Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARING*

&

STATEMENT OF NEED AND FISCAL IMPACT

Department of Human Services, Aging and People with Disabilities	411
Agency and Division	Administrative Rules Chapter Number

Kimberly Colkitt-Hallman	500 Summer Street NE, E-48 Salem, OR 97301-1074	(503) 945-6398
Rules Coordinator	Address	Telephone

RULE CAPTION

Homecare Workers Enrolled in the Consumer-Employed Provider Program

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

PUBLIC RULEMAKING HEARING

Date: August 15, 2016 **Time:** 1:00 pm

Location: Human Services Building
500 Summer Street NE, ROOM 160
Salem, Oregon 97301

Hearings Officer: Staff

This location is accessible for individuals with mobility impairments and auxiliary aids for persons with disabilities are available upon advance request.

RULEMAKING ACTION

AMEND:
411-031-0020; 411-031-0030; 411-031-0040; 411-031-0050

REPEAL:
411-031-0020(T); 411-031-0040(T); 411-031-0050(T)

Stat. Auth.: ORS 409.050, 410.070, 410.090

Other Auth.: S.B. 622 (2015)

Stats. Implemented: ORS 125.050, 125.065, 183.310, 410.010, 410.020, 410.070, 410.612, 410.614, 653.025

RULE SUMMARY

The Department of Human Services (Department) is amending OAR 411-031 to make permanent temporary changes that were implemented in March 2016 that bring the rules into compliance with new federal and state law and collective bargaining requirements in regards to homecare workers. The proposed rule changes:

- Permit the Department to begin calculating, tracking, and paying homecare workers for travel time between consumer-employers. This is a new requirement mandated by the United States Department of Labor (DOL) and the 2015-2019 Collective Bargaining Agreement between the Oregon Home Care Commission and the Service Employees International Union, Local 503, OPEU.
- Enable the Department to comply with Senate Bill 622, which adds homecare workers to the list of “Mandatory Reporters". The rules establish reporting standards and a process for what happens if a homecare worker does not report as they are required to do.
- Permit homecare workers to appeal terminations of their provider enrollment more quickly and to proceed to administrative hearing more easily than the current process allows. These temporary rules bring the Department into compliance with ORS 183.310.
- Update the language on the trusts process;
- Delete language in regards to benefits; and
- Minor grammar, formatting, and housekeeping changes were done to align the rules with other current program rule and definition changes.

The Agency requests public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing the negative economic impact of the rule on business.

Written comments may be submitted via e-mail to Kimberly.Colkitt-Hallman@state.or.us or mailed to 500 Summer Street NE, E48 Salem, Oregon, 97301-1064. All comments received will be given equal consideration before the Department proceeds with the permanent rulemaking.

Last Day for Public Comment (Last day to submit written comments to the Rules Coordinator):
August 21, 2016 at 5 p.m.

IN THE MATTER OF:

The amendment of OAR 411-031-0020; 411-031-0030; 411-031-0040; 411-031-0050 and repeal of OAR 411-031-0020(T); 411-031-0040(T); 411-031-0050(T) relating to homecare workers enrolled in the consumer-employed provider program.

Documents Relied Upon, and where they are available:

U.S. Department of Labor, Wage and Hour Division Fact Sheet #79A (September 2013) http://www.dol.gov/whd/regs/compliance/whdfs79a.htm

U.S. Department of Labor, Wage and Hour Division Final Rule (September 2013) http://www.dol.gov/whd/regs/compliance/whdfsFinalRule.htm

2015-2019 Collective Bargaining Agreement between the Oregon Home Care Commission and the Service Employees International Union, Local 503, OPEU available at: http://www.dhs.state.or.us/spd/tools/cm/homecare/index.htm.

S.B. 622 (2015), available from DHS Hearings and Rules Unit, 500 Summer Street NE E48, Salem, Oregon 97301.

Need for the Rule(s):

OAR 411-031 needs to be immediately amended to bring the Department into compliance with the U.S. Department of Labor's decision (upheld by the U.S. Court of Appeals) as it relates to homecare workers being paid for travel between consumer-employers' service settings effective 01/01/2016. The Department is doing this by establishing a clear framework under which homecare workers may claim, and be paid for, travel between the individuals for whom they work. The rules specify what travel time may and may not be claimed, and how the travel time will be calculated and reimbursed.

OAR 411-031 also needs to be amended to update the rules in regards to changes required by Senate Bill 622, which mandates homecare workers as mandatory reporters of abuse. The rule does this by establishing what the responsibilities of a mandatory reporter are, and establishes the Department's ability to terminate a homecare worker's provider enrollment if the homecare worker fails to discharge his or her duties as a mandatory reporter.

The Department also needed to amend the rules to update language surrounding benefits and the trusts process as the language surrounding those processes was outdated. The Department updated and removed the necessary rule language. The Department also needed to update the rules generally to follow current Department terminology and practice. The Department made these updates to the rule language as well. Minor grammar, formatting, and housekeeping changes were needed and made in order to align the rules with other current program rule and definition changes.

Finally, OAR 411-031 needs to be amended to put the Department into compliance with ORS 183.310. The rules do this by:

- Streamlining and simplifying the process for homecare workers to appeal terminations of their provider enrollment.
- Enabling the Department to issue final orders by default in uncontested termination actions.
- Shortening the period between a homecare worker being sent notice of termination and having access to an administrative hearing.
- Giving the homecare worker a longer period of time to appeal any termination.
- Making clear homecare workers have a right to legal representation when the homecare worker is wanting to appeal the termination of the homecare workers provider number.

Fiscal and Economic Impact:

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

The Department estimates that amending OAR Chapter 411 Division 031 will have the following fiscal and economic impact:

State Agencies: The Department estimates that the average travel cost per HCW to be $11.77 per month. On an 18-month basis, this comes to $4,125,911. The general fund costs associated with this comes to $1,229,109.00.

Units of Local Government: The Department estimates that units of local government will have a time savings due to the Department processing homecare worker terminations centrally as opposed to locally.

Consumers: The Department estimates there will be no fiscal or economic impact on consumers.

Providers: The Department estimates some HCWs will receive additional payments for travel time. The Department is unable to estimate the amount per HCW as payments will vary greatly depending on the number of consumers a HCW chooses to serve and the distance a HCW may have to travel.

Public: The Department estimates there will be no fiscal or economic impact on the public.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

The proposed rules apply exclusively to homecare workers. Homecare workers do not meet the definition of a small business as defined in ORS 183.310.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

The proposed changes impact homecare workers as described above in the Department's statement of cost of compliance.

c. Equipment, supplies, labor and increased administration required for compliance:

The proposed changes impact homecare workers as described above in the Department's statement of cost of compliance.

How were small businesses involved in the development of this rule?

Small businesses as defined in ORS 183.310 were not involved in the early development of these rules, but will be included in the public review and comment period.

Administrative Rule Advisory Committee consulted?:

Yes. The Administrative Rule Advisory Committee included representation from The American Association of Retired Persons (AARP), the Service Employees International Union, Local 503 (SEIU), Lane Council of Governments (LCOG), Multnomah County, the Oregon Home Care Commission, the Oregon Law Center, Gateway Living, Oregon Project Independence, the Independent Adult Care Provider Association, Long Term Care Ombudsman’s Office, Medicaid Long Term Care Quality Reimbursement Advisory Counsel, and the State Independent Living Council.

