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EMPLOYMENT DEPARTMENT

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RULES:

471-070-0010, 471-070-0400, 471-070-2100, 471-070-2180, 471-070-3040, 471-070-3100, 471-070-3130, 471-070-3340, 471-070-8540

ADOPT: 471-070-0010

RULE TITLE: Definitions

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Defines Paid Leave Oregon as the Paid Family and Medical Leave Insurance program as described under ORS chapter 657B.

RULE TEXT:

"Paid Leave Oregon" means the Paid Family and Medical Leave Insurance program as described under ORS chapter 657B.

STATUTORY/OTHER AUTHORITY: ORS 657B.340

STATUTES/OTHER IMPLEMENTED: ORS 657B.340

ADOPT: 471-070-0400

RULE TITLE: Wages: Definitions

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Defines terms used by the Paid Family and Medical Leave Insurance program related to wages used to calculate Paid Family and Medical Leave Insurance contribution amounts.

RULE TEXT:

(1) "Agricultural labor"

(a) Except as provided in subsection (c) of this section, "agricultural labor" means service on a farm in connection with the production, raising, or harvesting of any agricultural or horticultural commodity, includes farming in all its branches, and, among other things, also includes:

(A) Cultivating and tillage of the soil;

(B) Dairying;

(C) Raising, shearing, feeding, caring for, training, and management of livestock, bees, fur-bearing animals, wildlife, and poultry; and

(D) Practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, management, conservation, and improvement or maintenance of such farm and its tools and equipment, including preparation for market, delivery to storage or to market, or to carriers for transportation to market; and

(b) "Agricultural labor" includes all services performed in the employ of the operator or group of operators of a farm or farms (or a cooperative organization of which such operator or operators are members) in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator or group of operators produced more than one-half of the commodity, as measured by volume, weight, or other customary means, with respect to which such service is performed.

(c) "Agricultural labor" does not include, among other things, processing services that transform an agricultural commodity from its raw or natural state and services performed with respect to an agricultural product after it has been transformed from its raw or natural state.

(d) "Farms," as used in this section, includes stock, dairy, poultry, fruit, fur-bearing animals, Christmas tree and truck farms, plantations, orchards, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities.

(2) "Bonuses," "fees," and "prizes" means an extra payment given by an employer in consideration of performance, production, or a share of profits.

(3) "Domestic service"

(a) Except as provided in subsection (b) of this section, "domestic service" means general services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom the employee is employed. The term includes, but is not limited to, services performed as cooks, waiters/waitresses, butlers, housekeepers, child monitors, general house workers, personal attendants, baby-sitters, janitors, launderers, caretakers, gardeners, grooms, and chauffeurs of automobiles for family use.

(b) "Domestic service" does not include work performed by:

(A) A parent or spouse of the employer;

(B) A child of the employer who is under 26 years of age;

(C) Students who regularly attend elementary or secondary school during the day;

(D) Children, other than children of the employer, who are under 14 years of age;

(E) Children under 18 years of age who provide babysitting services and persons who provide babysitting on a casual basis;

(F) Persons who perform casual labor in private homes or the maintenance of private homes or their premises, including but not limited to yard work, washing windows, and shoveling snow;

