. Also, a Rulemaking Advisory Committee met several times to discuss draft rules and policy approaches. On February 24, 2022, LCDC filed its "Notice of Proposed Rulemaking" (the notice) with the Secretary of State. On May 19, 2022, LCDC adopted temporary rules. Finally, on July 21, 2022, LCDC adopted the permanent CFEC rules, which are at issue in this proceeding and which took the place of the temporary rules.

The CFEC rules amend three existing divisions in the LCDC rules—housing, OAR 660-008, transportation planning, OAR 660-012, and metropolitan greenhouse gas reduction targets, OAR 660-044. In broad terms, the CFEC rules require communities to update their local land use and transportation system plans to allow for greater residential density, reduce the amount of land that must be reserved for parking, achieve a reduction in residents' vehicle travel miles, and provide infrastructure for electric vehicles, among other things. In addition, cities, and some counties, within metropolitan areas in the state are required to designate "climate-friendly areas," and to adopt plans and regulations designed to meet the requirements for those areas, including identifying gaps in existing pedestrian and bicycle networks and proposing projects to fill those gaps. The CFEC rules also include provisions that are intended to improve equity for traditionally underserved communities relative to transportation and land use planning.

Before setting out petitioners' challenges, we first describe our scope of review under ORS 183.400. We may declare a rule invalid only if we determine that the rule "[v]iolates constitutional provisions," "[e]xceeds the statutory authority of the agency," or "[w]as adopted without compliance with applicable rulemaking procedures." ORS 183.400(4). Petitioners contend both that LCDC exceeded its statutory authority and that it did not comply with applicable rulemaking procedures. In addressing those challenges, we are limited to examining "[t]he rule under review," "[t]he statutory provisions authorizing the rule," and "[c]opies of all documents necessary to demonstrate compliance with applicable rulemaking procedures." ORS 183.400(3). We

begin by addressing the procedural challenges. *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984) (stating that procedural challenges should be addressed before challenges to the agency's scope of authority for the rule).

I. PROCEDURAL CHALLENGES

A. *Procedural Challenges under ORS 183.335*

We first address petitioners' challenges under ORS 183.335, which includes city petitioners' assignments of error 3 and 4 and industry petitioners' assignments of error 1 and 2. ORS 183.335 is part of the Oregon Administrative Procedures Act (APA) and sets out the notice and comment procedures for the adoption, amendment, or repeal of administrative rules and, more specifically to petitioners' challenges, ORS 183.335(2)(b) sets out in eight subparagraphs what the agency "shall include with the notice of intended action." Petitioners raise various challenges, arguing that LCDC's rulemaking notice was inadequate and requires that we invalidate the CFEC rules. We review whether LCDC substantially complied with the requirements of ORS 183.335. ORS 183.335(11)(a) ("[A] rule is not valid unless adopted in substantial compliance with the provisions of this section[.]").

1. *Industry petitioners' first assignment of error*

In their first assignment of error, industry petitioners argue that LCDC was required to issue a new notice under ORS 183.335 before repealing the temporary rules and adopting the permanent CFEC rules. They assert two distinct arguments in support of their position.

Industry petitioners first assert that the notice requirement in ORS 183.335 applies to the repeal or adoption of *any* rule—including a temporary one—and that LCDC's notice applied to the temporary rules only, so that LCDC failed to issue a notice for the permanent CFEC rules. We reject that argument because it does not comport with the record or attempt to grapple with all the applicable sections of ORS 183.335.

For their argument, industry petitioners solely point to ORS 183.335(1), which provides that, "[p]rior to the adoption, amendment or repeal of any rule, the agency shall give notice of its intended action[.]" However, LCDC adopted the temporary rules pursuant to ORS 183.335(5), and not pursuant to the notice that LCDC issued under ORS 183.335(1), which is the notice LCDC relied on for the permanent CFEC rules.[2] Under ORS 183.335(6)(a), a temporary rule "may be effective for a period of not longer than 180 days" and "does not preclude the subsequent adoption of an identical rule under subsections (1) to (4) of this section." Industry petitioners do not address the effect of ORS 183.335(5) or (6) on their argument and we will not make their argument for them. *See, e.g.*, *Beall Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700-01 n 2, 64 P3d 1193, *adh'd to as clarified on recons*, 187 Or App 472, 68 P3d 259 (2003) ("[I]t is not this court's function to speculate as to what a party's argument might be. Nor is it our proper function to make or develop a party's argument when that party has not endeavored to do so itself."). Thus, we reject industry petitioners' first argument supporting its contention that LCDC could not adopt the permanent CFEC rules without issuing a new notice.

In the alternative, industry petitioners argue that LCDC was still required to issue a new notice for the permanent

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[2] ORS 183.335(5)(a) provides:

"(5) Notwithstanding subsections (1) to (4) of this section, an agency may adopt, amend or suspend a rule without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, if the agency prepares:

"(a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice;

"(b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

"(c) A statement of the need for the rule and a statement of how the rule is intended to meet the need;

"(d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection; and

"(e) For an agency specified in ORS 183.530, a housing cost impact statement as defined in ORS 183.534."

rules because of the substantive differences between the permanent CFEC rules and the proposed draft rules included in the notice. In making that argument, industry petitioners point to four rules (out of the 89 CFEC rules) as examples of rules they argue were substantively changed from the noticed version—OAR 660-012-0135, OAR 660-012-0310, OAR 660-012-0315, and OAR 660-012-0330—but also acknowledge that changes to other CFEC rules were minor. Nonetheless, industry petitioners assert that the CFEC rules as a whole are invalid because of the substantial departures.

Responding to industry petitioners' alternative argument, LCDC asserts that the notice was sufficient because the permanent CFEC rules as a whole covered the same subjects as the draft rules in the notice, as provided in *Bassett v. Fish and Wildlife Comm.*, 27 Or App 639, 556 P2d 1382 (1976). LCDC further argues that, because industry petitioners have not demonstrated that *Bassett* is "plainly wrong," we should adhere to it. LCDC further observes that the rules singled out as examples by industry petitioners, although differing in detail, still address the same subjects.

We are not persuaded that the CFEC rules are wholly invalid because LCDC did not issue a new notice. "Whether a notice of proposed rulemaking substantially complies with the requirements of ORS 183.335 must be measured against the purpose of the notice." *Oregon Funeral Directors v. Mortuary and Cemetery Bd.*, 132 Or App 318, 323, 888 P2d 104 (1995). The purpose of the notice is to provide "the subject matter and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected[.]" ORS 183.335(2)(a)(B); *see also Oregon Funeral Directors*, 132 Or App at 323 (quoting the same purpose from the then-current version of ORS 183.335(2)(a)); *Assn. of Oregon Loggers v. Dept. of Ins. and Finance*, 130 Or App 594, 596, 883 P2d 859 (1994) ("The purpose of the notice of rulemaking is to alert interested persons that the agency's proposed action may have some effect on them."). Also, as relevant to industry petitioners' argument, we have explained:

> "The purpose of the notice requirement for rulemaking is twofold. It serves to inform the interested public about intended agency action. It triggers the opportunity for an agency to receive the benefit of the thinking of the public on the matters being considered. The notice requirement contemplates that an agency may often desire to alter a proposed rule after receiving public comment. To require, as petitioner would apparently have us do, that any modification of a proposed rule after hearing necessitates still another notice and another hearing would produce an unwieldy procedure and also might well result in either hearing after hearing or an agency reluctant to change a single word of its original proposals no matter how persuasive the arguments for change offered at the hearing."

Bassett, 27 Or App at 642. As such, in *Bassett*, we concluded that, although the adopted rules differed from the proposed rules, the notice was still adequate because the adopted rules did not cover a subject not specified in the notice. *Id.*; *cf. Watson v. OSP*, 90 Or App 85, 88, 750 P2d 1188 (1988) (agency did not comply with ORS 183.335(2) as provided in *Bassett* because the notice "was not broad enough to encompass the subject matter of the disputed rules"). We adhere to *Bassett* as industry petitioners have not demonstrated that the decision is "plainly wrong," *State v. Civil*, 283 Or App 395, 406, 388 P3d 1185 (2017), and conclude that LCDC substantially complied with ORS 183.335.

LCDC's notice provided in the opening statement of need:

> "On March 10, 2020, Governor Kate Brown issued Executive Order 20-04, directing agencies to reduce climate pollution. The Land Conservation and Development Commission is working on updating Oregon's Transportation Planning Rules and related administrative rules in response to this order. The Department of Land Conservation and Development (DLCD) initiated the Climate-Friendly and Equitable Communities (CFEC) rulemaking in September 2020.
>
> "The rulemaking will significantly impact Oregon's rules regarding transportation and housing planning, particularly in the eight areas with populations over 50,000 people (Albany, Bend, Corvallis, Eugene/Springfield, Grants Pass, Medford/Ashland, Portland metro, Salem/Keizer). Some of

> the rules will also apply to and/or impact communities outside of these areas."

In other sections of the notice, LCDC detailed that the rule changes were extensive, would affect most Oregon residents, would require new equity analyses, reflected an increased focus on climate pollution reduction, would require metropolitan areas to establish "climate-friendly areas," and identified that the transportation rules would be "significantly altered and expanded" and described the major new requirements for transportation system plans. The notice further provided a summary of the subject matter of each proposed rule and rule amendment, which was placed before the text of the proposed rule. Industry petitioners have not identified how the permanent CFEC rules on the whole fall outside of the subject matter covered in the notice. As to the four out of 89 CFEC rules that industry petitioners single out as examples, they still do not identify how those rules are not covered by the subject matter of the notice.

Accordingly, we conclude that LCDC substantially complied with ORS 183.335 when it relied on its notice for the permanent CFEC rules, although those rules differed from the draft rules in the notice.

2. *City petitioners' fourth assignment of error*

In their fourth assignment of error, city petitioners also argue that a substantial departure in the CFEC rules from the draft rules required LCDC to issue a new notice. However, instead of challenging the CFEC rules as a whole on that basis, city petitioners focus on one rule—OAR 660-012-0830(1)(c)—which provides:

> "(1) Cities and counties shall review and may authorize certain proposed facilities to be included as a planned project or unconstrained project in any part of the local comprehensive plan, including the transportation system plan.
>
> "*****
>
> "(c) To retain a proposed facility that is included in an existing acknowledged plan adopted as provided in OAR 660-012-0015, a city or county shall review that facility under this rule at the time of a major update to its transportation system plan."

Subparagraph (1)(c) was not part of the draft rules in the notice and was first included in the CFEC rules in the final packet presented to LCDC for adoption. That part of the rule expanded the analysis required by the rule to apply not just to newly proposed projects but also to existing planned projects. City petitioners argue that the expansion of the analysis by that addition to the rule was a change in subject matter that necessitated that LCDC provide a new notice for the rule and allow a new public comment period.

LCDC responds that including OAR 660-012-0830(1)(c) did not change the rule such that it covers a subject not specified in the notice, because it still covers the same subject of "roadway projects."

We first reject LCDC's characterization of the subject matter of the rule that was in the notice, because it was not left so broad or vague. The specific subject matter identified for OAR 660-012-0830 in the notice was that "[t]his rule provides for how local governments must review and authorize certain street and highway projects before adding them to a local transportation system plan." That subject matter summary does not suggest that the rule would apply to existing planned projects; it specified that the rule applies to projects "*before adding* them to a local transportation system plan." (Emphasis added.) That identified subject matter would not have alerted the public that the rule could require that the enhanced review would apply to projects that had already been included in an acknowledged plan. In addition, in the fiscal impact statement, the notice provided:

> "OAR 660-012-0830 outlines a significant change in the review of transportation facilities that could increase climate pollution. The process is intended to encourage local governments to identify, review, assess, and potentially implement alternatives to these types of facilities."

Nothing in that specific mention of the rule, or elsewhere in the sections of the notice that applied to all the CFEC rules, suggested that LCDC would be considering extending the new analysis required by OAR 660-012-0830 to projects already included in acknowledged plans. Unlike in *Bassett*, the adopted rule does cover a subject matter not specified in the notice and LCDC did not substantially comply with

the notice requirements of ORS 183.335 with respect to that rule.

As a result, we hold that OAR 660-012-0830(1)(c) is invalid.

3. *Industry petitioners' second assignment of error and city petitioners' third assignment of error*

Both industry petitioners and city petitioners also challenge the adequacy of particular sections of LCDC's notice, which are required by ORS 183.335. We address each of those sections in turn.

a. Citations of legal authority

Under ORS 183.335(2)(b)(A) and (B), the notice must include "[a] citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule" and "[a] citation of the statute or other law the rule is intended to implement." Here, in the notice under each proposed rule or rule amendment, LCDC listed ORS 197.040 as the statutory authority. Some of the rules that were amended also listed various other statutes within ORS chapter 197, and other chapters, as the statutes being implemented. However, the proposed rules that were new rules cited only to ORS 197.040 as the statute being implemented.

Petitioners argue that those citations in the notice are inadequate and render the CFEC rules invalid. City petitioners assert that LCDC made no effort to comply with the citation requirements and that ORS 197.040 is an insufficient statutory basis because LCDC made no effort to identity its substantive source of authority for the CFEC rules. Industry petitioners also argue that the citations are inadequate, arguing that LCDC's citations do not "serve the purpose of informing the public of what statutory policy the agency intends to carry out or 'implement' though its proposed rule." Industry petitioners argue that, if citing only to general rulemaking authority were sufficient, requiring citations in the notice would be rendered meaningless. Rather, they assert, because the citation requirement uses the word "authority" it must mean that the agency must

identify the substantive legislative policy that supports the agency's authority to enact the rule.

LCDC responds that a citation to ORS 197.040 was sufficient because that statute empowers LCDC to "adopt rules that it considers necessary to carry out ORS chapters 195, 196, 197 and 197A." ORS 197.040(1)(b). That citation, LCDC argues, provided notice that it was relying on and implementing the broad authority that the legislature delegated to it to carry out those ORS chapters. LCDC asserts that nothing in ORS 183.335(2)(b)(A) and (B) require an agency to identify the exact legislative policy that supports the agency's statutory authority to enact the rule; rather, it is a requirement that an agency identify the authority that the agency is relying on.

As previously stated, "[w]hether a notice of proposed rulemaking substantially complies with the requirements of ORS 183.335 must be measured against the purpose of the notice." *Oregon Funeral Directors*, 132 Or App at 323. We have not previously addressed the purpose of the citation requirement and, thus, we must discern the legislature's intent in including that requirement. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (explaining that the "paramount goal" of statutory interpretation is "discerning the legislature's intent"). In doing so here, we begin and end with the text and context of the provision. *Id.* at 171, 173 (holding that text and context "must be given primary weight in the analysis" and "[w]hen the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different").

From the text of ORS 183.335(2)(b)(A) and (B), we discern that the purpose of providing citations is to inform the interested public of the authority that the *agency* is relying on, that the *agency* believes bears upon the rule, and that the *agency* intends to implement. *See* ORS 183.335(2)(b)(A) (requiring the agency to include in the notice "[a] citation of the statutory or other legal authority *relied upon* and *bearing upon* the promulgation of the rule" (emphases added)); ORS 183.335(2)(b)(B) (requiring the agency to include in

the notice "[a] citation of the statute or other law the rule *is intended to implement*" (emphasis added)).

The context also supports our reading. The overall legislative purpose for the information required by ORS 183.335(2)(b) is to provide sufficient detail so that persons can discern if their interest is affected by the proposed rulemaking and have sufficient information needed to respond to the agency. *See Freemont Lumber Co. v. Energy Facility Siting Council*, 325 Or 256, 261-62, 936 P2d 968 (1997) (explaining that the 1977 amendments were "adopted in response to concerns that, because the then-abbreviated APA notice provisions provided insufficient information about the *agency's reasons* for proposing the rule, interested persons often were unable to submit data and arguments that were responsive to the agency's concerns in proposing the rule or rule change" (emphasis added)).[3] As the Supreme Court explained with respect to the statement of need in ORS 183.335(2)(b)(C), that legislative purpose is not disserved "simply because that statement is premised on an erroneous perception of law or fact. Indeed, a statement's usefulness may lie precisely in the fact that it brings the agency's mistaken legal or factual premises to light[.]" *Id.* at 262. While we agree with petitioners that ORS 183.335(2)(b)(B)'s reference to the law the agency intends to implement is a reference to the *substantive* law an agency intends to implement, and not just a reference to its general rulemaking authority,

[3] The citation requirement found in ORS 183.335(2)(b)(A) was originally enacted in 1977 and was required to be a part of the agency's statement of need. Or Laws 1977, ch 161, § 1 (requiring the statement to include "[t]he legal authority of any jurisdiction relied upon and bearing upon the promulgation of the rule"). That requirement was moved to its own paragraph in 1979, with the wording amended to that which appears in the statute today. Or Laws 1979, ch 593, § 11. *See also* David B. Frohnmayer, *The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform*, 58 Or L Rev 411, 463-67 (1980) (describing history).

The additional citation requirement found in ORS 183.335(2)(b)(B) was added by the legislature in 1993 and was enacted without amendment. Or Laws 1993, ch 729, § 3; House Bill (HB) 2262 (1993), introduced. As with the citation provision in ORS 183.335(2)(b)(A), the legislative history supports our conclusion that the purpose of requiring an agency to provide a citation of law it intended to implement was to provide information on what substantive law the agency *thinks* it is implementing. *See* Testimony, House Committee on Rules and Reorganization, HB 2262, Jan 27, 1993, Ex A (comments of William Funk, member of Secretary of State Administrative Rules Advisory Committee); Testimony, Senate Judiciary Committee, HB 2262 July 23, 1993, Ex F (comments of William Funk).

its purpose is nonetheless to give the public information on the agency's thinking as a procedural matter and does not require the agency to be correct about that authority in the notice.

Here, LCDC cited to ORS 197.040, which confers broad rulemaking and policy-setting authority on LCDC. ORS 197.040(1)(b) (authorizing LCDC to "adopt rules that it considers necessary to carry out ORS chapters 195, 196, 197 and 197A"); ORS 197.040(1)(c)(A) (authorizing LCDC to "[a]dopt by rule *** or by goal *** any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196, 197 and 197A"). As a matter of substance directly bearing on the CFEC rules, ORS 197.040(2)(c) also requires LCDC to "[p]repare statewide planning guidelines."

In addition, LCDC provided that it was intending to carry out the policy stated in Executive Order 20-04, a copy of which was made available with the notice. The notice further explained, particularly in the fiscal impact statement, what specific policies the CFEC rules were intended to implement in furtherance of the broad goals stated in that order. The notice also provided in the text of proposed OAR 660-012-000 that the rules in that division implemented Land Use Planning Goal 12, among other goals, and in the text of proposed OAR 660-044-000 that the rules in that division implemented Land Use Planning Goal 12 (Transportation) and the stated goal in ORS 468A.205 to reduce greenhouse gas emissions. Nothing in ORS 183.335 requires all citations to be appended to each individual draft rule; rather, ORS 183.335 requires that the citations appear in the notice.

Based on those citations, we conclude that LCDC provided notice of the citations to statutes or other law that it was relying on, that it believed bore on the CFEC rules, and that it was intending to implement. From a view of assessing the adequacy of the procedure used by LCDC, we conclude that those citations substantially complied with the requirements in ORS 183.335(2)(b)(A) and (B).

b. Statement of need

Under ORS 183.335(2)(b)(C), the notice must include "[a] statement of the need for the rule and a statement of

how the rule is intended to meet the need." The Supreme Court has explained that "[t]he 'need' contemplated by ORS 183.335(2)(b)(C) is a need that the rule-proposing agency *perceives*." *Freemont Lumber Co.*, 325 Or at 262 (emphasis in original).

Here, LCDC provided the following "statement of need" in the notice:

> "On March 10, 2020, Governor Kate Brown issued Executive Order 20-04, directing agencies to reduce climate pollution. The Land Conservation and Development Commission is working on updating Oregon's Transportation Planning Rules and related administrative rules in response to this order. The Department of Land Conservation and Development (DLCD) initiated the Climate-Friendly and Equitable Communities (CFEC) rulemaking in September 2020.
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> "The rulemaking will significantly impact Oregon's rules regarding transportation and housing planning, particularly in the eight areas with populations over 50,000 people (Albany, Bend, Corvallis, Eugene/Springfield, Grants Pass, Medford/Ashland, Portland metro, Salem/Keizer). Some of the rules will also apply to and/or impact communities outside of these areas."

Petitioners argue that LCDC's statement of need is inadequate because it does not contain the required detail of why any of the extensive and technical rules were needed and omits altogether the second requirement—how the rule is intended to meet the need.

We decline to read the notice so narrowly. Our task is to determine if the notice, as a whole, substantially complied with ORS 183.335(2)(b)(C). *See Fremont Lumber Co.*, 325 Or at 262 (considering the entirety of the notice—including the provision of the draft rule—in determining whether the agency's position was sufficiently clear to serve the purposes of ORS 183.335(2)(b)(C)). Although the part of the notice titled "statement of need" only identifies why the rulemaking was undertaken, the rest of the notice more than adequately explains the perceived agency need for the proposed rules and how the proposed rules are intended to meet that need. Petitioners do not address any other part

of the notice or attempt to explain why we cannot consider the rest of the notice in determining whether LCDC substantially complied with the procedural requirements of ORS 183.335(2)(b)(C). Accordingly, we reject petitioners' argument that LCDC's statement of need is procedurally inadequate.

c. Fiscal impact statement

Under ORS 183.335(2)(b)(E), the notice must include a fiscal impact statement, which requires:

> "A statement of fiscal impact identifying state agencies, units of local government and the public that may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include a cost of compliance effect on small businesses affected. For an agency specified in ORS 183.530 [which includes LCDC], the statement of fiscal impact shall also include a housing cost impact statement as described in ORS 183.534[.]"[4]

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[4] "Economic effect" is defined by statute to mean "the economic impact on affected businesses by and the cost of compliance, if any, with a rule for businesses, including but not limited to the costs of equipment, supplies, labor and administration." ORS 183.310(3). "Small business" is defined to mean "a corporation, partnership, sole proprietorship or other legal entity formed for the purpose of making a profit, which is independently owned and operated from all other businesses and which has 50 or fewer employees." ORS 183.310(10)(a).

In addition, ORS 183.336 provides:

"(1) The statement of cost of compliance effect on small businesses required by ORS 183.335(2)(b)(E) must include:

"(a) An estimate of the number of small businesses subject to the proposed rule and identification of the types of businesses and industries with small businesses subject to the proposed rule;

"(b) A brief description of the projected reporting, recordkeeping and other administrative activities required for compliance with the proposed rule, including costs of professional services;

"(c) An identification of equipment, supplies, labor and increased administration required for compliance with the proposed rule; and

"(d) A description of the manner in which the agency proposing the rule involved small businesses in the development of the rule.

"(2) An agency shall utilize available information in complying with the requirements of this section."

We first address city petitioners' arguments, which are solely focused on the fiscal impact statement relative to local governments. They argue that LCDC's statement "is nothing more than a performative gesture that contains no meaningful information" and operates to "lull the reader into thinking that the [CFEC] Rules will not have major financial impacts." City petitioners assert that the statement does not provide an indication of the scale of costs to local governments to comply with the rule, nor does it explain why LCDC could not calculate likely costs.

The Supreme Court has stated that the purpose of the fiscal impact statement is to "protect[] against arbitrary and inadequately informed governmental conduct." *Dika v. Dept. of Ins. and Finance*, 312 Or 106, 109, 817 P2d 287 (1991). We also have explained the analysis we will undertake in reviewing a fiscal impact statement:

> "The analysis of ORS 183.335(2)(b)(E) in *Dika* and subsequent cases reduces to two requirements: First, the statement must identify which entities are to be affected by enactment of the rules. Second, it must give the affected entities enough information to evaluate their position so that they might participate meaningfully in the rule adoption process or, if that information is not available, it must so state."

Independent Contractors Research Institute v. DAS, 207 Or App 78, 87, 139 P3d 995, *rev den*, 341 Or 579 (2006); *see also Oregon Cable Telecommunications v. Dept. of Rev.*, 237 Or App 628, 637-38, 240 P3d 1122 (2010) ("[T]he agency must either provide a quantifiable estimate of that impact or articulate reasons why no such estimate is possible, 'such as those that might be related to the inadequacy of "available information[.]"'" (quoting *Dika*, 312 Or at 110)). With that understanding, we reject city petitioners' challenge, which is solely directed at LCDC's failure to put any type of numerical value on the cost of local government compliance with the proposed rules, because LCDC's notice met the requirements as explained in the case law.

In the fiscal impact statement,[5] LCDC described the source of likely increases in costs for local governments with

[5] LCDC's notice included a lengthy fiscal impact statement. Consequently, we only discuss that statement in a summary fashion in this opinion. The statement

respect to complying with each group of rules—housing, transportation, and greenhouse gas reduction targets. Then, with respect to each, LCDC explained that it could not quantify the costs because they would greatly vary between individual jurisdictions based on a number of factors, including "previous planning efforts," "historic development patterns," "demographic patterns," "characteristics of projected housing demand," and "transportation system characteristics and needs." LCDC also explained that costs would vary based on how a local government chose to comply with the rules, whether it conducted the analysis internally or hired external consultants, how much public outreach is conducted, and local code amendment processes.

Although no scope of cost was estimated by LCDC, its fiscal impact statement did identify what would cause costs to the local governments and many of the factors that would influence the scope of those costs. Rather than "lull" a reader into thinking there were no major costs, as asserted by city petitioners, the statement did the opposite and alerted the reader that there could be significant costs of compliance for local governments. In addition, the factors identified by LCDC as influencing the scope of costs are factors within the knowledge of the individual jurisdictions; that is, they were not being hidden by LCDC in the notice. "If the statement, when considered with the other information, is sufficient to notify persons who might be economically affected to evaluate their positions, then the purpose of providing protection against arbitrary and inadequately publicized governmental conduct has been met." *Oregon Funeral Directors*, 132 Or App at 323. Here, we conclude that the purpose of the fiscal impact statement relative to local governments has been met.

Industry petitioners make similar arguments, but instead focus on the fiscal impact statement relative to Oregon businesses. They argue that the statement did not give any meaningful information about the effect of the rules on businesses. In particular, industry petitioners point out that no cost impact was offered for businesses dedicated

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included separate discussion of potential costs of compliance and other fiscal impacts relative to each of the three divisions—division 8, housing, division 12, transportation, and division 44, greenhouse gas reduction targets.

to building, remodeling, and selling single-family detached homes, a type of housing that will be effectively precluded in climate-friendly areas, or an estimate of the fiscal effect on freight and commercial trucking and the businesses that rely on them. Industry petitioners argue that LCDC had to do more than discuss cost of compliance; it was required to address any significant effect of the rules on businesses. Industry petitioners also point out that LCDC failed to include information required by ORS 183.336(1)(d).

We address industry petitioners' last argument first and agree that LCDC did not include anywhere in the notice "[a] description of the manner in which the agency proposing the rule involved small businesses in the development of the rule," ORS 183.336(1)(d). That description is required in the "statement of cost of compliance effect on small businesses required by ORS 183.335(2)(b)(E)." Here, however, LCDC did not identify any cost of *compliance effect* on small businesses, and industry petitioners have not identified any, as the proposed rules are directed at government entities and not small businesses. As a result, we do not perceive how LCDC's failure to describe the involvement of small business, if any, could render the notice legally inadequate, and industry petitioners have not offered such an explanation. Thus, we reject that argument as a basis on which to invalidate the CFEC rules.

Turning to industry petitioners' main argument, LCDC's fiscal impact statement made several observations relative to businesses. With respect to housing, the statement did not identify any economic impact on businesses, but the housing impact statement did state that "[t]he proposed rule changes will impact portions of the housing market, and as a result may have an impact on the cost of developing housing and home pricing (rents/purchase prices)." That section recognized that single family homes will be precluded in climate-friendly areas. The fiscal statement provided, with respect to transportation and greenhouse gas reduction target rules, that businesses "may be impacted by changes over time in transportation infrastructure," which could affect business ability to meet business needs, and that costs will increase in new construction to meet new requirements for

electric vehicle infrastructure and surface parking lots. In particular, LCDC recognized that freight traffic would be affected by increased congestion in denser areas, although it noted that, if vehicle mile reduction goals were met, there would be reduced congestion. The statement also explained that the impact on freight businesses depended upon the success of the rule changes and "is likely to vary substantively at the jurisdictional level" and further that, "[t]he impact on individual businesses is expected to be highly variable depending upon the nature of their operations and transportation requirements."

We again conclude that LCDC substantially complied with ORS 183.335 in the fiscal impact statement relative to businesses, because LCDC satisfied the purpose "of providing protection against arbitrary and inadequately publicized governmental conduct." *Oregon Funeral Directors*, 132 Or App at 323. The primary difficulty we have with industry petitioners' arguments is that they are in effect asserting that LCDC had to identify and quantify highly speculative economic impacts, including ones that may not be significant. However, ORS 183.335(2)(b)(E) tasked LCDC to "utilize available information to project any significant economic effect of that action on businesses[.]" As to that charge, LCDC identified anticipated significant economic effects on industry groups related to housing, transportation, and construction and identified specific rule changes that might economically impact those groups. LCDC also explained why it could not be more precise in its analysis given the number of factors that would influence the implementation of the rules in each jurisdiction. As such, LCDC alerted potentially affected businesses to the potential economic effects of the proposed rules on them, and along with the rest of the notice (which included a full set of draft rules), provided sufficient information for such businesses to assess their own position and meaningfully participate in the rule adoption process.

In sum, we reject city petitioners' third assignment of error and industry petitioners' second assignment of error, because LCDC substantially complied with the requirements in ORS 183.335 for its notice of proposed rulemaking.

B. *Procedural Challenges under ORS chapter 197*

In their first and second assignments of error, city petitioners bring two additional procedural challenges to LCDC's rulemaking based on ORS 197.040(1)(b) and ORS 197.047. We address each of those statutes in turn.

1. ORS 197.040(1)(b)

The legislature gave LCDC general rulemaking authority under ORS 197.040(1). The portion of that statute at issue in city petitioners' first assignment of error is ORS 197.040(1)(b), which provides that LCDC:

> "(b) In accordance with the provisions of ORS chapter 183, adopt rules that it considers necessary to carry out ORS chapters 195, 196, 197 and 197A. Except as provided in subsection (3) of this section, in designing its administrative requirements, the commission shall:
>
> "(A) Allow for the diverse administrative and planning capabilities of local governments;
>
> "(B) Consider the variation in conditions and needs in different regions of the state and encourage regional approaches to resolving land use problems;
>
> "(C) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;
>
> "(D) Assess the likely degree of economic impact on identified property and economic interests; and
>
> "(E) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact."

Additionally, ORS 197.040(3) provides, "The requirements of subsection (1)(b) of this section shall not be interpreted as requiring an assessment for each lot or parcel that could be affected by the proposed rule."

City petitioners assert that ORS 197.040(1)(b)(A) through (E) set out rulemaking procedures that LCDC is required to follow and that LCDC did not do so with respect to the CFEC rules. LCDC denies that ORS 197.040(1)(b) is an applicable rulemaking procedure. We, however, agree with

city petitioners that ORS 197.040(1)(b) sets out rulemaking procedures that apply to LCDC.

