

DRAFT 4/22/16 – minimum wage / SB 1532 (2016)
137-050-0715
Income

(1) "Income" means the actual or potential gross income of a parent as determined in this rule. Actual and potential income may be combined when a parent has actual income and is unemployed or employed at less than the parent's potential.

(2) "Actual income" means a parent's gross earnings and income from any source, including those sources listed in section (4), except as provided in section (5).

(3) "Potential income" means the parent's ability to earn based on relevant work history, including hours typically worked by or available to the parent, occupational qualifications, education, physical and mental health, employment potential in light of prevailing job opportunities and earnings levels in the community, and any other relevant factors. A determination of potential income includes potential income from any source described in section 4 of this rule.¹ **If a parent residing in Oregon is determined to be able to earn at the minimum wage, the hourly earning amount to be imputed as potential income will be based on the lowest minimum wage provided for in any area of Oregon, regardless of the**

¹ Commentary: Some employers will not allow an employee to work a full 40 hour week, which may not be customary to the occupation, but is customary to the employer. In these types of circumstances the fact-finder must determine whether to base the parent's earning ability on a regular 40-hour workweek, the customary work schedule for the parent's occupation, or work opportunities in the parent's current employment situation.

Example: A parent works 32 hours per week at a restaurant. Additional hours are unavailable. Other employment opportunities in the area for which the parent is qualified offer similar hours and wages. It would be inappropriate to base the parent's income on a 40 hour work week.

Other parents may have suffered reduced earning ability. For example, it would be inappropriate to attribute historical full-time income to a public school teacher who has been laid off and now works part-time as a substitute teacher – assuming there are limited employment opportunities in the area for a teacher of those credentials and work history.

On the other hand, it might be appropriate to attribute income based on historical earnings to a person who has left a lucrative professional career because, for example, a spouse earns sufficient income, or in order to work in a preferred field but at a lower rate of pay. Because the goal is to determine earning ability, this imputation should not simply apply the amount formerly earned. The review should include consideration of the currently available employment opportunities in that field in the parent's area, the condition of the parent's professional skills and/or equipment, and the time since the parent last worked in that occupation.

This provision also contemplates seasonal employment. A seasonally employed parent may have significant earnings for a portion of the year and then receive unemployment compensation for a portion of the year. Under those circumstances, the parent's earning ability might be based on an annual review of their income, divided over a twelve-month period.

If a parent's occupational history is known but the parent's income is not, the Oregon Employment Department's Oregon Labor Market Information System may be of use in assessing employment opportunities and potential earnings. See generally <http://www.qualityinfo.org/olmisi/OlmisZine>. For a statewide listing of earnings by profession, see <http://www.olmis.org/olmisi/PubReader?itemid=00000053>. For regional wage information tables, see <http://www.qualityinfo.org/olmisi/PubReader?itemid=00003174>.

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location of the parent’s residence within Oregon.²

(4) Actual income includes but is not limited to:

(a) Employment-related income including salaries, wages, commissions, advances, bonuses, dividends, recurring overtime pay,³ severance pay, pensions, and honoraria;⁴

(b) Expense reimbursements, allowances,⁵ or in-kind payments to a parent, to the extent they reduce personal living expenses;

(c) Annuities, trust income, including distribution of trust assets, and return on capital,⁶ such as

² **ORS 653.025, as amended by SB 1532 (2016), provides a three-tiered structure of minimum wages applicable to employers in different areas of Oregon. This provision is intended to ensure the fairest results and minimize the need for additional factual determinations by ensuring that any use of potential minimum wage earnings is based on the lowest of these figures.**

Under ORS 653.025(3), the applicable wages will be: from July 1, 2016, to June 30, 2017, \$9.50; from July 1, 2017, to June 30, 2018, \$10; from July 1, 2018, to June 30, 2019, \$10.50; from July 1, 2019, to June 30, 2020, \$11; from July 1, 2020, to June 30, 2021, \$11.50; from July 1, 2021, to June 30, 2022, \$12; from July 1, 2022, to June 30, 2023, \$12.50.

This provision does not restore the presumption in effect prior to July 1, 2013, that a parent is able to earn full-time minimum wage (though section 7 of this rule allows use of full-time minimum wage where there is insufficient information to make a finding of actual or potential income). Rather, it provides that where the court, administrative agency, or administrative law judge finds that a parent is able to earn minimum wage, the lowest Oregon minimum wage will be used to calculate income regardless of the obligor’s location in Oregon. This may apply to a parent found able to find work at the minimum wage but less than full-time, as may be common in some areas; that parent could be assessed potential income at the number of hours of work the parent is likely able to obtain, at the lowest Oregon minimum wage amount.

³ Commentary: Overtime is included to the extent it is regularly occurring. Sporadic overtime is not generally included. Overtime is calculated based on an annual amount, prorated over a twelve month period. The calculation of annual overtime takes into consideration those occupations that customarily have seasonal overtime. With evidence of a recent voluntary reduction in overtime hours, a fact finder may determine an annual average of overtime based on historic accumulation of overtime.

⁴ Commentary: Some employers contribute to medical benefits beyond the cost of health care coverage. This employer contribution should be included as gross income to the person. Any cash benefits a person may receive from not enrolling in, or “opting out” of, a health care coverage plan are considered income.