- (G) Individuals employed by organizations licensed as required by ORS 443.015 or 443.315;
 - (H) Individuals performing companionship services exempt from the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C 201 et seq.);
 - (I) Persons who perform house sitting duties that do not involve domestic service;
 - (J) Persons who provide domestic service in exchange for an in-kind good or service; and
 - (K) Services of those not of a household nature, such as services performed as a private secretary, tutor, nurse, or certified nursing assistant, even though performed in the employer's private home.
- (4) "Employing unit" has the same definition as "employer" as provided by ORS 657B.010(14).
- (5) "Employment" means any service performed by an employee for an employer for remuneration or under any contract of hire, written or oral, expressed, or implied.
- (6) "Holiday" means any of the holidays listed in ORS 187.010(1)(b)–(k) and (2), 187.020 and any holiday designated by the employer, union contract, or otherwise.
- (7) "Holiday pay" means any remuneration that an employer pays an employee for a holiday, including, but not limited to, full or partial paid time off or additional pay for work on a holiday.
- (8) "Paid time off" means compensated time away from work provided by an employer that the employee can choose to use for any reason, including, but not limited to, vacation, sickness, and personal time.
- (9) "Private home," as used in section (3) of this rule, means a fixed place of abode of an individual household. A separate and distinct dwelling unit maintained by a household in an apartment, house, hotel, or other similar establishment may constitute a private home, provided it is a place in which a person resides with the intention of residence or has so resided with the intention of returning. If a dwelling unit of an individual or family is used primarily as a boarding house for the purpose of supplying lodging to the public as a business enterprise, only that portion of the premises occupied by the individual or family may be considered a private home for the purposes of this rule.
- (10) "Sick pay" means remuneration paid by an employer to an employee for time away from work due to sickness, unless excluded as a fringe benefit under ORS 657.115.
- (11) "Stand-by pay" means remuneration paid by an employer to an employee who is required to be immediately available for work.
- (12) "Vacation pay" means remuneration paid by an employer to an employee for time away from work provided by an employer to an employee to use for any reason the employee chooses but does not include leave for sick pay, compensatory time, holiday, or other special leave.

STATUTORY/OTHER AUTHORITY: ORS 657B.340

STATUTES/OTHER IMPLEMENTED: ORS 657B.010

ADOPT: 471-070-2100

RULE TITLE: Tribal Government: Election Requirements and Effective Date

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Clarifies how a tribal government may elect coverage for the Paid Family and Medical Leave Insurance program and when the election becomes effective.

RULE TEXT:

(1) A tribal government may elect coverage at any time under the Paid Family and Medical Leave Insurance (PFMLI) program in accordance with ORS 657B.130(4). The tribal government must elect coverage separately for each business owned by the tribal government.

(2) A tribal government election of the PFMLI program coverage must be in writing and must be accomplished through an intergovernmental agreement between the State of Oregon acting by and through the Employment Department. The tribal government must agree to pay contributions for a period of not less than three years.

(3) A tribal government that has elected coverage by entering an agreement pursuant to section (2) of this rule shall be considered an "employer" and employees of the tribal government shall be considered "employees" under ORS chapter 657B and related administrative rules. The tribal government and its employees shall be subject to all rights and responsibilities therein, including, but not limited to:

(a) Payment of contributions at the same rate and amount as employers and employees as specified in ORS 657B.150 and applicable administrative rules.

(b) Filing and paying quarterly as required on the Oregon Quarterly Tax Report, including detailing the PFMLI portion of all PFMLI subject wages, the employee count, and the employee and employer PFMLI contributions due in accordance with ORS 657B.150 and OAR 471-070-3030.

(c) Receipt of PFMLI benefit amounts by eligible employees of tribal governments that have elected coverage in accordance with ORS 657B.050(1) and (2) and related administrative rules.

(d) Collection by the department of erroneous payments of benefits to employees of tribal governments in accordance with provisions for employees in ORS 657B.120 and related administrative rules.

(e) Job protection for eligible employees of tribal governments as specified in ORS 657B.060 and applicable administrative rules.

(f) Collection requirements or methods and applicable penalties on delinquent payments of contributions and recovery of improper benefit payments as described in ORS 657B.280 through 657B.330 and applicable administrative rules.

(4) Approved elective coverage becomes effective on the date the intergovernmental agreement is signed by the department and the tribal government.

(5) To the extent allowed by law, the terms of a PFMLI tribal government intergovernmental agreement may supersede this rule and OAR 471-070-2180, if both parties agree.