Signed Michael R. McCormick, Deputy Director, Aging and People with Disabilities 7/5/2016

Signature Date

DEPARTMENT OF HUMAN SERVICES
AGING AND PEOPLE WITH DISABILITIES
OREGON ADMINISTRATIVE RULES

CHAPTER 411
DIVISION 31

HOMECARE WORKERS ENROLLED IN THE CONSUMER-EMPLOYED PROVIDER PROGRAM

411-031-0020 Definitions

Unless the context indicates otherwise, the following definitions apply to the rules in OAR chapter 411, division 031:

(1) "AAA" means "Area Agency on Aging" as defined in this rule.

(2) "Ability and Willingness to Maintain Consumer-Employer Confidentiality" means a homecare worker is able and willing to keep personal information about a consumer-employer private.

(3) "Abuse" means abuse as defined by OAR 411-020-0002, OAR 407-045-0260, and OAR 943-045-0260.

(~~3~~4) "Activities of Daily Living (ADL)" mean those personal, functional activities required by an individual for continued well-being, which are essential for the individual's health and safety. Activities include eating, dressing~~/~~, grooming, bathing~~/~~, personal hygiene, mobility (ambulation and transfer), elimination (toileting, bowel, and bladder management), and cognition~~/~~ and behavior as defined in OAR 411-015-0006.

(~~4~~5) "ADL" means "activities of daily living" as defined in this rule.

(6) "Administrative Review" means the internal process the Department uses to review a decision to terminate or not to terminate a homecare worker's provider enrollment.

(~~5~~7) "Adult" means any person at least 18 years of age.

(~~6~~8) "Adult Protective Services" mean the services provided in response to the need for protection from abuse described in OAR chapter 411, division 020, OAR chapter 407, division 045, and OAR chapter 943, division 045.

(9) "Aging and People with Disabilities" means the program area of Aging and People with Disabilities, within the Department of Human Services.

(10) "APD" means "Aging and People with Disabilities".

(~~7~~11) "Area Agency on Aging (AAA)" means the Department designated agency charged with the responsibility to provide a comprehensive and coordinated system of services to older adults and adults with disabilities in a planning and service area. The terms AAA and Area Agency on Aging are inclusive of both Type A and Type B Area Agencies on Aging as defined in ORS 410.040 and described in ORS 410.210 to 410.300.

(12) "Base Pay Rate" means the hourly wage to be paid to homecare workers, without any differentials, established in the Collective Bargaining Agreement.

(~~8~~13) "Burden of Proof" means the existence or nonexistence of a fact is established by a preponderance of evidence.

(~~9~~14) "Career Homecare Worker" means a homecare worker with an unrestricted provider enrollment. A career homecare worker has a provider enrollment that allows the homecare worker to provide services to any eligible in-home services consumer. ~~At any given time, a career homecare worker may choose not to be referred for work.~~

(~~10~~15) "Case Manager" means an employee of the Department or Area Agency on Aging who assesses the service needs of individuals, determines eligibility, and offers service choices to eligible individuals. The case manager authorizes and implements an individual's service plan and monitors the services delivered as described in OAR chapter 411, division 028.

(~~11~~16) "Collective Bargaining Agreement" means the ratified Collective Bargaining Agreement between the Home Care Commission and the Service Employees International Union, Local 503. The Collective Bargaining Agreement is maintained on the Department's website:

(http://www.dhs.state.or.us/spd/tools/cm/homecare/index.htm). Printed copies may be obtained by calling (503) 945-6398 or writing the Department of Human Services, Aging and People with Disabilities, ATTN: Rules Coordinator, 500 Summer Street NE, E-~~10~~48, Salem, Oregon 97301.

~~(12) "Companionship Services" mean those services designated by the Department of Labor as meeting the personal needs of a consumer. Companionship services are exempt from federal and state minimum wage laws.~~

(17) "Community Transportation" means non-medical transportation a homecare worker provides to a consumer-employer:

(a) Using the homecare worker's personal vehicle; and

(b) Provided in accordance with the consumer-employer's authorized service plan.

(~~13~~18) "Consumer" or "Consumer-Employer" means an individual eligible for in-home services.

(~~14~~19) "Consumer-Employed Provider Program" refers to the program wherein a provider is directly employed by a consumer to provide either hourly or live-in in-home services. In some aspects of the employer and employee relationship, the Department acts as an agent for the consumer-employer. These functions are clearly described in OAR 411-031-0040.

(~~15~~20) "Department" means the Department of Human Services.

(~~16~~21) "Disability" means a physical, cognitive, or emotional impairment, which~~,~~ for an individual, constitutes or results in a functional limitation in one or more of the activities of daily living defined in OAR 411-015-0006.

(22) "Enhanced Homecare Worker" means a homecare worker who is certified by the Oregon Home Care Commission to provide services and supports for consumers who require assistance with certain medically-driven services and supports.

(23) "Established Work Schedule" means the work schedule established by the consumer-employer to best meet the consumer's assessed needs and

agreed to by the homecare worker employed by the consumer. A homecare worker adheres to the established work schedule by arriving to work on time, requesting absence from work in a timely manner, and notifying the consumer-employer of unscheduled absences in a timely manner.

(~~17~~24) "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

(25) "Exerts Undue Influence" means a homecare worker assumes or attempts to assume control of a consumer-employer's decision-making, finances, home, property, medication, social interaction or ability to communicate. Exertion of undue influence may exist whether or not a consumer-employer willfully allows the homecare worker to assume such control.

(~~18~~26) "Fiscal Improprieties" means a homecare worker committed financial misconduct involving a consumer's money, property, or benefits.

(a) Fiscal improprieties include, but are not limited to:

(A) Financial exploitation, as defined in OAR 411-020-0002(1)(e);

(B) Borrowing money, property, or belongings from a consumer~~,~~;

(C) Taking a consumer's property or money~~, having a consumer purchase~~;

(D) Accepting or receiving items or services purchased for the homecare worker~~,~~ by a consumer-employer;

(E) Forging a consumer's signature~~,~~;

(F) Falsifying payment records~~,~~;

(G) Claiming payment for hours not worked~~, or similar~~;

(H) Claiming to deliver services to a consumer during a time also claimed for travel;

(I) Repeatedly working or claiming to work hours not prior authorized on a consumer-employer's service plan;

(J) Claiming hours worked for a consumer-employer while taking time off or when a relief care worker is paid for providing services;

(K) Requesting or demanding payment for services from either the Department or the consumer in excess of the amount paid following the submission and processing of a properly completed claim; or

(L) Intentional acts ~~intentionally~~ committed for financial gain.

(b) Fiscal improprieties do not include the exchange of money, gifts, or property between a homecare worker and a consumer-employer with whom the homecare worker is related unless an allegation of financial exploitation, as defined in OAR 411-020-0002 or OAR 407-045-0260, has been substantiated based on an adult protective services investigation.

(~~19~~27) "Homecare Worker" means a provider, as described in OAR 411-031-0040, that is directly employed by a consumer to provide either hourly or live-in services to the consumer.

(a) The term homecare worker includes:

(A) A consumer-employed provider of Medicaid in-home services program described in OAR Chapter 411 Division 030;

(B) A consumer-employed provider in the Spousal Pay and Oregon Project Independence Programs;

(~~B~~C) A consumer-employed provider that provides state plan personal care services; and

(~~C~~D) A relative providing Medicaid in-home services to a consumer living in the relative's home.

(b) The term homecare worker does not include an Independent Choices Program provider or a personal support worker enrolled through Developmental ~~Disability~~Disabilities Services or the Addictions and Mental Health Division.

(~~20~~28) "Hourly Services" mean the in-home services, including activities of daily living and instrumental activities of daily living, that are provided by homecare workers to consumer-employers at regularly scheduled times.

(~~21~~29) "IADL" means "instrumental activities of daily living" as defined in this rule.

