Presiding Officer's Report to Agency on Rulemaking Hearing

Date: November 22, 2022

To: David Gerstenfeld, Acting Director

From: Anne Friend, OED Rules Coordinator

Subject: Presiding Officer's Report on Rulemaking Hearing – Paid Leave Oregon Batch 4 Appeal Rules

Public Hearings and Public Comment Period

Meeting Type	Hearing Date and Time	Hearing Location
Public Hearing	July 21, 2022, 10 a.m. to Noon	Virtual via Zoom
Public Hearing	July 23, 2022, 9 to 11 a.m.	Virtual via Zoom
Public Hearing	July 26, 2022, 4 to 6 p.m.	Virtual via Zoom
Public Comment Period	July 1 through August 1, 2022, at 11:59 pm	Submitted in writing via email.

Notice Filings (OAR 471-070-*)

Notice Number	Rule Numbers
Notice – Appeals	471-070-8005, 8010, 8015, 8020, 8025, 8030, 8035, 8037, 8040, 8045, 8050, 8055, 8060, 8065, 8070, 8075, 8080

Contents

Hearings Report

There were three rulemaking hearings on the proposed rules for the Paid Leave Oregon Division's Batch 4 administrative rules related to appeals, benefits, contributions, and equivalent plans. These hearings covered four notice of proposed rulemaking filings that the Department filed on June 29, 2022, with the Secretary of State's Office. All hearings were held virtually via the Zoom platform and recorded for the official record. At each hearing, I read the rulemaking information into the record and then began the hearings. Below, is a summary of each hearing and a summary of any comments received on the draft administrative rules related to appeals. The public comment period for this rulemaking effort was opened on July 1, 2022, and closed at 11:59 p.m. on August 1, 2022. This report covers only those comments related to appeals and contributions. A separate report will cover public comments received related to appeals, equivalent plans, and a Batch 5 report will cover benefits.

Public Hearing #1 – July 21, 2022

The first public hearing for the Batch 4 administrative rules took place on Thursday, July 21, 2022, from 10 a.m. - noon. The hearing occurred through Zoom and was recorded as part of the official record. Participants put their name in the Q & A or raised their hands within the Zoom meeting to comment on the proposed rules. There were 384 individuals registered to attend and 248 actually attended the hearing. Of the attendees, 11 different attendees provided testimony during the hearing on the draft administrative rules. Seven different attendees asked general questions about the program not specific to the administrative rules. A summary of the comments on the draft administrative rules can be found in the table below and in "Exhibit 001" attached.

Public Hearing #2 – July 23, 2022

The second public hearing for the Batch 4 administrative rules took place on Saturday, July 23, 2022 from 9 – 11 a.m. The hearing occurred through Zoom and was recorded as part of the official record. Participants put their name in the Q & A or raised their hands within the Zoom meeting to comment on the proposed rules. There were 44 individuals registered to attend and nine actually attended the hearing. Of the attendees, two attendees provided testimony during the hearing on the draft administrative rules. A summary of the comments on the draft administrative rules can be found in the table below and in "Exhibit 002" attached.

Public Hearing #3 – July 26, 2022

The third public hearing for the Batch 4 administrative rules took place on Tuesday, July 26, 2022 from 4 – 6 p.m. The hearing occurred through Zoom and was recorded as part of the official record. Participants put their name in the Q & A or raised their hands within the Zoom meeting comment on the proposed rules. There were 138 individuals registered to attend and 56 actually attended the hearing. Of the attendees, five attendees provided testimony during the hearing on the draft administrative rules. Three different attendees asked general questions about the program not specific to the administrative rules. A summary of the comments can on the draft administrative rules can be found in the table below and in "Exhibit 003" attached.

Public Comment Period – July 1, 2022 – August 1, 2022

The Notice of Proposed Rulemaking and Statement of Need and Fiscal Impact filing for the Batch 4 administrative rules was published in the Oregon Bulletin on July 1, 2022. Between July 1 and 11:59 p.m. on August 1, 2022, the public comment period was open for the public, interested parties and groups, and legislators to submit comments on the draft administrative rules. Comments and questions were primarily received and recorded by staff via the Rules@employ.oregon.gov email box. Any comments received regarding the Paid Leave Oregon Batch 4 administrative rules in other email boxes were subsequently forwarded to the Rules email box and recorded.

During the public comment period, the Department received written testimony from 20 different individuals or groups. Of the 20 written testimony received, three were comments solely about the general program, and are not included in the summaries. Summary of the testimony received specifically regarding Paid Leave Oregon Batch 4 administrative rules related to appeals can be found in the table below under the rule(s) the testimony was provided for. The exact comments can be found in the attached exhibits.