[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.130

STATUTES/OTHER IMPLEMENTED: ORS 657B.150, ORS 657B.130

ADOPT: 471-070-2180

RULE TITLE: Tribal Government: Termination of Elective Coverage

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Clarifies when and how a tribal government may terminate a previously approved elective coverage under the Paid Family and Medical Leave Insurance program.

RULE TEXT:

- (1) A tribal government may terminate elective coverage by filing a written notice with the department requesting a termination of the intergovernmental agreement.
- (2) A tribal government can terminate elective coverage any time after the coverage has been in effect for three years or longer. The termination shall take effect 30 calendar days after the notice to terminate is received by the department, unless a later date is requested by the tribal government in the written notice.
- (3) A tribal government may terminate elective coverage that has been in effect for less than three years if a voluntary or involuntary bankruptcy petition has been filed for the covered business. The termination shall take effect on the date the department receives the written notice and supporting documentation of the bankruptcy petition.
- (4) All contributions payable are due immediately upon termination of coverage.

[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.130

STATUTES/OTHER IMPLEMENTED: ORS 657B.130

ADOPT: 471-070-3040

RULE TITLE: Contributions: Withholding of Employee Contributions

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Clarifies the maximum allowable amount an employer may deduct from an employee's subject wages. If an employer fails to deduct the employee share of the contribution rate, it may not be deducted from the employee's future paychecks after the quarter.

RULE TEXT:

- (1) An employer may not deduct from the employee's subject wages more than the maximum allowable amount of 60 percent of the total contribution rate described in OAR 471-070-3010 for a pay period rounded to the nearest cent.
- (2) If an employer fails to deduct the maximum allowable employee share of the contribution rate for a pay period, the employer is considered to have elected to pay that portion of the employee's contribution that the employer failed to deduct, and the employer is liable to pay that portion of the employee share under ORS 657B.150(5) or ORS 657B.210(5) for that pay period if not corrected within the quarter. The employer may deduct from the employee's subject wages the amount they failed to deduct within the quarter.
- (3) An employer may elect to pay the employee's contribution, in whole or in part, and must provide a written notice, policy, or procedure to the employee or enter into a collective bargaining agreement with the employee specifying that the employer is electing to pay the employee contribution, making the employer liable for that portion of the employee contribution. The employer must give written notice of an update to its notice, policy, or procedure or amendments to its collective bargaining agreement to the employee at least one pay period prior to any reduction by the employer of the elected employee contribution amount that the employer previously elected to pay.
- (4) If an employer has elected to pay, in whole or in part, the employee portion of contributions as stated in section (3) of this rule, the employer may not deduct the amount the employer elected to pay from a future paycheck of the employee.

STATUTORY/OTHER AUTHORITY: ORS 657B.340

STATUTES/OTHER IMPLEMENTED: ORS 657B.150, 657B.210

ADOPT: 471-070-3100

RULE TITLE: Contributions: Place of Performance

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Clarifies the process for determining if employee's wages are earned services in Oregon and subject to Paid Family and Medical Leave Insurance contributions and Paid Family and Medical Leave Insurance benefits.

RULE TEXT:

(1) For purposes of this rule, "service not covered by a paid leave program in any other state or territory" means that the employee's wages for service are not covered under an existing paid leave program in another state or, if the state or territory has no paid leave program, would not be covered if that other state or territory had a paid leave program similar to Oregon's.

(2) For the purpose of implementing ORS 657B.175 and determining Oregon Paid Family and Medical Leave Insurance (PFMLI) subject wages, an employee's wages shall be used to make determinations under ORS chapter 657B and applicable rules if the employee's wages are earned for service:

(a) Performed entirely within Oregon; or

(b) Performed within and outside Oregon, but the service performed outside of Oregon is incidental to the employee's service performed within Oregon.