Under ORS 183.400(4)(c), we will declare a rule invalid if it "[w]as adopted without compliance with applicable rulemaking procedures." The reference to "applicable rulemaking procedures" includes those procedures contained in ORS chapter 183, as well as any other rulemaking procedure that the legislature has imposed on the agency in other statutes. *Western States Petroleum Assn. v. EQC*, 296 Or App 298, 307-08, 439 P3d 459 (2019). In *Western States Petroleum Assn.*, we concluded that "rulemaking" is a legal term of art that means "'the process used by an administrative agency to formulate, amend, or repeal a rule or regulation.'" *Id.* at 309 (quoting *Black's Law Dictionary* 1530 (10th ed 2014)). We further concluded that "procedure" means "'a particular way of doing or of going about the accomplishment of something.'" *Id.* (quoting *Webster's Third New Int'l Dictionary* 1807 (unabridged ed 2002)). Applying those definitions, we ultimately concluded that ORS 468A.266(5), which required The Environmental Quality Commission (EQC) to evaluate certain factors "in adopting rules under this section," is a rulemaking procedure.

Applying that reasoning here, we also must conclude that ORS 197.040(1)(b) is a rulemaking procedure, because it requires LCDC to assess and consider certain factors "in designing its administrative requirements." We find unpersuasive the distinctions that LCDC tries to draw from the legislature's use of the word "designing" as opposed to the word "adopting." Here, the operative wording appears immediately after the sentence directing LCDC to adopt rules in accordance with ORS chapter 183; it is clear from the text and context that the legislature was referring to the adoption of such rules when it directed LCDC to assess and consider particular factors in "designing its administrative requirements." *See Gaines*, 346 Or at 171 (holding that text and context "must be given primary weight in the analysis"). Accordingly, we turn to the substance of city petitioners' challenge.

City petitioners assert that LCDC failed to comply with ORS 197.040(1)(b) because it did not prepare "formal"

written assessments for the factors in subparagraphs (C) through (E) that LCDC was required to "assess."[6] They assert that such formal assessments were necessary because ORS 197.070 states that LCDC "shall keep on file and available for public inspection the assessments prepared pursuant to ORS 197.040 and 197.230." Additionally, city petitioners argue that LCDC was required to make formal findings with regard to the factors in subparagraphs (A) and (B). Because there are not such assessments or findings reflected in the record, city petitioners argue that the CFEC rules are invalid. In so arguing, they assert that informal discussions cannot meet the requirements in ORS 197.040(1)(b) and assert that the "assessment of administrative rule requirements" prepared by DLCD is insufficient, is only an attempt to "paper over" LCDC's failure, and cannot be relied on by LCDC because the statutory requirements apply to LCDC and not DLCD. City petitioners also assert that the fiscal impact statement provided in the notice cannot be used to satisfy ORS 197.040(1)(b). Finally, city petitioners also find fault with LCDC's formal adoption of the rules because it did not make specific findings related to ORS 197.040(1)(b).

LCDC responds that ORS 197.040(1)(b) does not require LCDC to make specific findings before adoption of rules, and asserts that it did engage in the required considerations and assessments.

We first note that, under our scope of review, we may

> "consider only whether the documents indicate that [LCDC] engaged in any evaluation of the statutorily mandated factors in adopting the [CFEC rules]. We do not examine the agency's thinking process, consider how it weighed any criteria, or attempt a substantive consideration of whether the agency made an appropriate policy choice given a particular statutory mandate."

Western States Petroleum Assn., 296 Or App at 310. In addition, in determining what ORS 197.040(1)(b) requires LCDC

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[6] We note that it is not clear that LCDC enacted all of the CFEC rules pursuant to its authority under ORS 197.040(1)(b), as opposed to its authority under ORS 197.040(1)(c)(A) to set statewide land use policy, which does not contain the same requirements. However, LCDC does not assert that as a basis on which to reject city petitioners' first assignment of error, so we do not address it further.

to do, we apply our usual statutory interpretation methodology to determine the legislature's intent. *Gaines*, 346 Or at 171.

We first reject city petitioners' assertion that LCDC had to make formal findings with regard to any of the factors in ORS 197.040(1)(b). Nothing in the text or context of that statute suggests that LCDC had to make any such findings. As LCDC points out, when the legislature intends for LCDC to make findings it knows how to say so directly. *Compare* ORS 197.230(1)(d) (requiring LCDC to "[m]ake a finding of statewide need for the adoption of any new goal or the amendment of any existing goal") *with* ORS 197.230(1)(a) (requiring LCDC to "assess" three factors in "preparing, adopting and amending goals and guidelines") *and* ORS 197.230(1)(b), (c) (requiring LCDC to "consider" and "give consideration to" listed factors in "preparing, adopting and amending goals and guidelines").

We also reject city petitioners' assertion that ORS 197.040(1)(b)(C) through (E) require some sort of formal, written assessment. Again, nothing in the text or context includes such a requirement or provides any particular form that the assessment must take. ORS 197.070 merely requires that such assessments be made publicly available; it also does not place requirements on what form those assessments must take.

Turning to whether LCDC met the procedural requirements of ORS 197.040(1)(b), we conclude that the documents in the rulemaking record demonstrate that LCDC complied with those procedures. DLCD prepared an "assessment of administrative rule requirements" for LCDC to consider, which was included in the packet discussing and recommending adoption of the CFEC rules. That document addressed each factor in ORS 197.040(1)(b)(A) to (E) and described how the rulemaking process had met those requirements. That document demonstrates that LCDC addressed each of the factors "in designing" the CFEC rules. We conclude that the fiscal impact statement in the notice, in addition to meeting the requirements in ORS 183.335, satisfies the requirements that LCDC "[a]ssess what economic and property interests will be, or are likely to be,

affected by the proposed rule," ORS 197.040(1)(b)(C), and "[a]ssess the likely degree of economic impact on identified property and economic interests," ORS 197.040(1)(b)(D). We find unpersuasive city petitioners' assertions that DLCD's assessment and the fiscal impact statement are insufficient, because those arguments are primarily concerned with the substance of LCDC's evaluation and not LCDC's procedural compliance. As noted above, in determining whether the documents demonstrate that LCDC complied with procedural requirements, "[w]e do not examine the agency's thinking process, consider how it weighed any criteria, or attempt a substantive consideration of whether the agency made an appropriate policy choice given a particular statutory mandate." *Western States Petroleum Assn.*, 296 Or App at 310.

We also reject city petitioners' argument that DLCD's assessment is inadequate because it was prepared by DLCD. It was prepared by DLCD as part of the packet of documents for LCDC to consider at the hearing to adopt the CFEC Rules. That packet described the rulemaking process and how it complied with all rulemaking procedures, including those in ORS 197.040. In adopting the CFEC rules, LCDC was necessarily relying on those documents. *See Western States Petroleum Assn.*, 296 Or App at 312 ("[I]t is irrelevant that DEQ initially did the evaluation and then presented that evaluation to EQC for its consideration. EQC unquestionably may rely on evaluations and material initially compiled by DEQ."). Because ORS 197.040(1)(b) did not require formal findings by LCDC, that is sufficient.

We are not persuaded by city petitioners' arguments and conclude that LCDC complied with the statutory requirements in ORS 197.040(1)(b)(A) though (E) "in designing" the CFEC rules.

2. ORS 197.047

In their second assignment of error, city petitioners argue that LCDC failed to comply with the notice requirements in ORS 197.047. That statute provides, in part:

> "(2) At least 90 days prior to the final public hearing on a proposed new or amended administrative rule of the Land Conservation and Development Commission

> described in subsection (10) of this section, the Department of Land Conservation and Development shall cause the notice set forth in subsection (3) of this section to be mailed to every affected local government that exercises land use planning authority under ORS 197.175.
>
> "* * * * *
>
> "(10) The provisions of this section apply to all statutes and administrative rules of the Land Conservation and Development Commission that limit or prohibit otherwise permissible land uses or cause a local government to rezone property. For purposes of this section, property is rezoned when the statute or administrative rule causes a local government to:
>
> "(a) Change the base zoning classification of the property; or
>
> "(b) Adopt or amend an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone."

City petitioners argue that this statute applies because the CFEC rules "forc[e] local governments to enact (through zoning changes) numerous land use limitations." In particular, city petitioners point to the rules relating to climate-friendly areas, which they argue require cities in metropolitan areas to study and then zone those areas consistent with many requirements, including requirements that "make it essentially impossible to build detached single-family homes."

Our fundamental problem with city petitioners' argument is that they seek to invalidate all 89 of the CFEC rules without identifying which of those rules they assert implicate the notice required by ORS 197.047. Although in their discussion of the climate-friendly area rules city petitioners cite to specific rules, at no point do city petitioners request that we only invalidate those specific rules. Even if those cited rules had the effect that city petitioners attribute to them, it cannot be the case that every single one of the CFEC rules requires rezoning or prohibits previously allowed uses. City petitioners do not explain why a failure to provide a required notice for a small subset of the CFEC rules would operate to invalidate all of the CFEC rules.

With respect to OAR 660-012-0310, OAR 660-012-0315, and OAR 660-012-0320, which city petitioners identify in their argument, we do not agree that those rules *on their face* trigger the notice requirements of ORS 197.047, as set out in ORS 197.047(10). The face of those rules as written does not have those effects or require local governments to take those actions. In a rule challenge, we are limited to the face of the rules and cannot consider the effect such rules might have in a particular application. ORS 183.400(3).

As a result, we reject city petitioners' second assignment of error.

II. STATUTORY AUTHORITY CHALLENGES

Both city petitioners and industry petitioners challenge LCDC's statutory authority to enact the CFEC rules in their entirety. In addition, city petitioners challenge one rule in particular—OAR 660-012-0920(7)(c)—as beyond the statutory authority of LCDC. In addressing a challenge to statutory authority, "[t]he record on review *** consists of two things only: the wording of the rule itself (read in context) and the statutory provisions authorizing the rule." *Wolf v. Oregon Lottery Commission*, 344 Or 345, 355, 182 P3d 180 (2008) (citing ORS 183.400(3)). An agency "exceeds the statutory authority of the agency" if the rule "depart[s] from a legal standard expressed or implied in the particular law being administered, or contravene[s] some other applicable statute." *Planned Parenthood Assn.*, 297 Or at 565. We address each of petitioners' assignments of error challenging LCDC's statutory authority in turn.

A. *Industry Petitioners' Third Assignment of Error*

In asserting that LCDC does not have statutory authority for enacting the CFEC rules, industry petitioners specifically argue that there is no expressed statutory policy in any of the statutes cited by LCDC in the permanent rules that authorize the CFEC rules. In so arguing, industry petitioners do not discuss the text of any of the CFEC rules and only point to a few rules as examples. Because, unlike city petitioners' argument as addressed below, industry petitioners explicitly argue that all of the CFEC rules

exceed LCDC's authority, we proceed to address those broad arguments, as far as they go.

We first note that industry petitioners do not argue that the CFEC rules exceed LCDC's general rulemaking authority set out in ORS 197.040. The legislature has conferred on LCDC broad authority to "adopt rules that it considers necessary to carry out ORS chapters 195, 196, 197 and 197A," ORS 197.040(1)(b), and to "[a]dopt by rule in accordance with ORS chapter 183 *** any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196, 197 and 197A," ORS 197.040(1)(c)(A). As articulated by the Supreme Court:

> "The legislature created LCDC to ensure consistent and comprehensive land use planning and to promote coordinated statewide land conservation and development. ORS 197.005. To accomplish those purposes, the legislature invested LCDC with broad policy-making and regulatory authority. It directed LCDC to set goals and standards for land use and declined to set the land use planning goals itself."

Lane County v. LCDC, 325 Or 569, 581, 942 P2d 278 (1997). Under that broad authority, LCDC can adopt rules within its purview as long as the rules are consistent with the general legislative policy; that is, the rule must be within the range of discretion allowed by the legislative policy. *Planned Parenthood Assn.*, 297 Or at 573 ("To the extent that the rule departs from the statutory policy directive, it 'exceeds the statutory authority of the agency' within the meaning of those words in ORS 183.400(4)(b).").

It is not obvious that the CFEC rules contravene some expressed legislative policy or law, and industry petitioners do not point to any such policy or law. Rather, industry petitioners assert that LCDC must point to a specific expressed legislative policy that authorized its particular rulemaking effort here. However, that is not the correct frame for our task given the broad authority the legislature has conferred on LCDC to implement the broad policy goals in ORS chapter 197. The question is whether the CFEC rules are within LCDC's discretion that the legislature

has allowed by the more general policy in the statutes.[7] *See, e.g.*, *1000 Friends v. LCDC*, 292 Or 735, 744, 642 P2d 1158 (1982) (reviewing whether it was within LCDC's delegated authority to adopt a particular land use planning goal by "inquiring into the policies which underlie the legislation"); *Springfield Education Assn. v. School Dist.*, 290 Or 217, 229, 621 P2d 547 (1980) ("The discretionary function of the agency is to make the choice and the review function of the court is to see that the agency's decision is within the range of discretion allowed by the more general policy of the statute."); *Free Oregon, Inc. v. Oregon Health Authority*, 329 Or App 460, 467-68, 541 P3d 897 (2023) (rejecting the argument that statutes had to confer specific authority with respect to vaccines because "the legislature opted to grant OHA 'full power in the control of communicable diseases,' without restricting the methods available to OHA"). That question, however, is not one that industry petitioners confront, and we do not think they could confront it in the vague, omnibus fashion in which they have chosen to bring their argument.

We decline to offer more extended discussion with respect to industry petitioners' third assignment of error. We note that industry petitioners make broad statements that do not engage with the text of any of the rules and they have not asked for us to invalidate only specific rules as beyond LCDC's statutory authority. However, under ORS 183.400(4), we are statutorily precluded from invalidating a rule unless it "[v]iolates constitutional provisions," "[e]xceeds the statutory authority of the agency," or "[w]as adopted without compliance with applicable rulemaking procedures." ORS 183.400(4) ("The court shall declare the rule invalid *only if* it finds that the rule ***." (Emphasis added.)). We are not at liberty to do what industry petitioners request and invalidate the entire package of CFEC rules based on broad arguments that do not engage with the text

[7] We note that the legislature has expressed several general policies within ORS chapter 197 that touch on the subject matter of the CFEC rules, including ORS 197.005 (legislative findings), ORS 197.010 (declaring legislative policy for land use), ORS 197.012 (encouraging compact urban development), and ORS 197.712 (directing LCDC to implement policies and requirements as to what is included in comprehensive plans). LCDC relies on both ORS 197.012 and ORS 197.712 for the CFEC rules.

of any rule and appear to actually pertain to only some unnamed subset of those rules. We are restricted to determining whether a rule, on its face, exceeds LCDC's statutory authority—generalized arguments about rules' purported effects on a jurisdiction do not suffice. *See, e.g.*, *Free Oregon, Inc.*, 329 Or App at 473 ("As we have mentioned, the scope of our review is limited to an evaluation of whether the rules, on their face, conflict with ORS 431.180. We are not called upon, and are not permitted within this proceeding, to evaluate the extent to which a particular application of the rules might contravene ORS 431.180[.]"). Nor will we dig into the text of particular rules called out as examples to determine if any of them should be invalidated for lack of authority when industry petitioners have not endeavored to do that for themselves and have not asked for that relief. *Beall Transport Equip. Co.*, 186 Or App at 700-01 n 2 ("[I]t is not this court's function to speculate as to what a party's argument might be. Nor is it our proper function to make or develop a party's argument when that party has not endeavored to do so itself."); *cf. Corcoran v. Board of Nursing*, 197 Or App 517, 527-28, 107 P3d 627 (2005) (holding that an omnibus challenge to agency's findings of fact in a final order will be rejected as unreviewable).

We reject industry petitioners' third assignment of error.

B. *City Petitioners' Fifth Assignment of Error*

City petitioners make a different argument from that of the industry petitioners. They assert that the land use statutes set out a clear policy directive that delegates responsibilities between local governments and LCDC, with LCDC "to remain at a high level, providing goals and objectives where needed, but not meddling in how land use planning is done at the local level." They argue that the CFEC rules violate that policy by micromanaging decisions that are to be left at the local level. City petitioners acknowledge that not all of the CFEC rules exceed the authority of LCDC to set objectives but argue that LCDC should have to do the work of separating out the valid from the invalid rules on remand, because it is LCDC's burden to demonstrate statutory authority.

In support of city petitioners' position, *amicus* the League of Oregon Cities (League) filed a brief, arguing that LCDC has no authority to adopt the CFEC rules because (1) the CFEC rules violate legislative policy for local government control over land use planning, (2) no statute expressly or implicitly authorized adoption of the CFEC rules, (3) the CFEC rules contravene statewide land use planning goals, and (4) the CFEC rules implement an executive order and not statewide land use planning goals.

We reject city petitioners' and the League's arguments for much the same reasons that we rejected the arguments of industry petitioners. Both city petitioners and the League primarily assert that the CFEC rules invade the local land use province of local governments and that LCDC is restricted to setting broad objectives and goals. First, we are unpersuaded by their arguments that LCDC is as limited as they assert. Second, and more importantly, none of their arguments provide a basis on which we can invalidate all of the CFEC rules. Neither city petitioners nor the League engage with the actual text of the rules, nor do they identify any particular rules that are beyond LCDC's statutory authority, continuously arguing that we must invalidate all of the rules. As we explain above, we cannot invalidate any particular rule unless on the face of that rule it exceeds LCDC's statutory authority. *See* ORS 183.400(3), (4). In the absence of argument about the actual text of a challenged rule and why it exceeds, on its face rather than based on its asserted effect, LCDC's broad delegative authority to implement legislative policy expressed in ORS chapter 197, we do not discern a route to invalidating any of the CFEC rules.

C. *City Petitioners' Sixth Assignment of Error*

In their final assignment of error, city petitioners argue that LCDC exceeded its statutory enforcement authority in enacting OAR 660-012-0920(7)(c). OAR 660-012-0920 is a new rule in the transportation division that directs LCDC to hold compliance hearings. Under OAR 660-012-0920, LCDC may hold compliance hearings if a city, county, or Metro has, among other things, "[f]ailed to comply with

a requirement in this division," OAR 660-012-0920(2)(d). Following such a hearing, ORS 660-012-0920(7) provides:

> "(7) If the commission finds a city, a county, or Metro out of compliance with the requirements of this division, the commission may use any authority granted to the commission, including but not limited to the actions below.
>
> "(a) Issue an order to remand a report with specific directions for changes necessary to comply with this division;
>
> "(b) Issue an enforcement order as provided in ORS 197.319 through 197.335;
>
> "(c) Issue an order to invalidate the acknowledgement of local transportation system plans that are not consistent with an approved Land Use and Transportation Scenario Plan; and
>
> "(d) Provide notice to the Oregon Department of Transportation and the United States Department of Transportation of the lack of compliance with state planning requirements."

City petitioners argue that LCDC does not have statutory enforcement authority to invalidate an acknowledged transportation system plan (TSP), which is the action listed in OAR 660-012-0920(7)(c). They argue that LCDC has a minor role in post-acknowledgement of plans and that nothing in ORS chapter 197 gives LCDC the authority to unilaterally change the local law that is an acknowledged land use plan. Instead, city petitioners assert, LCDC has a more limited statutory enforcement authority as provided in ORS 197.319 to 197.353.

LCDC responds that OAR 660-012-0920(7)(c) must be viewed in context, noting that that section only applies when the TSP is "not consistent with an approved Land Use and Transportation Scenario Plan." A Land Use and Transportation Scenario Plan (scenario plan) is a plan that the CFEC rules now require of local governments beyond the Portland Metro area. OAR 660-044-0110 - 660-044-0130. The scenario plan is a document that certain local governments must prepare and submit to LCDC for review. OAR 660-044-0120. Once the scenario plan is approved,

local governments must amend comprehensive plans, land use regulations, and TSPs to be consistent with the scenario plan and can only adopt amendments that are consistent with the scenario plan. OAR 660-044-130.

Given that context, LCDC argues that OAR 660-012-0920(7)(c) is just one enforcement option if a local TSP is inconsistent with the scenario plan. LCDC notes that the only way that would happen is if a local government obtained approval for a scenario plan but then declined to amend the TSP for consistency, as required by the rules. LCDC argues that it would not be changing local law by invalidating an inconsistent TSP, but that it would instead be ensuring that the inconsistent TSP did not continue to be in effect after approval of the scenario plan. LCDC argues that the enforcement authority in OAR 660-012-0920(7)(c) is "reasonably related" to ORS 197.320, which authorizes LCDC to issue orders to local governments. It asserts that the rule "fills the gap" that could arise if a local government obtains approval of a scenario plan and then fails to amend the TSP.

We agree with city petitioners. Unlike other topics in ORS chapter 197, the statutes governing LCDC's enforcement authority are specific, and OAR 660-012-0920(7)(c) is not consistent with them. *Planned Parenthood Assn.*, 297 Or at 565 (An agency exceeds its statutory authority if the rule "depart[s] from a legal standard expressed or implied in the particular law being administered, or contravene[s] some other applicable statute."). In particular the statute relied on by LCDC, ORS 197.320, provides:

> "The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions or actions into compliance with the goals, acknowledged comprehensive plan provisions, land use regulations or housing production strategy if the commission has good cause to believe [setting out 13 types of noncompliance]."

That statute authorizes LCDC to order local governments, among others, to take actions to come into compliance.

Further, ORS 197.335(1) sets out what such an order must contain, which includes:

> "(c) The corrective action decided upon by [LCDC], including the specific requirements, with which the local government, state agency or special district must comply. In the case of a pattern or practice of decision-making that violates an acknowledged comprehensive plan or land use regulation, the commission may require revisions to the comprehensive plan, land use regulations or local procedures which the commission believes are necessary to correct the pattern or practice."

ORS 197.335 also sets out additional enforcement authority for LCDC that can help to ensure local government compliance:

> "(3)(a) If the commission finds that in the interim period during which a local government, state agency or special district would be bringing itself into compliance with the commission's order under ORS 197.320 or subsection (2) of this section it would be contrary to the public interest in the conservation or sound development of land to allow the continuation of some or all categories of land use decisions or limited land use decisions, *it shall, as part of its order, limit, prohibit or require the approval by the local government of applications for subdivisions, partitions, building permits, limited land use decisions or land use decisions until the plan, land use regulation or subsequent land use decisions and limited land use decisions are brought into compliance.* The commission may issue an order that requires review of local decisions by a hearings officer or the Department of Land Conservation and Development before the local decision becomes final.
>
> "* * * * *
>
> "(4) As part of its order under ORS 197.320 or subsection (2) of this section, *the commission may withhold grant funds from the local government to which the order is directed.* As part of an order issued under this section, *the commission may notify the officer responsible for disbursing state-shared revenues to withhold that portion of state-shared revenues to which the local government is entitled* under ORS 221.770, 323.455, 366.762 and 366.800 and ORS chapter 471 which represents the amount of state planning

> grant moneys previously provided the local government by the commission. ***
>
> "(5)(a) As part of its order under this section, *the commission may notify the officer responsible for disbursing funds from any grant or loan made by a state agency to withhold such funds from a special district to which the order is directed*. The officer responsible for disbursing funds shall withhold funds as outlined in this section and shall release funds to the special district or department when notified to do so by the commission.
>
> "*****
>
> "(6) *The commission may institute actions or proceedings for legal or equitable remedies* in the Circuit Court for Marion County or in the circuit court for the county to which the commission's order is directed or within which all or a portion of the applicable city is located to enforce compliance with the provisions of any order issued under this section or to restrain violations thereof. Such actions or proceedings may be instituted without the necessity of prior agency notice, hearing and order on an alleged violation."

(Emphases added.) Those statutes expressly contemplate that the local government must take the corrective action ordered by LCDC; that is, it is the local government that must bring itself into compliance. What LCDC can do is include in its order the actions prescribed in ORS 197.335 to pressure the local government to comply. Those statues do not authorize LCDC to revoke an acknowledgement of a TSP, which is part of a local government's acknowledged comprehensive plan, OAR 660-012-0015(4). And we do not agree with LCDC that such revocation is reasonably related to an order directing the local government to take actions necessary to come into compliance. As a result, we conclude that OAR 660-012-0920(7)(c) exceeds LCDC's statutory authority and is invalid.

OAR 660-012-0830(1)(c) and OAR 660-012-0920(7)(c) held invalid; otherwise, CFEC rules held valid.

Housing Production Strategy Program - List of Tools, Actions, and Policies
OREGON ADMINISTRATIVE RULE CHAPTER 660, DIVISION 8, ATTACHMENT B

Revised - February 2022

Housing Production Strategy Guidance Document:

To assist cities in the creation and drafting of their Housing Production Strategy Report in compliance to HB 2003, the Department of Land Conservation and Development (DLCD) provided a guidance document of housing production strategies a jurisdiction could employ to facilitate housing production in their community. The document contains a list of strategies assigned by categories. Each strategy includes a brief overview of its intent and purpose as well as a projection of its expected impact by housing tenure and by income bracket. As the jurisdiction prepares a housing production strategy report, the jurisdiction would review the guidance document to select specific strategies that work best for their community and that address their identified Housing Needs. The jurisdiction would simply reference the strategy number when describing the adoption, implementation, and expected magnitude of impact of each strategy in their report. If the jurisdiction has a strategy that is not listed they would propose this under Category Z.

Categories of Tools, Actions, and Policies
The proposed categories contain tools, strategies, or policies that are intended to:

1. Reduce financial and regulatory impediments to develop Needed Housing;
2. Create financial and regulatory incentives for development of Needed Housing;
3. Provide access to local, state, and federal resources; and
4. Allow for local innovation.

Category A	Zoning and Code Changes	These are strategies that a jurisdiction can take to proactively encourage needed housing production through zoning and code modifications. These strategies may also include regulations to ensure housing goals are met.
Category B	Reduce Regulatory Impediments	These strategies address known impediments to providing needed housing. These include but are not limited to zoning, permitting, and infrastructure impediments.
Category C	Financial Incentives	These are a list of financial incentives that jurisdictions can give to developers to encourage them to produce needed housing.
Category D	Financial Resources	These are a list of resources or programs at the local, state and federal level that can provide money for housing projects. The majority of these resources are intended to provide money for affordable housing projects.
Category E	Tax Exemption and Abatement	These are a list of tax exemption and abatement programs that are intended to encourage developers to produce housing.
Category F	Land, Acquisition, Lease, and Partnerships	These are strategies that secure land for needed housing, unlock the value of land for housing, and/or create partnerships that will catalyze housing developments.
Category Z	Custom Options	Any other Housing Production Strategy not listed in Categories A through F that the jurisdiction wishes to implement will be outlined in this section and numbered accordingly.

Equitable Outcomes Note: Some of the strategies may not create an overall housing production increase however, they do increase or maintain housing for a specific affordability target or population.
Caution Note: Jurisdictions should be careful when picking strategies to ensure that housing strategies together in their aggregate do not work to suppress the overall supply of housing of stiffle housing production.

Anti-Displacement and Gentrification Toolkit:

In the Spring of 2021 DLCD partnered with Portland State University to create an anti-displacement and gentrification toolkit. Though not mandatory to use, the toolkit was designed 1) help jurisdictions better measure the pressures of anti-displacement and gentrification in their communities, and 2) direct HPS strategies towards mitigating these pressures as more housing is produced. In the process several additional columns were created to better understand the impact of each strategy when it comes to anti-displacement work. These additional columns are defined as follows:

Housing Equity Impact: DIRECT, (DIRECT), INDIRECT, AND (INDIRECT)

DIRECT strategies for meeting housing equity needs are focused on the supply. They are needed immediately and persistently by groups that are vulnerable in the housing market. These strategies directly produce or protect affordable housing, especially for communities of color and other protected class communities. They have strong impacts for anti-displacement that can be seen in the short-term. A (DIRECT) strategy is one that is specific to affordable housing and/or protected classes and vulnerable populations, but does not actually create housing.

Strategies that allow for more housing overall are **INDIRECT**; strategies that are oriented towards smaller units or diverse housing types are **(INDIRECT)** - they are more likely to address equity needs, but may also require additional tools to focus on adffordability, tenure, or accessibility. Likewise, strategies for housing preservation can be important for anti-displacement planning, if they are focused on maintaining affordability along with quality.

Neighborhood Typology:

The toolkit establishes a methodology for cities to categorize census tracts based on where gentrification and displacement pressures have already occurred or may occur in the future. These six Neighborhood Typologies (Affordable and Vulnerable, Early Gentrification, Active Gentrification, Late Gentrification, Becoming Exclusive, and Advance Exclusive)reflect the spatial distribution of housing inequity. Cities should take special consideration of these spatial inequities in the development of their Housing Production Strategies. Some Housing Production Strategies when applied flatly across an entire city result in negative or inequitable outcomes for communities members most at risk of displacement. The This section is intended to highlight which strategies may have unintended negative impacts on particular neighborhood typologies. This is not to imply that all Housing Production Strategies will have negative impacts on housing equity - many strategies work without particular concern across any kind of neighborhood. However, some housing production strategies are better suited for particular neighborhood types, and some strategies need special nuance or policy refinement to add special mitigation protections against further potential displacement impacts.

Green: GO use and implement, especially if a tool is useful in this neighborhood type

Yellow: PROCEED CAUTIOUSLY and carefully. This means that a strategy needs to be monitored for impacts and possibly paired with more direct mitigating strategies in this neighborhood type.

Red: STOP AND PLAN. This strategy is highly likely to create displacement pressures and must be paired with mitigation measures in this neighborhood type.

Category A: Zoning and Code Changes

These are strategies that a city can take to proactively encourage needed housing production through zoning and code modifications. These Strategies may also include regulations to ensure housing goals are met.

