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**PERMANENT ADMINISTRATIVE ORDER**

**ED 2-2023**

CHAPTER 471

EMPLOYMENT DEPARTMENT

**FILED**

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FILING CAPTION: Definition and administrative provisions related to small employers and department representatives for Paid Leave Oregon

EFFECTIVE DATE: 03/16/2023

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**RULES:**

471-070-3150, 471-070-3160, 471-070-8000

AMEND: 471-070-3150

REPEAL: Temporary 471-070-3150 from ED 14-2022

RULE TITLE: Employer Size: Definitions

NOTICE FILED DATE: 12/21/2022

RULE SUMMARY: Employer Size: Definitions - Amends the rule to define employer size by averaging over 12 months instead of by four quarters. Makes the temporary rule permanent.

**RULE TEXT:**

- (1) "Employee count" means a headcount of all of an employer's employees, including employees in Oregon and all out-of-state employees, excluding the number of replacement employees hired to temporarily replace eligible employees during Oregon Paid Family and Medical Leave Insurance (PFMLI) leave.
- (2) "Employer size" means an employer's average number of employees for the preceding 12 month period and is based on the number of employees on the employer's payroll for the pay period that includes the 12th of each month.
- (3) "Large employer" means an employer whose employer size is 25 or more employees.
- (4) "New employer" means an employer that has not previously operated or had employees in or outside of Oregon.
- (5) "Small employer" means an employer whose employer size is less than 25 employees.

STATUTORY/OTHER AUTHORITY: ORS 657B.360

STATUTES/OTHER IMPLEMENTED: ORS 657B.360

AMEND: 471-070-3160

REPEAL: Temporary 471-070-3160 from ED 14-2022

RULE TITLE: Employer Size: Method to Determine Number of Employees Employed by an Employer

NOTICE FILED DATE: 12/21/2022

RULE SUMMARY: Employer Size: Method to Determine Number of Employees Employed by an Employer – Amends the rule to establish a method for how to determine whether an employer has fewer than 25 employees for the Paid Leave Oregon program. The method is averaging over 12 months. Makes the temporary rule permanent.

RULE TEXT:

(1) Employer size is based on the average of the employer's monthly employee counts as defined in OAR 471-070-3150(2).

(a) An employer's employee count is the number of employees on the employer's payroll for the pay period that includes the 12th of the month, and is the sum of:

(A) The number of employees in Oregon; and

(B) The number of out-of-state employees.

(b) The employee count may not include any replacement employees hired to temporarily replace eligible employees during periods of Oregon Paid Family and Medical Leave Insurance (PFMLI) leave.

Example 1: ABC Construction has weekly pay periods covering Sunday to Saturday. For October 2022, the 12th of the month is included within the pay period covering October 9th to October 15th. ABC Construction paid 15 employees in Oregon and 8 employees in Washington during the pay period covering October 9th to October 15th. ABC Construction's employee count for October 2022 is 23 employees (15 Oregon employees + 8 out-of-state employees).

Example 2: Suzana Vucic, a domestic employer, has monthly pay periods. For April 2024, the 12th of the month is included within the pay period covering April 1st to April 30th. Suzana Vucic paid two employees in Oregon, including one employee temporarily hired to replace an employee during a period of PFMLI leave, and 0 employees out-of-state during the pay period covering April 1st to April 30th. Suzana Vucic's employee count for April 2024 is 1 employee (2 Oregon employees + 0 out-of-state employees - 1 replacement worker).

Example 3: Top Notch Temps has biweekly pay periods. The employer is based in Idaho and opened an office in Oregon in September 2024. For July 2024, the 12th of the month is included within the pay period covering July 12th to 26th. Top Notch Temps was not operating in Oregon during the pay period covering July 12th to 26th and had no Oregon employees or replacement workers and had 40 employees working in Idaho. Top Notice Temps' employee count for July 2024 is 40 employees (0 Oregon employees + 40 out-of-state employees - 0 replacement workers).

(2) Employer size is not rounded.

(3) Employer size shall be determined annually for each calendar year based on the average of the monthly employee counts from January to December in the previous calendar year.

Example 4: Abraham's Furniture Depot has the following employee counts for 2022: January - 25; February - 26; March - 26; April - 24; May - 23; June - 22; July - 24; August - 25; September; 26; October - 26; November - 26; December - 24. The monthly employee counts are added together and then divided by 12 months to arrive at the average employee count of 24.75  $[(25+26+26+24+23+22+24+25+26+26+26+24 = 297) / 12 \text{ months} = 24.75]$ . Abraham's Furniture Depot is a small employer for all of calendar year 2023.

Example 5: Sally's Tree Farms has the following employee counts for 2025: January - 15; February - 15; March - 14; April - 16; May - 10; June - 12; July - 20; August - 40; September - 45; October - 50; November - 55; December - 50. The

employee counts are added together and then divided by 12 months to arrive at the average employee count of 28.5  $[(15+15+14+16+10+12+20+40+45+50+55+50) = 342 / 12 \text{ months} = 28.5]$ . Sally's Tree Farms is a large employer for all of calendar year 2026.

Example 6: Reliable Transport has locations in California and Nevada and starts operating in Oregon in September 2026. The employee counts for 2026, which cover for the entire year even though Reliable Transport did not start operating in Oregon until September because Reliable Transport operated out-of-state, are: January - 20; February - 20; March - 21; April - 20; May - 20; June - 19; July - 20; August - 21; September - 30; October - 30; November - 31; December - 30. The employee counts are added together and then divided by 12 months to arrive at the average employee count of 23.5  $[(20+20+21+20+20+19+20+21+30+30+31+30) = 282 / 12 \text{ months} = 23.5]$ . Reliable Transport is a small employer for all of calendar year 2027.