(3) An employee's entire wages are PFMLI subject wages if the wages are for employee performance of services within and outside of Oregon and the service performed outside of Oregon is incidental to the employee's service performed in Oregon. Services performed outside of Oregon are incidental to the employee's service performed in Oregon in the following sequence:

(a) If the majority of the employee's service is performed within Oregon and the service outside of Oregon is temporary or transitory in nature or consists of isolated transactions and the employee's service is not covered by a paid leave program in any other state or territory. Factors that the department may consider in determining whether service is temporary or transitory in nature include:

(A) Length of service with the employer within Oregon compared to outside Oregon;

(B) Whether the service is an isolated situation or a regular part of the employee's work;

(C) Whether the employee will return to performing services in Oregon upon completion of the services performed outside of Oregon; and

(D) Whether the service performed outside of Oregon are of the same nature as those performed in Oregon.

(b) If subsection (3)(a) of this rule does not apply, the employee's service is not covered by a paid leave program in any other state or territory, and the employee's base of operations is in Oregon. Base of operations is an established location from where the employee starts work and customarily returns to perform services under the terms of the contract with the employer.

(c) If neither subsections (3)(a) or (b) of this rule apply, the employee's service is not covered by a paid leave program in another state or territory, and the place from which the service is directed or controlled is in Oregon. Direction and control means basic authority and overall control rather than immediate supervision by a manager or foreman.

(d) If neither subsection (3)(a), (b), or (c) of this rule apply, the employee's service is not covered by a paid leave program in another state or territory, and the employee's residence is in Oregon.

Example 1: Robert lives in Vancouver, WA, but rides a motorcycle to work at a company in Southeast Portland. Because Robert's service is performed entirely within Oregon, all wages earned are considered performed in Oregon and are PFMLI subject wages for Oregon. The fact that Robert resides in Washington does not matter.

Example 2: A storm hits Idaho. An employer in Oregon dispatches Rick who typically lives and works in Oregon to help with repair work. Rick works on an isolated project in Idaho for the employer for two weeks, and then returns to work in Oregon. Rick's employment is considered performed in Oregon and all wages earned for work in both Oregon and Idaho

are PFMLI subject wages for Oregon.

Example 3: Shannon works for an employer located in Oregon but works remotely on a permanent basis from a home office in California. Shannon never performs any service in Oregon. Even though the work is directed from Oregon, the service is performed entirely at Shannon's home in California. Therefore, the wages earned by Shannon are considered performed in California and are not PFMLI subject wages for Oregon.

Example 4: Kaitlynn works for an employer located in Illinois but works remotely on a permanent basis from a home office in Oregon. Kaitlynn never performs any service in Illinois other than attending eight days of meetings a year, which is very temporary in nature. Even though the work is directed from Illinois, the service is performed entirely at Kaitlynn's home office in Oregon. Therefore, all of the wages earned by Kaitlynn while in Oregon and Illinois are considered performed in Oregon and are PFMLI subject wages for Oregon.

Example 5: Ganesh is a foreman in Oregon for an Oregon business for several years. Ganesh was moved from the Oregon job to a Texas job where Ganesh worked for seven months until the job was complete, at which time Ganesh returned to Oregon to continue work for the same Oregon employer. Although Ganesh was in Texas for seven months, the employee's regular work is in Oregon, and the Texas work was temporary in nature and incidental to the work performed in Oregon. Therefore, the place of performance is considered Oregon and all of Ganesh's wages earned for work in both Oregon and Texas are PFMLI subject wages for Oregon.

Example 6: Luis is a resident of Nevada and was hired by an Oregon business to work as a foreman on a Nevada job only. After the seven months of employment in Nevada, the work ends. Luis moves to Oregon and continues to work for the Oregon business on jobs throughout Oregon. While Luis was working entirely in Nevada, the wages were considered performed in Nevada and are not PFMLI subject wages. When Luis moved to Oregon and started performing work in Oregon as permanent employment, the place of performance switched to Oregon and all wages earned after the move become PFMLI subject wages for Oregon.

Example 7: Xann works for a major airline as a flight attendant and is based out of Portland, Oregon. Because Xann's work begins and ends in Oregon and the work outside of Oregon is incidental (temporary or transitory in nature) to the work within Oregon, Xann's place of performance is considered Oregon and all of the wages earned are PFMLI subject wages for Oregon.