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
A01	Ensure Land Zoned for Higher Density is not Developed at Lower Densities	This strategy will work on establishing minimum density standards, updating development codes to prohibit new single-family detached housing in high density zones, and allow single-family detached homes in medium density zones only if they meet minimum density or maximum lot size requirements.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Morrow County HNA, 2017	INDIRECT	All	Planning and continued monitoring with attention to displacement in gentrifying areas; add incentives for direct production of equity needs
A02	Zoning Changes to Facilitate the Use of Lower-Cost Housing Types	In many cities, towns, and counties, changes to local zoning policies can help to facilitate the development of lower-cost housing types, such as Accessory Dwelling Units (ADU's), manufactured homes, multifamily housing, micro-units, or single-room occupancy developments. Changes to local zoning policies can also help to facilitate the development of safe overnight sheltering options for unhoused residents, such as Safe Park programs, Conestoga Hut Micro-shelters, sleeping pod micro-shelters, and others.To increase the likelihood the market can produce lower-cost housing types, it is important to make them allowable as of right in all locations and neighborhoods. If not, still provide flexibility in zoning code to still issue variance or conditional use permits that allow deviations from existing regulations on a case-by-case basis.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	DIRECT	All	Planning and continued monitoring of production vs. needs
A03	FAR, Density, or Height Bonuses for Affordable Housing	FAR, density, and height bonuses for affordable housing developments. Note: FAR/density bonuses do not work if there is not adequate height to make additional development feasible.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	Early Gentrification Active Gentrication Late Gentrification	These tools work best in strong markets; have a medium impact on displacement
A04	Housing Rehabilitation Codes	Housing rehabilitation codes (or rehab codes) are building codes designed to reduce the costs of renovating and rehabilitating existing buildings, thereby facilitating the continued availability and habitability of older rental housing and owner-occupied homes. This is especially helpful to facilitate conversation into multiplex housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	*Local Housing Solutions*	INDIRECT	Early Gentrification Active Gentrification Late Gentrification	Where naturally occurring affordable housing is being lost to rehab; add incentives to maintain affordability to increase anti-displacement impacts
A05	Code Provisions for ADUs	ADUs are smaller, ancillary dwelling units located on the same lot as a primary residence. They are typically complete dwellings with their own kitchen, bathroom and sleeping area. Given that ADUs are usually built by individual homeowners with limited experience or financial resources, code provisions can have a significant influence on the feasibility of their development and enable more widespread production. For example, easing occupancy requirements, allowing more ADUs on a lot, and expanding maximum size requirements. Certain building and development code regulations can inadvertently drive up ADU construction costs. More flexibility in siting, design, construction and lower fees are also needed to achieve feasibility in many cases.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of the Dalles Housing Strategy Report (2017)	(INDIRECT)	All	ADUs, cottage, and middle housing have a medium impact on preventing displacement, with planning and continued monitoring of production; add incentives and programs to target affordability and increase impact
A06	Broaden the Definition of Housing Type	Broaden the definition of "housing unit" to allow for more flexibility across use types. For example, SROs are not always allowed in certain residential zones. Including them in the definition of housing unit, or broadening the set of uses allowed across all residential districts, would allow for greater flexibility of housing type.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	Affordable & Vulnerable Early Gentrification Active Gentrification Late Gentrification Exclusive	Planning and continued monitoring of production and locations; add incentives and programs to increase impact and avoid clustering
A07	Allow for Single Room Occupancy in Residential Zones	Allow for SRO, Adult Dorms, and Cohousing in all residential zones. Note: SROs may be favored due to their ability to serve more people for less cost; it is not always a better housing type for all populations. Considerations should be given to ADA accessibility when planning SROs.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	Affordable & Vulnerable Early Gentrification Active Gentrfication Late Gentrification Exclusive	Planning and continued monitoring of production and locations; add incentives and programs to increase impact and avoid clustering
A08	Promote Cottage Cluster Housing	Cottage clusters are groups of relatively small homes typically oriented around shared common grounds with 4-14 homes typically between 1,000-1200 square feet in size. By further defining cottage cluster design and development standards, housing code can effectively address a predictable process for developers, and potentially encourage greater production for this housing type. Some examples may include: allowing for a wide range of sizes and attached/detached options for housing; not specifying ownership structure so that both renters/owners can live on the same cluster; ensuring that minimum site size, setbacks and building coverage requirements do not prohibit cottage cluster development on smaller lots; draft design requirements that ensure neighborhood compatibility, and efficient use of land, but are not so specific as to restrict the ability to adapt to varying neighborhood contexts. Other ideas include: uniformed codes, form-based codes, and allowing shared underground infrastructure when practical (e.g. sewer lines from each cottage can connect to one main that runs out to street, rather than 8 parallel lines out to street).	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of the Dalles Housing Strategy Report, April 2017	(INDIRECT)	All	ADUs, cottage, and middle housing have a medium impact on preventing displacement, with planning and continued monitoring of production; add incentives and programs to target affordability and increase impact
A09	Short-Term Rentals Regulations	Short-term rentals can be seen as an investment strategy for small investors, but can also remove rental housing supply from the market, in effect driving up rent from the local housing market. To avoid this effect, regulations can include definitions for various forms of short-term rentals, defining use, and occupancy standards, and even adding limits to the number of days that a short term rental can be in operation in order to mitigate their impact on the local housing market. Short Term Rental Regulation should begin with/include registration requirements for all short term rentals.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Morrow County HNA, 2017	DIRECT	All	High impact on displacement especially in hot neighborhoods
A10	Inclusionary Zoning	Requiring that a portion of the units within a market rate development be set aside as affordable housing. This tool will often be combined with property tax exemptions, fee waivers, or development bonuses to offset the cost of affordable housing units. Careful consideration should be employed when enacting inclusionary zoning. Note: A number of studies, including those analyzing the IZ Ordinance in Portland, have shown that IZ suppresses, rather than increases, the creation of new housing. Given that, if IZ is proposed, the financial components need to be calculated right to ensure that the inclusionary rate is not too high for the offsets provided and that overall housing production increases as a result.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	Active Gentification Late Gentrification	These tools work best in strong markets; have a medium impact on displacement; they pair with incentives that can be customized to context for maximum overall impact

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
A11	Add Restrictive Covenants to Ensure Affordability	Adding restrictive covenants to ensure affordability over time at a certain income level for affordable housing developments. Restrictive covenants are usually placed on a property in exchange for a local or state government providing financial contribution to the project. These covenants work best over the short-term (up to 30 years); after that they become unable to accommodate changed circumstances.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	Strong tool for subsidized housing preservation in all markets
A12	Align Lot Division Density with Zoning Density	Sometimes there are conflicting regulations between the density that is allowed by the zoning code versus the density that is allowed when lot division (for fee-simple lots) is considered. This can cause unintentional reductions in density, only caused by the fact that the developer would like to create for-sale housing on fee-simple lots. Ideally, the densities would be aligned, so there is not a density reduction between - condominium versus fee-simple developments.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	INDIRECT	All	Planning and continued monitoring of production; add incentives and programs to target affordability and increase impact
A13	FAR & Density Transfer Provisions	Enable and encourage Transfer of Development Rights (TDR) to maximize available Floor Area Ratio (FAR) provided public benefit (e.g. historic preservation & affordable housing) are attained and covenants ensure long term benefit. This strategy assumes that there are adequate, realistic, and relatively easy receiving areas for TRDs.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	Early Gentrification Active Gentrification Late Gentrification	These tools work best in strong markets; have a medium impact on displacement when pained with affordability tools
A14	Re-examine Requirements for Ground-floor Retail/Commercial	Critically re-assess requirements for ground floor retail; lively streetscape is a worthy goal, but not for every street. Jurisdictions can inadvertently impose massive costs on developers by requiring ground floor retail and commercial space even when it's unlikely to be fully occupied or generate nearly enough revenue to pay for itself. Ground floor uses should be driven by market demand; with residential use more beneficial to meet needed housing in some cases (eg. affordable housing).	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Bend	INDIRECT	All	--
A15	Encourage Diverse Housing Types in High-Opportunity Neighborhoods	Enable developments that support multiple unit sizes, types, and tenure options to promote diverse housing options in high-opportunity neighborhoods. With a goal of reversing historical patterns of racial, ethnic, cultural and socio-economic exclusion. Use an analysis of "Access to Opportunity" to decide which zones or locations (via zoning overlay) to determine where this is appropriate. Goal is to promote access to opportunity (e.g., high performing schools, multiple transportation options, services, etc.) to households with a range of backgrounds and incomes. The jurisdiction could pare this strategy with a robust program of incentives (e.g, deeper financial incentives, greater range of housing types, more regulatory waivers, etc.) to be made available in these areas than in other areas of the city.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	Late Gentrification Exclusive	Planning and continued monitoring of production; add incentives and programs to target affordability and increase impact
A16	Manufactured Housing Community Preservation Zone	Change the zoning of existing manufactured housing communities to be preserved to a single-use zone that only allows manufactured housing communities. Consider lifting restrictions of stick-built homes in cooperatively-owned and other manufactured homes.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Portland Mfd Dwelling Park Amendment	DIRECT	Affordable & Vulnerable Early Gentrification Active Gentrification	Planning and monitoring for potential displacement; may need additional incentives and programs in active gentrification for higher impact
A17	Small Dwelling Unit Developments	Allow a land division where small lots or parcels are created below the standard lot/parcel size for dwelling units that are limited in size. Calculate density differently for the dwelling units due to their limited size. Density example: a. Dwelling units 600 square feet or smaller: 0.25 of a dwelling unit. b. Dwelling units 601 to 1,200 square feet: 0.50 of a dwelling unit.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Bend	(INDIRECT)	All	ADUs, cottage, and middle housing have a medium impact on preventing displacement, with planning and continued monitoring of production; add incentives and programs to target affordability and increase impact
A18	Increase Density near Transit Stations and Regional Multi-use Trails	Adopt increased density codes by right near transit stations, with higher levels of density near high capacity/high frequency stations, then stepping back into residential areas. Automatically upzone based on transportation corridor classifications; meaning wider ROWs get more flexibility in land use by right. This will add some flexibility for new transit stops, including bus stops. Be careful not to word the language so that people incorrectly assume that the density can only come after the transit has been put in place.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	Affordable & Vulnerable Early Gentrification Active Gentrification Late Gentrification Exclusive	Planning for transit extensions, especially in areas of early gentrification, is important; add incentives and programs to target affordability and increase impact for anti-displacement of transit-riding populations
A19	High Density Requirements for to-be-Annexed Land	Requiring a certain portion of to-be-annexed land to include a percentage of high density. Be careful that this strategy is not used as a way for low density areas in high-infrastructure locations to shirk responsibility to upzone.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Newberg	INDIRECT	All	Planning and continued monitoring for housing needs; add incentives for direct production of equity needs
A20	Pre-Approved Plan Sets for Middle Housing Typologies	Providing a pre-approved set of plans for middle housing typologies (ex. Cottage clusters, townhomes, and SROs). The plans would be highly-efficient, designed for constrained lots and low cost solutions, and would allow for streamlined permitting. This would help attract developers that typically develop only single-family housing to get into the missing middle housing production. Consider partnering with a university, design institution, or developing a competition to produce plans.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	All	ADUs, cottage, and middle housing have a medium impact on preventing displacement, with planning and continued monitoring of production; add incentives and programs to target affordability and increase impact
A21	Pre-Approved Plan Sets for ADUs	Provide a pre-approved set of plans for ADU designs (6-10 sizes/configurations) that, if chosen by a developer/owner, would lead to automatic approvals and reduced permitting schedule. Plans would reduce the need for architectural costs and reduce barriers to entry.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	All	ADUs have a medium impact on preventing displacement, with planning and continued monitoring of production; add incentives and programs to target affordability and increase impact
A22	Mixed Housing Types in Planned Unit Developments	Require or incentive a mix of housing types within Residential Planned Unit Developments (PUD).	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Forest Grove	INDIRECT	All	Cottage and middle housing have a medium impact on preventing displacement, with planning and continued monitoring of production; add incentives and programs to target affordability and increase impact

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
A23	Accessible Design	Provide incentives in the development code to increase the number of units designed to meet Universal Design, Lifelong Housing Certification, and other similar standards. Examples of incentives include: expedited review and permitting processing, planning and building fee reductions, system development charge deferrals, density or building height bonuses.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	Directly addresses equitable housing need
A24	Legalize Alternative Housing Types on Wheels and in Parks	Many smaller housing formats are built on wheels, including tiny homes on wheels (THOWs), park model homes, and recreational vehicles (RVs). providing occupants significant flexibility in where they site their homes, yet many local codes prohibit the siting of these housing types outside of manufactured home parks and RV parks. Permitting these housing types, with appropriate siting standards to ensure adequate public facilities access and life/safety, can provide additional permanent or interim housing options outside of parks. Allowing broader siting of RV parks and amending standards to allow THOWs, park model homes, and other housing types on wheels can also provide additional siting opportunities.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Tiny House on Wheels (THOWS) - City of Portland	(INDIRECT)	All	--
A25	Legalize and Encourage Tiny Homes and Villages	The Oregon Reach Code, Part II, defines a "tiny house" as a dwelling that is 400 square feet or less in floor area, excluding lofts. While many (though not all) jurisdictions allow tiny homes to be sited as a primary or accessory dwelling, few encourage their development through regulatory incentives. Legalizing the siting of tiny homes as primary or accessory dwellings through the removal of minimum unit size requirements can enable the development of this housing type. Jurisdictions can encourage the development of tiny houses and tiny house villages by providing regulatory incentives – such as reductions in required off-street parking or open space – for units less than 400 SF in floor area	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	All	--

Category B: Reduce Regulatory Impediments

These strategies address known impediments to providing needed housing. These include but are not limited to process, permitting, and infrastructure impediments.

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
B01	Remove or Reduce Minimum Parking Requirements	Removing parking requirements for residential uses provides the opportunity to reduce the amount of lot area used for pavement and provides more space for housing and open space. This strategy offers greater flexibility to site housing and reduces costs associated with providing parking. Allow developers to respond to market demands and transit access without having the burden of parking minimums. Consider removing parking requirements near transit or for affordable housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Tigard	INDIRECT	All	--
B02	Remove Development Code Impediments for Conversions	Streamlining the conversion of larger single-family homes into multi-unit dwellings (e.g. duplex or triplex). This should be aligned with reduced off-street parking requirements, so that conversion doesn't trigger the need to add additional driveways (or isn't halted by inability to add additional driveways).	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Tigard	(INDIRECT)	Early Gentrification Active Gentrification	Converstions that upgrade and upscale may displace through broader neighborhood changes; conversions that create more rental and moderate cost housing may stabilize
B03	Expedite Permitting for Needed Housing Types	Expedited permitting will help to reduce costs of development of Needed Housing as identified by the City. Consider projects with direct or indirect funding from local government as essential and projects with long term affordability covenants through tax abatement or inclusionary requirements as high priority and/or only expedite housing according to the jurisdictions identified needed housing types. Local governments might also consider assigning a designating staff to shepherd projects through the construction process in order to expedite process.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Portland (direct funding only)	(INDIRECT)	All	--
B04	Expedite Lot Division for Affordable Housing	Expedite lot divisions and subdivisions for affordable housing projects	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(DIRECT)	All	--
B05	Reduce Regulatory Barriers to Lot Division	Remove barriers such as minimum street frontage, driveway requirements, etc., that impact minimum lot size/density during lot division. Preferably allow by-right lot division up to max number of units allowed.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	All	Increased dendsity in gentrifying neighborhoods may not serve to stabilize; add incentives and programs to target affordability and increase impact
B06	Streamline Permitting Process	In some cities, towns, and counties, the process associated with obtaining approval for new construction is so time-consuming or costly that it dampens the amount of new development and adds significantly to its costs. To help streamline the process, cities, towns and counties can initiate a comprehensive review of all steps in the development approval process to identify the factors that most significantly suppress new residential construction and redevelopment. With a clearer picture of the obstacles, local leaders can then begin to assess whether they can be reduced or eliminated to stimulate development activity. In doing the comprehensive review, it is critical that actual timeline performance be evaluated not just the planned timeline.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	INDIRECT	All	Planning and continued monitoring of production; add incentives and programs to target affordability and increase impact
B07	Flexible Regulatory Concessions for Affordable Housing	Often, nonprofit housing developers and housing agencies face regulatory impediments to building affordable housing, which can often derail projects. This strategy provides a flexible framework for delivery of affordable housing including but not limited to reduced minimum setbacks, height bonuses, and/or allowing for flexibility in how units are delivered. This strategy is not intended to allow for a lower quality for affordable housing buildings.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Morrow County HNA, 2017	(DIRECT)	All	Planning and continued monitoring of production and locations; add incentives and programs to increase impact and avoid clustering

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
B08	Waive Off-Site Infrastructure Requirements for Needed or Affordable Housing	Waive infrastructure build-out requirements for infill affordable or needed housing projects constructed in neighborhoods without a network of those amenities currently. Example: Waive requirements for curb, gutter and sidewalk build-out on the lot if it is located in an area without either connecting curb, gutter, and sidewalk currently or viable plans for funding infrastructure construction within the next decade. This is especially relevant in smaller, more rural locations.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Clackamas County Housing Report	**(INDIRECT)**	**All**	**Planning and continued monitoring of production; add incentives and programs to target affordability and increase impact**
B09	Capital Improvements Programming (CIP)	Programming work in a Capital Improvements Programming (CIP) so that projects are constructed sooner to support development of middle housing or to open up more land in an Urban Growth Boundary (UGB) for development of middle housing. Coordinate housing planning with CIP work to prioritize those projects that would support development (e.g. new water line, sewer pumping station). If the UGB is amended or the premises on which the CIP were based changed substantially, the CIP should be revised.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**INDIRECT**	**All**	--
B10	Public Facility Planning	Completing water, sewer, and transportation PFPs and getting capital improvement projects (CIP) built so that costs to develop on land zoned for needed housing can be further anticipated and supported. In addition, public utilities planning also allows for more unit capacity, especially in areas that are upzoned for denser housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Tigard City of Bend	**INDIRECT**	**All**	--
B11	Pro-Housing Agenda	Change the culture of Planning / Development Services departments to have a pro-housing agenda for both rental and homeownership. Supplement with fair housing education and education on the supply and demand impact on housing prices. The State could support jurisdictions in this effort by providing an incentive (e.g. funding set-aside) for jurisdictions that adopt aggressive pro-housing policies. In the State of California housing funds are prioritized for cities that adopt pro-housing policies. Though it may be counterintuitive, since this allows anti-housing cities to avoid housing altogether. Alternatively, the State of Oregon could consider a stick rather than carrot approach (e.g. withholding highway funds).	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**INDIRECT**	**All**	**A more focused agenda on afffordable housing will address NIMBY and stigma issues with rental housing, affordable housing, and protected classes**
B12	Pro Affordable Housing Agenda	Change the culture of Planning / Development Services departments to have a pro Affordable Housing agenda for both rental and homeownership. Supplement with fair housing education and education on the supply and demand impact on housing prices. The State could support jurisdictions in this effort by providing an incentive (e.g. funding set-aside) for jurisdictions that adopt aggressive pro Affordable Housing policies. This agenda should include a plan to ensure that affordable housing is not suppressed in single-family zones or in wealthier communities. As part of this, encourage departments to look closely at how existing approaches may inadvertently favor one type of tenure over another.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**(DIRECT)**	**All**	**A pro-affordable housing agenda does not create housing directly; but it is an important component of planning to ensure that equity is achieved. Including Fair Housing and addressing protected classes such as race/ethnicity and national origin will further target this strategy to equitable outcomes**
B13	Align Bike Parking Requirements with Actual Use	Require bicycle parking requirements more in line with actual use. Example: No more than 1-1.5 bike parking stalls per unit.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**INDIRECT**	**All**	--
B14	Adopt Affirmatively Furthering Fair Housing as a Housing Policy in Comprehensive Plan	Amend the comprehensive plan to explicitly make Affirmatively Furthering Fair Housing a Housing Policy. Example below, based on federal guidance on affirmatively furthering fair housing and current state protected classes. Jurisdictions may add additional protected classes, such as ancestry, ethnicity, or occupation. Additionally, a jurisdiction could create an Analyis of Impediments to Fair Housing (AI) even when not required, and conduct fair housing training for Council, Planning Commission, and other relevant policymakers. Jurisdictions would work to make known evidence and best practices in planning, to reverse discrimination and exclusion as well as concentrations of wealth, a required aspect of the comprehensive plan process. Housing Policy x: Affirmatively Furthering Fair Housing [Jurisdiction] affirmatively furthers access to decent, affordable housing with convenient access to the services and destinations Oregonians need to thrive without regard to their race, color, religion, national origin, sex, familial status, mental or physical disability, source of legally-derived income, marital status, sexual orientation or gender identity.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**(DIRECT)**	**All**	**addressing affordability and equitable access for all people; as well as considering neighborhood clustering and neighborhood change as part of access to opportunity. It is an important undergirding for housing planning and directing resources; but does not create housing**
B15	Reduce the Power of NIMBYism to stop, slow, change, or reduce affordable housing	Many jurisdictions give communities/neighborhoods too much veto power on both zoning policy, and particular project proposals to keep others who they don't approve of from moving in. Dedicate funds to educate citizens on poverty, exclusion, and racial dynamics. Remove policies that allow neighborhood opposition to evidence based zoning proposals and individual projects. Decisions about what kind and how much housing goes where it needs to be data-driven and focused on equitable outcomes instead of the best outcomes for those with the most money and/or privilege.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**(DIRECT)**	**All**	**removing policies ais a stronger and more direct impact than educating communities.**
B16	Holistic Planning to Distribute New Density More Equitably	Geography is often at odds with social equity; natural beauty is often in wealthy neighborhoods, as are historic buildings, allowing them to exclude new development and affordable housing. Develop a targeted plan to distribute density within the jurisdiction more equitably to areas with quality schools, access to natural resources etc. Additionally, work to distribute transit equitably to ensure that exclusionary neighborhoods don't remain that way because they don't offer transit for higher density housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**(INDIRECT)**	**All**	**Planning and continued monitoring of production; add incentives and programs to target affordability and increase impact**
B17	Reduce on-site Common/Active Open Space Requirements	Remove or reduce requirements for on-site common/active open space. Instead, ensure that adopted Parks plans fully consider the needs of every neighborhood, and that the jurisdiction is actively working toward satisfying those needs.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**INDIRECT**	**Affordable & Vulnerable Early Gentrification**	**Take care with neighborhoods that are seeking more holistic revitalization to balance non-housing needs with housing production**
B18	Prioritize Home Ownership	Jurisdictions would develop a comprehensive review of the impediments to the development of homeownership opportunities and actionable steps to remove those impediments. *Note: An important impediment to condominium development is the risk associated with the current condominium law in Oregon. A revamp of this law is needed to increase homeownership opportunities that are smaller in size. This would require action at the state level.*	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	**(INDIRECT)**	**All**	**To ensure access to homeownership to under-represented groups, pair development of owner-occupied housing types with homebuyer education, financial assistance like downpayments and low-cost loans, and affirmative marketing**

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
B19	Survey Applicants on Development Program Decision-Making	Add a section to the city's development application asking developers how they decided on their development program and which public incentives were part of the consideration. This would lead to better information about how to tailor city strategies toward production. An alternative to requiring cities to collect this info, is to consider this approach as part of a production strategy. To be a strategy it needs additional action like logging and making publicly available the aggregated survey information on the city's housing/development/planning webpage or similar. The information could be collected on a form separate from the development application, so it is clear that the additional information is not part of the permit decision.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Housing Production Strategy Technical Advisory Committee	(INDIRECT)	All	–

Category C: Financial Incentives

These are a list of financial incentives that cities can offer to developers to encourage them to produce needed housing.

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
C01	Reduce or Exempt SDCs for Needed Housing	Reducing, deferring, and/or financing System Development Charges (SDCs) at a low interest rate for needed housing types. This strategy reduces development costs.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Tigard	(INDIRECT)	All	Increase impacts by focusing SDC incentives on needed housing types from the equity housing needs analysis
C02	Modify SDC fee schedules	Updating SDC fee schedule so that is tied to dwelling size. This strategy ensures that smaller dwelling sizes in single and multi-family housing are not disproportionately burdened by fees and therefore encouraged. Consider per square foot fees rather than per dwelling.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Florence	(INDIRECT)	All	Increase impacts by focusing SDC incentives on needed housing types from the equity housing needs analysis
C03	Reduce or Exempt SDCs for ADUs	Waivers/reductions of SDCS for ADU production in order to improve the feasibility of the development. Create a model ordinance for the waiver, or deferment, of SDCs. Scale SDCs based on size, resource efficiency, and access to alternative transportation.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Portland	(INDIRECT)	Early Gentrification Active Gentrification	In strong market, this can produce more housing units; ADUs have medium anti-displacement impact, can be increased with programs to target affordability and equity
C04	Incentivize Manufactured and Modular Housing	Give Bonus Density Incentives for manufactured and factory built housing. Consider tying bonus to modular housing that demonstrates if housing meets affordability targets of below 120% AMI.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Metro King County RMHP	(DIRECT)	All	–
C05	Waive or Finance Park Impact Fees for Affordable Housing	A policy providing for the exemption (preferred) or financing park impact fees (helpful) for affordable housing ensures a mix of affordable housing. Financing the fee while still collecting can mitigate the cost of the fee to coincide with the available cash flow of the affordable housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Tualatin Hills Park & Recreation District	(DIRECT)	All	Reduced fees have medium impacts on displacement
C06	Publicly Funded Infrastructure Improvements	Fund off-site improvements for workforce or affordable housing; e.g. street intersection improvements triggered by development.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	–	(DIRECT)	All	Reduced fees have medium impacts on displacement
C07	Reconsider Applying Park SDCs	If there are appropriate levels of parks and open space near the project, these impact fees should not be charged or should be assessed at a much lower rate. They are not general funds to be allocated without a nexus to the development.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	–	(INDIRECT)	Early Gentrification Active Gentrification	Reduced fees have medium impacts on displacement in strong markets; make more impact by targeting to affordable development
C08	Transportation SDCs Tied to Parking	Tie transportation SDCs to the number of parking spaces, as the number of parking spaces is a more accurate predictor of the number of trips that will start or end at every development. By tying transportation costs directly to vehicle storage, the system will both be assessing transportation impacts fairly and encouraging alternate modes of transportation.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	–	(INDIRECT)	Early Gentrification Active Gentrification	Reduced fees have medium impacts on displacement in strong markets; make more impact by targeting to affordable development

Category D: Financial Resources

These are a list of resources or programs at the local, state, and federal level that can provide funding for housing projects, primarily subsidized affordable housing projects.

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
D01	Community Development Block Grant (CDBG)	CDBG Grants are federal funds set aside in the form of grants to be used to meet national objectives: direct benefit for low and moderate income households; benefit to predominantly low income areas; elimination of slums and blight. Eligible activities include public works infrastructure, community facilities, new housing development, housing rehabilitation, and public services (counselling, social services & microenterprise training, including short-term emergency rent assistance). Eligibility is based upon the levels of low- and moderate-income families that may benefit from services provided by the eligible projects. While Cities can choose not to apply for CDBG, control of whether or not they receive CDBG is ultimately at the Federal level and like the State of	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Tigard City of Eugene City of Beaverton City of Hillsboro City of Gresham City of Portland	DIRECT	Affordable & Vulnerable	–

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
		choose not to apply for CDBG; some or whether or not they receive CDBG is ultimately at the federal level and like the State of Oregon, these funds can be used for things that have little to do with housing, so may have limited impact. A better gauge may be HOW cities use their CDBG; for housing benefit or other.			City of Bend City of Redmond State of Oregon			
D02	Low Income Housing Tax Credit (LIHTC)	Federal tax provision that encourages private investment in affordable rental housing by providing qualified investors with a dollar-for-dollar reduction in federal income tax liability in exchange for investment in qualifying new construction and rehabilitation projects. LIHTCs may also be paired with Tax Exempt Revenue Bonds.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	DIRECT	Early Gentrification Active Gentrification Late Gentrification	In strong markets, LIHTC can be used to create mixed-income housing that provides cross-subsidy to affordable units; LIHTC can also be combined with additional programs to extend the affordability period for the housing
D03	Housing Trust Funds	Housing Trust Funds are a flexible source of funding that can be used to support a variety of affordable housing activities. Because they are created and administered at the city, county, region, or state level, housing trust funds are not subject to the restrictions of federal subsidy programs and therefore can be designed specifically to address local priorities and needs. The entity administering the fund determines eligible activities, which can include anything from emergency rent assistance for families facing the threat of eviction or homelessness to gap financing for new construction of affordable housing to repairs for older homeowners.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	DIRECT	All	--
D04	Operating Subsidies for Affordable Housing Developments	Operating subsidies are payments made annually (or more frequently) to owners of affordable housing developments that make the housing more affordable by covering a portion of the ongoing costs of operating the development.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	DIRECT	All	--
D05	Employer - Assisted Housing Programs	Employer-assisted housing programs provide a channel through which employers can help their employees with the cost of owning or renting a home, typically in neighborhoods close to the workplace. Assistance may be provided in a variety of ways, including through down payment grants or loans that are forgiven over a period of employment, homeownership counseling and education, rental subsidies and, less commonly, direct investment in the construction of rental housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	(INDIRECT)	Early Gentrification Active Gentriciation	Employer-assisted housing in areas near transit or near workplaces can support stability and equity, and contribute to a 'pro-housing agenda'.
D06	HOME Program	HOME is a federal program established by Congress in 1990 that is designed to increase affordable housing for low- and very low-income families and individuals. All States and participating jurisdictions receive HOME funds from HUD each year, and may spend HOME on rental assistance, assistance to homebuyers, new construction, rehabilitation, improvements, demolition, relocation, and limited administrative costs.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	--
D07	Dedicated Revenue Sources for Affordable Housing	A dedicated revenue source for affordable housing provides an ongoing committed stream of revenue for affordable housing, often deposited into a Housing Trust Fund. This can be helpful in increasing the total funding available for affordable housing. The fund can receive its sources from: Transient Lodging Taxes collected from Short Term Rentals, developer fee and real estate transfer taxes *(not constitutional in Oregon)*.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions City of Portland Housing Investment Fund	DIRECT	All	--
D08	Demolition Taxes	Cities, towns, and counties establish demolition taxes and condo conversion fees as a way to generate revenue and replace affordable housing lost to these activities. The proceeds from both demolition taxes and condo conversion fees are typically deposited in a Housing Trust Fund to support affordable housing activities. To ensure that a demolition tax on residential development does not deter needed redevelopment - this strategy should only be applied if the housing replacement is 1:1. If the proposed development is more dense than the original structure, there should not be a demolition tax.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	INDIRECT	Active Gentrification Late Gentrification Exclusive	Medium impacts to prevent displacement in strong market with lots of demolition and conversion, with impacts in the short term and potential to fund housing. Plan and monitor production vs. needs
D09	Construction Excise Tax (CET)	A Construction Excise Tax (CET) is a tax on construction projects that can be used to fund affordable housing. According to state statutes, the tax may be imposed on improvements to real property that result in a new structure or additional square footage in an existing structure.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Portland City of Eugene City of Sisters	DIRECT	All	Plan and monitor production vs. needs
D10	Tax Increment Financing (TIF) Set-Aside	Create a TIF set-aside for affordable housing development programs within designated Urban Renewal Areas (URAs). Target could be to begin setting aside funds for affordable housing projects as a medium-term action, over the next 5 years or so. For example: Portland City Council designates 45% of the gross amount of TIF for designated housing purposes (rental housing for households under 60% of Area Median Income (AMI) and homeownership for households under 80% of AMI.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Portland	DIRECT	Affordable & Vulnerable Early Gentrification Active Gentrification	The TIF set-aside can fund housing; but it is a financing mechanism that relies on overall property values increasing to create the increment. TIF is associated with gentrification and displacement, especially for people of color. This may be exacerbated by Oregon's restriction of TIF funds to physical development; add community and economic development activities for low-income and POC to support their staying in place as neighborhoods improve
D11	Flexible Use of Housing Choice Vouchers	Public Housing Authorities have the ability to attach up to 20% of their voucher assistance to specific housing units for each low income housing project, up to 25% of any single project. Project-Based Rental Assistance (PBRA) vouchers provide rental assistance for eligible individuals and families who occupy specific housing units managed by private owners who have entered into agreements with a housing agency. The household pays an established amount to the owner each month (typically approximately 30% of monthly income) and the housing agency pays the balance of the rent due. If public housing authorities include homeownership in their administrative plan, housing vouchers may also be used to facilitate low income homeownership.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	DIRECT	All	--
D12	Targeted Vouchers	Vouchers that target renters at the 60-80% AMI who are often left out of the housing funded by bond funds and other public sources that are focused on lower income levels. Housing Authorities use affordable housing dollars and issue vouchers that are good for one year and pay any landlord the difference between what the tenant can afford and market rent. This takes the reporting burden off the landlord and essentially allows any existing unit to be affordable. Each year the tenant would have to prove to the Housing Authority if they were still income qualified and if not.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	--

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
D13	Low-Interest Loans / Revolving Loan Fund	Housing Repair and Weatherization Assistance for low and moderate income households may be capitalized by Tax Increment Financing (TIF), Community Development Block Grant (CBDG) Funds, or local Housing Trust Funds.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Portland	DIRECT	All	--
D14	Eviction Prevention Programs	Eviction Prevention Programs provide financial assistance to help renters facing eviction stay in their homes. These programs are generally designed for families who are being evicted due to nonpayment of rent during or following an unforeseen crisis, such as job loss or serious illness, rather than those who face more persistent affordability challenges. Jurisdictions may be interested in investing in eviction prevention to address concerns about displacement of low-income renters and also to avoid or reduce use of other more costly local services, like homeless shelters.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	DIRECT	Affordable & Vulnerable Early Gentrification Active Gentrification Late Gentrification	Eviction prevention programs have high anti-displacement impacts, in the short-term, and across all markets. They are especially useful in strong markets where there are economic incentives to evict.
D15	Bond - for Resident Support Services and Permanent Supportive Housing Services	Limited Tax General Obligation Bond that creates a funding source for supportive housing services, such as access to health care, mental health, and other social services that better support and stabilize residents who face complex challenges and will benefit from affordable housing programs.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Oregon Metro City of Portland	DIRECT	All	--
D16	General Obligation Bonds – for Affordable Housing	Following the passage of Measure 102 Oregon local governments, including cities and counties, can now issue voter-approved general obligation bonds to provide direct funding for construction and other capital costs associated with the development and construction of affordable housing. These funds can be loaned or granted to both public and privately owned affordable housing projects. "Affordability" is required to be determined by voters and each jurisdiction, and can be above or below minimum affordability levels established for the federal LIHTC program and other established federal and State affordable housing finance programs, defining affordability by reference to Area Median Income (AMI) as established by HUD. The bonds could be paired with other financing such as Low Income Housing Tax Credits, or could be used for homeownership opportunities.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Oregon Metro City of Portland Oregon Measure 102	DIRECT	All	--
D17	Use IHBG funds for Urban Native Americans	Mixing of Indian Housing Block Grants (IHBG), typically used for housing for Native Americans on reservation land, with other traditional affordable housing funding sources allows preference for Native members in urban affordable housing projects.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	NAYA and CDP and Confederated Tribes of the Siletz	DIRECT	All	--
D18	Weatherization Funds through Community Action Agencies	Use weatherization funds administered by statewide network of Community Action Agencies to preserve aging housing stock occupied by income-qualified residents.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	OHCS Weatherization Assistance	DIRECT	Affordable & Vulnerable Early Gentrification Active Gentrification	Weatherization funds can address displacement by improving habitability in low-income neighborhoods; and by reducing energy costs and needs for expensive repairs that may displace owners in gentrifying neighborhoods.
D19	Transit-Oriented Development Grants	Provide financial incentives to developers to create transit-oriented communities. Funding can be used for site acquisition, infrastructure projects and residential/mixed-use projects.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Oregon Metro TOD Program	(INDIRECT)	All	Planning ahead for affordability in TOD is important for not displacing households who are most likely to use transit (low-mod income, renters, POC, and immigrants); making it an effective strategy for equity and to support multi-modal transportation.
D20	Local Innovation and Fast Track (LIFT) Program for Affordable Rental Housing Development	The Local Innovation and Fast Track (LIFT) Housing Program's objective is to build new affordable housing for low income households, especially families. Funds are available for Serving Historically Underserved Communities, Rural and Urban Set-asides, Urban Communities, Service to Communities of Color, and Rural Communities. Available for affordable homeownership units (below 80% AMI).	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	OHCS Housing Development Program	DIRECT	All	--
D21	Mental Health Trust Fund Awards	Administered by the Oregon Health Authority for capital construction costs.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	--
D22	Foundations Awards	Local, regional, and national foundations provide both capital funding and program funding for a wide variety of innovative housing models and programs.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Examples: Meyer Memorial Trust and Oregon Community Foundation (OCF)	DIRECT	All	--
D23	State of Oregon Debt	State of Oregon to offer non-recourse low-interest debt that can be used to fund workforce or affordable housing. This could be provided through an existing relationship like Network for Oregon Affordable Housing (NOAH). This would be a valuable tool for providing housing in rural communities, where conventional debt funding may not be readily available. *Note: This strategy has been suggested by the housing development community, but programs are not yet in place in the State of Oregon.*	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	--
D24	State of Oregon Debt Support	State of Oregon to provide some form of collateralization to support private debt placement for a workforce or affordable housing project. For example, the State could provide Letters of Credit and/or Guarantee on behalf of the developer to the private lender. This would be a valuable tool for providing housing in rural communities, where conventional debt funding may be hesitant to invest without substantial backing that the State could provide. *Note: This strategy has been suggested by the housing development community, but programs are not yet in place in the State of Oregon.*	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	--

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
D25	Luxury Tax for Equitable Housing	Oregon State sales tax on luxury items, 2nd homes, etc. dedicated to providing funds for affordable housing funds. *Note: This strategy has been suggested by the housing development community, but programs are not yet in place in the State of Oregon.*	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	--
D26	Reallocate Health and Public Safety Resources to Housing	Because healthy housing makes a huge difference in health care, public safety, and other costs, identify paths to redirect budgets from those sectors toward housing construction funds and supporting services. Use advanced modeling projections and adjust as needed over time.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	--
D27	Georgist Land Tax	Generate tax revenue for affordable housing by reducing the gains accrued from public investments that are capitalized into private value.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	A land tax promotes equity among homeowners, if properly calibrated and incentives more development of housing supply. This requires state law changes. https://www.pdx.edu/news/psu-study-portland-land-value-tax-would-improve-equity-homeowners-incentivize-development

Category E: Tax Exemption and Abatement

These are a list of tax exemption and abatement programs that are intended to encourage developers to produce housing.