Summary of Comments Received on and Responses for Paid Leave Oregon Batch 4 Administrative Rules Related to Appeals

Rule Number	Name & Affiliation	Exhibit Number	Comment Summary	Responses	Rule Change – Yes/No
471-070-8005 – Appeals: Request for Hearing	Lisa Kwon, Time to Care Oregon Coalition	020	Support ability to request a hearing without completing a specific form.	Support for administrative rule as written, no changes needed.	No
	Laurie Hoefer, Legal Aid Services of Oregon; Julie Samples and David Henretty, Oregon Law Center	016	(1) Oppose as need to define "otherwise expresses intent to appeal" to include contacting department with questions/concerns about denial of benefits or correspondence received. Support alternative methods to request hearing.	Not all persons with questions or concerns about a Paid Leave Oregon decision or correspondence received will want to appeal. They may just need further clarification to understand the decision. If they do express a desire to appeal, the department does not require a form to be filed requesting an appeal and will consider the expression a request for an appeal.	No
	Cassandra Gomez, A Better Balance; Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center;	006, 016, 020	(2) Support 60 days to file request for hearing for benefits and ability to file on website.	Support for administrative rule as written, no changes needed.	No

	Lisa Kwon, Time to Care Oregon Coalition				
	Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center	016	(2) Oppose as the hearing may be requested by text and auto response confirming submission be sent for hearing requests sent by email, text, and secured website.	The Paid Leave Oregon Division will consider accepting communication by text in the future with technology and infrastructure changes.	No
	Lisa Kwon, Time to Care Oregon Coalition	020	(5) Support non-contested benefit payments will not be stayed following a request for hearing.	Support for administrative rule as written, no changes needed.	No
471-070-8010 – Appeals: Assignment to Office of Administrative Hearings	Lisa Kwon, Time to Care Oregon Coalition	020	Oppose as strongly recommend revisiting which parties may request hearings and clarify parties to a hearing will differ depending on the grounds for the hearing so it aligns with statute.	Added clarification in OAR 471-070-8005 to specify entities entitled to request a hearing.	Yes
	Aruna Masih, OR State Fire Fighters Council	018	(2) Oppose as ALJ should not dismiss if there is new evidence that wasn't available previously.	Allowing another hearing because new evidence is available could lead to potential multiple hearings on the same issue for the same party.	No
	Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center	016	(3) Oppose as recommend a process to request copies from the department for the documents and records.	Information on how to request copies from the Paid Leave Oregon Division will be included in the letter.	No
471-070-8015 – Appeals: Contested Case Proceedings	Cassandra Gomez, A Better Balance;	006, 020	(2)(a) Oppose as allow a person who prefers to speak in a language other than	The Paid Leave Oregon Division will work with the Office of Administrative Hearings	No

Interpretation for Non-English-speaking Persons	Lisa Kwon, Time to Care Oregon Coalition		English, be allowed to request an interpreter.	on potential changes to interpretation options for contested case hearings.	
	Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center	016	(2)(a) Oppose as a non-English speaking person shall be able to determine whether able to adequately communicate in English, not the department.	Determination for the need of interpreter is not at the discretion of the Paid Leave Oregon Division, but rather at the discretion of the requestor.	No
	Lisa Kwon, Time to Care Oregon Coalition	020	(2)(b) Support comprehensive definition of "qualified interpreter".	Support for administrative rule as written, no changes needed.	No
	Cassandra Gomez, A Better Balance	006	(4)(a) Oppose as limit the ability to appoint interpreter that is not certified and ability to request a different interpreter due to dissatisfaction, to that of the requesting party.	A certified interpreter may not be available in every language needed for interpretation. To protect all parties, ability to request a different interpreter should be open to any party to the hearing and ultimately determined by the administrative law judge.	No
	Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center	016	(4)(d) Oppose as requiring ALJ to appoint a different interpreter if party or witness is dissatisfied, rather than being permissive, and to inform non-English speaking persons of ability to request a different interpreter.	Changed "may" to "will".	Yes
	Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David	016	(4)(e) Oppose as a Non-English speaking person should have access to a substitute interpreter to assist the ALJ when	The Non-English speaking person may let the qualified interpreter know they are not satisfied and would like a new interpreter. The administrative law judge	No