Employer contributions to profit sharing, such as unexercised stock options, should be treated as gross income only if such contributions are capable of ready conversion into cash (i.e., liquid).

⁵ Commentary: Allowances, such as a car, home or cellular phone allowance provided by an employer, may be considered income to the extent they reduce living expenses consistent with section 4(f). Example: If an employer provides the employee a cellular phone subsidy of \$100 per month, that amount could be included in income. If, however, the cellular phone were restricted to business use, it would not be considered in determining income. In calculating income for an active duty service member, income includes housing and subsidy allowances and special pay allowances.

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interest and dividends;

(d) Income replacement benefit payments including Social Security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, and Department of Veterans Affairs disability benefits;

(e) Inheritances,⁷ gifts and prizes, including lottery winnings; and

(f) Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, minus costs of goods sold, minus ordinary and necessary expenses required for self-employment or business operation, including one-half of the parent's self-employment tax, if applicable. Specifically excluded from ordinary and necessary expenses are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses,⁸ investment tax credits, or any other business expenses determined by the fact finder to be inappropriate or excessive for determining gross income.⁹

(5) Child support, food stamps, Social Security or Veterans benefits received on behalf of a child in the household, adoption assistance, guardianship assistance, and foster care subsidies are not considered income for purposes of this calculation.¹⁰

(6) If a parent's actual income is less than the parent's potential income, the court, administrator, or administrative law judge may impute potential income to the parent.¹¹

⁶ Commentary: A return on capital, including interest and dividends, can be considered regardless of whether the return is paid out to the party or reinvested to increase the value of the capital investment.

⁷ Commentary: Inheritances are separately listed beginning in 2013 based on *In re Marriage of Leif*, 246 Or App 511, 266 P3d 165 (2011).

⁸ Commentary: The straight-line method (regular depreciation) deducts an equal amount of depreciation each year. Accelerated depreciation front-loads the depreciation, realizing less income. If the property is sold and new property purchased and accounted for using accelerated depreciation, lower income results on an ongoing basis for tax purposes. See *IRS Publication 936*.

⁹ Commentary: Determining gross income for persons involved in the operation of a business can be difficult. The problem is best addressed by the discovery process and by the fact finding authority of the decision maker.

Undistributed corporate income is included in determining the gross income of the parties (see *Perlenfein and Perlenfein*, 316 Or 16 (1993)). However, the gross income thus calculated may be rebutted in whole or in part if there is evidence that such income is not actually available to the parent.

¹⁰ Commentary: Adoption assistance, foster care, and guardianship subsidy payments are intended to cover the cost of care for children who may have extraordinary education, emotional or physical needs. The parents are still obligated to provide for the basic needs of the child.

¹¹ Commentary: Whether a person is receiving his/her potential income must be determined on a case-by-case basis. See *Matter of Marriage of LaFavor*, 151 Or App 257, 949 P.2d 313 (1997). The drafters also note that under ORS 107.135(3) as interpreted in *Hogue and Hogue*, 115 Or App 697 (1992), even a good-faith reduction in income may not constitute a substantial change in circumstance for purposes of modifying a support judgment where the parent fails to prove that the reduced income results in reduced ability to pay.

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(7) If insufficient information about the parent's income history is available to make a determination of actual or potential income, the parent's income is the amount the parent could earn working full-time at the **lowest**¹² minimum wage in the state in which the parent resides.¹³

(8) Potential income may not be imputed to:

(a) A parent unable to work full-time due to a verified disability;

(b) A parent receiving workers' compensation benefits;

(c) An incarcerated obligor as defined in OAR 137-055-3300; or

(d) A parent whose order is being temporarily modified under ORS 416.425(13).

(9) To determine monthly income when the employee is paid:

(a) Weekly, multiply the weekly earnings by 52 and divide by 12.

(b) Every two weeks, multiply the bi-weekly earnings by 26 and divide by 12.

(c) Semimonthly (twice per month), multiply the semimonthly earnings by 2.¹⁴

(10) Notwithstanding any other provision of this rule, if the parent receives Temporary Assistance for Needy Families, the parent's income is presumed to be the amount which could be earned by full-time work at the minimum wage in the state in which the parent resides. This income presumption is solely for the purposes of the support calculation and not to overcome the rebuttable presumption of inability to pay in ORS 25.245.¹⁵

(11) As used in this rule, "full-time" means 40 hours of work in a week except in those industries, trades or professions in which most employers, due to custom, practice or agreement, utilize a normal work week of more or less than 40 hours in a week.¹⁶

Stat. Auth.: ORS 25.270 – 25.290, 180.345

¹² Commentary: See Commentary note 2, at section 3(a) of this rule.

¹³ Commentary: Where the parent's state of residence is unknown, use **the lowest** Oregon minimum wage.

¹⁴ Commentary: Irregular income, such as seasonal, commission, or overtime work, or volatile investment income, may be computed based on a representative period, such as one or two years, with the goal of accurately estimating ongoing ability to pay support.

¹⁵ Commentary: TANF recipients are presumed unable to pay support (ORS 25.245). However, it is necessary to impute some income to all parties (even parents who receive public assistance). Income is imputed for purposes of calculating the relative responsibility of each parent and not to order a TANF recipient to pay support.

¹⁶ Commentary: This definition of "full time work" is adapted from that used by the Employment Department. This rule does not contemplate the term "underemployed."

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