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
E01	Nonprofit Low-Income Rental Housing Exemption	This tool can provide a simplified way for affordable housing owned and operated by a nonprofit (as well as land held by a nonprofit for future affordable housing development) or Community Land Trusts (at least in land value) to qualify for a property tax exemption. Work should be done to make it easier for projects/land to qualify; minimizing the number of taxing authorities needed to grant an approval.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	See Oregon Revised Statute Chapter 307.540	DIRECT	Affordable & Vulnerable	--
E02	Property Tax Exemption for Affordable Housing Tied to Level of Affordability	Create a Property Tax Exemption for affordable housing that is tied to level of affordability instead of the ownership structure. For example, grant a property tax exemption for affordable housing that serves households making less than 60% of AMI at initial lease up. Don't tie the property tax exemption to ownership (LLC, non-profit, housing authority) and only require income verification at the beginning of a residents tenancy. The property should still get the exemption even if the household increases income after their initial lease up so they can build assets in place.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(DIRECT)	Early Gentrification Active Gentrification	Take care to include homebuyer and post-purchase financial education to avoid loss of assets in gentrifying neighborhoods, where owners can be pressured to sell or to take out refinance loans.
E03	Vertical Housing Development Zone Tax Abatement	Partial property tax exemption program on improvements for new mixed use development. To qualify, a project must have improved, leasable, non-residential development on the ground floor and residential development on the floors above. A partial abatement on land value is allowed for each equalized floor of affordable housing. This abatement could be made better by an adjustment to the floor equalization formula - right now, there is a 20% abatement per equalized floor, but if the project ends up being 3.8 equalized floors it only gets 3 floors worth of the abatement rather than an apportioned abatement.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Authorized by Oregon Revised Statute, 307.841. City of Hillsboro City of Beaverton City of Milwaukie Oregon City City of Gresham City of Tigard City of Wood Village City of Forest Grove	DIRECT	Active Gentrification Late Gentrification	Calibrate incentives to needed housing types, e.g., affordability levels. Incentives for inclusion of affordable units work best in strong markets.
E04	Multiple Unit Property Tax Exemption (MUPTE)	This strategy can be used to incentivize production of multifamily housing with particular features or at particular price points by offering qualifying developments a partial property tax exemption over the course of several years.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	See Oregon Revised Statute, Chapter 307.600	(INDIRECT)	Active Gentrification Late Gentrification	Calibrate incentives to needed housing types, e.g., affordability levels. Incentives for inclusion of affordable units work best in strong markets.
E05	Multiple Unit Limited Tax Exemption (MULTE)	Under the Multiple-Unit Limited Tax Exemption (MULTE) Program, multiple-unit projects receive a ten-year property tax exemption on structural improvements to the property as long as program requirements are met.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Authorized by Oregon Revised Statute, Chapter 307.600 Multiple Unit Limited Tax Exemption (MULTE) - City of Portland	(INDIRECT)	Active Gentrification Late Gentrification	Calibrate incentives to needed housing types, e.g., affordability levels. Incentives for inclusion of affordable units work best in strong markets.
E06	Homebuyer Opportunity Limited Tax Exemption Program (HOLTE)	Under the HOLTE Program, single-unit homes receive a ten-year property tax exemption on structural improvements to the home as long as the property and owner remain eligible per program requirements.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Authorized by Oregon Revised Statute, 307.651. Homebuyer Opportunity Limited Tax Exemption (HOLTE) - City of Portland	(INDIRECT)	Affordable & Vulnerable	Calibrate incentives to needed housing types, e.g., affordability levels. Incentives for inclusion of affordable units work best in strong markets.
E07	Homestead Tax	Consider allowing Homestead Tax on second homes to support development of affordable housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(DIRECT)	Affordable & Vulnerable	--
		Property taxes are based on property values and so can go up regardless of the taxpayers' ability to pay. In the case of homeowners, rising property taxes can be an obstacle to housing affordability and stability. A tool used in a number of jurisdictions						

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
E08	Property Tax Relief for Income-Qualified Homeowners	homeowners, rising property taxes can be an obstacle to housing affordability and stability. A tool used in a number of jurisdictions for mitigating these effects on those with limited incomes is by capping the amount of property tax that homeowners have to pay as a share of their income. Some jurisdictions also provide relief to lower-income renters by treating some portion of their rent as attributable to property taxes and then providing an income tax credit to offset the increase in taxes. In addition to basing the benefit on income, eligibility for caps can also be restricted to specific populations such as seniors, disabled persons, and/or veterans.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Local Housing Solutions	(DIRECT)	Active Gentrification Late Gentrification Exclusive	Supporiting owners to stay in place as housing markets heat up is an important preservation strategy; it does not maintain the affordability of the unit at stake.
E09	Investing into Federal Opportunity Zones (OZ)	Qualified Opportunity Zones (QOZ) were created by the 2017 Tax Cuts and Jobs Act. These zones are designed to spur economic development and job creation in distressed communities throughout the country and U.S. possessions by providing tax benefits to investors who invest eligible capital into these communities. Taxpayers may defer tax on eligible capital gains by making an appropriate investment in a Qualified Opportunity Fund and meeting other requirements.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Opportunity Zones FAQ (IRS)	INDIRECT	Affordable & Vulnerable Early Gentrification Active Gentrification	The OZ program has been found to be generally poorly targeted and monitored; as with any investment incentive it is important to include strong anti-displacement protections for vulnerable residents and ensure their inclusion in economic opportunities.
E10	Delayed Tax Exemptions	Allow housing to be built and operated at market rate while allowing developers to choose a path that maintains or reduces rents over time. Once the property falls below 80% AMI (but maintains HUD quality standards), tax exemptions would kick in. This could be an alternative to upfront incentive dollars, SDC reductions, etc for providing affordable housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	All	--

Category F: Land, Acquisition, Lease, and Partnerships

These are strategies that secure land for needed housing, unlock the value of land for housing, and/or create partnerships that will catalyze housing developments.

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
F01	Land Banking	Public purchasing of vacant/under-utilized sites of land in order to save for future affordable housing development. House Bill 2003, section 15 supports land banking: SECTION 15. (1) As used in this section, "public property" means all real property of the state, counties, cities, incorporated towns or villages, school districts, irrigation districts, drainage districts, ports, water districts, service districts, metropolitan service districts, housing authorities, public universities listed in ORS 352.002 or all other public or municipal corporations in this state.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Metro TOD Program	(DIRECT)	Active Gentrification Late Gentrification Exclusive	Planning ahead for areas of public investment wth land banking can support affordable housing development without needing to purchase lots. In already developed, exclusive areas, using public land may be the only cost effective strategy for building new affordable units.
F02	Joint Development Agreements	The Federal Transit Administration (FTA) enables local transit agencies to enter into Joint Development Agreements (JDAs) with private or non-profit developers of low income housing, market-rate housing, and/or commercial development. Joint Development is a process by which public transit or other local or state agencies agree to make land available at donated or reduced prices for private development, which may include affordable housing. Projects must demonstrate benefit to transit operations (ridership) and infrastructure and are subject to FTA approval.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	All	Important foundation with focus on housing for transit dependent people (Low income, renters, POC and immigrants)
F03	Community Land Trusts	Land acquired by nonprofits or community-based organizations that maintain permanent ownership of land. Prospective homeowners are able to enter long-term (i.e., 99-year), renewable leases at an affordable rate. Upon selling, homeowners only earn a portion of the increased property value, while the trust keeps the remainder, thereby preserving affordability for future low-to moderate-income families	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	All	Land trusts are a very strong anti-displacement measure in all neighborhood types, with immediate and long-term impacts.
F04	Public/Private Partnerships (P3)	Partnerships between government and the private sector and/or nonprofits have the capacity to bring resources to the table that would otherwise not be available if each institution were able to help communities provide housing on its own. This can come in the form of coalitions, affordable housing task forces, and collaboratives.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(INDIRECT)	Affordable & Vulnerable Early Gentrification Active Gentrification Late Gentrification Exclusive	Setting clear public goals; including monitoring of provision of public benefits; and including financial penalties for not meeting goals are important for strengthening community benefits agreements in public-private partnerships.
F05	Preserving Low-Cost Rental Housing to Mitigate Displacement	Preventing displacement and preserving "naturally occurring" affordable housing through acquisition, low-interest loans/revolving loan fund for preservation, and/or code enforcement. Example: The Oregon Legislature committed $15 million in lottery bonds to Oregon Housing and Community Services (OHCS) in 2019 to create a naturally occurring affordable housing loan fund. Modeled after the Greater Minnesota Housing Fund.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	NOAH Impact Fund	DIRECT	Early Gentrification Active Gentrification Late Gentrification	Preservation is cost-effective compared to new construction and can prevent displacement in the immediate term for households in place.
F06	Preserving Safe, Affordable Manufactured Homes	Manufactured home parks often provide a form of affordable housing stock, but are particularly vulnerable to redevelopment pressures since lots are temporarily leased out. In order to preserve safe, affordable options into the future, manufactured home parks may be protected through assistance that allows community purchase of the underlying land, manufactured homes and provide funds used to maintain upkeep of these dwelling units. This strategy is often implemented through use of Land Trusts, Resident-Owned Cooperatives, Public Ownership of Land, or Condominium Conversion of the real estate assets to preserve the community(ies). Oregon Housing and Community Services (OHCS) has regularly received lottery bonds or general funds from the Oregon Legislature to preserve manufactured home parks through either Resident Owned Cooperatives or Non-profit ownership.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Portland OHCS Mfd Dwelling Parks Program	DIRECT	Affordable & Vulnerable Early Gentrification Active Gentrification	--
F07	Providing Information and Education to Small	Providing information to small, local developers that will help them understand land use permitting processes and give them a	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	INDIRECT	All	--

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
	Developers	sense of clarity and certainty about requirements so they can better provide smaller scale housing at an affordable level.	Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Sale				
F08	Conversion of Underperforming or Distressed Commercial Assets	Acquisition of underperforming or distressed commercial assets (commercial, retail, industrial, or hotel) or partnerships with owners of the assets for conversion into needed housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	DIRECT	Affordable & Vulnerable Early Gentrification Active Gentrification	Most likely to be cost effective in some neighborhood market types.
F09	Enhanced Use Lease of Federal Land	The US Department of Veterans Affairs (VA) may lease land for up to 85 years to developers of projects which provide the VA with compensation. Such enhanced use leases have been used to provide land for permanent affordable housing for people experiencing homelessness including veterans in Oregon, Minnesota and Washington States.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Housing Authority of Douglas County	(DIRECT)	All	--
F10	Prioritize Housing on City/County Owned Land	Surplus property suitable for housing is offered up for affordable development.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Eugene	(DIRECT)	All	--
F11	Combine Community Land Trust with Limited Equity Cooperative Model	Combine a Community Land Trust (CLT) with a Limited Equity Cooperative for a lower barrier entry to homeownership of a share of a permanent small/tiny home community.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	SquareOne Villages	DIRECT	All	--
F12	Surplus Land for Affordable Housing	Sell land at the State or City's cost (below market) to developers of affordable housing. Long-term lease at very minimal cost to developers for land the City is not yet ready to surplus. County surplus of foreclosed land to affordable housing developers and/or housing authority.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Bend	(DIRECT)	All	--
F13	McKinney-Vento Federal Surplus	Cities may partner with the Federal Government to surplus Federal land for homeless housing or services under McKinney Vento.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Bend	(DIRECT)	All	--
F14	Right of First Refusal for Land Purchase	Affordable housing providers could be offered a Right of First Refusal for city, county, or state owned land when the land would be used for affordable housing. Examples include a manufactured home program where residents can buy out the manufactured home park when the owner is ready to sell.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	CASA of Oregon - Mfd Housing Co Op Dev	(DIRECT)	All	--
F15	Ordinances that Address Zombie Housing	More assertive tax foreclosures to enable zombie housing to be rehabbed into occupied housing.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	INDIRECT	Affordable & Vulnerable	--
F16	Regulatory Agreement	Regulatory Agreement, between the jurisdiction and developer, in place with the land sale that keeps the units affordable for 20 years in exchange for SDC waivers. This is straightforward without going through a difficult or costly process.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	City of Beaverton	(DIRECT)	Active Gentrification Late Gentrification	Prepare for agreement expiration with preservation plans
F17	Designated Affordable Housing Sites	A jurisdiction would establish designated sites with a completely different set of regulations than apply to the balance of the public and private building sites. The sites would be overseen by an Affordable Housing Commission, that is empowered to prioritize, fast track, and approve affordable housing projects (with designated and required affordability objectives) and bypass the majority of the city's fees and regulations. The Commission would have its own set of requirements (structural approval, zoning allowance, etc.), but they would be streamlined, and tailored to facilitate a quicker and much less expensive process.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(DIRECT)	All	--
F18	Utilize Surplus Land Owned by Faith-Based Organizations for Affordable Housing	Over the past few decades, faith institutions across the country have been declining. This has prompted conversations within different faith communities about how to refocus their mission of social change. The housing affordability crisis in many cities around the country has brought these institutions into the work of creating affordable housing in their communities. This strategy would: 1) Identify faith and community-based organizations that are interested in offering their available land for development of affordable housing, 2) Provide design and finance consultation for three organizations to prepare them for future affordable housing development projects, and 3) Determine barriers to development and how those can be addressed and/or streamlined.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	Expanding Opportunities for Affordable Housing, Metro and City of Portland	(DIRECT)	All	--
F19	Affordable Housing Preservation Inventory	Prepare an inventory of subsidized and naturally occurring affordable housing to support proactive policies intended to preserve the affordable housing stock. This strategy is intended to help offset some of the need for costly new construction.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	The Center for Housing Policy, Washington DC Opportunity Zone Toolkit, US Department of Housing and Urban Development	(DIRECT)	All	--

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
F20	Fair Housing Education, Referral, and Other Services	Provide residents, property owners, property managers, realtors, lenders and others involved with real estate transactions with access to Fair Housing information and referrals. Ensure that city staff know how to identify potential Fair Housing violations and make referrals to the Fair Housing Council of Oregon and state and local enforcement agencies. Partner with and fund Fair Housing Council of Oregon to provide periodic Fair Housing Audit Testing, customized outreach and education and other specialized services.	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(DIRECT)	All	--
F21	Public or Mission-Driven REITs and Turn-Key Delivery	Most public subsidies and tax incentive programs are complex due to the need for regulation and corruption prevention, imposing many impediments to developing affordable housing. Jurisdictions would participate in a public REIT that buys turn-key projects for set costs. This would motivate mission-minded developers to drive down cost knowing that risk is minimal by having a buyer at the end. If the developer doesn't deliver the required specs, quality, and competitive construction cost, then they have to sell or rent on the open market or find other incentives in current, standard fashion. The jurisdiction could invest state pension funds in these REITs. *Note: Though this strategy has been suggested by the housing development community, it is not clear if this program is currently available to jurisdictions in the State of Oregon*	Publicly-Subsidized (< 30% AMI) Affordable (30-80% AMI) Workforce (80-120% AMI) Market Rate (> 120% AMI)	For Rent For Sale	--	(DIRECT)	All	--

Category Z: Custom Options

Any other Housing Production Strategy not listed in Categories A through F that the jurisdiction wishes to implement will be outlined in this section and numbered accordingly.

#	Strategy	Description	Affordability Target	Tenure Target	Source (if available)	Housing Equity Impact	Neighborhood Typology	Mitigating Measures
Z01	TBD	Any other Housing Production Strategy not listed above in Categories A through F that the jurisdiction wishes to implement should be filled in here and numbered accordingly.	--	--	--	--	--	--

Oregon Housing Needs Analysis Legislative Recommendations Report: *Leading with Production*

Legislative Report

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Oregon Department of Land Conservation and Development
Oregon Housing and Community Services

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About this Report

The report responds to specific legislative direction dating back to House Bill 2003 (2019). This bill charted a new direction to more fully and equitably meet housing needs as required by Goal 10: Housing, of Oregon's statewide land use planning program. House Bill 2003 led to multiple reforms, including a requirement for local adoption of Housing Production Strategies (HPSs) and the development of a new pilot methodology for estimating statewide housing need. In House Bill 2003 and the pilot methodology the model to estimate statewide housing need was called the Regional Housing Needs Analysis (RHNA), but it is now called the Oregon Housing Needs Analysis (OHNA).

In a budget note in House Bill 5006 (2021), the Legislature then directed Oregon Housing and Community Services (OHCS) and the Department of Land Conservation and Development (DLCD) to deliver recommendations on how to implement the OHNA in advance of the 2023 Legislative Session. The Legislature followed up with additional direction in House Bill 5202 (2022) to address issues related to land capacity and the implementation of the OHNA.

This report documents the core components of the agencies' recommendations. While it may be possible to consider some of these recommendations in isolation from others, our core finding is that Oregon's ongoing housing crisis requires comprehensive and structural changes to Goal 10 implementation and housing production. Many precedent documents and processes inform these recommendations:

1. OHCS and DLCD each published reports in 2021 (OHCS summary report, OHCS technical report, and DLCD report) describing technical elements of the new statewide methodology for calculating housing need and recommending legislative action to implement it.
2. In early 2022, OHCS and DLCD developed an initial framework document, titled *Meeting Oregon's Housing Needs: Next Steps for Equitable Housing Production,* to describe how the new methodology might be incorporated into the state's Goal 10 processes. The recommendations herein build from this framework.
3. DLCD and Communitas Consulting facilitated a working group, which met six times to inform recommendations. To review meeting materials and summaries, visit the OHNA Project Webpage.
4. Kearns & West led six stakeholder focus groups and three follow-up sessions with partners from nonprofit, development, local government, and fair housing organizations to solicit input. A summary of all stakeholder engagement is included in Appendix E.
5. DLCD held 14 regional forums with local government planners, developers, elected officials, and advocacy groups around the state to inform recommendations. A summary of all stakeholder engagement is included in Appendix E.
6. In response to a 2022 legislative budget note and direction, DLCD led a parallel Housing Capacity Working Group, charged with considering specific reforms to the Housing Capacity Analysis and the process described in statewide planning Goal 14-Urbanization. This group met a total of seven times to inform recommendations, which are included in Recommendation 1.4 and Appendix A of this report.
7. ECONorthwest conducted best practices research into what is working in other states and reviewed an audit of California's housing planning system to inform these recommendations.
8. ECONorthwest completed a series of technical revisions to the initial pilot methodology and prepared a report summarizing these refinements, which is included in Appendix D of this report.

9. The University of Oregon conducted a literature review and a survey of planners, developers, and local governments regarding barriers to development and published a report summarizing their results, which is included in Appendix F of this report.

Relevant Acronyms

AFFH: Affirmatively Furthering Fair Housing
AMI: Area Median Income
BLI: Buildable Land Inventory
DLCD: Department of Land Conservation and Development
HCA: Housing Capacity Analysis
HPS: Housing Production Strategy
LCDC: Land Conservation and Development Commission
LIFT: Local Innovation Fast Track
LIHTC: Low-Income Housing Tax Credit
OHCS: Oregon Housing & Community Services Department
OHNA: Oregon Housing Needs Analysis
PAB: Private Activity Bond
RHNA: Regional Housing Needs Analysis (prior name for OHNA)
SDC: System Development Charge
UGB: Urban Growth Boundary

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Executive Summary

Oregon's housing undersupply threatens the very core of our common purpose as Oregonians. We cannot grow sustainably, move toward a more equitable economy, or address the full complexity of the homelessness crisis unless we substantially increase our supply of homes.

Making meaningful progress will require comprehensive system reforms. While Oregon has already made great strides, including through recent legislative initiatives such as House Bill 2001 and House Bill 2003 (2019), we are still falling behind. To continue, the state and its communities must now tackle the harder reforms needed to prioritize housing production.

Our current system plans for and invests in too little housing. The outcome is undersupply, rising home prices, segregation and displacement in some communities, and deepening inequities across all communities. Together, we must plan for and build the housing we need, where we need it.

The recommendations in this document describe the comprehensive, system-wide reforms needed to reverse decades of underinvestment in housing production and development readiness, organize our land use planning systems toward the common goal of building housing, and begin to redress disparities in housing outcomes. These recommendations can only make a difference if the Oregon Legislature commits to serious reform of the land use planning system, helps local governments pay for public infrastructure and affordable housing, and creates a cohesive state approach to housing production. Those comprehensive reforms will require significant investments, as well as changes to state statute, rule, and guidance to implement. In summary, they are:

Housing Under-Production is a National Problem

Oregon is not alone. While nearly every state is experiencing underproduction, Oregon's outcomes are among the worst.

Measured as a share of housing stock, **Oregon ranks 4th in under-producing housing in the country** behind California, Colorado, Utah, and ahead of Washington State.

Recommendation 1) Plan for what's needed.

Oregon's land use system needs to balance housing production with growth management, economic, and environmental goals. For this to work, the system requires a reorientation that starts with an updated and consistent statewide methodology to more clearly determine housing need and equitably distribute it among jurisdictions. Planning for what's needed requires that:

1.1 **Adopt OHNA Methodology.** Formalize the OHNA methodology as the standardized, statewide source for setting common goals for housing planning. OHCS and DLCD have extensively reviewed and refined the 2019 pilot methodology (see Appendix D for refinements) Maintaining and deploying it will require administrative and technical capacity, a regular cycle of review and update to incorporate new data, and annual database management to track statewide progress toward housing production targets.

What is the Oregon Housing Needs Analysis?

The OHNA is the cornerstone of a reformed housing planning system. It provides a comprehensive, city-by-city estimate of housing need by income, along with data and information about how local housing outcomes vary by race and ethnicity, age, disability status, and other identity markers. When implemented, it will be a regularly updated data suite that can be used to set state and local **housing production targets**. It provides a **more accurate representation** of full housing need and a **more equitable distribution of affordable housing** throughout regions.

In the methodology alone, the **ONHA takes a big step toward equitable outcomes** compared to the current Housing Capacity Analysis methods, by incorporating historic housing underproduction and housing needed for people experiencing homelessness into future production targets, and by **using regional incomes to project housing need** by income level. In addition, the OHNA would be the source of annual housing production dashboards that provide clear metrics that can be used to track and monitor real production outcomes and metrics related to housing equity.

1.2 **Establish Production Targets and Equity Indicators.** Establish housing production targets and equity indicators, produced by the state, for cities with a population above 10,000 people to help solve our crisis. The state would measure progress toward targets in an outcome-driven system that adjusts policies over time.

1.3 **Emphasize Housing Production Strategies.** With their OHNA-derived housing production targets and strengthened policy requirements, cities would craft community-led and implementable Housing Production Strategies (HPSs) that promote equitable housing production and overcome locally specific development barriers.

1.4 **Streamline UGB Amendments.** Improve and streamline land capacity and urbanization processes to expedite well-planned expansions that support needed housing where capacity is limiting production.

Recommendation 2) Build what's needed, where it's needed.

It's one thing to plan to accommodate housing and another for that housing to be built. Where housing is built and for whom dramatically impacts who prospers and how our neighborhoods function. Building what's needed where it's needed will require us to:

2.1. **Commit Sustained, Coordinated Investment.** Commit resources for housing production, affordable housing production, and development readiness, including infrastructure funding. This is not a one-time, small-scale investment. The state must sustain this effort over time and focus investments in the construction of housing that the market is least likely to produce without aid: housing for low- and middle-income households and housing in rural and coastal markets. Creative financing and funding sources that leverage private investment should be considered. Additionally, the state has the opportunity to better coordinate existing resources and focus funding toward the goal of housing production (see Recommendation 3.1).

2.2. **Reinforce Housing Choice for All.** Use the implementation of Housing Production Strategies to advance fair and equitable housing outcomes, including addressing segregation and displacement.[1] We must build more housing in the places where it is needed, with intentional strategies that aim for fair housing and enable housing choice for all.

Recommendation 3) Commit to working together with urgency.

Housing underproduction is a systemic problem that no one actor can resolve. Public, private, local, and statewide entities all have a role to play and can become obstacles when not coordinated. **There is no one entity or person responsible for the public sector role in housing production at the state level.** For our state to have an effective system to accelerate housing production, we must have coordinated administrative systems that can deliver. Working together with urgency requires us to:

3.1. **Establish a Coordinated Governance Structure.** Develop a mechanism for state agency administration, collaboration, and accountability, to make rapid progress toward housing production goals. The solution should encompass a housing production team composed of experts in development, affordable housing development, fair housing, planning and development code, permitting processes, etc. to diagnose and overcome development barriers to quickly identify and implement policy or funding interventions where needed.

3.2. **Continue State and Regional Policy Action.** Develop strategies in which the State and Metro Regional Government (Metro) clearly articulate the tools, actions, and policies the state and regional governments will employ to meet housing production targets. These strategies should describe what they will contribute to partnerships with local jurisdictions, consistent with their statutory and charter limitations. Metro will continue to manage its region's land use planning processes and will use housing projection methodologies consistent with the OHNA. The state will allocate housing production goals to local jurisdictions within the Portland Metropolitan Area.

Implementation Considerations

Few policy imperatives are more important to Oregon's future than increasing the pace of building new homes. Housing production is on the critical path to building Oregon's economic competitiveness, helping families prosper, and improving community resilience. Simply producing the units needed to meet current demand could generate up to $40 billion in additional economic growth, a boost that would benefit us all.[2]

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[1] Those who most often face housing discrimination, segregation, and displacement include, but are not limited to, low-income households, households of color, people with disabilities, large families, other federally protected classes, and households with other specific housing needs.

[2] This estimate is based on Oregon's share of the national economic benefits that come from producing 3.8 million housing units across the country over a 20-year time period (as described in Up for Growth's *Housing Underproduction in the U.S. 2022 Report*), scaled to match the OHNA estimates of current underproduction and units needed for people experiencing homelessness. Economic growth is measured as increase in gross domestic product.

Implementing these recommendations will likely need to be sequenced over more than one legislative cycle. To make near-term progress on their implementation, we recommend that the Legislature consider bills in the 2023 session that advance the goal of building more homes. DLCD and OHCS look forward to continuing conversations about solutions and refining these recommendations in advance of and during the 2023 legislative session.

A. Redefine Oregon's Planning Process for Housing

The Legislature should establish the OHNA as the foundation for Goal 10 planning processes in state statute, including directing cities to replace local projections of need in Housing Capacity Analyses (HCAs) with OHNA-generated 20-year need. It should strengthen HPSs by requiring actions that address housing barriers and advance fair housing outcomes, and by incorporating production targets based on the data provided in the OHNA. Additionally, the Legislature should make statutory changes necessary to make needed urban growth boundary (UGB) expansions[3] more efficient and certain and support housing production within the UGB.

B. Coordinate State Response

The Legislature should establish a Housing Production Team and administrative leadership position. This team should be deployed as quickly as possible to achieve early housing production wins by helping cities build on challenging development sites, removing barriers, and focusing state resources. Additionally, this team should be charged with developing the first ever statewide Housing Production Strategy, which can shift the state's energy and efforts to this urgent challenge. The Legislature should direct staff at a broad cross-section of agencies, including DLCD, Oregon Housing and Community Services, Business Oregon, the Oregon Health Authority, the Bureau of Labor and Industries, and the Oregon Department of Transportation, to coordinate their activities and (as appropriate) available funding toward the goal of housing production in coordination with the new Housing Production Team.