(4) For new employers, employer size shall be determined quarterly until the employer has operated for an entire calendar year. At the end of each quarter, the average monthly employee counts from the preceding 12 months shall be used to determine the employer size for the quarter.

Example 7: Cafe Senad is a new business only in Oregon that started operating in May 2027. Cafe Senad's first quarterly payroll report is filed for the second quarter of 2027 (April to June). Employer size for the 2027 second quarter is based on the average employee counts for July 2026 to June 2027. Cafe Senad's employee counts are: May 2027 - 25; June 2027 - 30; and 0 for all other months. The employee counts are added together and then divided by 12 months to arrive at the average employee count of 4.58  $[(0+0+0+0+0+0+0+0+0+25+30) = 55 / 12 \text{ months} = 4.58]$ . Cafe Senad is a small employer for the second quarter of 2027 and is not required to pay the employer contributions for the second quarter.

Employer size for the 2027 third quarter is based on the average employee counts for October 2026 to September 2027. Cafe Senad's employee counts are: May - 25; June - 30; July - 42; August - 44; September - 44; and 0 for all other months. The employee counts are added together and then divided by 12 months to arrive at the average employee count of 15.41  $[(0+0+0+0+0+0+0+25+30+42+44+44) = 185 / 12 \text{ months} = 15.41]$ . Cafe Senad is a small employer for the third quarter of 2027 and is not required to pay the employer contributions for the third quarter.

Employer size for the 2027 fourth quarter is based on the average employee counts for January to December 2027. Cafe Senad's employee counts are: May - 25; June - 30; July - 42; August - 44; September - 44; October - 50; November - 52; December - 55; and 0 for all other months. The employee counts are added together and then divided by 12 months to arrive at the average employee count of 28.5  $[(0+0+0+0+25+30+42+44+44+50+52+55) = 342 / 12 \text{ months} = 28.5]$ . Cafe Senad is a large employer for the fourth quarter 4 of 2027 and must pay the employer contributions for the fourth quarter.

(5) An employer that determines there is a need to correct their employer size after submitting their Oregon Quarterly Tax Report(s) or Oregon Annual Report shall amend the reports and update the employer contributions.

(a) If the employer changes from a small employer to a large employer, then the employer shall pay employer contributions with the amended reports. Penalties and interests may be assessed in accordance with ORS 657B.320, 657B.910, and associated administrative rules.

(b) If the employer changes from a large employer to a small employer, then the employer shall be credited the previous employer contributions paid. The department may require verification of the employee count before a credit is applied.

(6) The department may verify employee count at any time by requesting employee count information or records or through employer audits or other requests for information and documentation from employers. The department may reassess employer size based on the verification received or other information gathered by the department.

(a) If the department determines that an employer designation should be changed from a small employer to a large employer, then the employer shall be assessed any employer contributions due. Penalties and interests may be assessed

in accordance with ORS 657B.320, 657B.910, and associated administrative rules.

(b) If the department determines that an employer designation should be changed from a large employer to a small employer, then the employer may be credited the previous employer contributions paid in error.

[Publications: Contact the Oregon Employment Department for information about how to obtain a copy of the publication referred to or incorporated by reference in this rule.]

STATUTORY/OTHER AUTHORITY: ORS 657B.360

STATUTES/OTHER IMPLEMENTED: ORS 657B.360

ADOPT: 471-070-8000

REPEAL: Temporary 471-070-8000 from ED 16-2022

RULE TITLE: Appeals: Department Representation in Hearing

NOTICE FILED DATE: 12/21/2022

RULE SUMMARY: Appeals: Department Representation in Hearing – Establishes that an officer or employee of the Oregon Employment Department may represent the department in certain hearings for Paid Leave Oregon. Makes the temporary rule permanent.

RULE TEXT:

(1) Subject to the approval of the Attorney General, an officer or employee of the Oregon Employment Department is authorized to appear on behalf of the department in the following types of hearings conducted before the Office of Administrative Hearings:

- (a) Administrative decisions related to Paid Family and Medical Leave Insurance (PFMLI) benefits under ORS 657B.100 and 657B.120 and applicable rules.
- (b) Administrative decisions related to PFMLI contributions under ORS 657B.130 to 657B.175 or 657B.370 and applicable rules.
- (c) Administrative decisions related to PFMLI penalties imposed under ORS 657B.910 or 657B.920 and applicable rules.
- (d) Administrative decisions related to PFMLI employer assistance grants under ORS 657B.200 and applicable rules.
- (e) Administrative decisions related to PFMLI equivalent plans under ORS 657B.210 and applicable rules.

(2) The agency representative may not make legal argument on behalf of the agency.

(a) "Legal argument" includes arguments on:

- (A) The jurisdiction of the agency to hear the contested case;
- (B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency; and
- (C) The application of court precedent to the facts of the particular contested case proceeding.

(b) "Legal argument" does not include presentation of motions, evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

- (A) The application of the statutes or rules to the facts in the contested case;
- (B) Comparison of prior actions of the agency in handling similar situations;
- (C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;
- (D) The admissibility of evidence;
- (E) The correctness of procedures being followed in the contested case hearing.

STATUTORY/OTHER AUTHORITY: ORS 657B.340, ORS 183.452

STATUTES/OTHER IMPLEMENTED: ORS 183.452, 657B.410