(~~22~~30) "Imminent Danger" means there is reasonable cause to believe an individual's life or physical, emotional, or financial well-being is in danger if no intervention is immediately initiated.

(31) "Inactivated" means the process through which a homecare worker is made temporarily ineligible to work for any consumer-employer. Inactivating a homecare worker's provider enrollment does not terminate the homecare worker's provider enrollment.

(~~23~~32) "Individual" means an older adult or an adult with a disability applying ~~for~~ or eligible for services.

(~~24~~33) "In-Home Services" mean the activities of daily living and instrumental activities of daily living that assist an individual to stay in his or her own home or the home of a relative.

(~~25~~34) "Instrumental Activities of Daily Living (IADL)" mean those activities, other than activities of daily living, required by an individual to continue independent living. The definitions and parameters for assessing needs in IADL are identified in OAR 411-015-0007.

~~(26) "Lack of Ability or Willingness to Maintain Consumer-Employer Confidentiality" means a homecare worker is unable or unwilling to keep personal information about a consumer-employer private.~~

~~(27) "Lack of Skills, Knowledge, and Ability to Adequately or Safely Perform the Required Work" means a homecare worker does not possess the skills to perform services needed by consumers of the Department. The homecare worker may not be physically, mentally, or emotionally capable of providing services to consumers. The homecare worker's lack of skills may put consumers at risk because the homecare worker fails to perform, or learn to perform, the duties needed to adequately meet the needs of the consumers.~~

(35) "Live-In Services" mean ~~the Consumer-Employed Provider Program~~ services provided when ~~a consumer~~an individual requires and receives assistance with activities of daily living~~,~~ and instrumental activities of daily living~~, and twenty-four~~ throughout a 24-hour work period by one homecare worker and the homecare worker may not leave the individual~~availability. Time spent by any live-in homecare worker doing instrumental activities of daily living and twenty-four hour availability are exempt from federal and state minimum wage and overtime requirements~~.

(36) "Mandatory Reporter" means an individual who is required under ORS 124.050-060 to report the abuse or suspected abuse of a child, an older adult, or the resident of a nursing facility, to the Department or to a law enforcement agency.

(37) "Medically-Driven Services and Supports" means medical or behavioral treatments, assessed by a case manager and included in a consumer's service plan, which a consumer requires in addition to assessed ADL, IADL and live-in services.

(38) "Non-Motorized Transportation" means traveling on foot, riding a bicycle, traveling in a wheelchair or scooter, or other similar means of transportation.

~~(29) "Older Adult" means any person at least 65 years of age.~~

(~~30~~39) "Office of Administrative Hearings" means the ~~panel~~Office described in ORS 183.605~~ to ~~-183.690 established within the Employment Department to conduct contested case proceedings, and other such duties, on behalf of designated state agencies.

(40) "Older Adult" means any person at least 65 years of age.

(41) "Oregon Homecare Commission" means the commission established and operated pursuant to Article XV, Section 11, of the Oregon Constitution, and ORS 410.595-625.

(~~31~~42) "Oregon Project Independence" means the program of in-home services described in OAR chapter 411, division 032.

(43) "Personal Support Worker" has the meaning given in OAR 411-375-0010.

(~~32~~44) "Preponderance of the Evidence" means that one party's evidence is more convincing than the other party's.

(45) "Provide Services as Required" means a homecare worker provides services to a consumer as described in the consumer's service plan.

(~~33~~46) "Provider" means the person who renders the services.

(~~34~~47) "Provider Enrollment" means a homecare worker's authorization to work as a provider employed by a consumer for the purpose of receiving payment for authorized services provided to consumers of the Department. Provider enrollment includes the issuance of a Medicaid provider number.

(~~35~~48) "Provider Number" means an identifying number issued to each homecare worker who is enrolled as a provider through the Department.

(~~36~~49) "Relative" means a person, excluding an individual's spouse, who is related to the individual by blood, marriage, or adoption.

(50) "Relief Homecare Worker" means a homecare worker who works for a consumer-employer when the consumer-employer's regularly scheduled homecare worker is absent.

(51) "Representative" or "Consumer-Employer's Representative" means any of the following:

(a) A person appointed by a consumer-employer to participate in service planning on the consumer-employer's behalf.

(b) A consumer-employer's natural support with longstanding involvement in assuring the consumer-employer's health, safety, and welfare.

(c) A person, other than the consumer, who, on the consumer's behalf, assumes or is given any of the employer responsibilities listed in OAR 411-030-0040(8).

(~~37~~52) "Restricted Homecare Worker" means the Department or Area Agency on Aging has placed restrictions on a homecare worker's provider enrollment as described in OAR 411-031-0040.

(~~38~~53) "Self-Management Tasks" means "Instrumental Activities of Daily Living" as defined in this rule.

~~(39) "Services are not Provided as Required" means a homecare worker does not provide services to a consumer as described in the consumer's service plan authorized by the Department.~~

(54) "Skills, Knowledge, and Ability to Adequately or Safely Perform the Required Work" means a homecare worker possesses and demonstrates the physical, mental, organizational, and emotional skills or abilities necessary to perform services which safely and adequately -meet the needs of consumers.

(55) "State Minimum Wage" or "Minimum Wage" means the rate of pay set forth in ORS 653.025.

(~~40~~56) "These Rules" mean the rules in OAR chapter 411, division 031.

~~(41) "Twenty-Four Hour Availability" means the availability and responsibility of a homecare worker to meet the activity of daily living and instrumental activity of daily living needs of a consumer as required by the consumer over a twenty-four hour period. Twenty-four hour availability services are provided by a live-in homecare worker and are exempt from federal and state minimum wage and overtime requirements.~~

(57) "Time Off" means time where a homecare worker is not providing services to a consumer during a normally scheduled work time..

(~~42~~58) "Unacceptable Background Check" means a check that produces information related to a person's background that precludes the person from being a homecare worker for the following reasons:

(a) The person applying to be a homecare worker has been disqualified under OAR 407-007-0275;

(b) A homecare worker enrolled in the Consumer-Employed Provider Program for the first time, or after any break in enrollment, after July 28, 2009 has been disqualified under OAR 407-007-0275; or

(c) A background check and fitness determination has been conducted resulting in a "denied" status, as defined in OAR 407-007-0210.

~~(43) "Unacceptable Conduct at Work" means a homecare worker has repeatedly engaged in one or more of the following behaviors:~~

~~(a) Delay in arrival to work or absence from work not prior-scheduled with a consumer that is either unsatisfactory to a consumer or neglects the consumer's service needs; or~~

~~(b) Inviting unwelcome guests or pets into a consumer's home, resulting in the consumer's dissatisfaction or a homecare worker's inattention to the consumer's required service needs.~~

(59) "Unwelcome Nuisance to the Workplace" means unwelcome guests or pets invited by a homecare worker into a consumer's home, resulting in the consumer's dissatisfaction or a homecare worker's inattention to the consumer's required service needs.

(~~44~~60) "Violated the Requirement to Maintain ~~Violation of~~a Drug-Free Workplace" means there was a substantiated complaint against a homecare worker for --

(a) Being intoxicated by alcohol, inhalants, prescription drugs, or other drugs, including over-the-counter medications, while responsible for the care of a consumer, while in the consumer's home or care setting, or while transporting the consumer; or

(b) Manufacturing, possessing, selling, offering to sell, trading, or using illegal drugs while providing authorized services to a consumer or while in the consumer's home or care setting.

(~~45~~61) "Violates the ~~Violation of~~ Protective Service and Abuse Rules" means, based on a substantiated allegation of abuse, a homecare worker was found to have violated the protective service and abuse rules described in OAR chapter 411, division 020, OAR chapter 407, division 045, or OAR chapter 943, division 045.