C. Create Innovative Funding and Finance Solutions

In addition to funding affordable housing production through OHCS, the Legislature should establish new housing production funding mechanisms aimed at housing the market cannot produce on its own, including middle-income housing. Along with better coordination of existing funding sources, new sources for infrastructure funding, systems development charges, and pre-development activities are needed. Several formal and informal groups of stakeholders are considering innovative funding and financing mechanisms that are resonant with the recommended fund types in this report.

[3] Each Oregon city is surrounded by an urban growth boundary (UGB); a line that designates where a city expects to grow over a 20-year period. Generally speaking, it's where the city ends, and the farms and forests begin.

I. Introduction: Our Housing Crisis

Oregon's lack of housing threatens the very core of our common purpose. Decades of underbuilding have driven up home prices and rents and left too many without adequate housing choices. Too often, people can't afford housing at all. We won't be able to grow sustainably, move toward a more equitable economy, or address the full complexity of the homelessness crisis unless we substantially increase our pace of building new homes. Over the next 20 years, Oregon's communities need to add more than 550,000 units, over 30 percent of which will house Oregon's lowest-income residents and will most likely require public funding or subsidy. We must organize our systems to plan for and build these homes.

We cannot equitably distribute what is being underproduced. The people who are suffering most acutely from our housing shortage are disproportionately lower income households and communities of color. The lack of housing options perpetuates segregation through economic exclusion. By restricting people's housing choices, we make Oregon less fair, deprive people of basic human dignity, and limit our collective growth and prosperity. Where housing is built and for whom dramatically impacts who prospers and how our neighborhoods function. We need a range of housing types for all income levels, distributed equitably around and within each region of the state, providing access to employment and critical services and reducing the overall cost-burden to families and individuals.

This applies to both renting and homeownership. For most Americans, homeownership is the primary path to building personal and generational wealth. However, housing scarcity inverts the American dream. The market caters mostly to wealthier buyers, while rising housing costs make it nearly impossible for many to buy their first homes. At the same time, the lack of housing increases the need for publicly financed units and ultimately forces the most vulnerable people to become unhoused. This is devastating for people experiencing homelessness and has negative social and economic impacts on communities.

Oregon's system of comprehensive land use planning describes a decades-old intention to do better. It embodies the state's core values and has long represented a consensus on the preservation of farm and forest land, the importance of community engagement, and the need to plan for a healthy economic future. It also includes a requirement that jurisdictions plan for the "availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households."[4] However, Oregon has not fully realized this vision and many thousands of Oregonians lack an affordable, accessible, or safe place to live.

A recent survey conducted by the University of Oregon sheds light on what is not working. The survey found broad agreement that we face significant challenges in the cost, availability, and readiness of land to support development as well as the prohibitive cost of infrastructure, materials, and labor. There are sharper divides among those surveyed, however, when

[4] Goal 10 of Oregon's Land Use Planning: https://www.oregon.gov/lcd/OP/Documents/goal10.pdf

determining who is responsible for causing and addressing the current crisis. The survey finds that local governments tend to implicate the lack of funding and inflexibility on the part of developers to deliver a broader range of housing types, while private and non-profit developers view over-regulation and onerous processes as the culprit. Meanwhile, for the most part, local governments interested in advancing affordable housing solutions have been left on their own, without meaningful coordination or investment from the state to help find and implement solutions.

By statute, DLCD regulates the land use planning and policy that is implemented at the local level. OHCS funds affordable housing production and preservation. However, *no state agency is directly responsible for overall housing production*. This has left some jurisdictions without workable solutions to incentivize market or affordable housing production and allowed others to avoid their housing obligations. We should not be surprised that, despite the best efforts of the agencies and local governments, the outcome of this disconnected system has been decades of housing underproduction and the perpetuation of housing inequities.

The recommendations offered in this report focus on streamlining statutory requirements and bureaucracy so that Oregon can deliver real outcomes -- more housing in all parts of the state, a diversity of housing types, and more affordable units where they are needed. We offer these recommendations with a great sense of urgency. While there are many efforts underway to address the immediate symptoms caused by our lack of housing, we will not be able to meaningfully address the hardships faced by Oregonians until we focus on the long-term solution: providing more housing options for everyone, everywhere.

A Shift in Focus That Benefits Us All: Leading with Production

While the originators of Goal 10 intended for careful planning that would result in balanced, diverse, and affordable outcomes, implementation has fallen far short of that intent. The historic implementation of Goal 10 has overemphasized "accommodation" of housing need by completing an accounting exercise of the theoretical capacity of land, while doing little to ensure that housing is built or address where it should be located and whether households are realistically able to access it. This has negative consequences for all Oregonians – with dramatic underproduction, rising rates of cost burdening and homelessness, and continued patterns of segregation and involuntary displacement. The state needs to make comprehensive updates to our planning systems to better produce needed housing.

The recommendations in this report shift the current system's focus on accommodating potential housing growth to building the housing Oregonians need. We do this by:

- Accurately identifying what housing is needed by income and holding ourselves accountable to action
- Equitably allocating housing need within and between communities
- Requiring jurisdictions to consider context-specific actions to address displacement and segregation

- Providing strategic, flexible funding for housing the market cannot build on its own
- Connecting existing Fair Housing[5] obligations to our land use system and Housing Production Strategies to support diverse, quality, physically accessible, affordable housing choices with access to economic opportunities, services, and amenities
- Measuring and evaluating progress towards improved housing outcomes, especially for those who have been historically underserved

Taken together, these recommendations can transform our system from one that plans for and invests in too little housing to one that plans for and builds the housing we need, where we need it.

Our Shared Housing Obligation

We all share a responsibility to find the solutions that let us build what's needed where it's needed. The lack of sufficient units affects every community, but the people who are suffering most acutely from our housing shortage are disproportionately lower income, communities of color, or people with disabilities. They cannot be asked to wait another decade or more for Oregon to reverse the discriminatory policies and practices that have limited their housing options.

Solutions include: policies that enable production, public and private investment in a range of housing types, and clear policy goals so we can hold ourselves and each other accountable to outcomes.

To make meaningful change, Oregon needs a comprehensive system reform that brings state and local governments and affordable and market-rate developers together with common goals for building more homes, building more publicly supported homes, and investing in inclusive communities. To achieve this aim, we need a clear shift in approach to lead with production.

Reforming the Goal 10 Planning System for Housing

Oregon does not have a clear roadmap to follow for state oversight of housing production. Few other states have attempted a production-focused strategy, and none of them share Oregon's statewide land use planning system. While our review of national best practices provides lessons learned from other states, applying them in Oregon requires a thoughtful, carefully implemented approach, at least in part because the Oregon Legislature has already taken some of the suggested steps. In House Bill 2001 (2019), it eliminated zoning exclusive to detached single-unit homes, allowing a greater diversity of housing to be built throughout the state, and required cities of over 10,000 to develop Housing Production Strategies (HPSs). While these are necessary steps that will yield long-term benefits, expedited housing production will also require an alignment of a full suite of policy tools, agency coordination, and public investment.

[5] All recipients of federal funds from the Department of Housing and Urban Development are required to affirmatively further the policies and purposes of the Fair Housing Act, also known as "affirmatively further fair housing" or "AFFH."

In many states that are newer to comprehensive planning initiatives, zoned capacity limits housing production. Oregon's problems are different. The state has already increased zoned capacity to enable production, including through recent legislative initiatives such as House Bill 2001 (2019). Now, we must tackle the harder reforms needed to lead with production. We need to make sure that enough zoned capacity is available in the right places so that community members, especially those who have experienced historic marginalization, have meaningful choices in where they live and what kind of housing choices are available to them. At present, our system generates lower housing production in whiter, more affluent communities and expands capacity mostly in lower-income and more diverse communities. We need to improve the often onerous and contentious system for allowing jurisdictions to add land needed to meet growth and current housing deficits. And, most importantly, we need to turn our attention and investments to making land ready for development, advance state and local policies that are supportive of increased production and housing options and accelerate affordable low- and middle-income housing construction.

The recommendations in this report are far-reaching and will fundamentally change the way Oregon plans for and produces housing. If adopted, these changes could modernize Goal 10 into a national model for housing production. Goal 10 systems reform can deliver:

- **Increased focus on local actions that enable land readiness and production**, including removal of zoning and regulatory barriers and access to infrastructure investment
- **A smoother and less litigious UGB expansion process**, supported by the land use efficiencies in housing production strategies, a more accurate representation of housing need and capacity, and increased flexibility to unlock land where it's needed
- **Advancing fair housing goals**, by expanding production and housing options in historically exclusionary areas and integrating diverse, affordable, quality, and accessible housing across regions
- **Better and clearer guidance on local actions**, clarifying the purpose of each planning function and reducing and streamlining current requirements

These improvements are anchored by the objectivity of the OHNA methodology, data, and unit allocation to local jurisdictions. It is critical that these goals be seen as achievable and not an unfunded mandate. Discussions with local governments, market rate and affordable housing developers, and various advocacy organizations throughout the state have clarified that the state needs to implement changes that foster **partnership** between state and local governments, **accountability** to working towards housing need, and **investment** to support affordable housing production that the private housing market cannot produce on its own.

II. Core Recommendations

Recommendation 1) Plan for what's needed

Overview: Lead with Production

Leading with production requires a fundamental shift from a more passive planning approach to accommodate growth to outcomes-based strategies that focus on production.

As directed by statute, our current system addresses housing need by using past development trends to calculate the land supply and zoning capacity needed to meet future demand. However, past trends may not reflect the actual regional housing need and demand for housing options in any particular location. In this current system, most jurisdictions systematically underestimate their future housing demand, and especially underestimate their demand for housing for lower income households, because the demand was not appropriately accounted for originally and was reinforced through low production performance. This creates a negative feedback loop where underproducing housing, especially affordable housing, causes future projections to further underestimate need. A consequence of this dynamic over several decades is that the Housing Capacity Analysis (or Housing Needs Analysis), the historic implementing document of Goal 10, has become a land supply calculation and growth management tool that has little to do with actual housing production needed for a healthy society and economy. Instead, Goal 10 implementation has enabled and reinforced housing inequities between and within communities.

Overcoming this challenge requires implementing a new methodology that better estimates total need and does not rely on past development trends to determine where growth will occur (recommendation 1.1), setting production targets and measuring progress toward those targets and equitable outcomes (recommendation 1.2), strengthening Housing Production Strategies so that they are better organized to remove barriers to development (recommendation 1.3), and streamlining the process for expanding urban growth boundaries when they are needed in a coordinated housing planning system (recommendation 1.4).

1.1 Formalize the OHNA as the foundation for housing planning in Oregon.

Part of 2019's House Bill 2003 directed OHCS to develop a pilot methodology to estimate Oregon's statewide housing need. In its inception, this methodology was called the Regional Housing Needs Analysis or RHNA, borrowing the term from California. In this implementation work, it is renamed the Oregon Housing Needs Analysis, or OHNA, to better reflect its evolution to a unique, Oregon-specific model. The pilot analysis was completed and extensively reviewed in 2020, including a full results report, technical methodology, and assessment report that documents how this methodology improves upon current processes.

The OHNA methodology is the cornerstone of a different approach to Goal 10 implementation. The recommendations in this report assume access to the data and information that would come from implementing the OHNA methodology. The OHNA methodology will provide a data-informed measurement of housing need in each area of the state that, (i) estimates units needed

to meet current and future housing need, (ii) catches up with past underproduction and the resulting pent-up demand, (iii) accounts for people experiencing homelessness, and (iv) ensures a more equitable distribution of affordable units within a region. Using this methodology, the state will calculate and allocate housing need with a standardized approach, replacing housing needs projections that are currently developed by local jurisdictions at great expense of time and resources.

As part of this implementation effort, DLCD and OHCS recommend changes to the pilot methodology to fully account for the impacts on housing markets from second and vacation homes, improve and broaden indicators of housing outcomes, and better align income brackets with funding sources available to support affordable housing production. These recommended changes are documented in the technical report included in Appendix D. The revised methodology suggests that **Oregon needs 554,691 new housing units** to accommodate 20 years of population growth and to account for current underproduction and the lack of units for people experiencing homelessness.[6] About 176,300 of these units, or 32 percent, will need to be affordable for households earning less than 60 percent of statewide area median income (AMI).

With these revisions, the OHNA contains the following parts:

1. **Needed Housing (20-year housing need).** For each city and county and for the state as a whole, the OHNA will provide estimates of housing need for 20 years, by income range. These estimates will replace the 20-year projection of housing need currently completed locally by cities in housing capacity analyses. Local jurisdictions will continue to make critical decisions about the types, characteristics, and location of housing based on the state methodology, community priorities, and context-sensitive local information, such as cost burden, accessibility, and household demographics.

2. **Housing Production Index (housing production targets).** The OHNA will also establish local housing production targets for cities over 10,000 (see recommendation 1.2). These targets set a baseline by which the state regularly tracks and evaluates progress on housing production.

3. **Housing Production Dashboard (measures progress toward meeting need).** Annually, for each city that has a six or eight-year production target, for Metro, and for the State, the state will compile and publish data showing progress toward production targets (see recommendation 1.2 for details) in a housing production dashboard.

4. **Housing Equity Indicators (measures housing outcomes).** For each city, the OHNA model will provide annual reports on housing outcomes. These include data and information about rates of rent burdening and homeownership by race and ethnicity, age,

[6] The pilot methodology estimated a total statewide need of about 554,000 units, of which 110,000 units were due to underproduction. The revised methodology shifts the income bins used and better accounts for the effects of second and vacation homes on total housing stock, which decreases the overall estimate for underproduction while increasing housing need in areas of the state with concentrations of second homes.

and disability status (as data allow for smaller jurisdictions). It can also be updated to include information about segregation and risk of gentrification, or other measures of housing outcomes, such as climate resilience within communities. The information provided will vary from geography to geography; for some smaller geographies, data are insufficient to provide reliable disaggregation. While DLCD and OHCS will lead further engagement and discussion following legislative adoption of these recommendations to confirm the specific measures that are most useful and appropriate, recommendation 1.2 provides initial concepts.

The OHNA will need to be reviewed and updated on a regular cycle as new data become available. This update process should include a process in which the implementing agency consults with a range of experts for peer review and publishes notice and review of the proposed methodology. The most appropriate schedule for significant revisions is likely to be every ten years, timed as new census data and geographic boundaries become available. Smaller mid-cycle adjustments and updates are possible if warranted and resources are available. To maintain and run the model on a regular basis, the OHNA will need to be housed in an agency with data capabilities including housing economics, modeling capacity, database management, and data visualization skills, and with the ability to gather information from local governments about actual rates of production to track progress toward targets.

OHCS oversaw the process of developing the methodology and could continue regularly running and updating the methodology on a regular basis. This work requires staff capacity commensurate with the analytical, procedural, and communications requirements as directed by the Legislature. We estimate that implementation would require a qualified staff person (1 FTE equivalent) to regularly complete and update the methodology, with additional staff capacity to continue work ancillary to the analysis itself, including external communications, public engagement, policy analysis, and data publication, mapping, and visualization. However, the exact number of staff necessary depend on the extent of analysis and engagement directed by the Legislature.

The Oregon Office of Economic Analysis is another possible lead agency for this work in the long run, as they are involved in neither the funding nor regulation of housing and may be seen as impartial. However, it is important to emphasize that this agency has much less programmatic infrastructure in place to conduct this analysis. Therefore, it would very likely take more staff capacity and funding appropriation to implement initially. Overall, regardless of which agency or office manages it, state government needs to closely coordinate the technical work of running and maintaining the OHNA model with implementation of the system (see recommendation 3.1 for more details about system administration).

Broadening "Needed Housing"

Under the current Goal 10 framework, Oregon cities are required to plan for "needed housing", which refers to housing types determined to meet locally identified need at a variety of price or rent ranges. Currently, this means that cities needed to plan for different housing types, such as single-family, multi-family, and manufactured housing types, based on locally-driven analyses. These analyses are conducted by individual cities and consider anticipated population growth, household demographics, local market trends, and various context-sensitive factors.

However, the implementation of this requirement has often overlooked a number of factors that affect need, especially for historically marginalized communities such as people experiencing homelessness, people with disabilities, and communities of color. Additionally, many of the housing types projected in local analyses are based primarily on past development trends, even if that housing is unlikely to meet need or be affordable to current and future residents.

To implement an OHNA, the Legislature would need to establish a statute that requires a state agency to regularly develops and conduct a methodology estimating and allocating housing need to local jurisdictions, including the number of units and the affordability ranges needed over the next twenty years. Additionally, existing statutes would need to be adjusted to better plan for a variety of housing needs, types, and characteristics, including factors that are currently omitted:

- Broadening the types of needed housing to include middle housing and accessible housing,
- Clarifying that household demographics include considerations of race and ethnicity, disability status, and student population (if applicable), and
- Including the effect of second and vacation homes on need, as estimated by the OHNA.

Note: specific changes to the needed housing statute are outlined in greater detail in Appendix C

This would establish a system in which the state estimates the **total amount of housing and affordability ranges** needed, while local jurisdictions make critical decisions about the **types, characteristics, and location of housing** based on the state methodology and context-sensitive local information, such as cost burden and disability status, as well as community priorities.

1.2 Create production targets and indicators and measure progress towards outcomes in local Housing Production Strategies.

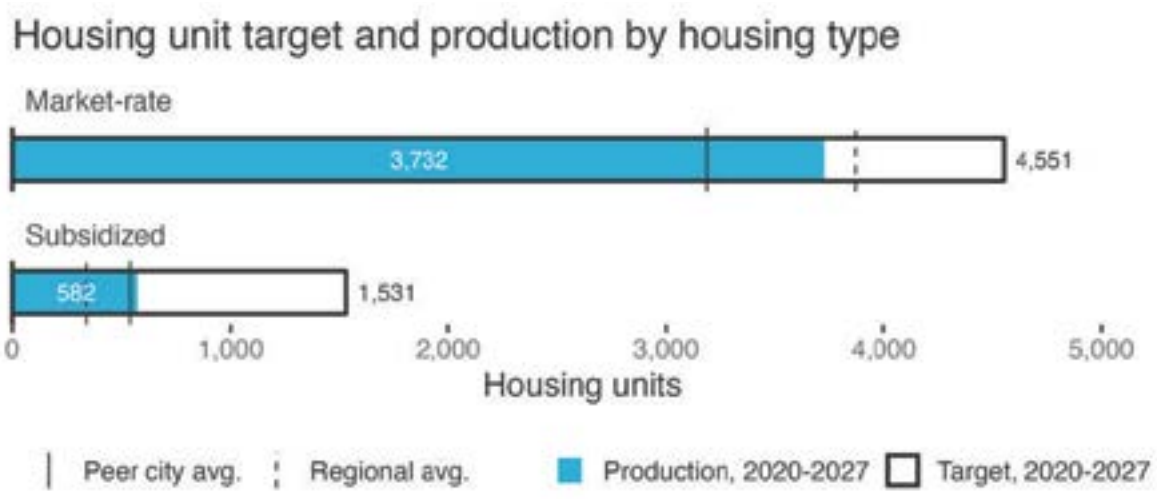
The proposed framework draws from the OHNA's Housing Production Index to set production targets that orient all partners toward common goals for market-rate and publicly supported housing production. Using the OHNA allows the state to benchmark housing production on an annual basis and informs local policy decisions, providing transparent, regular information about progress toward outcomes.

The OHNA methodology addresses inequities in the current system by allocating a share of regional demand to each community based on income, access to jobs, and population. In this way, the state and local governments can collectively begin to address chronic underproduction and geographic inequity at a regional scale. This will allow implementing jurisdictions to make informed decisions about how to plan for an increase in housing production and allow state agencies to partner with local jurisdictions to help fund and implement those plans. It also means

jurisdictions will not have to wait until the end of a six- or eight-year planning cycle to consider housing production.

The state will not expect jurisdictions to hit their targets exactly in each cycle. However, if it is clear that a jurisdiction's production is much lower than in regional or market-based peers,[7] there are likely locally specific development barriers that the jurisdiction must address. A production-focused system will use measurement of progress toward targets to identify these problem areas, and work proactively to address them, bringing state funding and expertise to support. Below is an example of what such a dashboard might look like, with commentary on the data options, for a fictional city.

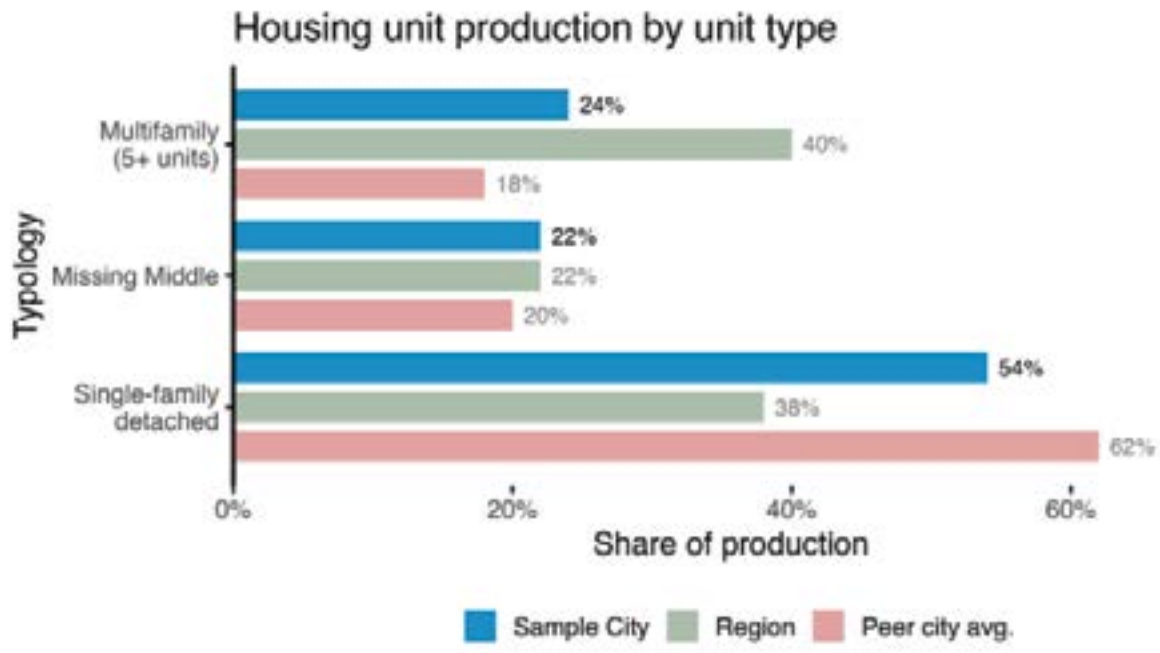
Figure 1. Sample Housing Production Dashboard



Production by housing type

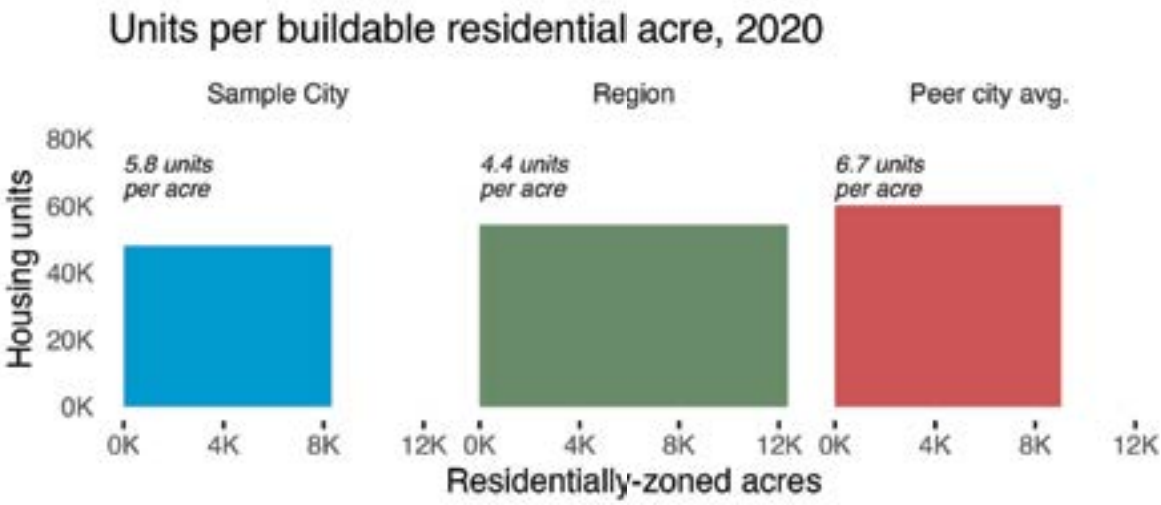
- Track permitting and production data that is already collected by DLCD.
- Compare to region and peer cities to highlight overall housing market.
- Could also provide trend-line.

[7] The technical report included in Appendix D describes how market-based peer cities could be determined.



Production by unit type

- Use DLCD data about the unit typology to track production (or permits) by basic housing typology (single-unit, middle housing, multi-unit).
- No "targets," just relative data and information.
- "Efficiency measures" in the HPS will consistently work towards greater housing diversity and choice.



Land use efficiency

- Could be based on calculations of buildable residential land from local Buildable Land Inventories.
- If a jurisdiction is "built up," the image should expand upwards.
- If a jurisdiction is sprawled, the image would expand to the right.
- No "targets," just relative data and information.

Twenty-year need (the basis for targets articulated in the Housing Production Index) can be produced on an annual basis, so that cities that are on different planning cycles can have access to the most current data inputs as they begin their analyses. For an individual city, production targets will be set for the entire six- or eight-year time period, as either 30 percent of 20-year need (for cities on a six-year cycle) or 40 percent of 20-year need (for cities on an eight-year cycle) and will be based on Needed Housing data available the year they begin their planning process. Progress toward the six- or eight-year target will be measured annually in the dashboard. New targets will be assigned in the next six- or eight-year cycle, based on updated data that reflect progress toward targets in previous cycles.

Targets should be set for both the **total number of units** and the **total number of affordable units** that should be constructed in six or eight years. By tracking progress toward total unit production, the system recognizes and encourages the production of units affordable to all residents and of all types. Achieving total production targets will help cities overcome past underproduction, which is necessary to allow the private market to better meet the needs of middle-income residents. By tracking progress toward publicly-supported units for lower-income Oregonians, the system recognizes that the private market, on its own, cannot meet all housing need. Even in a well-supplied market, these units will need public support, as market-rate units are unlikely to filter to these levels of affordability in a timeframe that will provide real relief to Oregonians in need.

A few considerations about determining thresholds for measuring publicly supported affordable units:

- To establish a target for affordable units, we recommend using one income category, all units affordable to households earning less than 60 percent of Area Median Income, (AMI). While there is substantial need for housing for the lowest income Oregonians (with incomes below 30 percent of AMI) it is not practical to track the production of units at these lower levels of affordability, because these units layer subsidies that are impracticable to measure. It is common to add rent subsidies to help very low-income residents access units that may technically be rent-restricted to those below 60 percent of AMI, rather than to build units that are rent-restricted below 30 percent of AMI.
- While the target is focused on one income category, the Housing Production Dashboard should track and report publicly-supported units at all income categories, including housing affordable to middle-income households earning between 60 and 120 percent AMI. In some instances, these are also publicly supported, with the goal of supporting middle-income or home ownership access. While these data will not fully represent the total amount of housing production affordable to these households, it will measure the impact of state and local subsidies aimed at this segment of the market.

Additionally, the OHNA model will track specific indicators of housing outcomes that can enable jurisdictions to better understand and support strategies designed to overcome inequities in the housing market. The pilot methodology included extensive data analysis and documentation for

cities across the state on indicators of housing outcomes that should be maintained as part of the OHNA dashboard going forward. These included cost burden, tenure, and other factors, by race, ethnicity, age, and disability status.

Additional indicators can and should be added to the dashboard, such as segregation, displacement, a deeper look at housing for people with disabilities, greenhouse gas emission reduction, or climate resilience, based on the priorities established by the Legislature and through rulemaking for implementation. The technical report (Appendix D) describes in more detail the data available to evaluate housing outcome disparities by race, ethnicity, age, and disability status, and offers a few example statistics and graphics. The report also summarizes the data limitations and ways to show as much detail as possible for smaller geographies.

Overall, the dashboard is envisioned as an accessible, publicly available web-based data interface that will provide relevant housing production and outcome data for each relevant geography. The dashboard reporting is a critical evaluative tool that will inform needed refinements to a local jurisdiction's Housing Production Strategies. Over time, the dashboard will also help jurisdictions across the state learn from one another about the types of policy and regulatory approaches that are working well and will provide a simple and transparent way for community members to track progress.

Implementing the OHNA in the Metro Region

Adopting the OHNA methodology will need to operate somewhat differently within the boundaries of the Portland Metro region. Metro Regional Government holds statutory responsibility for coordinating forecasts within its urban growth boundary. This entails Metro completing a regional forecast and distributing expected growth to its constituent cities and counties. This system has proven largely effective for integrating land use and transportation planning, resulting in livable communities and reduced greenhouse gas emissions. Metro and the region's cities have also developed a distinct system for identifying and planning for UGB expansions that includes urban and rural reserves, as well as concept planning for new urban areas. The region's approach recognizes that Metro is responsible for forecasts and managing the UGB while cities and counties are responsible for zoning and service provision. These differing responsibilities require coordination and a focus, not just on land need, but city readiness to urbanize land.

A core purpose of implementing an OHNA is to distribute housing more equitably between cities in a region. Under the current system, localized needs projections reinforce disparate responsibilities between cities in planning for a diversity of housing types and affordability. While the methodology addresses this dynamic statewide, in the Portland Metro, it will be critical that the resultant allocation of housing results in a more equitable distribution of housing in the region while maintaining Metro Regional Government's statutory responsibilities. More importantly, this allocation must be paired with systematic changes to the implementation of Goal 10 to ensure local governments are taking meaningful actions to increase production, diversity, and affordability within their communities. To do this, we recommend a partnership approach among the state, Metro Regional Government, and local jurisdictions, including the following core components:

1. **Metro should maintain its regional forecast coordination and growth management responsibilities** with its ongoing focus on readiness and requiring concept planning for urban reserves before expanding the UGB. Its 20-year regional forecast should include the same considerations that the OHNA considers, including the effect of underproduction, homelessness, and second/vacation homes.
2. **The state should allocate six-year production targets** for local governments above 10,000 population within the region, based on the 20-year regional forecast. These targets should be applied to local Housing Production Strategies and reflect an equitable distribution of housing between cities within the region. For neighboring communities outside of the Portland Metro region and within the tri-county region, the OHNA will estimate and allocate needed housing similar to other cities in the state.
3. **Local jurisdictions should continue conducting Housing Capacity Analyses** to ensure they adopt efficiency measures and strategize preparing buildable lands for development in subsequent cycles of their Housing Production Strategy.
4. **Accountability should be state-driven for local jurisdictions above 10,000 population** to implement meaningful actions that support production. See Recommendation 1.3 for more detail.
5. **Goal 10 should be applicable to urban, unincorporated areas in the Metro.** While cities above 10,000 population in the Metro must regularly plan for housing under Goal 10, there are substantial urban, unincorporated areas in the Metro UGB that are currently omitted from this requirement. Addressing this will require cities and counties in the Metro to amend or establish agreements to ensure urban, unincorporated areas are planned for under Goal 10. While the counties may in many cases have current zoning authority over these areas, it is important to stress that planning for these areas should not become the sole responsibility of counties, given that cities typically provide urban services to annexed areas. Further, in those areas not anticipated to be annexed by cities, the state must be prepared to provide on-going funding and investment to Metro counties to ensure they have sufficient resources to complete any needed interim Goal 10 requirements for urban, unincorporated areas.
6. **Metro Regional Government should complete a "Housing Coordination Strategy"** similar to local Housing Production Strategies but with an emphasis on regional coordination rather than local policies. See Recommendation 3.2 for detail.