Example 8: Ryan is a truck driver who leaves each week in an eighteen wheeler from their home base in Dillard, Oregon, picks up supplies in Northern California and delivers the supplies to Tacoma, Washington. Ryan performs some service in Oregon; driving up and down I-5, changing the oil in the eighteen wheeler and performing maintenance, as well as performing service in California and Washington. Ryan's base of operation is Dillard, Oregon, as the place they leave from and return to, and Ryan's wages are not covered under a paid leave program in Washington or California; therefore, the place of performance is considered Oregon. All of Ryan's wages earned in Oregon, California, and Washington are PFMLI subject wages for Oregon.

Example 9: Cameron is a salesperson who lives in Klamath Falls, Oregon and sells products in Oregon, California, and Nevada and whose employer is located in New York. Cameron works from the home in Klamath Falls where Cameron receives instruction from the employer and communicates with customers. Once a year Cameron travels to New York for a two-week sales meeting. Cameron's base of operations is in Oregon and service is performed in Oregon, California, and Nevada. Because Cameron performs service in the base of operation state, which is Oregon, all of Cameron's wages earned in Oregon, California, and Nevada are PFMLI subject wages for Oregon.

Example 10: Lois works for an Oregon employer that has retail stores in both Oregon and Washington. Lois works at both locations for an equal amount of time during the year. Lois's wages are not covered under Washington's paid leave program and Lois's work is directed from the Oregon headquarters. Therefore, all the wages earned by Lois in Oregon and Washington are considered PFMLI subject wages for Oregon as Lois's work is considered performed in Oregon where the work is directed or controlled.

Example 11: Kelley is a contractor whose main office is located in Idaho and is regularly engaged in road construction work in Oregon and Washington. All operations are under direction of a general superintendent whose office is also in La Grande, Oregon. Work in Oregon and Washington is directly supervised by field supervisors working from field offices located in each of the two states. Each field supervisor has the power to hire and fire personnel; however, all requests for additional staff must be cleared through the central office in La Grande. Kelley works regularly in Oregon and Washington. Because Kelley's work is not considered performed in another state, the base of operation is not in a state where Kelley works, but the direction and control comes from the central office in La Grande, Oregon, all the wages earned by Kelley in Oregon and Washington are considered performed in Oregon and are PFMLI subject wages for Oregon.

Example 12: Bre is a computer designer who works two days a week from home in Beaverton, Oregon and three days a week in the office in Vancouver, Washington. All of Bre's work is directed from the headquarters in Vancouver, Washington and Bre's wages are thus covered under Washington's paid leave program. All the wages earned by Bre teleworking in Oregon and in-person work in the Washington office are considered Washington wages and are not PFMLI subject wages for Oregon.

Example 13: Andrew works for a Washington employer that dispatches Andrew, who lives in Medford, Oregon, on calls to repair furnaces throughout Oregon, Idaho, and California. Andrew doesn't know where the work will be performed from day to day or each week. Andrew's work is directed from Washington, but no service is performed in Washington. The services performed in Idaho and California would be considered incidental to Andrew's service in Oregon. Since Andrew's residence is in Oregon, all of Andrew's wages earned in Oregon, Idaho, and California are considered Oregon wages and are PFMLI subject wages for Oregon.

Example 14: Theresa lives in Bandon, Oregon and is a member of a traveling circus that performs in Oregon, California, and Arizona. The circus is directed and controlled from Florida. Theresa performed only in Oregon and Arizona before getting a new job. There is no base of operation or direction or control in Oregon and Arizona where the work was performed. Because Theresa performed some service in Oregon where lived, and resides in Oregon, all of the wages earned in Oregon and Arizona are considered performed in Oregon and are PFMLI subject wages for Oregon.