Stat. Auth.: ORS 409.050, 410.070, ~~&~~ 410.090
Stats. Implemented: ORS 410.010, 410.020, ~~&~~ 410.070

411-031-0030 Purpose

The rules in OAR chapter 411, division 031 establish the standards and procedures governing homecare workers and the fiscal services provided on behalf of the Department~~/~~ or AAA consumers to homecare workers enrolled in the Consumer-Employed Provider Program. Homecare workers provide home and community-based waiver, state plan, and Oregon Project Independence in-home services to the Department~~/~~ or AAA consumers. In-home services supplement the ability of the Department~~/~~ or AAA consumers to continue to live in their own homes.

Stat. Auth.: ORS 409.050, 410.070, ~~&~~ 410.090
Stats. Implemented: ORS 410.010, 410.020, ~~&~~ 410.070

411-031-0040 Consumer-Employed Provider Program

The Consumer-Employed Provider Program contains systems and payment structures to employ both hourly and live-in providers. The live-in structure assumes a provider is required ~~for~~to provide the consumer-employer with assistance performing activities of daily living (ADLs) and~~,~~ instrumental activities of daily living (IADLs)~~, and twenty-four~~ throughout the course of a 24-hour ~~availability~~period. The hourly structure assumes a provider is required for ADLs and IADLs during specific substantial periods. Except as indicated, all of the ~~following~~ criteria in this rule apply to both hourly and live-in providers:

(1) EMPLOYMENT RELATIONSHIP. The relationship between a provider and a consumer is that of employee and employer. A homecare worker shall never be a representative, (see OAR 411-031-0020(51)), for a consumer-employer for whom the homecare worker currently provides paid services.

(2) CONSUMER-EMPLOYER JOB DESCRIPTIONS. A consumer-employer or consumer-employer's representative is responsible for creating and maintaining a job description for a potential provider in coordination with the services authorized by the consumer's case manager.

(3) HOMECARE WORKER LIABILITIES. The only benefits available to homecare workers are those negotiated in the Collective Bargaining Agreement and as provided in Oregon Revised Statute. This Agreement does not include participation in the Public Employees Retirement System or the Oregon Public Service Retirement Plan. Homecare workers are not state employees.

(4) CONSUMER-EMPLOYER ABSENCES. When a consumer-employer is absent from his or her home due to an illness or medical treatment and is expected to return to the home within a 30 day period, the consumer's live-in provider may be retained to ensure the live-in provider's presence upon the consumer's return or to maintain the consumer's home for up to 30 days at the rate of pay immediately preceding the consumer's absence.

(5) SELECTION OF HOMECARE WORKER. A consumer-employer or consumer-employer's representative carries primary responsibility for locating, interviewing, screening, and hiring his or her own employees. The consumer-employer or consumer-employer's representative has the right to employ any person who successfully meets the provider enrollment standards described in section (8) of this rule. The Department/ or AAA office determines whether a potential homecare worker meets the enrollment standards needed to provide services authorized and paid for by the Department.

(6) EMPLOYMENT AGREEMENT. A consumer-employer or consumer-employer's representative retains the full right to establish an employer-employee relationship with a person at any time after the person's Bureau of Citizenship and Immigration Services papers have been completed and identification photocopied. Payment for services is not guaranteed until the

Department has verified that a person meets the provider enrollment standards described in section (8) of this rule and notified both the employer and homecare worker in writing that payment by the Department is authorized.

(7) TERMS OF EMPLOYMENT. A consumer-employer or consumer-employer's representative must establish terms of an employment relationship with an employee at the time of hire. The terms of employment may include dismissal or resignation notice, work scheduling, absence reporting, and any sleeping arrangements or meals provided for live-in or hourly employees. Termination and the grounds for termination of employment are determined by a consumer-employer~~.~~ or consumer-employer's representative. A consumer-employer or consumer-employer's representative has the right to terminate an employment relationship with a homecare worker at any time and for any reason.

(8) PROVIDER ENROLLMENT.

(a) ENROLLMENT STANDARDS. A homecare worker must meet all of the following standards to be enrolled with the Department's Consumer-Employed Provider Program and may not work, or claim payment for service unless they meet the following criteria:

(A) ~~The homecare worker must m~~Maintain a drug-free work place.

(B) ~~The homecare worker must c~~Complete the background check process described in OAR 407-007-0200 to 407-007-0370 with an outcome of approved or approved with restrictions. The Department~~/~~ or AAA may allow a homecare worker to work on a preliminary basis in accordance with OAR 407-007-0315 if the homecare worker meets the other provider enrollment standards described in this section of the rule.

(C) ~~The homecare worker must haved~~Demonstrate the skills, knowledge, and ability to perform, or to learn to perform, the required work.

(D) ~~The homecare worker's~~Possess current U.S. employment authorization that has been ~~must be~~ verified by the Department or AAA.

(E) ~~The homecare worker must b~~Be 18 years of age or older. The Department may approve a restricted enrollment, as described in section (8)(d) of this rule, for a homecare worker who is at least 16 years of age.

(F) ~~The homecare worker must c~~Complete an orientation as described in section (8)(e) of this rule.

(G) ~~The homecare worker must h~~Have a tax identification number or social security number that matches the homecare worker's legal name, as verified by the Internal Revenue Service or Social Security Administration.

(b) DENIAL OF PROVIDER ENROLLMENT. The Department~~/~~ or AAA may deny an application for provider enrollment in the Consumer-Employed Provider Program when the applicant --

(A) Has violated the requirement to maintain a drug-free workplace;

(B) Has an unacceptable background check;

(C) Demonstrates a lack of the skills, knowledge and ability to adequately or safely perform the required work;

(~~A~~D) ~~The applicant has a history of violating~~Violates the protective service and abuse rules in OAR chapter 411, division 020, OAR chapter 407, division 045, and OAR chapter 943, division 045;

(~~B~~E) ~~The applicant has committed~~ Commits fiscal improprieties;

(~~C~~F) ~~The applicant does not have the skills, knowledge, or ability to adequately or safely~~ Fails to provide services as required;

~~(D) The applicant has an unacceptable background check;~~

~~(E) The applicant is not 18 years of age;~~

(G)Lacks the ability or willingness to maintain consumer-employer confidentiality;

(H) Introduces an unwelcome nuisance to the workplace;

(I) Fails to adhere to an established work schedule;

(J) Has been sanctioned or convicted of a criminal offense related to a public assistance program;

(K) Fails to perform the duties of a mandatory reporter;

(~~F~~L) ~~The applicant h~~Has been excluded by the Health and Human Services, Office of Inspector General, from participation in Medicaid, Medicare, and all other Federal Health Care Programs;

~~(G) The Department/AAA has information that enrolling the applicant as a homecare worker may put vulnerable consumers at risk; or~~

(~~H~~M) ~~The applicant's~~ Fails to provide a tax identification number or social security number ~~does not match~~that matches the ~~applicant's~~homecare worker's legal name, as verified by the Internal Revenue Service or Social Security Administration~~.~~; or

(N) Exerts undue influence over a consumer-employer.

(c) BACKGROUND CHECKS.

(A) When a homecare worker is approved without restrictions following a background check fitness determination, the approval must meet the homecare worker provider enrollment requirement statewide whether the qualified entity is a state-operated Department office or an AAA operated by a county, council of governments, or a non-profit organization.

(B) Background check approval is effective for two years unless --

(i) Based on possible criminal activity or other allegations against a homecare worker, a new fitness determination is conducted resulting in a change in approval status; or

(ii) Approval has ended because the Department has inactivated or terminated a homecare worker's provider enrollment for one or more reasons described in this rule or OAR 411-031-0050.