1.3 Strengthen the Housing Production Strategy to promote production and overcome barriers.

The existing rules and laws governing HPS implementation provide a starting place to ensure state and local governments are doing everything they can to promote housing production.[8] According to House Bill 2003 (2019), the Legislature gave DLCD statutory authority to review, amend, and remand Housing Production Strategies. The current accountability system is designed to emphasize general *action towards addressing a need*, rather than achieving specific numerical targets or implementing any one particular action.

The implementation of the OHNA can build on this existing accountability framework and ensure that state agencies and local governments are taking meaningful and effective actions towards housing production. DLCD should incorporate a review of performance and progress

[8] Oregon Administrative Rules 660-008-0065 and 0070.

towards housing production outcomes and OHNA targets as part of its current review process that occurs at development of a new HPS, midway through the HPS implementation cycle, and then again at the six- or eight-year update of the HPS. With this addition, the system would then be organized to define clear goals, transparently show progress toward those goals, learn together about which actions are helping to make progress over time, and adjust strategies accordingly.

The proposed reforms focus community attention on building the housing we need where we need it (the desired outcome), rather than meeting administrative planning requirements that may or may not result in needed housing production. This makes HPSs – the set of identified local planning and policy changes to support housing production – the centerpiece of Goal 10 implementation.

Building Local Capacity

The vast majority of housing is built by the private sector. At the same time, local plans and development policies play a significant role in creating the conditions for housing production. Given the scope of the state's housing crisis, we recommend measuring the effectiveness of an HPS by the outcomes it produces. The goal is not to penalize jurisdictions for missing their targets – it will take time to dig ourselves out of our housing shortage – but to evaluate what is working and to course-correct when strategies are not leading to more housing for communities who need it most.

It is important to emphasize that the implementation of locally-focused policy and funding action on housing will require substantial investments in local capacity. DLCD's 2023-25 Agency Request Budget includes additional staff and a regular biennial investment of $2.5 million intended to provide jurisdictions technical and financial support for Goal 10 implementation. Additionally, the housing capacity recommendations discussed in Appendix A call for additional investment in urbanization planning and technical support. These investments are critical to support housing and urbanization planning, but they are insufficient on their own to fulfill the gap jurisdictions face. For example, the Oregon Office of Economic Analysis estimates that meeting housing production needs identified in the OHNA requires approximately 400-500 more public sector workers per year simply to approve, permit, and inspect the additional units at the local level.[9]

To address this gap, the state should partner with local jurisdictions and provide funding support (described in recommendation 2.1) tied to HPS implementation. Under the current and revised Goal 10 framework, cities above 10,000 in population are required to regularly complete housing planning requirements.

Small, Rural, and Coastal Communities

It is important to emphasize that small, rural, and coastal communities very often face significant and unique challenges with housing production. Many of these communities face significant

[9] Oregon Office of Economic Analysis. "Addressing Oregon's Housing Shortage". Accessed via: https://olis.oregonlegislature.gov/liz/2021I1/Downloads/CommitteeMeetingDocument/256863

economic challenges that significantly inhibit production and have limited resources and staff capacity to support housing planning and production.

While it is reasonable to require larger cities to periodically update plans and policies to support housing production, establishing the same requirements to smaller cities is impractical because they lack the financial and staffing resources needed to complete that work. Therefore, these recommendations seek to lift these communities up and provide them the support they need via the following actions and investments:

- Continue to enable, but do not require, communities below 10,000 to adopt HPSs and access the same funding resources that support production as larger jurisdictions.
- Enable county and regional entities to adopt county- or region-wide Housing Coordination Strategies in coordination with cities below 10,000 to access the same funding resources. See Recommendation 3.2 for more detail.
- Direct state investment to support housing production where the market is unable, with an emphasis on housing affordable to low- and middle-income households in rural and coastal markets.
- Establish a program that enables DLCD to provide funding and capacity to smaller communities without requiring submittal of competitive grant applications.
- Provide direct DLCD analytical support for smaller communities pursuing Goal 10 housing-related initiatives.
- Establish more streamlined analytical requirements and policy responses to housing need for smaller communities.

Housing Production Strategies

While cities are currently required to adopt strategies that comprehensively address identified needs, the current accountability framework does not require implementation of a particular strategy or to meet a specific production threshold. Currently, state administration of the HPS program progresses from collaboration, assisting jurisdictions in need of support, to increasingly more stringent measures should inaction continue. At the highest level of enforcement, if a jurisdiction is recalcitrant towards adopting meaningful strategies that address housing needs, DLCD has the authority to petition the Land Conservation and Development Commission (LCDC) to issue an enforcement order, requiring the jurisdiction to address the deficiency. These recommendations propose an important change to this system: integrating regular data-informed evaluation of progress toward targets and needed housing outcomes as part of the OHNA. This will help focus strategies and provide clear indicators of successful implementation. This additional data and information will help to focus collaborative conversations about the resources and strategies needed to overcome production barriers.

By establishing housing production as the primary indicator of progress, cities can orient their strategies toward the necessary policy changes, housing types, and measures of land readiness to

enable housing outcomes and break the negative feedback loop that leads to underproduction in the current system. Each HPS will be unique to local circumstances, and local expertise is essential to figuring out which strategies make sense in a specific context. At the same time, we can organize local actions into categories that are consistent with statewide goals and best practices for building the housing we need in the places we need it. Tighter definitions of HPS categories will also allow for more consistent evaluation by local jurisdictions and DLCD of their effectiveness and comparisons between peer cities.

The current administrative rule for HPSs requires jurisdictions to provide an interim, mid-cycle implementation report and a full report at the end/start of each cycle.[10] We recommend maintaining these existing reporting functions and will seek to help jurisdictions fulfill the requirements.

Through the OHNA, the state will provide baseline housing needs data that is currently the obligation of cities to generate, as described in recommendation 1.2 above. In addition, the table below provides an overview of the HPS elements that are currently required, and how we propose amending them with clarifications in existing rules and guidance. These changes will ensure that the actions are sufficiently and comprehensively focused on making land ready for development and for equitable housing production.

Figure 2. Suggested Revisions to Existing Housing Production Strategy Elements

Current elements of the HPS	Recommended revisions
Contextualized housing need	The state will provide OHNA-generated baseline data that is currently an obligation of local jurisdictions. Cities may add data necessary to help inform strategies.
Production strategies	When the HPS is adopted and approved, funding for implementing these strategies is unlocked. Strategies must address the following categories of actions: ▪ Zoning and code changes ▪ Reduce regulatory impediments ▪ Financial incentives and resources ▪ Land use efficiency measures ▪ Development readiness ▪ Fair housing (more details in recommendation 2.2) To support development of these strategies, new guidance will be needed regarding fair housing, housing mix and land use efficiency measures, and DLCD's defined HPS program outcomes.
Engagement	Local governments will continue to engage consumers and producers of needed housing, as required by current administrative rules. Future state level guidance will be needed to support this work and Goal 1.
Fair housing narratives	New data will be available to support cities' fair housing strategies and reporting through the OHNA, measured as annual indicators of housing outcomes. DLCD will provide additional guidance about how cities can use production-related policies and actions to advance fair housing.

[10] Oregon Administrative Rule 660-008-0060.

Accountability

Throughout this process, accountability at all levels of government was raised as a substantial condition for success needed to facilitate the development of needed housing. While DLCD has an existing accountability framework predicated on timely, good-faith implementation of tools, actions, and policies that promote production, participants raised a need to better clarify this framework. Specifically, it is not clear under the current framework how underperformance in market rate or affordable housing production will result in meaningful funding or policy interventions to increase production, nor is it sufficiently clear that failure to take meaningful action will be met with appropriate enforcement actions.

It is important to emphasize that under any accountability framework, it will take substantial investment at the state level to support the kinds of policy and funding interventions that are needed to increase production. This report calls for that investment in partnership with local governments to increase local capacity and funding needed to build housing, especially housing that the market would not otherwise produce on its own (see Recommendation 2.1). Additionally, while many participants have called for increased local accountability, many participants have also correctly asserted that local governments only control a portion of the policy levers that affect housing production and affordability. Underproduction of housing is a consequence of a myriad of policy and economic factors, and any accountability framework should acknowledge and reflect this dynamic.

Recognizing that accountability requires substantial Legislative decision-making, this report provides several considerations to inform future discussion that provides policy pathways that balance perspectives heard throughout the process. First and foremost, the project team recognizes that **unmet housing need should be addressed with meaningful action from all levels of government**. Achieving that goal requires three major components:

1. Clearly define "unmet housing need" through the OHNA
2. Respond to identified unmet housing need through local and state policy and funding interventions, in partnership.
3. Establish clear enforcement parameters to ensure timely action.

1. Define "unmet housing need"

Recommendation 1.2 establishes housing production targets and provides baseline data by which the state regularly tracks and reports housing outcomes, including annual market-rate and affordable housing production, for cities above 10,000 population. Additionally, it includes relative peer and regional assessments of local jurisdictions to assess the relative performance of jurisdictions by geography and market typology. While this information is not sufficient on its own to definitively assess underperformance, it provides a critical barometer to direct policy and funding interventions.

If a local jurisdiction consistently produces less housing in comparison to the region and other similar housing markets, it suggests that policy and funding interventions may be necessary to

facilitate the production of housing[11]. Thus, Recommendation 1.2 enables DLCD, with appropriate direction and parameters assigned by the Legislature, to define a threshold in which a response is warranted.

2. Respond to unmet housing need

Currently, jurisdictions regularly complete Housing Production Strategies to identify tools, actions, and policies that promote production of needed housing, and DLCD reviews and approves, amends, or remands submitted HPSs to ensure they substantially comply with administrative rule. By necessity, this framework requires substantial discretion, because the actions cities take to promote housing production will vary substantially based on local economic, political, and implementation dynamics. As a consequence, there is a lack of clarity on "how much is enough" with regard to identified strategies.

It is possible to provide more clarity through enhanced review and partnership by DLCD. If a jurisdiction is identified as consistently producing less housing than regional or market peers, this could trigger a requirement for DLCD to conduct an audit and review of city policies in advance of their next HPS, focused on identifying the following:

- Financial and regulatory impediments to production
- Financial and regulatory incentives, including available state resources
- Actions that advance fair and equitable outcomes

This audit should include a series of recommendations by which a city could address identified barriers to housing production, either through changes to local policies/actions, coordination of state resources, or other measures. After conducting the audit, DLCD could then be required to develop a performance plan in consultation with cities to establish a series of actions that address the barriers identified in the audit, timelines for the implementation of those actions, and coordination of state and local resources needed for implementation, such as financial or technical support.

This review and performance plan could be extended to a broader range of state agencies with the establishment of a coordinated statewide entity described in Recommendation 3.1, which could provide a much more comprehensive review of the full suite of tools a city could access than DLCD can alone. Additionally, the Legislature could also establish parameters that increase the likelihood of timely and coordinated action, including:

- Establishment of a timeframe by which implementation of actions must be implemented;

  Please note: The timeline must balance the need for urgent action with practicable local implementation, with flexibility to modify timelines to accommodate local circumstances. As a

[11] Interventions cannot be "one size fits all" and should respond to a variety of local contexts and conditions, especially in consideration of fair and equitable housing outcomes. See Recommendation 2.2 and the Technical Report (Appendix D) for more information.

starting place for discussion, one option could be adoption of actions within two years of the adoption of an HPS with flexibility for the state to amend deadlines to accommodate extenuating circumstances.

- Requiring DLCD (and potentially other agencies that distribute financial resources to local jurisdictions) to prioritize funding and technical support for jurisdictions with unmet housing need; and
- Establishing clear and scaling enforcement actions connected to the timely implementation of actions, discussed below.

3. Establish clear enforcement parameters

Communities throughout the state generally support the provision of adequate, affordable housing options within their community, and it is important to recognize that to increase the production of needed housing, most of the time this requires providing resources and tools to communities to support the implementation of that vision. However, it is equally important to recognize that appropriately-scaled enforcement provisions are an important tool in ensuring meaningful and timely action.

It is important to emphasize that **enforcement should only occur upon failure to act timely or act at all, not as a consequence of housing underproduction on its own**. Enforcement should begin collaboratively and take progressive steps in response to inaction, while providing opportunities for jurisdictions to readily come back into compliance. An enforcement policy must recognize that many factors operating at the national, state, and local levels can inhibit production and local capacity to address barriers. It is also critical to emphasize that **without substantial state investment in both local capacity and housing production writ large, it will not be possible to implement an accountability framework that delivers meaningful results**.

Additionally, it's important to recognize that there may be cases where, despite consistent good-faith implementation of strategies to facilitate production, housing production remains stymied due to factors outside of a jurisdiction's control. In these instances, there should be a list of policy options where a jurisdiction can demonstrate they are doing all they reasonably can to promote production, without risking the application of potential enforcement provisions.

Under the current framework, enforcement actions begin collaboratively and become progressively more substantial if delinquency continues, with the most substantial measure being an enforcement order issued by LCDC. A challenge with this approach is it 1) costs significant time and resources to compel action and 2) creates uncertainty as to whether failure to act will result in enforcement. Establishing **clear timelines** and **automatically applicable provisions** when a deadline passes addresses these shortcomings and enables city staff to clearly signal to local decisionmakers what needs to occur by when and what happens in lieu of local action.

Enforceable provisions must be established through legislative deliberation, but generally, the more impactful an enforcement provision is, the more contentious and challenging it will be to adopt, implement, and enforce. Additionally, it is important to consider how enforcement might differ between overall housing production and affordable housing production. Affordable

housing production faces a variety of barriers, and while overall production requires long-term policy solutions to create healthy market environments, there is a compelling argument to expedite and reduce barriers for subsidized affordable housing substantially to proportionally respond to the affordability crisis.

Below are a few examples of provisions the Legislature could consider, organized from less to more impactful:

1. Application of streamlined permitting processes for units that meet zoning requirements and specific criteria – e.g. California Assembly Bill No. 2011 (2022)
2. Application of a "development override" for subsidized affordable housing meeting specific criteria – e.g. Senate Bill 8 (2021) or Massachusetts Chapter 40 B (1969)
3. Application of a "model code" enabling a greater diversity of housing types in a defined area – e.g. House Bill 2001 (2019)
4. Application of tax incentives, such as property tax exemptions, for qualifying subsidized affordable housing meeting specific criteria – e.g. California Senate Bill 196 (2019)
5. Withholding certain state funding sources, such as state transportation funding – e.g. Utah House Bill 462 (2022)

All of the example provisions represent substantial enforcement actions that should not be applied lightly, and any inclusion of such provisions should not be applied until there has been substantial opportunity to address barriers, including state partnership and investment to overcome barriers to housing production.

Other Major Statewide Policy Initiatives

A critical dynamic in the implementation of the Oregon Housing Needs Analysis is how systemic changes to the housing planning system interface with other statewide policy initiatives. In particular, there is significant ongoing policy work related to climate change, wildfire, and housing preservation that stakeholders raised as intersecting with legislative recommendations.

Climate Change

The Land Conservation and Development Commission adopted rules for Climate-Friendly and Equitable Communities in July 2022. The rules require fifteen communities to designate "climate-friendly areas" – walkable, mixed-use neighborhoods where residents, workers, and visitors can meet most of their daily needs without having to drive. These areas are required to accommodate 30% or more of a community's projected 20-year housing need. This raises a critical question: how do we ensure that we are able to provide significantly more housing while planning for neighborhoods that mitigate greenhouse gas emissions?

This was a substantial consideration during rulemaking. Stakeholders and DLCD staff wanted to ensure that ambitious policy facilitating climate-friendly areas did not inhibit a community's ability to plan for an adequate supply of housing by creating "phantom capacity" – capacity on paper that is unlikely to be realized in practice. To achieve this, the rule requires cities to designate this capacity *in addition to* their 20-year land supply, but this capacity does not "count" until development occurs.

This is a key strategy in planning for significantly more housing. Climate policy and housing policy are inextricably linked, and addressing both requires building a substantial amount of housing in walkable, mixed-use neighborhoods that mitigate greenhouse gas emissions. In all Oregon communities, we need to plan for this abundance while also conservatively estimating land capacity to ensure that these policies do not artificially inhibit an adequate supply of land. In total, the OHNA recommendations ensure that communities are planning for this abundance, ensuring there is an adequate supply of developable land and preparing land to support housing production.

While adopted rules enable the possibility of "climate-friendly areas" through changes to land use, by itself, it does not guarantee that the housing will actually be built. To ensure climate-friendly areas result in actual production on the ground, implementation will need to ensure the designation of these areas is consistent with funding and policy actions identified in the local Housing Production Strategy. This will include a variety of strategies, ranging from reducing regulatory impediments to providing financial incentives, to support the production of housing in these communities and pair them with the needed investments in infrastructure, transit, and amenities to ensure these communities foster affordability, choice, and resilience in the future.

Wildfire Adapted Communities

As directed by Senate Bill 762, DLCD has published a Wildfire Adapted Communities Recommendations Report for consideration by the Oregon Legislature during the 2023 legislative session. The recommendations focus on potential ways the statewide land use planning program and local comprehensive plans and zoning codes can minimize risk, even as the frequency, intensity, and duration of wildfires continue to increase.

The wildfire report is complementary to this report, providing six recommendations and multiple implementation alternatives intended to increase the resiliency of communities. The emphasis of the report is *not* to prohibit the production of needed housing, but rather, to facilitate development in a manner that reduces wildfire risk and minimizes loss of life and property. Protecting existing homes from wildfires is necessary to prevent housing shortages in fire prone communities. DLCD's recommendations build on the protections recently adopted by the Legislature in SB 762 to minimize the spread of wildfires at the community and neighborhood level, thus further reducing the risks to individual homes and development.

Housing Preservation

This recommendations report makes clear that in order to address the housing affordability crisis Oregon faces today, state and local governments need to plan for substantially more housing and focus policy and funding interventions on increasing housing production. However, an important strategy to support affordability and promote housing stability is the preservation of existing housing supply, especially "naturally-occurring affordable housing" – housing that is relatively affordable without subsidy.

While the recommendations emphasize the need to focus on housing production at all levels of government, the framework should also facilitate the preservation of naturally occurring and subsidized affordable housing that would otherwise be lost to age or demolition. To do this, state and local policies should incentivize and encourage the rehabilitation or adaptive reuse of aging properties while focusing redevelopment on areas with lower risk of displacement, such as in underutilized parking lots or vacant large-scale retail/office sites. The housing capacity recommendations included in Appendix A include several recommendations that incorporate these principles in the local implementation of housing production strategies.

1.4 Streamline land capacity and urbanization processes to expedite well-planned expansions.

A renewed commitment to implementing Goal 10 for housing requires careful consideration of the relationship to Urban Growth Boundary (UGB) expansions. It is important to note that the adoption of OHNA-generated production targets and Housing Production Strategies are required for cities over 10,000, regardless of their existing built conditions and expansion context. In other words, jurisdictions that have achieved some level of infill or are "land-locked", i.e., physically unable to expand their UGB, will still be responsible for a share of the overall need.

UGB amendments are an existing tool to increase the supply of development ready land. Between 2016 and 2021, there have been a total of 35 successful UGB amendments (out of 37), 13 of which were to accommodate residential land needs.[12] Increasing housing supply and providing affordable options will require a combination of planning and policy actions at all levels, and when warranted, this should continue to include UGB amendments. To facilitate a smoother UGB amendment process, this report includes nine recommendations (see page 28) that increase the capacity and flexibility for local jurisdictions to pursue UGB amendments, reduce the likelihood of appeal or challenge of UGB decisions, and better prepare land within the UGB to support housing production.

Under the current system, jurisdictions conduct a Housing Capacity Analysis (HCA), which consists of two major components: a 20-year housing needs projection and a Buildable Lands Inventory. These two analyses answer a critical question: "Is there enough land within the UGB, zoned to sufficient capacity, to accommodate twenty years of projected growth?" If there is a deficiency of land, a jurisdiction must adopt measures to accommodate needed housing. First, the jurisdiction must adopt "efficiency measures," which are policies that increase development within a UGB. If a jurisdiction cannot reasonably accommodate needed housing within a UGB, the jurisdiction must expand its UGB, conducting a locational analysis under Goal 14 to determine which area would best suit the identified need.

Figure 3. The Current Goal 10 Process



The current process requires a local jurisdiction adopt a housing capacity analysis that projects past conditions into the future to determine whether increasing zoned capacity is necessary.

[12] Department of Land Conservation and Development. *Urban Growth Boundary Adjustments 2016-2021.* Accessed via: https://www.oregon.gov/lcd/UP/Documents/UGB_Amendments_2016-2021.pdf

Housing capacity analyses have emphasized characterizing density and counting the hypothetical capacity of lands for housing at the expense of supporting the actual production of housing. The consequence of this dynamic is that, while jurisdictions have substantial land and zoned capacity on paper, this land is not readily developable and housing production slows as available land supply becomes increasingly more costly to serve and prepare for development.

To put the emphasis on housing production, we recommend shifting the focus of land use efficiency measures from a Housing Capacity Analysis limited to analyzing the potential of lands for providing housing to the Housing Production Strategy (HPS) for cities over 10,000, which includes measures to support housing production, prepare land for development, and increase housing efficiency and diversity. Making this change in the HPS can serve a dual function, providing a policy and planning roadmap for housing production while also making the Goal 14: Urbanization process for land supply simpler and more efficient.

With the HPS at the center of housing implementation, communities can consider plans and policies specifically in terms of meeting their housing production goals. Cities can consider where it makes sense to upzone or rezone, where they should make capital investments in community amenities, where they should focus investments in low-cost market rental preservation efforts and affordable housing production, whether they can streamline their regulatory process to reduce costly delays in permitting, and what kinds of housing types match the OHNA-derived need, to name a few examples. Cities can then adopt these updates into local planning documents, ordinances, and/or comprehensive plans.

Leading with production requires some adjustments to the sequencing of Goal 10 compliance within Oregon's land use program. The current system begins with a local, city-based analysis to determine how many new households might demand housing in the future, translates that demand into unit types and income categories based on past development and demographic trends, and then determines whether there is sufficient land supply to meet the estimated future demand. Further, the method of analysis often varies by jurisdiction, meaning that local projections are not consistent and standardized across the state. When there is a gap, this is addressed either through land use efficiency measures such as rezoning and/or by expanding the urban growth boundary. Local governments often make this determination without consideration of the broader regional housing market, where economic growth is anticipated in the future, the current level of housing choice afforded in the region and other regional demographic distributions, desired equitable outcomes, fiscal impacts, or other systemic effects.

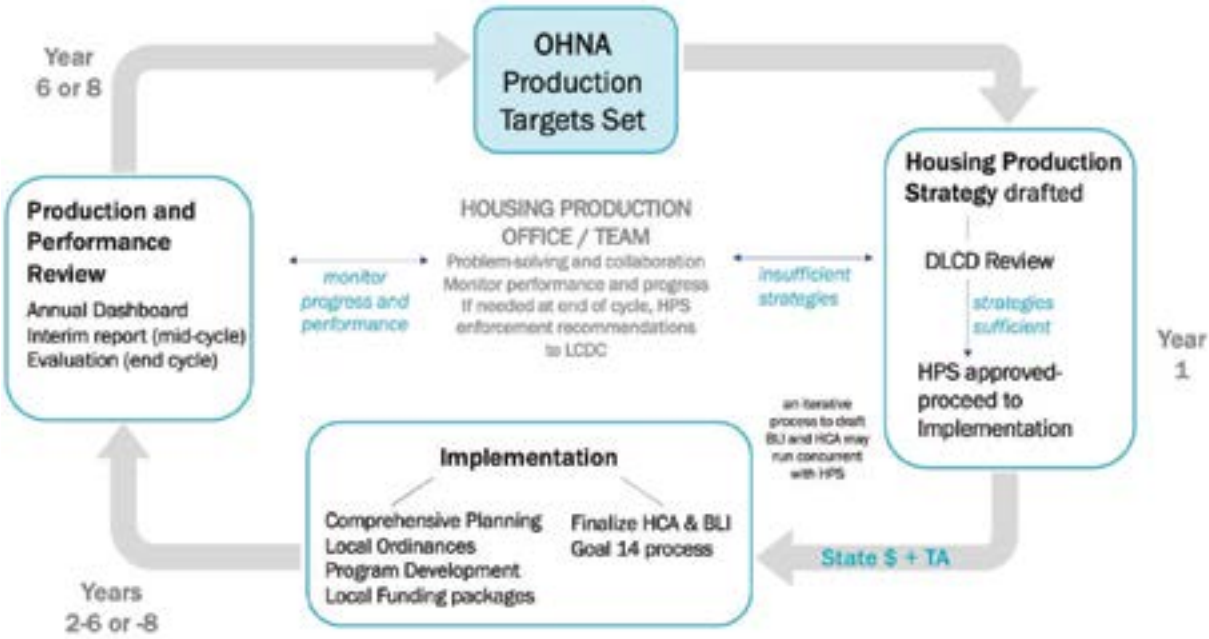
This means that production strategies are only factored in after the jurisdictions have forecast and planned for housing types and determined the need for additional land supply. The process does not take into account the impact that Housing Production Strategies – such as easing regulatory restrictions, minimizing procedural delay, preparing land for development, or increasing housing choices allowed in communities – may have on future development patterns.

This recommendation merges these two processes so OHNA targets inform HPSs, and implementation of those strategies can shape HCAs. In this way, HPS outcomes will inform

future Buildable Lands Inventories (BLIs) and HCAs. While in practice the two processes may inform one another, conceptually, it is helpful to consider this improved Goal 10 implementation process as a cycle in which we transform a negative feedback loop to positive by centering housing production targets. This outcome-focused and comprehensive housing production system will be implemented on a rolling basis, with new targets provided in each planning cycle. If a city is meeting the need and its rates of housing underproduction and cost burdening are declining, its future targets will reflect that progress.

Overall, these process revisions serve to streamline work for local governments by increasing certainty in land supply decisions, providing common datasets that are produced at the state level rather than locally, and creating a space for productive policy discussions in the HPS that are tied to a clear, measurable set of outcomes and targets.

Figure 4. Revised Housing Production Strategy Review Process



House Bill 5202 - Housing Capacity

This recommendation includes a series of refinements to Goal 10 and Goal 14 developed in consultation with a Housing Capacity Work Group, convened by DLCD in response to Legislative direction under House Bill 5202 (2022). Through this process, DLCD has identified a total of nine recommendations to streamline the HCA and UGB amendment process. The net effect of these recommendations would increase local capacity, reduce administrative burden, increase legal certainty, and build on existing tools to facilitate the timely expansion of UGBs and prepare land for development and redevelopment. These recommendations are summarized below. Specific housing capacity recommendations are included in Appendix A. Housing Capacity Recommendations included in this document and are also integrated with the policy outline included in Appendix C.

A. Better Utilize Land within the UGB

1. Enable the adoption of "efficiency measures" in the Housing Production Strategy, enabling a jurisdiction to adopt efficiency measures in advance of a UGB amendment.
2. Direct LCDC to adopt administrative rules and guidance on the local implementation of efficiency measures that support housing production and affordability, prioritizing the following outcomes:
   - Credit recent local implementation of statewide policy initiatives related to housing
   - Increase housing diversity, efficiency, and affordability
   - Enhance flexibility in housing choice and location
   - Reduce cost or delay and increase procedural certainty for housing production
   - Incentivize preservation and stability of naturally-occurring affordable housing
   - Prepare land for development and redevelopment, including underutilized commercial or employment lands

B. Streamline Establishing Need for a UGB Amendment

3. Amend the "needed housing" statute (ORS 197.303) to replace local housing needs projections with the OHNA and provide greater local discretion to plan housing types and characteristics in response to need and market feasibility, rather than primarily on past development trends.
4. Amend the "buildable lands" statute (ORS 197.296) to reflect a more realistic estimation of 20-year residential land supply and provide more options to discount land that is unlikely to develop.
5. Direct LCDC to refine administrative rules related to buildable lands inventories to provide more methodological options for local jurisdictions to estimate land capacity.

C. Streamline Regulatory Review of UGB Amendment

6. Adjust the "urban reserve" statute (ORS 197.145 and 197A.320) and related administrative rules to increase flexibility and ease of local implementation.
7. Facilitate the existing UGB land exchange process to remove lands within the UGB unlikely to develop within twenty years, while adding land that is more likely to develop.

D. Increase Local Capacity & Support

8. Appropriate funding to support local urbanization planning, including UGB amendments, UGB land exchanges, public facilities planning, urban reserve, and concept planning, prioritizing supporting smaller and more rural communities.
9. Focus new housing staff requested in DLCD's Agency Request Budget to focus on urbanization and public facilities planning to support local governments with analysis and technical assistance, prioritizing supporting smaller and more rural communities.

Additional Policy Considerations - Small-Scale UGB Amendment

The nine recommendations listed above reflect a substantial set of reforms developed in a very short timeframe prescribed by the Legislature. Critically, these recommendations reflect a series of refinements that have pretty broad support among stakeholders, even among those who often substantially disagree on urbanization-related policy. However, it is important to acknowledge that discussions surrounding urbanization are often significantly contentious, and given the short duration of the legislatively-prescribed deadline, DLCD staff recognized that consensus building for every policy option would be challenging.

DLCD staff believe that a core intent of the Legislative direction provided under HB 5202 required bona fide discussion on potential policy options that could reduce local analytical burden in pursuing a UGB amendment in exchange for delivery of statewide housing goals. The Legislative direction driving this work under HB 5202 is a direct response to a bill considered in the 2022 Session, House Bill 4118, which proposed requiring approval of UGB amendments in response to housing proposals affordable to households earning at or below area median income.

This proposal reflects a broader legislative discussion surrounding this kind of policy. Previously, House Bill 4079 (2016) was initially adopted to evaluate the barriers to affordable housing production arising from the UGB amendment process, and whether a removal of that process (with limitations) would stimulate provision of affordable housing. This legislation enabled two cities (later three) to pursue a UGB amendment without completing a Goal 10 and Goal 14 analysis for a qualifying proposal. To date, two of the three cities (Bend and Redmond) are in progress, but have not yet completed, projects, and the third (Pendleton) has not begun its process.

These policies, and similar policies modeled after these bills, were substantially contentious among work group members. In particular, many members raised significant concern about a potential bypass to the urbanization system that undermines the land use planning program at large, while other members maintain that a pathway could leverage the urbanization process to support statewide housing affordability goals.

While the short timeframe associated with the process was insufficient to establish a fully-developed and viable policy option with substantial buy-in from stakeholders, DLCD staff learned many important takeaways that warrant inclusion in this report. First, it is important to emphasize that **whether to advance a policy option that provides a streamlined UGB amendment in exchange for delivery of affordable housing is a legislative decision**. Should the Legislature decide to pursue this option, there are several considerations to improve its implementation, effectiveness, and political viability. This includes:

1. **A requirement for deed restriction guaranteeing delivery of affordable and diverse housing options in exchange for regulatory flexibility**. The Legislature would need to determine the types of housing outcomes that the pathway should require. Examples include:

- Regulated affordable housing for low-, moderate-, and mixed-income housing, including affordable rental, homeownership, and cooperative ownership housing.
- Diverse housing options the market is unlikely to produce, including manufactured, middle, and multi-family housing.

2. **Regulatory streamlining that reduces the analytical burden for small and capacity-constrained local jurisdictions** utilizing the pathway. Example approaches include:

   - A "shifted burden" approach, in which submittal of a qualifying project triggers a requirement for DLCD to conduct a limited Goal 10 and 14 analyses within a specified timeframe.
   - A "limited analysis" approach, in which a subset of jurisdictions identified as facing significant growth and affordability challenges under the OHNA qualify for a limited site alternative analysis, weighing priority and locational factors for several potential development areas.
   - An "analysis waiver" approach, in which small jurisdictions with constrained planning capacity submitting qualifying proposals would not be required to prepare Goal 10 or Goal 14-related analysis for limited UGB amendments, subject to a cap on the number of UGB amendments within a 5-year period.