STATUTORY/OTHER AUTHORITY: ORS 657B.340

STATUTES/OTHER IMPLEMENTED: ORS 657B.175

ADOPT: 471-070-3130

RULE TITLE: Contributions: Successor in Interest Unpaid Contribution Liability

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Clarifies when and how a successor in interest is liable for unpaid Paid Family and Medical Leave Insurance contributions.

RULE TEXT:

(1) If an employer fails to pay the Paid Family and Medical Leave Insurance (PFMLI) payroll contribution due within 10 calendar days of ending operations, as described in ORS 657B.150(14)(a), any person who becomes a successor in interest to the business is liable for the full amount of the unpaid PFMLI payroll contribution.

(2) For purposes of ORS 657B.150 and this rule, an employer is a total successor in interest when all or substantially all of the components parts of the business are transferred to or otherwise acquired by the successor in interest, including the employees necessary to carry on day-to-day operations and essential business functions in the same manner and for the same purposes as carried on prior to the acquisition or transfer.

(3) For purposes of ORS 657B.150 and this rule, an employer is a partial successor in interest when a distinct and severable portion of the business is transferred to or otherwise acquired by the successor in interest, including the employees of that portion of the business necessary to carry on day-to-day operations and essential business functions in the same manner and for the same purposes as carried on prior to the acquisition or transfer.

(4) Liability for unpaid contributions under this section shall be assessed as follows:

(a) When an employer acquires the trade or business as a total successor in interest that has an unpaid contribution balance due, the successor in interest is liable for the full amount of the unpaid PFMLI payroll contribution.

(b) When an employer acquires the trade or business as a partial successor in interest that has an unpaid contribution balance due, the predecessor is liable for the total unpaid PFMLI payroll contribution.

(5) Unpaid contributions assessed to the successor in interest shall be due immediately upon assessment.

STATUTORY/OTHER AUTHORITY: ORS 657B.150

STATUTES/OTHER IMPLEMENTED: ORS 657B.150

ADOPT: 471-070-3340

RULE TITLE: Contributions: Overpayment Refunds

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Clarifies when and how contribution, interest, fine, or penalty overpayments will be refunded by the department without interest.

RULE TEXT:

(1) Contributions, interest, fines, or penalties received in excess of the amount legally due and payable, shall be refunded by the department without interest.

(2) The department shall not refund for sums of \$10 or less unless requested in writing by the person who made the payment, or their legal representative, within three years of the date that the money was paid to the department, as provided under ORS 293.445.

STATUTORY/OTHER AUTHORITY: ORS 657B.340, ORS 293.445

STATUTES/OTHER IMPLEMENTED: ORS 293.445

ADOPT: 471-070-8540

RULE TITLE: Penalty Amount When Employer Fails to File Report

NOTICE FILED DATE: 06/29/2022

RULE SUMMARY: Clarifies when and how much of a penalty will be assessed to an employer who fails to report all required contributions timely.

RULE TEXT:

(1) If an employer fails to file all required reports within the time period described in ORS 657B.920(2), the department may assess a late filing penalty in addition to any other amounts due.

(2) The penalty shall be 0.02 percent of the employer's employees total Paid Family and Medical Leave Insurance (PFMLI) subject wages for the late report rounded to the nearest \$100. If the penalty is calculated to be less than \$100, the amount will be the minimum \$100.

Example: Athena's Yoga and Piyo Studio has 20 employees with total PFMLI subject wages for first quarter of 2024 of \$120,000. Athena does not file the 2024 Oregon Quarterly Tax Report for the first quarter. The department sends a written notice warning on May 10, 2024, to Athena's Yoga and Piyo Studio, but they do not correct the deficiency by filing the needed report. A penalty of \$24 ($0.0002 \times \$120,000$ PFMLI subject wages) is calculated by the department. But since the minimum penalty is \$100, the penalty imposed by the department is \$100.

STATUTORY/OTHER AUTHORITY: ORS 657B.340

STATUTES/OTHER IMPLEMENTED: ORS 657B.92