(C) Prior background check approval for another Department provider type is inadequate to meet background check requirements for homecare worker enrollment.

(D) Background rechecks are conducted at least every other year from the date a homecare worker is enrolled. The Department~~/~~ or AAA may conduct a recheck more frequently based on additional information discovered about a homecare worker, such as possible criminal activity or other allegations.

(E) Homecare workers must inform the Department and their consumer-employer within 14 days of being arrested, cited for, or convicted of any potentially disqualifying crime listed in OAR 407-007-0040.

(d) RESTRICTED PROVIDER ENROLLMENT.

(A) The Department~~/~~ or AAA may enroll an applicant as a restricted homecare worker. A restricted homecare worker may only provide services to ~~a~~one specific consumer.

(i) Unless disqualified under OAR 407-007-0275, the Department~~/~~ or AAA may approve a homecare worker with a prior criminal record under a restricted enrollment to provide services to a specific consumer who is a family member, neighbor, or friend after conducting a weighing test as described in OAR 407-007-0200 to 407-007-0370.

(ii) Based on an applicant's lack of skills, knowledge, or abilities, the Department/ or AAA may approve the applicant as a restricted homecare worker to provide services to a specific consumer who is a family member, neighbor, or friend.

(iii) Based on an exception to the age requirements for provider enrollment approved by the Department as described in subsection (a)(E) of this section, a homecare worker who is at least 16 years of age may be approved as a restricted homecare worker.

(B) To remove restricted homecare worker status and be designated as a career homecare worker, the restricted homecare worker must complete a new application and background check and be approved by the Department/ or AAA.

(e) HOMECARE WORKER ORIENTATION. Homecare workers must participate in an orientation arranged through a Department/ or AAA office. The orientation must occur within the first 30 days after the homecare worker becomes enrolled in the Consumer-Employed Provider Program and prior to beginning work for any specific Department/ or AAA consumers. When completion of an orientation is not possible within those timelines, orientation must be completed within 90 days of being enrolled. If a homecare worker fails to complete an orientation within 90 days of provider enrollment, the homecare worker's provider number is inactivated and any authorization for payment of services is discontinued.

(f) INACTIVATED PROVIDER ENROLLMENT. A homecare worker's provider enrollment may be inactivated when --

(A) The homecare worker has not provided any paid services to any consumer in the last 12 months;

(B) The homecare worker's background check results in a closed case pursuant to OAR 407-007-0325;

(C) The homecare worker informs the Department/ or AAA the homecare worker is no longer providing services in Oregon;

(D) The homecare worker fails to participate in an orientation arranged through a Department/ or AAA office within 90 days of provider enrollment;

(E) The homecare worker, who at the time is not providing any paid services to consumers, is being investigated by Adult Protective Services for suspected abuse that poses imminent danger to current or future consumers; or

(F) The homecare worker's provider payments, all or in part, have been suspended based on a credible allegation of fraud pursuant to federal law under 42 CFR 455.23.

(g) ENHANCED HOMECARE WORKER ENROLLMENT. A homecare worker who is certified by the Oregon Home Care Commission to meet the enhanced homecare worker criteria in OAR 411-031-0020(22) may receive payment at the enhanced hourly rate for providing ADL and IADL services as set forth in the Collective Bargaining Agreement when --

(A) The homecare worker is employed by a consumer whose service plan indicates the need for medically-driven services and supports;

(B) The consumer's service plan specifically authorizes the homecare worker to provide the medically driven services and supports; and

(C) The homecare worker provides the medically driven services and supports as set forth in the service plan.

(h) EFFECTIVE DATE OF ENHANCED HOMECARE WORKER RATE PAYMENT. A homecare worker may receive the enhanced rate effective the first day of the month following the month in which the homecare worker:

(A) Meets the enhanced homecare worker certification criteria identified in section (g)(A) through (C) of this rule, and

(B) Works for a consumer-employer who requires medically-driven services and supports.

(9) TIME OFF.

(a) A homecare worker requesting time off must make a request to the consumer-employer or consumer-employer's representative.

(b) The decision to approve or deny a homecare worker's request to schedule time off is made by the homecare worker's consumer-employer or the consumer-employer's representative.

(c) A homecare worker who has been approved to take time off by the consumer-employer or consumer-employer's representative must notify the consumer-employer's APD or AAA case manager before taking time off.

(d) When a homecare worker schedules time off, the APD or AAA office will make reductions to the homecare worker’s authorized hours commensurate with the number of hours the homecare worker plans to take as scheduled time off.

(e) Under no circumstances will a homecare worker be required to secure a relief homecare worker or ensure that services are provided to a consumer-employer during the homecare worker’s scheduled time off.

(f) When a homecare worker plans to provide services as a relief homecare worker, the relief homecare worker must contact the consumer-employer's APD or AAA case manager for authorization prior to providing relief services for the scheduled relief care hours.

~~PAID LEAVE.~~

~~(a) LIVE-IN HOMECARE WORKERS. Irrespective of the number of consumers served, the Department authorizes one twenty-four hour period of leave each month when a live-in homecare worker or~~

~~spousal pay provider is the only live-in provider during the course of a month. For any part of a month worked, the live-in homecare worker receives a proportional share of the twenty-four hour period of leave authorization. A prorated share of the twenty-four hours is allocated proportionately to each live-in when there is more than one live-in provider per consumer.~~

~~(A) ACCUMULATION AND USAGE FOR LIVE-IN PROVIDERS. A live-in homecare worker may not accumulate more than 144 hours of accrued leave. A consumer-employer, homecare worker, and case manager must coordinate the timely use of accrued hours. Live-in homecare workers must take vacation leave in twenty-four hour increments or in hourly increments of at least one but not more than twelve hours. A live-in homecare worker must take accrued leave while employed as a live-in.~~

~~(B) THE RIGHT TO RETAIN LIVE-IN PAID LEAVE. A live-in homecare worker retains the right to access earned paid leave when terminating employment with one employer, so long as the homecare worker is employed with another employer as a live-in within one year of separation.~~

~~(C) TRANSFERABILITY OF LIVE-IN PAID LEAVE. A live-in homecare worker who converts to hourly or separates from live-in service and returns as an hourly homecare worker within one year from the last day of live-in services is credited with their unused hours of leave up to a maximum of 32 hours.~~

~~(D) CASH OUT OF PAID LEAVE.~~

~~(i) The Department pays live-in homecare workers 50 percent of all unused paid leave accrued as of January 31 of each year. The balance of paid leave is reduced 50 percent with the cash out.~~

~~(ii) Vouchers requesting payment of paid leave received after January 31 may only be paid up to the amount of remaining unused paid leave.~~

~~(iii) A live-in homecare worker providing live-in services seven days per week for one consumer-employer may submit a request for payment of 100 percent of unused paid leave if --~~

~~(I) The live-in homecare worker's consumer-employer is no longer eligible for in-home services described in OAR chapter 411, division 030; and~~

~~(II) The live-in homecare worker does not have alternative residential housing.~~

~~(iv) If a request for payment of 100 percent of unused paid leave based on subparagraph (D)(iii)(I) and (II) of this subsection is granted, the homecare's paid leave balance is reduced to zero.~~

~~(b) HOURLY HOMECARE WORKERS.~~

~~(A) On July 1st of each year, active homecare workers who worked 80 authorized and paid hours in any one of the three months that immediately precede July (April, May, June) are credited with one 16 hour block of paid leave to use during the current fiscal biennium (July 1 through June 30) in which the paid leave was accrued.~~