3. **Limitations on the scope, scale, and applicability of the pathway.** Examples include:

   - Jurisdiction applicability, considering:
     - Population – The policy should emphasize providing an additional option to small jurisdictions with limited staff capacity and resources, not to larger jurisdictions with more capacity and resources to pursue a standard UGB amendment.
     - Population growth and cost burden – With the implementation of an OHNA, it is possible to measure and identify fast growing communities facing significant cost burden, enabling the option in communities where it is most needed.
     - Geographic or regional limitations – The policy should consider the exclusion of areas with significant concerns about the loss of resource lands, such as the Willamette Valley.
     - Frequency of use – The policy should have a limit on the frequency of use to ensure it does not overwhelm staff capacity or bypass the standard urbanization process.
   - Site applicability, considering:
     - Site size – There should be some upper acreage threshold for qualifying projects included in the policy. Examples of commonly suggested acreage thresholds include up to 50 or up to 100 acres.
     - Resource land exclusion – The policy should prohibit the inclusion of high-value farmland lands from the pathway and consider requiring a streamlined Goal 14 priority analysis. As discussed previously, the policy should consider excluding geographic areas where preservation of resource lands are a higher priority.

Recommendation 2) Build what's needed, where it's needed

Overview: Addressing housing need at all levels

On its own, the market will not meet the housing needs of all Oregonians. Housing for the lowest income Oregonians will always require public support, and the funding gap for meeting that need is daunting. Additionally, in most parts of the state, denser development, infill development, smaller product types, development in rural communities, and redevelopment of underutilized or contaminated parcels are harder for developers to get permitted, successfully finance, and feasibly build. These units are very important to meeting overall housing need, as they provide important workforce housing and homeownership opportunities, and help build climate-resilient communities and add needed units to an undersupplied market. Overall, approximately 49% of Oregon's needed housing over the next 20 years will require some public subsidy.

In many areas, denser development, infill development, smaller product types, and the redevelopment of underutilized or contaminated parcels are harder to build and require public subsidy.

While housing generally becomes more affordable as it ages, we cannot count on this process for several reasons: (a) it can take generations to reach lower affordability levels, (b) it almost never produces safe, adequate housing for the lowest income levels, and (c) it can halt or even reverse (for example, through gentrification) when a market is undersupplied.

Digging out of our housing deficit will require ongoing funding support from the Legislature that includes and extends beyond the traditional categories of affordable housing. Investments should be targeted to the development types that the market would not otherwise produce on its own, such as those listed above. **Without strong public investment in housing development, implementation of the OHNA will simply help us do a better job counting what we do not build**.

2.1 Commit sustained, coordinated investment

While simplifying and rationalizing our planning system is an important piece of the puzzle, there are many other significant barriers to housing production that communities face. Private market housing providers are not able to provide housing affordable to lower income households without subsidy, and local governments will need new tools to take on an expanded role in housing production. Success requires a new and expanded partnership between the state and local jurisdictions. Without significant state investment, OHNA implementation will likely be understood as an unfunded mandate that fails to provide the necessary conditions for local governments to comprehensively address housing need.

Oregon needs to produce about 27,000 housing units annually to meet the 20-year statewide production targets. In recent years the state has only produced 15,000-20,000 units per year.[13] To

[13] Source: U.S. Department of Housing and Urban Development's State of the Cities Data Systems (SCODS) database on Oregon housing permits. Between 2014 and 2021 annual permits have ranged from about 15,300 to 19,100 statewide.

close this gap, we need to look at which investments are best suited to overcome market barriers at all income levels with particular attention to the needs of historically underserved Oregonians.

Publicly Supported Affordable Housing

The most challenging unmet need to address is at the lower end of the income spectrum of households earning less than 60 percent of area median income (AMI). While public support is needed for many types of development, it is most acute to produce about 9,000 units per year that are affordable to low-income households. Lower-income Oregonians are affected most severely by the housing shortage and live with the greatest housing instability. This intervention point has the most urgent need for additional direct subsidies and support.

As the state's affordable housing financing agency, OHCS's funding mechanisms and allocation methodologies rely on complex and layered data and evaluation criteria designed to target resources toward strategic policy objectives. OHCS already prioritizes housing need in its allocation methodologies and can use the OHNA data to ensure that affordable housing production is equitably distributed across the state.

Affordable Housing Financing in Oregon is Changing

Affordable housing finance relies on layering local, state, federal, and philanthropic resources along with private equity and debt to fund development. These layered resources are necessary because the rents that are affordable to the intended tenants are below what it costs to develop and operate the property, leaving a "funding gap." This gap requires public subsidy or low-cost financing to pay for construction and ongoing operations along with large levels of mortgage or debt service payments.

To bring the impact of state resources to scale, OHCS has worked to maximize the use of federal Low Income Housing Tax Credits (LIHTCs) that are generated when the project includes financing with federally allocated Private Activity Bonds (PABs). Long an underutilized program, recent state and local investments in affordable housing were deliberately structured to leverage this 4% LIHTC and have successfully delivered new development. This increases utilization of the 4% LIHTC program has exhausted all built up capacity for the Private Activity Bond resource.

While the 4% LIHTC program will continue to operate and be a source of leverage for state Local Innovation and Fast Track (LIFT) investments, it is not a program that can continue to expand beyond that allowed by the annual federal Private Activity Bond authority allocated to Oregon. This means that the 4% LIHTC program cannot be used to increase the current rate of affordable housing development and future gap funding from the state or local jurisdictions is going to require either much higher per unit subsidy rates or some other source of fund leverage.

OHCS has managed unprecedented levels of investment in affordable housing

Despite federal constraints, OHCS hopes to continue recent momentum in affordable housing development. A major component of this is through a 2023-2025 funding request to the Oregon Legislature that includes $160 million for LIFT rental housing production and another $65 million for affordable homeownership. This would help create an estimated 1,200 rental units and 280 homeownership units, which, combined with the leveraging of available federal funds, would develop an estimated 4,000 new affordable homes for rent or purchase over the biennium. Additionally, OHCS is requesting more than $260 million to support affordable housing development and preservation of affordable homes. Even with this significant investment request, these resources are primarily required to continue funding at the level of recent years and will unfortunately fund less than a quarter of the documented need.

In summary, the landscape for affordable housing funding in Oregon has changed, and action at all levels of government is necessary to meet the moment and provide the funding required to continue developing the level of affordable housing needed by low-income Oregonians.

Additional funding for affordable housing development is critical to meet the needs of Oregon's lowest-income households. The Legislature should consider the investments included in OHCS' 2023-25 Agency Request Budget as an absolute minimum to maintain current production levels, which fall far short of actual needs as outlined in the OHNA. More resources from the state will be necessary to make more progress towards meeting these needs, the funding is only a part of the solution.

Federal caps on LIHTC and PABs currently limit the ability to utilize state and local funds most effectively. The Oregon Legislature must look to Congress as vital partners in housing solutions and pursue changes that will maximize the benefit of state and local investment. Legislation such as the Affordable Housing Tax Credit Improvement Act would, among other things, make technical adjustments to the PAB and 4% LIHTC program that would foster equity investment from the private sector into affordable housing developments and effectively stretch state investments further to allow for greater production. Combining federal action with more state resources for LIFT or other OHCS funding programs would have a substantial positive impact, augmenting unit production in the state beyond even the unprecedented growth in recent years.

Other types of support

Chronic underproduction has made it much harder for more people to afford the cost of housing. This now extends well beyond the traditional categories of publicly supported housing and affects higher income households as well. We need to pursue innovative tools that more effectively work with the market to support development types that might not be feasible. This can be especially true in smaller cities and more rural markets where infrastructure and land readiness costs are prohibitive for local budgets.

At a minimum, we recommend that the state coordinate existing funding sources that are currently distributed across many agencies and ensure that they are leveraged toward the goal of housing production. For example, Business Oregon already distributes some funds for the

purpose of infrastructure development, and recently produced an economic recovery plan that highlights workforce housing as a major impediment to achieving resilience in the business community. The Oregon Department of Transportation acquires land as it invests in transportation infrastructure, some of which might be used for housing development. The Department of Environmental Quality administers a Clean Water State Revolving Fund that has recently been significantly expanded with federal infrastructure funding and could be leveraged to support housing production. There are many other examples. While coordinating these investments and activities would require administrative structures that do not exist, this strategy is the most straightforward near-term option to make progress toward production goals, in part because it does not require new revenue sources.

At the same time, we know that additional, sustained resources will be needed. We cannot meaningfully move toward meeting housing need without aggressive investment in desired housing outcomes. The following types of funding would be particularly helpful to consider. Further inquiry with developers, lenders, and other partners in the development process can help to clarify how incentive programs might best be structured, funded, and targeted to needed types.

- **Infrastructure and development readiness**. Local governments will require infrastructure investments to jump-start housing production strategies both within existing UGBs and in expansion areas. This could take the form of a revolving loan fund or grant program such as those that currently exist within Business Oregon and would offer significant incentives for jurisdictions to play a more active role in housing production. Additional funds could be made available on a competitive basis to jurisdictions successfully meeting housing production metrics, such as the number of units permitted.

  Infrastructure funds would be used to support land acquisition, parcel consolidation, and infrastructure in expansion areas. It would also be available for retrofitting infrastructure for infill development, and master planning for larger sites. This could be structured like a block grant, such as those currently available for economic development. Ideally, these funds would be distributed with limited administrative requirements required from local entities, proportionate to the need identified in the OHNA.

- **Systems development charges** (SDCs) are fees charged to new development to help cover the incremental impact of new units and households on local infrastructure. While there is no question that these fees are necessary to the viability of public infrastructure, they also increase the cost of development and can be a barrier to production. A state-level fund to buy down the cost of SDCs for both affordable and market-rate workforce housing could support development that would not otherwise occur. Such a fund would create an incentive for needed housing types without affecting the revenues that local governments depend on for basic services in their communities. By backfilling these costs, the state could help make more units viable and affordable. Additionally, this could be set up as a local matching fund to maximize available resources for the greatest impact. As a very

rough starting-place estimate, an investment of $100 million could incentivize the creation of 5,000 - 10,000 units depending on program structure, that would not otherwise be built.

- **Gap funding.** Most local governments have extremely limited capacity and few resources to take an active role in housing development. The state could help jurisdictions achieve specific outcomes in their HPSs by providing access to capital for gap funding and assistance for workforce and missing middle housing (e.g., duplexes, triplexes, cottage clusters, etc.). We recommend that the state consider a revolving loan fund, capitalized by state dollars, to help overcome local barriers to production such as site acquisition, preparation, or rehabilitation, or gap funding directly to a project that helps a jurisdiction meet its production targets.
- **Funding for implementing fair housing strategies.** Housing production is one of several tools available to help cities advance fair housing outcomes. With expanded guidance, cities may be including additional strategies that better connect people to units, facilitate homeownership, increase unit accessibility, and reduce discriminatory practices. To support policy development and implementation, some grant or technical assistance funding for local governments will be helpful. Additional incentives should be made available by the state to support affordable housing development in areas of concentrated affluence, where higher land costs are often a barrier to development. By more equitably distributing affordable housing across communities, we can work toward equitable and fair housing goals such as dismantling segregation, preventing displacement, improving homeownership opportunities, or increasing the accessibility of existing or new housing, among others.
- **Technical assistance and capacity building.** Current staffing levels in local governments would be stretched beyond capacity by realizing the shared objective of catalyzing a rapid increase in statewide housing production. This requires a significant legislative investment to support implementation of Goal 10, which would include technical assistance for locally needed plans and permit capacity to speed up the building process.

  The Oregon Office of Economic Analysis estimates that 400-500 new local planners and inspectors would be needed statewide for a 10,000 increase in annual housing starts. Currently, many cities fund their permitting staff at least in part through permit fees charged on development. This means that cities must staff up quickly when the development market picks up and may have to lay off staff when development cools. This is highly inefficient and can lead to permitting delays. Additional funding for permitting staff, perhaps conditioned on decreased permitting fees to development, could help overcome this challenge.

  Additionally, the transition to an implementation-focused system suggests the addition of other types of local government staff, including planning staff who can create actionable Housing Production Strategies and coordinate policies and investments to support production. In the previous biennium alone, a historic investment from the Legislature in housing planning totaling $4.5 million supported 92 housing-related

projects in 75 jurisdictions. This translates to $1 million of investment supporting roughly 20 new housing projects in about 15-20 communities. DLCD has submitted an Agency Request Budget to establish a continuous biennial budget of $2.5 million for direct planning assistance to local jurisdictions in order to implement legislative housing direction. More funding support will directly result in increased local capacity to work on housing production, especially in small communities, and is an essential signal that the state is a true partner in housing production.

2.2 HPS implementation should advance fair housing outcomes

While housing abundance is a necessary precondition to housing equity, it is insufficient on its own. The people who are suffering most acutely from our housing shortage are disproportionately lower income and communities of color. They cannot be asked to wait another decade or more for Oregon to reverse the discriminatory policies and practices that have limited housing options for generations. Meaningful implementation of Goal 10 must provide a range of housing types for all income levels, distributed equitably around and within each region of the state, and for people of all ages and abilities. This provides access to employment and critical services and reduces the overall cost-burden to families and individuals. Centering the HPS in our Goal 10 system creates a new space for communities to address these issues directly.

Housing Production Strategies can serve as an important tool available to cities to help advance fair housing outcomes. Improved guidance to cities can help them consider how policies that influence housing production and the built environment intersect with fair housing outcomes. DLCD can begin by connecting existing, but currently separate, guidance regarding gentrification and anti-displacement into the HPS process, and cross-walking other existing guidance to more clearly demonstrate how the recommended tools can support land use efficiency.

Fair Housing Considerations

The Fair Housing Act prohibits discrimination in housing because of race, color, national origin, religion, sex (including gender identity and sexual orientation), familial status, or disability status.[14] Oregon's laws also protect people from discrimination based on source of income, domestic violence survivorship, and marital status.[15]

Furthermore, the Fair Housing Act requires the U.S. Department of Housing and Urban Development (HUD) and its recipients of federal financial assistance to Affirmatively Further Fair Housing, which means they must "do more than simply not discriminate… take meaningful actions to overcome patterns of segregation and foster inclusive communities."[16]

OHCS, Business Oregon and the Oregon Health Authority receive federal funds from HUD and as such have an obligation to affirmatively further fair housing. These agencies work together to comply with this mandate by engaging in fair housing planning through a process called the Analysis of Impediments to Fair Housing Choice every five years.

The OHNA housing equity indicators are intended to help provide standardized data across Oregon communities to monitor housing outcomes on a range of equity and fair housing concerns. The goal is that this data will help jurisdictions in their fair housing and equity reporting requirements and help communities track progress and hold jurisdictions and the state accountable with easy-to-read annual reports on progress.

In addition, these recommendations align local actions in a Housing Production Strategy with the Fair Housing obligations of combating housing discrimination, overcoming patterns of segregation, and fostering inclusive communities free from barriers that restrict access to opportunity.

In developing HPSs, local jurisdictions and state partners will need to consider which actions to deploy in which places to generate the desired outcomes, such as assessing where upzoning can help to undo patterns of exclusion and underproduction, or where is it necessary to consider stabilization and anti-displacement measures. These issues can be addressed using a decision-making framework similar to the example below. In the near term, jurisdictions can estimate current levels of production and patterns of growth using their permit data, recent HCAs, or other easily available sources. Over time, the OHNA will provide data to help jurisdictions understand what actions are most effective in individual census tracts and within jurisdiction as a whole.

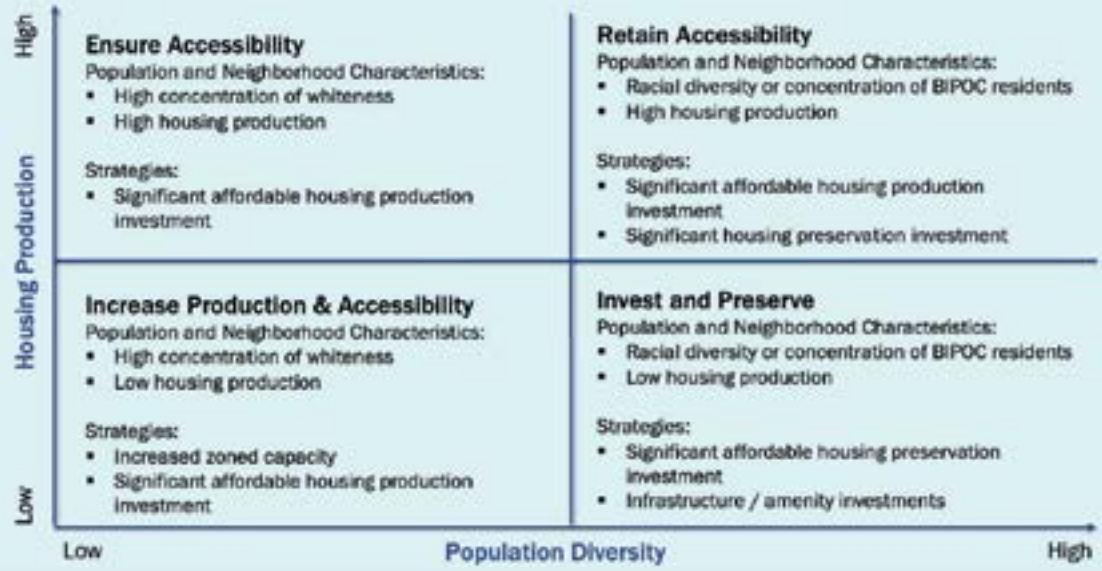
[14] U.S. Department of Housing and Urban Development. "Housing Discrimination Under the Fair Housing Act." https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview.

[15] State of Oregon Bureau of Labor and Industries. "Civil Rights and Fair Housing." https://www.oregon.gov/boli/civil-rights/Pages/fair-housing.aspx.

[16] U.S. Department of Housing and Urban Development. "Affirmatively Furthering Fair Housing." https://www.hud.gov/AFFH

Example Fair Housing Framework

Figure 5. Example Framework to Determine Strategies Needed for Fair Housing Production



The framework in Figure 4 is one way to think about organizing that guidance. On the vertical axis, the framework conceptually shows a range of housing production outcomes, from low production in slower growing or constrained environments to high production. On the horizontal axis, it conceptually shows community diversity, from low diversity, where there is a relative concentration of whiteness, to high. The fair housing challenges and solutions vary in each quadrant and so must the strategies. For example, areas with a high concentration of white households and corresponding concentration of affluence that have low housing production (in the bottom left-hand corner), restrictive zoning is likely reducing development capacity and should be increased. In the opposite corner, relatively high diversity combined with high housing production suggests a strong need for anti-displacement strategies and investment in preservation.

It is possible to place communities – either entire cities or census tracts – in these quadrants to provide a key input to cities as they complete their HPSs. The technical report included in Appendix D outlines recommended changes to the OHNA Pilot Methodology will provide more details and examples. Many of the tools that might be applied to fair housing outcomes are already listed in HPS guidance but are not clearly cross-walked to desired policy outcomes nor to the market characteristics that are likely to drive neighborhood change.

As described in the funding recommendations above, local governments will need new tools and technical assistance to plan and implement specific programmatic improvements aimed at fair housing outcomes and anti-displacement and gentrification. This could take the form of a specific housing equity fund.

Recommendation 3) Commit to working together with urgency

Overview: Dedicate state level staff to oversee and support housing production across the entire market spectrum

Currently, there is no specific agency of state government responsible for overall housing production, and many of the available regulatory tools are better suited to preventing unwanted developments than to encouraging those that are needed. As a result, the policy response to the current housing shortage has been disjointed, with siloed policy discussion and action occurring at several agencies without meaningful, systemic coordination between them or with local and regional partners.

A comprehensive, production-focused system needs leadership and coordination across the many entities engaged in some aspect of housing production. Simply put: someone needs to be in charge, to: (1) ensure coordination of available funding sources and regulatory authorities (currently spread across many agencies) toward meeting production targets, and (2) implement the OHNA model, including ongoing management of the data that measure progress toward targets.

Figure 6. State agency roles in housing production.

Agency	Roles in Housing Production
Oregon Housing and Community Services	Affordable Housing Finance, Fair Housing
Department of Land Conservation and Development	Planning & Zoning Rules, Public Facilities Planning, Land Use Regulation
Department of Administrative Services	Economic Analysis
Oregon Department of Transportation	Integrated Transportation and Land Use, Transportation Infrastructure and Planning
Department of Environmental Quality	Water and Wastewater Infrastructure, Environmental Regulation
Business Oregon	Infrastructure & Capital Improvements Funding, Economic Development, Community Development Block Grants, Brownfields Redevelopment
Bureau of Labor and Industries	Occupational Licensing, Fair Housing
Department of Consumer and Business Services	Building Codes, Lending & Financial Regulation

3.1 Develop a coordinated statewide administrative structure

Coordinated statewide action would require sufficient authority to (a) convene agency leadership, (b) develop and refine policies to achieve desired housing production outcomes, (c) administer programs with accountability in housing production as well as fiscal and budget, contracting, HR, and IT services, (d) provide specialized housing production expertise to local partners, (e) direct funding for housing and public infrastructure, and (f) provide regular reporting to the Legislature and Governor's office.

Recognizing an urgent need to begin addressing housing production barriers, we recommend establishing an interagency Housing Production Team and administrative leadership position. The leadership of this team should be housed at the coordinated statewide administrative entity, and staff assigned to the team should be drawn from multiple agencies, leveraging the expertise and programmatic knowledge of each agency. This team should respond to a legislative mandate that directs agencies to coordinate their existing and potential new funding sources and regulatory authorities toward the goal of housing production. This provides a clear focal point for communicating and partnering with local governments.

The Housing Production Team should have (or be able to contract for) expertise in affordable housing finance, market rate development, permitting and building code, land readiness, fair housing law, community engagement, and development policy analysis. The team would deliver a commitment to federal and state requirements for fair housing, including anti-displacement tools and other housing equity strategies. This would also facilitate better coordination of housing production with broader policy initiatives, including transportation, equity, infrastructure, environmental quality, and climate. This team would function in two ways:

A. As technical experts that can be called on to address specific site development challenges or policy questions in partnership with local governments. Local jurisdictions face numerous constraints that inhibit the development of sites that would otherwise support housing production and receive minimal support from the state in technical or financial assistance to address such constraints. This team would provide varied and specialized housing production expertise that can diagnose and overcome development barriers through policy and investment interventions. It should also be able to deploy technical assistance and consultant support to ensure that it can help unstick complex development sites or evaluate thorny policy questions.

B. As an accountability and review team, to oversee progress toward goals in HPSs. The team would recommend actions that may be missing in local strategies or need more attention on a regular review cycle. In its accountability function, we recommend that the inter-agency Housing Production Team incorporate the existing staff review of HPS documents. This will enable the team to partner with local jurisdictions on specific actions identified in the HPS to ensure they have the resources and state coordination needed for implementation. If necessary, they would also be able to recommend enforcement orders for cities that are not meeting targets and are not taking sufficient action to address those deficits.

Implementing the OHNA will require a high degree of trust, communication, and transparency, as jurisdictions become accustomed to the new methodology. The establishment of a coordinated statewide administrative structure and Housing Production Team may necessitate phasing, recognizing the substantial challenge of reorganizing power and responsibility among state government agencies. We recommend further discussion around the best models for building confidence, such as community and stakeholder engagement, contracting of experts in the field, and regular reporting to the Legislature.

3.2 State and Regional Continuing Policy Action

The goal in centering housing production and outcomes in Goal 10 implementation is to remove barriers to housing development and to align capacity for better outcomes. This is true at both the local level and across state and regional government. To ensure that we are bringing all resources to bear in addressing the housing crisis, we recommend that the state and Metro Regional Government adopt action plans similar to HPSs that would:

- Define new regional and state actions to meeting need, such as the LIFT affordable housing development program or Metro's voter-approved measures for affordable housing and permanent supportive housing
- Identify existing resources that could be invested or leveraged for better outcomes
- Coordinate with local implementation
- Report to legislature on regional and state progress
- Identify new opportunities for action

In contrast to locally-adopted HPSs, the action plan that Metro adopts must recognize the coordinating role that regional governments play in housing planning. Rather than adopting specific policies, such as local zoning codes and regulations, regional housing coordination strategies should emphasize the collaborative actions among local governments that can be facilitated regionally. For example, regional housing coordination strategies could include identifying shared funding sources, sharing staff capacity, or entering intergovernmental agreements to promote housing production.

While we recommend that Metro be required to periodically complete such a strategy, counties and other regional entities should be able to opt-in and collaborate with cities, especially those with populations under 10,000, making them eligible for funding, capacity, and resources to address shared housing priorities. This would be especially helpful in smaller, more rural communities.

At the state level, the administrative entity described in Recommendation 3.1 should periodically complete a coordinated state HPS. Such a requirement would help address significant data gaps and follow up policy work. At present, we do not have an accurate picture of how much housing exists or is being produced statewide. An Oregon HPS would create a baseline understanding and data standards to track new production and the equitable distribution of housing options. This would allow for comprehensive tracking of the state's progress towards closing the gap in underproduction.

Additionally, many of the policy issues DLCD and OHCS heard through engagement require follow-up and collaboration with other state agencies. See Appendix B for a detailed list of DLCD's follow-up policy work. These and other areas of follow-up work highlight the need for a statewide HPS in which the state is consistently working to promote housing production and evaluate progress towards equitable outcomes.

III. Conclusions and Next Steps

Housing underproduction is a systemic, nationwide challenge that has been decades in the making. Nearly every state has failed to produce enough homes to meet the need. In this respect, even with its comprehensive land use program, Oregon is not unique. Along with the other coastal and intermountain west states that have seen rapid population growth, Oregon's situation is dire. We rank fourth worst in states in terms of underproduction as a share of total housing units, better only than California, Colorado, and Utah.[17]

This crisis is felt throughout Oregon, whether in large urban areas with skyrocketing rent and home values, in more rural communities struggling to find construction workers and developers, or on the coast where the local workforce competes for housing with short-term rentals. While some important details remain to be resolved in the coming months, we believe that these recommendations will position Oregon to make the systemic changes necessary to confront this challenge.

Few policy imperatives are more important to Oregon's future than increasing the pace of building new homes. Housing production is essential for Oregon's economic competitiveness, helping families prosper, and improving community resilience. Simply producing the units needed to meet current demand could generate up to $40 billion in additional economic growth, a boost that would benefit us all.[18] Achieving this will take hard work, coordinated action and investment from many partners in the public and private sectors, and at the state, regional, and local levels.

The recommendations described in the pages above are complex and comprehensive. Implementing them will require significant investments, changes to state statute, rules, and guidance, and will likely need to be sequenced over more than one legislative cycle. To make near-term progress on their implementation, we recommend that the Legislature consider bills that advance the bipartisan goal of building more homes, as follows:

A. **Redefine Oregon's Planning Process for Housing.** The state should establish the OHNA as the foundation for Goal 10 planning processes in state statute. This should, at a minimum:

   - Adopt core components of the OHNA methodology into statute, including that the OHNA must account for underproduction and an estimate of housing needed to serve people experiencing homelessness, must be allocated based on regional incomes and job distributions, and must be reviewed and updated with appropriate new data on a regular cycle. (Recommendation 1.1)

[17] Up for Growth, 2022, Housing Underproduction in the U.S. 2022, https://www.upforgrowth.org/underproduction

[18] See footnote 2 on page 3.

- Create administrative capacity to run the OHNA and track progress toward targets on an annual basis. This could be in OHCS, or in the Office of Economic Analysis. (Recommendation 1.1)
- Direct cities to replace local projections of need in Housing Capacity Analyses with OHNA-generated 20-year need numbers, by income, produced by the state. (Recommendation 1.1 and 1.4)
- Direct cities to strengthen Housing Production Strategies by requiring actions that address housing barriers and advance fair housing outcomes (Recommendation 1.3 and 2.2) and by incorporating production targets based on the data provided in the OHNA (Recommendation 1.2).
- The state should make statutory changes necessary to make needed UGB amendments more efficient and better prepare land for development. This should include direction and funding/resources for DLCD and LCDC to continue work related to Goal 10 and facilitating timely expansion of Urban Growth Boundaries when a need is identified. (Recommendation 1.4 and Appendix A).

B. **Coordinate the state response.** The state should establish a coordinated statewide administrative structure with a Housing Production Team. If it is necessary to phase this in, a temporary Housing Production Team could be established as part of DLCD or OHCS while broader discussion occurs. The housing production issues facing many communities demand an immediate state response. This team should be deployed as quickly as possible to achieve early housing production wins by helping cities unstick challenging development sites, removing barriers and focusing state resources. Additionally, this team should be charged with developing the first ever statewide Housing Production Strategy, which will serve to shift the state's energy and efforts to this urgent challenge. Over time, as rules are developed and take effect, this team can begin to function in its review process to assist with HPS implementation and accountability. (Recommendations 3.1 and 3.2).
   - Provide position authority and Legislative direction for staff at other agencies to work with the newly established Housing Production Team toward the goal of housing production. Meeting production goals will require coordinating existing funding sources to meet housing need, working across agencies to overcome site permitting challenges, and providing support to local staff to overcome affordable housing funding challenges. (Recommendation 3.1)

C. **Create innovative funding and finance solutions.** The state should establish new housing production funding mechanisms aimed at middle housing or workforce housing development. Several stakeholder forums are considering innovative funding and financing mechanisms that are resonant with the recommended fund types in this report. (Recommendation 2.1)

The process of developing a Statewide Housing Production Strategy will inevitably uncover additional changes that are needed, and iterative improvements should be expected. More work will undoubtedly be required in future Legislative sessions. The Housing Production Team may need to evolve as we learn from its initial successes. Additional funding sources are required to make meaningful progress. Further accountability mechanisms may be needed. However, the comprehensive legislative package described above would be a substantial movement in the right direction, putting Oregon on the trajectory to lead the nation with a new approach to housing production focused on meeting the needs of all Oregonians. These recommendations, and the associated increase in housing production, will only succeed with sustained Legislative leadership and action in the 2023 Session and beyond.

IV. Appendices

Appendix A. Housing Capacity Recommendations

Appendix B. Follow-up Policy Work – Basis for a Statewide Housing Production Strategy

Appendix C. OHNA Legislative Policy Outline

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Appendix E. OHNA Engagement Summary

Appendix F. University of Oregon Development Barriers Survey Summary

Bureau of Labor and Industries
Civil Rights Complaint & Investigation Process

Leila Wall, BOLI Civil Rights Division
June 27, 2025

Leila Wall
Civil Rights Division
Bureau of Labor and Industries

leila.wall@boli.oregon.gov

Civil Rights Division Basics

Who Can File a Complaint?