	Henretty, Oregon Law Center		determining if good cause exists in requesting change of interpreter.	will determine if a substitute interpreter is needed.	
	Lisa Kwon, Time to Care Oregon Coalition	020	(4)(f) Oppose as concerned with the burden to the worker hiring a substitute interpreter for reasons beyond good cause. Costs for a substitute interpreter should be covered by the department.	The Paid Leave Oregon Division will work with the Office of Administrative Hearings on potential changes to reasons allowed for a substitute interpreter.	No
	Jan Montes, Caregiver; Dahlia Andrite, Family Forward	002, 003	(5) Oppose as add subsection requiring cultural competency training and knowledge for the interpreter.	ORS 45.291 defines the qualification needed for a certified interpreter. The Paid Leave Oregon Division feels this is beyond our authority to define the qualifications further.	No
	Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center	016	(5) Oppose as clarify formal experience as an interpreter is not necessary for an interpreter who can interpret adequately.	A qualified interpreter does not need to be a certified interpreter, the rule states the administrative law judge just considers these factors.	No
	Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center	016	(7) Oppose as need more guidance as to what qualifies the department to be "on notice" of need for interpreter. Filing of application for benefits in English doesn't assume claimant speaks English.	Changed rule to "is not on notice" to "does not have knowledge".	Yes

	Cassandra Gomez, A Better Balance; Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center; Lisa Kwon, Time to Care Oregon Coalition	006, 016, 020	(7)(b) Oppose as recommend reducing the number of days to request an interpreter from 14 days to 7 days.	The Office of Administrative Hearings needs time to coordinate the assignment of the interpreter. As well, the administrative law judge has the authority to waive the 14 calendar day notice as specified in (7)(c).	No
	Cassandra Gomez, A Better Balance; Laurie Hoefer, Legal Aid Services of OR; Julie Samples and David Henretty, Oregon Law Center; Lisa Kwon, Time to Care Oregon Coalition	006, 016, 020	(7)(c) Support waiver of advance notice for good cause; however, oppose as would like a broader definition of "good cause". Specify in notice with appeal rights what deadline is to request interpreter.	The model rule [OAR 137-003-0590(6)(a)] does not define good cause. The Paid Leave Oregon Division will monitor this concern and may make changes in the future. The Paid Leave Oregon Division will consider including method to request an interpreter in the letters.	Yes
471-070-8020 – Appeals: Contested Case Proceedings Interpretation for Individuals with a Disability	Cassandra Gomez, A Better Balance; Lisa Kwon, Time to Care Oregon Coalition	006, 020	Oppose as recommend adding requirement for the department to notify OAH when person with disability needs interpreter or assistive communication device, similar to the	Added language from OAR 471-070-8015 to clarify the department must notify Office of Administrative Hearing of a need for interpreter or assistive communication device when the department has knowledge of the need.	Yes

			notice required for non-English-speaking person in OAR 471-070-8015.		
	Lisa Kwon, Time to Care Oregon Coalition	020	(3)(a) Oppose as recommend that only the requesting party may waive their right to a certified interpreter.	A certified interpreter may not be available in every language needed for interpretation. To protect all parties, ability to request a different interpreter should be open to any party to the hearing and ultimately determined by the administrative law judge.	No
	Lisa Kwon, Time to Care Oregon Coalition	020	(3)(c) Oppose as the only person who requested an interpreter may request a substitute interpreter.	A certified interpreter may not be available in every language needed for interpretation. To protect all parties, ability to request a different interpreter should be open to any party to the hearing and ultimately determined by the administrative law judge.	No
	Cassandra Gomez, A Better Balance; Lisa Kwon, Time to Care Oregon Coalition	006, 020	(5) Oppose as recommend reducing the number of days to request interpreter from 14 to 7 days.	The Office of Administrative Hearings needs time to coordinate the assignment of the interpreter. As well, the administrative law judge has the authority to waive the 14 calendar day notice as specified in (5)(a)	No
471-070-8025 – Appeals: Late Request for Hearing	Cassandra Gomez, A Better Balance	006	Support "good cause" inclusion of incapacity or limiting health condition.	Support for administrative rule as written, no changes needed.	No
	Lisa Kwon, Time to Care Oregon Coalition	020	Oppose as recommend including examples for other sources of good cause such as employee is out of state and does not receive determination.	The draft rule allows for Office of Administrative Hearings to determine if good cause exists. If going to be at another address for a long period of time, the claimant should update their address with the Paid Leave Oregon Division.	No