~~(B) On February 1st of each year, active homecare workers who worked 80 authorized and paid hours in any one of the three months that immediately precede February (November, December, January) are credited with one 16 hour block of paid leave.~~

~~(C) One 16 hour block of paid leave is credited to each eligible homecare worker, irrespective of the number of consumers the homecare worker serves. Such leave may not be cumulative from biennium to biennium.~~

~~(D) UTILIZATION OF HOURLY PAID LEAVE.~~

~~(i) Time off must be utilized in one eight hour block subject to authorization. If a homecare worker's normal workday is less than eight hours, the time off may be utilized in blocks equivalent to the homecare worker's normal workday. Any remaining hours that are less than a normally scheduled workday may be taken as a single block.~~

~~(ii) Hourly homecare workers may take unused paid leave when the homecare worker's employer is temporarily unavailable for the homecare worker to provide services. In all other situations, a homecare worker who is not working during a month is not eligible to use paid time off in that month.~~

~~(E) LIMITATIONS OF HOURLY PAID LEAVE. Homecare workers may not be compensated for paid leave unless the time off work is actually taken except as noted in subsection (b)(G) of this section.~~

~~(F) TRANSFERABILITY OF HOURLY PAID LEAVE. An hourly homecare worker who transfers to work as a live-in homecare worker (within the biennium that the hourly leave is earned) maintains the balance of hourly paid leave and begins accruing live-in paid leave.~~

~~(G) CASH OUT OF PAID LEAVE.~~

~~(i) The Department pays hourly providers for all unused paid leave accrued as of January 31 of each year. The balance of paid leave is reduced to zero with the cash out.~~

~~(ii) Vouchers requesting payment of paid leave received after January 31 may not be paid if paid leave has already been cashed out.~~

(10) DEPARTMENT FISCAL AND ACCOUNTABILITY RESPONSIBILITY.

(a) DIRECT SERVICE PAYMENTS. The Department makes payment to a homecare worker on behalf of a consumer for all in-home services. The payment is considered full payment for the ~~Medicaid~~ home and community-based services rendered. ~~Under no circumstances is~~ A homecare worker ~~to~~must not demand or receive additional payment for ~~Medicaid~~ home and community-based services from a consumer or any other source. Additional payment to homecare workers for the same home and community-based services covered by ~~Medicaid~~ the Department is prohibited.

(b) TIMELY SUBMISSION OF CLAIMS. In accordance with ~~OAR 410-120-1300~~the Collective Bargaining Agreement, all claims for services must be submitted within ~~12 months of~~365 days from the first date of service listed on the claim.

(c) ANCILLARY CONTRIBUTIONS.

(A) FEDERAL INSURANCE CONTRIBUTIONS ACT (FICA). Acting on behalf of a consumer-employer, the Department applies applicable FICA regulations and --

(i) Withholds a homecare worker-employee contribution from payments; and

(ii) Submits the consumer-employer contribution and the amounts withheld from the homecare worker-employee to the Social Security Administration.

(B) BENEFIT FUND ASSESSMENT. The Workers' Benefit Fund pays for programs that provide direct benefits to injured workers and the workers' beneficiaries and assist employers in helping injured workers return to work. The Department of Consumer and Business Services sets the Workers' Benefit Fund assessment rate for each calendar year. The Department calculates the hours rounded up to the nearest whole hour and deducts an amount rounded up to the nearest cent. Acting on behalf of the consumer-employer, the Department --

(i) Deducts a homecare worker-employees' share of the Benefit Fund assessment rate for each hour or partial hour worked by each paid homecare worker;

(ii) Collects the consumer-employer's share of the Benefit Fund assessment for each hour or partial hour of paid services received; and

(iii) Submits the consumer-employer's and homecare worker-employee's contributions to the Workers' Benefit Fund.

(C) The Department pays the consumer-employer's share of the unemployment tax.

(d) ANCILLARY WITHHOLDINGS. For the purpose of this subsection of the rule, "labor organization" means any organization that represents employees in employment relations.

(A) The Department deducts a specified amount from the homecare worker-employee's monthly salary or wages for payment to a labor organization.

(B) In order to receive payment, a labor organization must enter into a written agreement with the Department to pay the actual administrative costs of the deductions.

(C) The Department pays the deducted amount to the designated labor organization monthly.

(e) STATE AND FEDERAL INCOME TAX WITHHOLDING.

(A) The Department withholds state and federal income taxes on all payments to homecare workers, as indicated in the Collective Bargaining Agreement.

(B) A homecare worker must complete and return a current Internal Revenue Service W-4 form to the Department~~/~~ or AAA's local office. The Department applies standard income tax withholding practices in accordance with 26 CFR 31.

(11) REIMBURSEMENT FOR COMMUNITY TRANSPORTATION.

(a) A homecare worker is reimbursed at the mileage reimbursement rate established in the Collective Bargaining Agreement when the homecare worker uses his or her own personal motor vehicle for ~~community~~ transportation~~, if~~ that is prior-authorized ~~by~~in a ~~consumer's case manager~~consumer-employer's service plan. If unscheduled transportation needs arise during non-office hours, the homecare worker must ~~provide an explanation as to~~explain the need for the transportation to the consumer-employer's case manager, and the transportation must be approved by the ~~consumer's~~consumer-employer's case manager ~~prior to~~before reimbursement.

(b) Medical transportation through the ~~Division of Medical Assistance Programs (DMAP~~Oregon Health Authority (OHA), volunteer transportation, and other transportation services included in a consumer's service plan is considered a prior resource.

(c) The Department is not responsible for vehicle damage or personal injury sustained when a homecare worker uses his or her own personal motor vehicle for ~~DMAP~~OHA or community transportation, except as may be covered by workers' compensation.

(d) Except as set forth in (a) of this section, homecare workers shall not receive any mileage reimbursement.

(12) PAYMENT FOR TRAVEL TIME

(a) A homecare worker who travels directly between the home or care setting of one consumer-employer and the home or care setting of another consumer-employer will be paid at the base pay rate for the time spent traveling directly between the homes or care settings. For the purposes of this rule, "Travel Directly" means a homecare worker's travel from one consumer-employer's home or care setting to another consumer-employer's home or care setting is not interrupted other than to:

(A) Eat a meal;

(B) Purchase fuel for the vehicle being used for the travel;

(C) Use a restroom; or

(D)Change buses, trains or other modes of public transit.

(b) The total time spent traveling directly between all of a homecare worker's consumer-employers may not exceed 10 percent of the total work time the homecare worker claims during a pay period. Unless otherwise specified in statute or rule, the amount of time a homecare worker may take to travel directly from one consumer-employer's home or care setting to another consumer-employer's home or care setting may not exceed one hour unless an exception has been granted by the Department.

(c) When a homecare worker uses the homecare worker's own vehicle to travel directly between two consumer-employers the Department shall determine the time needed for a homecare worker to travel directly based on a time estimate published in a common, publicly-available, web-based mapping program.

(d) When a homecare worker uses public transportation to travel directly, payment for travel time shall be based on the public transportation providers' scheduled pick-up and drop-off times for the stops nearest the consumer-employers' homes or care settings.

(e) When a homecare worker uses non-motorized transportation to travel directly, payment for travel time shall be based on a time estimate published in a common, publicly-available, web-based mapping program.

(f) Claims for travel time exceeding the Department's time estimates may require a written explanation from the homecare worker before the Department pays the claim. Time claimed in excess of the Department's time estimate may not be paid.

(g) A homecare worker shall not be paid for time spent in transit to or from the homecare worker's own residence.

(h) The Department is not responsible for vehicle damage or personal injury sustained when a homecare worker uses his or her own personal motor vehicle to travel between the homes or care settings of consumer-employers, except as may be covered by workers' compensation.