- **Anyone** who **believes** they have been subjected to an unlawful act in employment (as well as places of public accommodation, housing, and vocational schools) based on a **protected class or activity** in Oregon

Federal and Oregon Civil Rights Laws

TITLE VII- CIVIL RIGHTS ACT OF 1964

- Race
- Color
- National Origin
- Religion
- Sex*
- Retaliation
- Association

OREGON REVISED STATUES 659A

- Race
- Color
- National Origin
- Religion
- Sex
- Retaliation
- Association

Federal and Oregon Civil Rights Laws

Federal

- Age (ADEA)
- Americans with Disabilities Act
- Family and Medical Leave Act
- Genetic Information Nondiscrimination Act (GINA)

Oregon

- Age
- Disability
- Oregon Family Leave Act/Paid Leave
- Genetic Screening and Brainwave Testing

Additional Protections Under Oregon Law

- **Gender identity**
- **Sexual orientation**
- Injured worker status
- Whistleblowing (general)
- Marital status
- Reporting workplace health or safety hazards
- Use of Credit History
- Reporting health care violations
- Family relationship
- Veterans' preference in public employment
- Expunged juvenile record
- Oregon Sick Time
- Garnishment



Additional Protections Under Oregon Law

- Safety accommodations and leave for victims of domestic violence, harassment, sexual assault, or stalking
- Prohibition on requiring a medical release unless employer pays out of pocket costs
- Testifying before the State Legislature
- Protection from certain tests, screenings, and examinations
- Lawful use of tobacco products during off duty hours
- Leave for spouses of service members called to active duty
- Leave to serve in state-organized Militia
- Uniformed Service Leave and Veteran Status



Civil Rights Division Statistics

FYTD 2025 (as of May)

- 43,885 general inquiries
- 4,066 questionnaires received
- 2,082 cases opened

Civil Rights Division Statistics

FYTD 2025 (as of May)

- Age – 11%
- Disability – 41%
- Paid Leave/OFLA – 18%
- Injured Worker – 9%
- National Origin – 10%
- OSHA – 7%
- Race/Color – 18%
- Retaliation/WB – 57%
- Sex (and adjacent) – 38%
- Sick Leave – 7%

Common Terms and Acronyms

- Complainant/CP/PCP
- Respondent/RP/R
- APU
- CATTY
- RATTY
- FEPA
- LNDR
- LDOH
- LOD
- NJ
- PRAN/CSN/RTS/NRTS/90-day notice
- RFI
- SED/ “Cause”
- Dismissal
- Charge/Complaint

Filing a Complaint

Initiating Investigation Process

- Employee (complainant) contacts Civil Rights Division and fills out an "Employment Discrimination Questionnaire"
- Online portal - https://complaints.boli.oregon.gov/home/landing
- Questionnaires are assigned to intake staff
- Intake staff may contact complainants to verify information and ask follow up questions, then draft "formal" complaint which is sent to Complainant to review and sign
- **Option**: Attorney-drafted complaint

Writing the Complaint

- Must meet the following requirements:
  1. Gives the name and address of the aggrieved person and the respondent;
  2. Identifies the protected class basis of the complaint;
  3. Is signed by the aggrieved person;
  4. Describes the actions complained of, including:
     a. The date(s) of occurrence;
     b. What the action was and how it harmed the aggrieved person; and
     c. The causal connection between the aggrieved person's protected class and the alleged harm.

OAR 839-003-0005(5)

Amended Complaint vs. New Complaint

- Complaints may be amended to add information that is supported by facts in the complaint, to correct technical defects, and to add additional Respondents
  - e.g., complaint describes discrimination based on race but does not cite ORS 659A.030
- New developments require a new complaint, even if they are related to an already asserted protected class
  - e.g., complainant is terminated after complaint is filed and believes it is based on the same protected class originally alleged
- Allegations based on a new protected class cannot be added as an amendment

Filing Timelines

- A complaint is considered filed on the day that BOLI receives a valid complaint
  - Valid = meets requirements of OAR 839-003-0005(5)
  - 12:00 am – 11:59 pm on weekdays; weekends and holidays filed on next business day
    - See also: ORS 174.120 – Computation of time
- ORS 659A.030, 659A.082, 659A.112 – five-year SOL
- Everything else – one-year SOL

BOLI CRD & EEOC

A Tale of Two Agencies

- To file in federal court, employee must first "exhaust administrative remedies" by filing with Equal Employment Opportunity Commission (EEOC)
- EEOC is BOLI CRD's federal counterpart
- BOLI & EEOC workshare agreement:
  - Complaint submitted to BOLI is dual filed with EEOC *or*
  - Complaint submitted to EEOC is dual filed with BOLI
- No forum shopping – only one agency will investigate
- Dual filing is automatic if complaint meets EEOC requirements

EEOC Charge – Important Distinctions

- Why wasn't my complaint dual filed with EEOC?
- Employee numbers:
  - Most statutes require 15+ employees
  - ADEA requires 20+ employees
    - And only applies to ages 40+ (Oregon law is 18+)
- Timeline:
  - 300 days from last date of harm
- Allegations based on gender identity

Is my complaint dual filed?



June 27, 2024

Leila Wall
1800 SW 1st Ave
Suite 500
Portland, OR 97201

RE: Complainant: Leila Wall
Respondent: State of Oregon
Case #: [redacted]
EEOC #: HRD-2024-99999

You have been identified as a participant as a Civil Rights complaint that has been filed with the Civil Rights Division at the Bureau of Labor and Industries. The investigator assigned to your case is Leila Wall, and the phone number is 503-[redacted].

In the course of processing this civil rights complaint, it was determined that the complaint met the criteria to be filed under both state and federal law. Therefore, this complaint was co-filed with the Equal Employment Opportunities Commission (EEOC). The EEOC is our federal counterpart. Co-filing ensures that the complaint is recorded with both state and federal civil rights enforcement agencies.

Enclosed, please find an EEOC charge notification letter, Form 131-A. Unless otherwise notified, the complaint will still be investigated by our agency. Once we conclude our investigation, you may receive further correspondence from EEOC.



June 27, 2024

Leila Wall
1800 SW 1st Ave
Suite 500
Portland, OR 97201

RE: Complainant: Leila Wall
Respondent: State of Oregon
Case #: [redacted]
EEOC #: HRD-2024-99999

Enclosed is a copy of the perfected complaint of unlawful practice that you filed on June 27, 2024.

Your complaint has been assigned to Civil Rights Investigator Leila Wall for investigative review. The Civil Rights Division is currently evaluating whether to investigate this matter further.

Answers to Common EEOC Questions

- 15-day waiting period after BOLI closes a case
- Let us know if you request federal right to sue after we dismiss
- If you are withdrawing a case to file in court, please specifically state that you are requesting a right to sue notice
- If a case filed with EEOC is closed and you would like us to close our record of the case, please send us the EEOC closure notice
  - We don't always know when EEOC has closed their case

Responding to a Complaint

Position Statement

- When a case is opened, employer will receive notice of complaint and a request for response to allegations
- This response is referred to as a “position statement”
- Providing a position statement allows employers to:
  - Rebut the allegations in the complaint
  - Detail their version of the alleged events
  - Produce exculpatory evidence
  - Assert legal defenses
- Response is initially required within 14 days of the date of the letter, but investigators can and will allow additional time – just ask!

Tips for Responding to a Complaint

- **Respond to the allegations**
- **Stick to the relevant facts**
- **Include relevant documentation**
- **Review policies prior to responding**

Respond to the Allegations

- Provide a response that fully addresses each material allegation in the complaint
  - This can be as simple as responding line by line to each item in the complaint
- Failure to respond/rebut may result in Complainant's statement being taken as true
- It's better to tell the truth, even if it looks a little bad, than to make something up that looks worse
- Include additional detail as necessary to supplement/ support your response

Stick to the (Relevant) Facts

- Reference facts, not conclusions
- Investigators are not a jury – no need for emotional appeal or shock value
- Extra facts or details that are irrelevant and meant to be inflammatory will not be considered
- Providing information unrelated to the allegations can lead to (additional) liability
- Investigators can and will consider information given/statements made outside of the "formal" response
  - Everything is a public record and part of the investigation file
  - Nothing is "off the record"

Include Relevant Documentation

- Referenced documents should be included with position statement
- Asserting a defense with no documentation to support it (if it should be documented) will lend it comparatively little weight in an investigation
  - If it isn't written down, it didn't happen
- The party with the best documentation (usually) wins
- Investigator will request documents that are not sent initially

Review Policies Prior to Responding

- Know what relevant policies are and how they've been implemented in the past
  - Analyze comparators and potential witnesses yourself
- (Optimally before a complaint is filed…) Double check that no policies are in violation of the law
  - Especially leave policies!
- Identify any discrepancies between actions in the complaint and normal procedures
  - Determine the reason and make sure that it isn't based on a protected class
- Don't change policies after receiving a complaint*

Investigation

Standard Investigative Framework

The Civil Rights Division uses a “substantial evidence” standard, which requires an investigation to find evidence that a reasonable person would accept as sufficient to support the following elements:

1. The complainant is a member of a protected class;
2. The complainant was harmed by an action of the respondent; and
3. The complainant's protected class was the motivating factor for the respondent's action.

OSHA Retaliation Rebuttable Presumption

ORS 654.062(7):

- If an employee or prospective employee alleging retaliation for reporting/opposing workplace health or safety hazards was subjected to adverse action within 60 days of protected activity, there is a rebuttable presumption that the adverse action was unlawful
- Respondent may rebut the presumption by a *preponderance of the evidence*

- *How do I know if this applies to me?*
  - Case number begins with OS

Basics of Investigations

- Investigator interviews the complainant using information from the questionnaire, complaint, and position statement to determine next steps
- Investigations must be completed within one year from filing date*
- Investigators may request additional information from either side in order to make a final determination

Possible Next Steps

- Witness interviews
  - Coworkers, past employees, customers
- Requests for information (RFI = RFP + interrogatories)
  - Questions about documents or information in response
  - Personnel files
  - Emails, texts, phone logs, any other written communications
  - Information about past/current employees
  - Other documentation relevant to protected class
    - Leave requests, workers' comp documents, etc.
- Respondent interviews
  - Any supervisory personnel that may have knowledge related to the allegations; bad actors

Providing Additional Information

- Responding in stages is a possibility if some information will take too long to locate/compile
- "Friendly" subpoenas can be sent if needed
- "Unduly burdensome" vs document dumps
- Talk to the investigator about any concerns you have; limiting response to useful information
- Don't send us anything you can't live without

Settlement/Conciliation/Mediation

- Either party may propose a settlement at any point in the investigation process, and investigator will determine if other party is also interested
- Investigators are able to facilitate settlement discussions between parties
- BOLI's new(ish) ADR unit offers more formal mediation options – notice sent with all case openings
  - Contact investigator for more information!

Anticipating the Outcome

- Investigators are not required or expected to give complainant attorneys advance notice of intent to recommend dismissal
- An investigator's demeanor during interviews and correspondence may or may not be an indication of their assessment
- The best indication of the investigative findings are the questions asked and not asked

Concluding the Investigation

Determination

- Once the investigation has concluded, the investigator will make a determination on the merits of the case
- Possible outcomes:
  - Dismissal – investigation did not uncover substantial evidence of unlawful practice; complainant may still pursue in court
  - Substantial evidence finding – Notice of Substantial Evidence Determination is issued to all parties

Issuance of Right to Sue Notice

- Dismissals (other than settlement):
  - 90-day right to sue issued when investigation is complete (case is closed)
  - You may withdraw the complaint at any time to proceed in court
  - If your intention is to withdraw, please let the investigator know!
- Substantial evidence findings:
  - Right to sue notice not issued when investigation is completed (case is still "open")
  - Issued on one-year filing anniversary OR when case is closed, whichever comes first
    - Closure reasons: administrative closure by BOLI, withdrawal to file in court
- EEOC cases
- HB 2957

Post-Determination

- Case is referred to Administrative Prosecution Unit for review
- The agency may attempt to conciliate cases in which substantial evidence of an unlawful practice is found
- If the parties settle prior to prosecution, the agency will execute a conciliation agreement
  - Many settlements have "side agreements" to which the agency is not a party
  - **Please consider the Workplace Fairness Act while negotiating settlements**
- If the parties do not settle, the agency will issue formal charges and prosecute the case in an administrative hearing
- Complainant(’s attorney) may withdraw case at any time



Questions?

OREGON BUREAU OF LABOR & INDUSTRIES

Leila Wall, *Oregon Bureau of Labor and Industries, Portland*

Leila Wall has worked for the State of Oregon, Bureau of Labor and Industries (BOLI) since 2016. Leila is currently a member of BOLI's Civil Rights Division, which enforces laws related to discrimination in employment, housing, places of public accommodation, and vocational schools. Leila graduated from Lewis and Clark Law School where she studied employment law.

Is this a familiar scenario in your firm or practice: You have an Elderly Client who has just passed away. You open probate. The personal representative finds out that Elderly Client invited in his 32-year-old grandson to take care of him. All this was done without a written rental agreement, of course. You must sell the property, but grandson will not vacate, despite an unsparingly kind demand letter from you.

Or homeowner client calls to say she invited a friend to stay on her couch for a few weeks because the friend has fallen on hard times. Now the friend won't leave.

What do you do next?

In this CLE we will cover probate, guardianships and conservatorships, trusts, ORS 90.403 (unlawful possessor), 105.115(1)(b), and ejectment. We will not address nonpayment cases or foreclosures.

We all know that the forcible entry and detainer process (FED) is a speedy way to resolve landlord-tenant possession issues. You've served a termination notice, time passes, the tenant does not vacate, so you file the eviction complaint, attaching the notice. Eight days later you are in court for first appearance. You enter an FED stipulated agreement, ask for a trial, or take a default because the tenant failed to appear. If you enter an agreement, and the tenant does not keep the agreement, the landlord files a declaration of noncompliance, the court issues a notice of restitution, the tenant still does not vacate, you file for your writ of execution of judgment of restitution, and the sheriff dispossesses the tenants.

In probate, guardianships and conservatorships, and trusts, you often are not certain what the status is of the person who is occupying the property. There may be a written rental agreement that has gone missing, the occupier may allege an oral rental agreement, or the occupier may remain silent. There is a show-cause procedure for all four of these. We will use that show-cause procedure to force the occupier to declare their status. After we know their status, then we either (1) get an order to vacate or (2) follow the above path for an eviction/FED.

In ORS 90.403 (unlawful possessor) and 105.115(1)(b) case, we will use an FED. In ejectment, we will use the regular circuit court process.

<u>Probate - Mostly the law with a little procedure</u>

The probate court has jurisdiction under ORS 111.095(4)(e). The personal representative has a right and a duty under ORS 114.225 to take possession of the estate property. To exercise that right and perform that duty, the personal representative files a motion for delivery of possession of real property. *Id*. at (2).

The personal representative must give the occupants notice. You can find the content requirements for all notices at ORS 111.215. All that you are doing at this stage is sorting the occupants by legal status. You find out which people are tenants, and which are not. For the non-tenants, you will ask the court to grant an order for the non-tenants to vacate.

You will have a hearing if the occupants object to your motion. ORS 111.241. The show-cause procedure puts burden on the occupant. In case the occupants do not object, put language in your motion and your order or judgment for all that you want (order to vacate; order for writ).

The personal representative has a statutory duty to take possession and control of property. ORS 114.225(1). Often, the house is the only asset, so even if there are heirs in the house, the personal representative still has a duty to sell the house and to distribute the proceeds to the heirs and devisees if personal representative so decides. ORS 114.225(1) (see dependent clause).

The motion for delivery of possession of real property itself has several requirements. *See* ORS 114.225(2)(a). You must state why chapter 90 does not apply to this situation. You will serve this notice (and motion) on all adults occupants. *Id.* at (2)(b). You must leave the spouse and dependent kids in for at least one year after death, even if they are tenants. ORS 114.005(1)(a).

Next, review ORS 111.215 for the requirements that have to be in the notice that you include with the motion. Walk through this section and all will be made clear. But to preview it for you, you need the following:

a. Name address and telephone number of the person giving the notice.
b. Declare the nature of that person's interest, that is, personal representative.
c. Tell the occupants that if they object they have to give a plain and concise statement of the basis for their objection.
d. Include a copy of your motion for delivery of possession of real property with the notice.
e. Be sure to give the notice to the personal representative! I am the landlord-tenant lawyer and I am not the probate lawyer, so I'll be sure to serve the personal representative (who is also my client).
f. If anyone in the house has a fiduciary, serve the fiduciary also.
g. If there are minors in the house, serve the parents. If the minor is 14 or older, serve that minor.
h. Serve by at least one of these methods: by first-class mail to the residence or business, or by personal delivery to the residence or business. Serve DHS and OHA if relevant.
i. Serve the occupant’s attorney, if the occupant has one.
j. Now the time frame. A little complicated. ORS 111.215 (4)(a). No later than 15 days before the earlier of the date for filing objections or the date set for the hearing. The easy way to do this is to just call the probate court, get a hearing date, and then date your notice 15 days before that date.
k. File your proof of service.

You'll get a limited judgment to require delivery of possession of property. ORS 111.275(1)(c). Though I have only ever seen an order to vacate. That worked for the sheriff! And the sheriff is the one you have to satisfy at the end of the day because they will dispossess the occupants.

Try to get your writ language into the vacate order coming out of the show-cause hearing so that you don't have to do a motion for a writ. Or get that limited judgment with the writ language in it (“order writ to issue”).

At the end of the show-cause hearing you will know who is a tenant and who is not. Draft your order to vacate for the non-tenants, but don't file the order just yet. Go prosecute your FED, take that to the writ stage if need be, then execute both writs on the same day. For example, your probate writ

will say, “all squatters except Tenant Doe.” Your FED writ will say “only Tenant Doe.” Why? Because even though you can get the squatters out faster, you don't want the tenant still there opening the door for them.

Does the personal representative get attorney fees? If you've ever done probate cases you know that you the lawyer can get your fees from the estate in the final accounting. ORS 116.183(1). You know that the procedure is not the same as the ORS 20.075 factors. *Id.* at (2)(a). But did you know that insofar as you represent the personal representative, you get your fees, win or lose? *Id.* at (3).

Probate - here's the exact procedure

1. File the motion for delivery of possession real property under ORS 114.225. Allege that the personal representative is entitled to possession.
    a. If you know that you have a tenant, state so.
    b. Fully alleged the facts and the law of the probate case (what stage of the proceedings you're at, what the court has held in any hearings, and so on),
    c. Title vests in the PR. 114.215.
    d. Personal representative is entitled to file this motion. ORS 114.255.
    e. Personal representative must preserve the estate. ORS 114.265.
    f. Personal representative needs to sell and has the power to sell the house. ORS 114.325. Personal representative is entitled to prosecute actions. ORS 114.305(19).
    g. Allege the jurisdictional hook of ORS 111.095(4)(e) and .085(1)(d).
    h. Ask for an order to show-cause why the occupant should not vacate.
2. Declaration of personal representative (or personal representative’s lawyer)
    a. “I'm the personal representative, here are the facts about the house that granddad lived in, here are my duties (to marshal the assets and administer the estate).
    b. “Here are the facts about the date the occupants moved in; I do not believe they are tenants, and here's why: personal representative has not been able to locate a written rental agreement; occupants have not offered a written rental agreement, occupants will not tell me their status.”
3. After the personal representative serves the ORS 111.215 notice to the occupants, before that, I will have mailed the occupants an informal vacate notice. I will have given the occupants all the motions and pleadings and I will have given them a deadline.
    a. If you read ORS 111.215—an unforced error if you don't comply—you'll see this 15-day requirement at (4)(a). Don't be afraid. Call probate clerk and ask for a date for the hearing; Mention that you are about to mail this notice and that you need that firm date in order to back date your notice. That should give you enough time to satisfy the notice and timing requirements of 111.215(4)(a).
        i. “We served that notice on Dec. 8 and filed it on Dec. 27. The notice gave a deadline of Dec. 26 (18 days) for objections. One objection came in on Dec. 21. Thus, all now have notice of a possible hearing.”
    b. You've drafted your motion. You've drafted your notice. Be sure to attach the notice to your motion and your motion to the notice. File your motion with the notice as an exhibit. Make it an exhibit to the personal representative’s declaration if you like. Then mail the motion and the notice and the declaration to the occupants.

4. Now for the order to show-cause. After the court signs the order you need to communicate to the occupants the time and date of the hearing.
5. Prayer for order:
    a. “Show-cause why the personal representative does not have present and exclusive right to the property;
    b. “For an order to vacate;
    c. “For a writ of assistance (some courts will make you plead separately for this as a motion for a writ of assistance, or the court will have you plead it again in any order after the hearing);
    d. “Attorney fees” (if allowed).
6. The order itself: You will already have called the probate clerk to get those dates.
7. The hearing itself. It's show-cause, so the occupants should go first, but prepare a little prima facie case in case you go first.
8. Order after hearing:
    a. Draft it, but the court may draft its own order.
    b. All you really are looking for is the “order to vacate” part
    c. You may have to file a motion for a writ; see above. Drafting a writ is beyond the scope of this CLE but I'm sure with the help of Barbooks you all know how to do it.

<u>Guardianships and conservatorships</u>

<u>Common to both:</u>

1. ORS 125.065 is the notice requirement, but it applies to .060, which does not mention the show-cause hearing. It has all those 15 days we used in probate, but I don't see that probate is required to apply here.
2. That said, you might have a show-cause hearing, if the court says so. ORS 125.080. And the court may compel attendance of anyone. ORS 125.025(3)(a).
3. Guardianships and conservatorships do not invoke the same interests that a probate case does, that is, heirs and devisees.
4. Attorney fees are at ORS 125.095(1), but I'm afraid this is only for the funds of the protected person, so this does not give a right to get attorney fees from other than a protected person.
5. There is nothing special for guardianships; they fit under fiduciaries generally. ORS 125.055 to .098.
6. But for conservatorships, the guardian “shall take possession of all the property of substantial value . . . and of rents . . . .” ORS 125.420. That is a duty.
7. Authorized acts without court approval: The conservator “[P]rosecutes or defends actions . . . for the protection of a state assets . . . .” ORS 125.445(26).
8. You can get a court order to compel a tenant for a copy of the rental agreement. ORS 125.465(1)(c).

<u>Trusts</u>

While there is no show-cause proceeding in the trust code like there is in probate and the protected proceedings, there are several provisions that give you essentially the same authority to ask for one. Among them are, first, a trustee’s general duty to take reasonable steps to take control of and protect the trust property. ORS 130.690. Then ORS 130.725(26), giving the trustee authority to

distribute the trust property to the persons entitled to the property. Although this is specifically on termination of the trust, that may be your case. ORS 130.725(24) gives the trustee authority to prosecute or defend an action to protect the trust property and to allow the trustee to perform the trustees duties. This is directly on point if you need to remove a person from the property. Insofar as someone has filed a claim against the trust and you need to liquidate trust property in order to pay the claim, ORS 130.700 gives the trustee that power. At the end of the day, the trustee must act or it's a breach of trust. ORS 130.800.

You can sum all this up in your pleadings with such a statement as follows: “The Trustee is entitled to take possession of the Trust real property for purposes of administering the Trust, including selling the Trust real property. The Trustee needs possession of the Trust real property urgently because the occupants’ wrongful possession of the Trust real property hinders the Trustee’s ability to perform its administrative duties. The Court should order occupants to appear and show cause why they should not immediately vacate the Trust real property.” (Courtesy of Denise Gorrell of Samuels Yoelin Kantor, LLP.)

Court has jurisdiction in these actions “regarding any matter involving the beneficiaries interests in the trust.” ORS 130.055(2). A court may intervene to protect an interest of an interested person. ORS 130.050(1). This is excellent authority for a show-cause motion and so is ORS 130.050(3). Likewise with ORS 130.060, giving a circuit court jurisdiction to any matter concerning the administration of a trust, and what is administration but protecting the assets?

If the occupant is a tenant under a rental agreement and not a beneficiary, use the FED process. if the occupant is a tenant who's also a beneficiary, there’s probably no rental agreement, but if the trust says the house goes to this tenant-beneficiary, you expect tenant-beneficiary’s rental agreement (if there is one) to terminate when the tenant-beneficiary becomes tenant in common with the other beneficiaries. Nothing to do there. If the house is part of the residue that needs to be sold, and the occupant is a tenant, use an FED. If the house is part of the residue that needs to be sold, and the occupant is a beneficiary but not a tenant, use show-cause (or if no current trust case, file a petition to vacate).

The court proceeding is the same way as the final accounting and probate, and then we have this cryptic sentence: “notice of a judicial proceeding shall be given in the manner required by statute for the approval of the final accounting in a decedent’s state.” ORS 130.035(4). That leads us ORS 116.093 and there’s the procedure. It’s less involved than our ORS 111.215(4)(a) process for probate, but still involved.

1. Call the clerk and get a time for the hearing.
2. Send out your notices at least 20 days before the hearing. Serve by first-class mail, personal delivery, or e-mail.
3. Mail a copy of whatever you're asking for, and the proposed judgment to each distributee if the distributee is a beneficiary. “To the trustee and all persons whose interests are affected by the requested action or relief.” ORS 130.035(4)(a).
4. File your proof of mailing before the hearing.

You can get attorney fees for “administration.” ORS 130.815. You could even charge the fees to the beneficiaries you need to dispossess.

Unauthorized possessors under a tenant who has vacated: ORS 90.403

If you get this situation, you are very lucky—the easiest 24 hours' termination there is. This is where a tenant invites a guest or others, those guests or others are not listed on the rental agreement, then the tenant leaves, leaving those guests behind.

Just three requirements:

1. The tenant has vacated. ORS 90.403(1)(a).
2. The rental agreement prohibits subleasing or guests without written permission of landlord. *Id.* at (b).
3. The landlord has not knowingly accepted rent from the guests. *Id.* at (c).

Although the statute requires the notice to only "specif[y] the cause," I would draft the above three elements into the notice, citing to the departed tenant's name, the no-subleasing provision of the rental agreement, and recite that you've not knowingly accepted rent from the guests.

As often has not, some rental agreements will not have the no sub-leasing provision. If that is your case, you can't serve this type of notice, so consider the next method.

ORS 105.115(1)(b): Holding possession without any written lease or agreement

"[T]he following are causes of unlawful holding by force within the meaning of ORS 105.110, 105.123 and 105.126 . . . when . . . the tenant or person in possession . . . is holding possession without any written lease or agreement."

Use this when you don't have a written rental agreement, or you don't have a rental agreement at all. I leave it to your interpretive skills and knowledge of the Conjunctive/Disjunctive Canon to analyze whether you read "written" to apply to both "lease" or "agreement," or only to "lease." My money is on: "Written" modifies both.

This is your classic squatter situation. Squatters are not regulated by the Residential Landlord and Tenant Act. ORS 90.110(5). Don't accept rent or you may turn the squatter into a tenant. If you have accepted rent, then you either have an oral rental agreement with just the rent term, or you continue under ORS 105.115(1)(b). The rental agreement is still not written.

Give a 10-day courtesy notice so that you can satisfy the "holding by force" of ORS 105.110 when the occupant does not then vacate. "Holding by force" is an element of your cause of action. ORS 105.115(1). File the complaint under ORS 105.126. We know from our discussion above that squatter is excluded from chapter 90. Pay your $281.

Now for the arguments when the tenants' lawyer shows up to decry you, "This is not a landlord-tenant relationship, so you cannot use the FED process, who taught you how to be a landlord-tenant lawyer!" First, make a structural argument based on the language of the ORS 105.115(1)–(2). This statute is a thorough mix of landlord-tenant and non-landlord-tenant. Look at the instances of "tenant" and "person in possession" as you read the statute. Different words mean different things.

This "tenant or person in possession" disjunct is in

1. (1)(a) twice;

2. (1)(b), (c)–(g) is only "possessor" or "person in possession";
3. (2)(a)(A); and
4. (2)(a)(B).

In so far as "tenant" means something different from "person in possession," Salem did not reckon all these ORS 105.115(1)–(2) instances as landlord-tenant. In fact, the "possessor" or "person in possession" instances outnumber the "tenant" instances by more than 2-to-1 (9 to 4), even counting the section exclusive to chapter 90—ORS 105.115(2). All you need is an entry by force or a peaceable entry and a holding by force. ORS 105.110.

A few older cases operated under the principle that, categorically, an unlawful holding by force is only in a landlord-tenant relationship. *See Bunch v. Pearson*, 186 Or App 138, 62 P3d 878 (2003), rev den, 335 Or 422 (2003) and *Kerr v. Jones*, 193 Or App 682, 91 P3d 828 (2004).

But that has changed. The most recent, highest, mandatory authority trains its gaze more on the statute, ORS 105.115, than the case law. As you will see in the *Bank of New York Mellon* cases, the court at first reflexively reached for the old principle.

Bank of New York Mellon v. Lash, 301 Or App 658, 457 P3d 345, (2020). Purchaser of real property at sheriff's sale brought FED against prior owner following judicial foreclosure of prior owner's legal interest in property. Trial court granted judgment of eviction in favor of purchaser. Owner appealed. COA held that the *statutory* definition of "unlawful holding by force" refers only to landlord-tenant relationships, citing *Bunch v. Pearson* and *Kerr v. Jones*.

On reconsideration, *Bank of New York Mellon v. Lash*, 303 Or App 456, 463 P3d 614 (2020), *rev den*, 367 Or 217 (2020), it was all just a mistake—no one looked at ORS 105.115(1)(d) (2009(!)), which gives *statutory* authority for purchaser at judicial or nonjudicial foreclosure sale a right to file FED. Which is funny because in original *Mellon*, the court said that a trustee sale is okay because of, again, statutory authority (in ORS chapter 86), but sheriff's sale does not (in ORS chapter 18). But here we are in 105.115, *statutory* authority. My point is that COA is migrating its grounding of "unlawfully holding by force" in a statute rather than an arbitrary court-derived category.

Finally, COA says *Mellon* should have used the non-chapter 90 complaint, which does include the "unlawful holding by force" language, whereas the chapter 90 complaint does not use this language! What were you saying about "unlawful holding by force" being only for landlord-tenant relationships?

Other statutory arguments: Sometimes a tenants' lawyer will argue that the way the parties conducted themselves turns this non-landlord-tenant situation into a landlord-tenant situation, that the relationship ripened so. Not without a rental agreement, it did not. See the definition of "tenant" in ORS 90.100(51)(a)(A)—there must be a rental agreement. And, to our point, a tenant "does not mean guest or temporary occupant." 90.100(51)(c). No rental agreement, not a tenant—sounds exactly like where we started: "the . . . person in possession . . . is holding possession without any written lease or agreement." But please note that one can form a rental agreement by accepting rent (as such and not something else).

Finally, one quick policy argument: Squatters and overstaying guests should not get more rights (rights of tenants, that is), time (ejectment), or due process (an FED) than tenants.

Ejectment

Make ejectment your civil case of last resort when with unlawful occupants. Properly speaking, ejectment is appropriate when title is at issue. *Bunch v. Pearson*. You generally don't have title issue with squatters or tenants. If need be, you can bring an ejectment in a probate case, ORS 111.085(1) d), or in a trust case as a declaratory judgment action. ORS 130.050(3). No notice required.

It's a regular circuit court action and it goes on the circuit court docket. In most counties in Oregon, docket space is no problem, but in Multnomah County, it's 9 to 12 months before a trial. You file your complaint, and the occupant has 30 days to answer.

If you really want to use ejectment, and if your client/property owner is patient enough, bring a 105.115(1)(b) case and you can quickly smoke out the occupant's status. ORS 105.075 says you can use ejectment for tenants, and that might be worthwhile if you have a mix of tenants and non-tenants on the property. But now *Duckworth v. Duckworth*, 327 Or App 219, 534 P3d 1076 (2023), says you can litigate title in FED cases (but query whether an FED helps or hurts with the non-tenants*; see* ORS 105.115 (1)(b)).

Generally, you must plead and prove that you have a legal estate in real property, and that you have the right possession. Specifically, your complaint should include the elements at ORS 105.010: (a) nature of plaintiffs interest; (b) plaintiff is entitled to possession; (c) defendant is holding by force (there's that "holding by force" again!); (d) description of property; and (e) damages, if relevant (you could allege damages for fair rental value you are missing out on).

Possession goes, of course, go to a landlord-tenant relationship, but why would you give the tenant 30 days to answer your ejectment complaint when you can be in FED court in eight days?

If you are the defendant, answer by alleging your own title, alleging title in another that is not the plaintiff, or alleging adverse possession.