(i) Homecare workers shall not receive any mileage reimbursement for traveling between the homes or care settings of consumer-employers.

(~~12~~13) BENEFITS. Workers' compensation and ~~health insurance~~unemployment are available to eligible homecare workers as described in the Collective Bargaining Agreement. In order to receive homecare worker ~~services~~workers' compensation, a consumer-employer must consent and provide written authorization to the Department for the provision of workers' compensation insurance for the consumer-employer's employee.

(~~13~~14) OVERPAYMENTS. An overpayment is any payment made to a homecare worker by the Department that is more than the homecare worker is authorized to receive.

(a) Overpayments are categorized as follows:

(A) ADMINISTRATIVE ERROR OVERPAYMENT. The Department failed to authorize, compute, or process the correct amount of in-home service hours or wage rate.

(B) PROVIDER ERROR OVERPAYMENT. The Department overpays the homecare worker due to a misunderstanding or unintentional error.

(C) FRAUD OVERPAYMENT. "Fraud" means taking actions that may result in receiving a benefit in excess of the correct amount, whether by intentional deception, misrepresentation, or failure to account for payments or money received. "Fraud" also means spending payments or money the homecare worker was not entitled to and any act that constitutes fraud under applicable federal or state law (including 42 CFR 455.2). The Department determines, based on a preponderance of the

evidence, when fraud has resulted in an overpayment. The Department of Justice, Medicaid Fraud Control Unit determines when to pursue a Medicaid fraud allegation for prosecution.

(b) Overpayments are recovered as follows:

(A) Overpayments are collected prior to garnishments, such as child support, Internal Revenue Service back taxes, or educational loans.

(B) Administrative or provider error overpayments are collected at no more than 5 percent of the homecare worker's gross wages.

(C) The Department determines when a fraud overpayment has occurred and the manner and amount to be recovered.

(D) When a person is no longer employed as a homecare worker, any remaining overpayment is deducted from the person's final check. The person is responsible for repaying an overpayment in full when the person's final check is insufficient to cover the remaining overpayment.

Stat. Auth.: ORS 409.050, 410.070, ~~&~~ 410.090
Stats. Implemented: ORS 410.010, 410.020, 410.070, 410.612, ~~&~~ 410.614

411-031-0050 Termination, Administrative Review, and Hearing Rights

(1) EXCLUSIONS TO APPEAL AND HEARING RIGHTS. The following are excluded from the administrative review and administrative hearing rights process described in this rule:

(a) Terminations based on a background check. The homecare worker has the right to a hearing in accordance with OAR 407-007-0200 to 407-007-0370.

(b) Homecare workers ~~that~~who have not worked in the last 12 months. The provider enrollment may become inactivated, but may not be terminated. To ~~activate~~reactivate the provider enrollment number, the homecare worker must complete ~~an~~the application and

~~background check~~enrollment process set forth in OAR 411-031-0040(8)(a).

(c) Homecare workers ~~that~~who fail to complete a background recheck.

(d) Homecare workers ~~that~~who are denied a provider enrollment number at the time of initial application.

(e) Homecare workers who are not currently providing services to any consumers and whose provider enrollment is inactivated while an Adult Protective Services investigation is being completed.

(f) Homecare workers who have been excluded by Health and Human Services, Office of Inspector General, from participation in Medicaid, Medicare, and all other federal programs.

(2) REFERRAL OF POTENTIAL VIOLATIONS TO APD CENTRAL OFFICE. When an APD or AAA office has reason to believe a homecare worker has committed one or more of the violations listed in section (3) of this rule, the APD or AAA office shall refer the alleged violation to APD central office using the Department-approved referral form. The homecare worker who allegedly committed the violation shall be provided a copy of the completed referral form.

(~~2~~3) VIOLATIONS RESULTING IN TERMINATION OF PROVIDER ENROLLMENT. ~~The Department~~APD central office may terminate ~~the~~a homecare worker's provider enrollment when a homecare worker --

(a) ~~Violates~~Has violated the requirement to maintain a drug-free work place;

(b) Has an unacceptable background check;

(c) ~~Lacks~~Demonstrates a lack of the skills, knowledge, and ability to adequately or safely perform the required work;

(d) Violates the protective service and abuse rules in OAR chapter 411, division 020, OAR chapter 407, division 045, and OAR chapter 943, division 045;

(e) Commits fiscal improprieties;

(f) Fails to provide services as required;

(g) ~~Lacks~~Demonstrates a lack of the ability or willingness to maintain consumer-employer confidentiality~~. Unless given specific permission by the consumer-employer or the consumer-employer's legal representative, the homecare worker may not share any personal information about the consumer including medical, social service, financial, public assistance, legal, or interpersonal details~~;

(h) Introduces an unwelcome nuisance to the workplace ~~Engages in unacceptable conduct at work~~;

(i) Fails to adhere to an established work schedule;

(j) Has been sanctioned or convicted of a criminal offense related to that individual's involvement in any program established under any public assistance program;

(k) Fails to perform the duties of a mandatory reporter;

(~~i~~l) Has been excluded by the Health and Human Services, Office of Inspector General, from participation in Medicaid, Medicare, and all other federal health care programs; ~~or~~

(~~j~~m) Fails to provide a tax identification number or social security number that matches the homecare worker's legal name, as verified by the Internal Revenue Service or Social Security Administration~~.~~;

(n) Works for a consumer-employer or claims payment for working while the homecare worker does not have a valid, current, unexpired provider number;

(o) Fails to inform the Department and their consumer-employer within 14 days of being arrested, cited for, or convicted of any potentially disqualifying crime listed in OAR 407-007-0040; or

(p) Exerts undue influence over a consumer-employer.

(4) ADMINISTRATIVE REVIEW. Except in instances where an alleged violation presents imminent danger to present or future consumers, upon receiving an APD or AAA office's referral of an alleged violation listed in section (3)(a) or (3)(c) through~~-~~ (3)(p~~m~~) of this rule, APD central office shall complete an administrative review within 30 days.

(a) The administrative review provides an opportunity for APD central office to review the local office's referral and decide whether to terminate a homecare worker's provider enrollment.

(b) The administrative review may include the provision of new evidence, either by the homecare worker or by the APD or AAA office, which APD central office may consider in reaching its decision.

(c) As a part of the administrative review, the homecare worker and a representative may take part in an administrative review conference with APD central office.

(d) After an administrative review conference, APD central office will conclude the administrative review within 10-business days. The administrative review process is concluded when APD central office sends the homecare worker a written notice. If, based on the administrative review, APD central office determines a homecare worker did not violate one or more of the subsections of section (3) of this rule, APD central office shall send a written notice of this determination to the APD or AAA office and to the homecare worker.

(e) Upon agreement of both parties, an extension of the 10-business day deadline may occur.

(5) NOTICE OF PROPOSED TERMINATION OF HOMECARE WORKER PROVIDER ENROLLMENT. When APD central office proposes to terminate a homecare worker's provider enrollment, the homecare worker shall be provided with a written Notice of Proposed Termination of Homecare Worker Provider Enrollment. The notice must:

(a) Include a short and plain explanation of the reason for the proposed termination;

(b) Indicate the date the Notice of Proposed Termination of Homecare Worker Provider Enrollment was sent to the homecare worker;

(c) Cite the rules supporting the decision to issue the Notice of Proposed Termination of Homecare Worker Provider Enrollment;

(d) List the effective date of the proposed termination; and

(e) Inform the homecare worker of the homecare worker's appeal rights, including:

(A) The right to legal representation;

(B) How to request a contested case hearing; and

(C) The right to continue working until a final order resolves the contested case.

(f) For terminations based on substantiated protective service allegations, complainants, witnesses, the name of the alleged victim and protected health information are not to be disclosed in or with the notice.

(6) NOTICE OF EMERGENCY TERMINATION OF HOMECARE WORKER PROVIDER ENROLLMENT. When an alleged violation presents imminent danger to current or future consumers, APD central office may issue a Notice of Emergency Termination of Homecare Worker Provider Enrollment prior to the completion of an administrative review. A Notice of Emergency Termination of Homecare Worker Provider Enrollment must:

(a) Include a short and plain explanation of the reason for the emergency termination;

(b) Indicate the date the Notice of Emergency Termination of Homecare Worker Provider Enrollment was sent to the homecare worker;

(c) Cite the rules that support APD central office's decision to issue the Notice of Emergency Termination of Homecare Worker Provider Enrollment;

(d) List the effective date of the Notice of Emergency Termination of Homecare Worker Provider Enrollment; and

(e) Inform the homecare worker of the homecare worker's appeal rights, including:

(A) The right to legal representation;

(B) How to request a contested case hearing; and

(C) The right to take part in an administrative review before requesting a contested case hearing.

(7) ADMINISTRATIVE HEARINGS. If APD central office sends a homecare worker a Notice of Proposed Termination of Homecare Worker Provider Enrollment or an Emergency Termination of Homecare Worker Provider Enrollment, the homecare worker may complete a request for an administrative hearing.

(a) The homecare worker's request for an administrative hearing must:

(A) Be in writing;

(B) Be postmarked no later than 14 days after the date of the Notice of Proposed Termination of Homecare Worker Provider Enrollment or Emergency Termination of Homecare Worker Provider Enrollment was sent; and

(C) Specify the issues or decisions being appealed and the reasons for the appeal.

(b) The Department shall refer the homecare worker's administrative hearing request to the Office of Administrative Hearings as described in OAR chapter 137, division 003.

(c) When the Department refers an administrative hearing request, under these rules, to the Office of Administrative Hearings, the Department shall indicate on the referral whether the Department is authorizing a proposed order, a proposed and final order, or a final order.

(d) A homecare worker who completes an administrative hearing request may take part in an informal conference with a Department hearing representative before the administrative hearing.

(e) No additional hearing rights have been granted to homecare workers by this rule other than the right to a hearing on the issue of Department's decision to terminate the homecare worker's provider enrollment.

(8) TERMINATION IF NO ADMINISTRATIVE HEARING REQUEST FILED. If a homecare worker is sent a Notice of Proposed Termination of Provider Enrollment or a Notice of Emergency Termination of Provider Enrollment and does not request an administrative hearing within 14 days of the date the Notice of Proposed Termination of Provider Enrollment or a Notice of Emergency Termination of Provider Enrollment was sent, APD central office shall send the homecare worker a Final Order by Default in accordance with OAR 137-003-0670. Once the time period for appeal has expired, the provider enrollment is terminated by the Department.

~~(3) IMMEDIATE TERMINATION. The Department/AAA may immediately terminate a provider enrollment on the date the violation is discovered, prior to the outcome of the administrative review, when an alleged violation presents imminent danger to current or future consumers. The homecare worker may file an appeal of this decision directly to the Department - Central Office. The homecare worker must file any appeal within 10 business days from the date of the notice.~~

~~(4) TERMINATION PENDING APPEAL. When a violation does not present imminent danger to current or future consumers, the provider enrollment may not be terminated during the first 10 business days of the administrative review appeal period. The homecare worker must file any appeal within 10 business days from the date of the notice. If the homecare worker appeals in writing prior to the deadline for appeal, the enrollment may not be terminated until the conclusion of the administrative review.~~

~~(5) TERMINATION IF NO APPEAL FILED. The decision of the reviewer becomes final if the homecare worker does not appeal within 10 business days from the date of the notice of the decision. Once the time period for appeal has expired, the provider enrollment is terminated by the reviewer or designee.~~

~~(6) BURDEN OF PROOF. The Department has the burden of proving the allegations of the complaint by a preponderance of the evidence. Evidence submitted for the administrative hearing is governed by OAR 137-003-0050.~~

~~(7) ADMINISTRATIVE REVIEW PROCESS. The administrative review process allows an opportunity for the Department/AAA program manager or the Department - Central Office to review and reconsider the decision to terminate the homecare worker's provider enrollment. The appeal may include the provision of new information or other actions that may result in the Department/AAA changing its decision.~~

~~(a) A written notice is issued by the Department/AAA when the Department decides to terminate a homecare worker's provider enrollment. The written notice includes --~~

~~(A) An explanation of the reason for termination of the provider enrollment;~~

~~(B) The alleged violation as listed in section (2) of this rule; and~~

~~(C) The homecare worker's appeal rights, including the right to union representation, and where to file the appeal.~~

~~(D) For terminations based on substantiated protective services allegations, the notice may only contain the limited information allowed by law. In accordance with ORS 124.075, 124.085, 124.090, and OAR 411-020-0030, complainants, witnesses, the name of the alleged victim, and protected health information may not be disclosed.~~

~~(b) INFORMAL CONFERENCE. At the first level of appeal, an informal conference (described in OAR 461-025-0325) if requested by the homecare worker, is scheduled with the homecare worker and any union representative. The Department/AAA program manager, or designee,~~

~~meets with the homecare worker, reviews the facts, and explains why the decision was made. The informal conference may be held by telephone.~~

~~(c) The homecare worker must specify in the request for review the issues or decisions being appealed and the reason for the appeal. The appropriate party, as stated in the notice, must receive the request for review within 10 business days of the date of the decision affecting the homecare worker. If the homecare worker decides to file an appeal, they must file their appeal in the following order:~~

~~(A) ADMINISTRATIVE REVIEW.~~

~~(i) Program manager (or designee) at the local Department/AAA office. This is the first level of review for terminations pending appeal described in section (4) of this rule.~~

~~(ii) Department Central Office. This is the second level of appeal for terminations pending appeal described in section (4) of this rule. This is the only level of review for immediate terminations described in section (3) of this rule.~~

~~(B) OFFICE OF ADMINISTRATIVE HEARINGS.~~

~~(i) A homecare worker may file a request for a hearing with the local office if all levels of administrative review have been exhausted and the homecare worker continues to dispute the Department's decision. The local office files the request with the Office of Administrative Hearings as described in OAR chapter 137, division 003. The request for the hearing must be filed with the local office within 30 calendar days of the date of the written notice from the Department - Central Office.~~

~~(ii) When the Department refers a contested case under these rules to the Office of Administrative Hearings, the Department indicates on the referral whether the Department is authorizing a proposed order, a proposed and final order, or a final order.~~

~~(iii) No additional hearing rights have been granted to homecare workers by this rule other than the right to a hearing on the Department's decision to terminate the homecare worker's provider enrollment.~~

~~(d) A written response of the outcome of the administrative review is sent to the homecare worker within 10 business days of the review date.~~

~~(e) If the administrative review determines that the decision to immediately terminate the provider enrollment was unjustified, the reviewer or designee must have the provider enrollment restored to active status and any earned benefits such as paid leave reinstated. The written response must notify the homecare worker that the provider enrollment is restored.~~

~~(8) REQUEST FOR EXTENSION TO DEADLINE. The Department/AAA or the homecare worker may request an extension of the 10-day deadline described in subsection (7)(e) above for circumstances beyond their control, if further information needs to be gathered to make a decision, or there is difficulty in scheduling a meeting between the parties.~~

Stat. Auth.: ORS 409.050, 410.070, ~~&~~ 410.090
Stats. Implemented: ORS 410.070