471-070-8030 – Appeals: Notice of Hearing	Cassandra Gomez, A Better Balance; Lisa Kwon, Time to Care Oregon Coalition	006, 020	(2) & (3) Oppose as include claim, benefits decision, and determination in relation to disqualification for benefits or repayment of benefits be included as reasons an employee may file a claim.	Revised rule to clarify it is for anything related to benefits.	Yes
	Jan Montes, Caregiver; Dahlia Andrite, Family Forward	002, 003	(2) Oppose as recommend including notice provided to employee verbally – may not understand written notice.	The notice of hearing is the Office of Administrative Hearing process. Will continue to work with Office of Administrative Hearings to determine if other processes are needed.	No
	Bridget Caswell, Sedgwick	008	(2) Oppose as employer and Third-Party Administrator need to know status of claim for job protections.	Employer will be notified if there is a change to the claimant's Paid Leave Oregon status, but the employer or third-party administrator is not a party to the appeal. The Division is still working through how job protection would work.	No
	Cindy Goff, American Council of Life Insurers	015	(2) Oppose as plan administrators are not listed in parties to be notified of hearing.	Plan administrators are not a party to contested case hearings of Paid Leave Oregon administrative decisions. Plan administrators will be notified if there is a change to the claimant's Paid Leave Oregon status after the hearing.	No
	Aruna Masih, OR State Fire Fighters Council	018	Oppose as want opportunity for labor organization to intervene in contested case hearing.	Added additional representatives, including union representative, in OAR 471-070-8050(5)(b).	Yes
471-070-8035 – Appeals: Subpoenas	Aruna Masih, OR State Fire Fighters Council	018	Oppose as there is no reference of right for circuit court to enforce subpoenas.	Added new section (8) with enforcement of subpoena in circuit court copied from model rule.	Yes

471-070-8037 – Appeals: Individually Identifiable Health Information	Lisa Kwon, Time to Care Oregon Coalition	020	Support rule as written.	Support for administrative rule as written, no changes needed.	No
471-070-8040 – Appeals: Postponement of Hearing	Lisa Kwon, Time to Care Oregon Coalition	020	Support rule as written.	Support for administrative rule as written, no changes needed.	No
471-070-8045 – Appeals: Telephone and Video Conference Hearings	Aruna Masih, OR State Fire Fighters Council	018	(4) Oppose as employees may not be able to meet the tight timeline to submit exhibits 7 days prior to hearing when hearing notice may be 14 days in advance giving only 7 days to prepare.	Employees have from the time they request a hearing until 7 calendar days prior to the hearing to gather exhibits. Less than 7 calendar days does not give the claimant or department enough time to review the other party's exhibits. Additional evidence can be introduced during the hearing.	No
	Lisa Kwon, Time to Care Oregon Coalition	020	Support rule as written.	Support for administrative rule as written, no changes needed.	No
471-070-8050 – Appeals: The Hearing	Aruna Masih, OR State Fire Fighters Council	018	(5)(d) Oppose as ALJ explanation to unrepresented party should be on the record.	The hearing is recorded and the ALJ explanation is part of the record.	No
	Aruna Masih, OR State Fire Fighters Council	018	(6) Oppose as reference to in camera review on privilege issues should be included.	It is unclear why evidence would be privileged and not made part of the hearing in a Paid Leave Oregon contested case hearing. Camera review of evidence has not been a concern in unemployment insurance contested case hearings. The Division will monitor and revise if there is an issue.	No

	Aruna Masih, OR State Fire Fighters Council	018	(7) Oppose that ALJ may offer evidence. ALJ is decision maker.	Edited draft rule to remove ALJ may offer evidence.	Yes
	Lisa Kwon, Time to Care Oregon Coalition	020	Support rule as written.	Support for administrative rule as written, no changes needed.	No
471-070-8055 – Appeals: Continuance of Hearing	Lisa Kwon, Time to Care Oregon Coalition	020	Support rule as written.	Support for administrative rule as written, no changes needed.	No
471-070-8060 – Appeals: Office of Administrative Hearings Transmittal of Questions	Lisa Kwon, Time to Care Oregon Coalition	020	Support rule as written.	Support for administrative rule as written, no changes needed.	No
471-070-8065 – Appeals: Administrative Law Judge's Decision	Cassandra Gomez, A Better Balance; Lisa Kwon, Time to Care Oregon Coalition	006, 020	(4) Oppose as suggest requiring notice of ALJ decision include further appeal rights.	ORS 183.470 requires a final order to include statutes under which the order may be appealed, therefore the notice is required by statute to include further appeal rights.	No
	Aruna Masih, OR State Fire Fighters Council	018	(4) Oppose as request ALJ notice include section on evidentiary rulings.	Added a new (d) for evidentiary rulings to include or exclude evidence.	Yes
471-070-8070 – Appeals: Dismissals of Requests for Hearing	Cassandra Gomez, A Better Balance; Lisa Kwon, Time to Care Oregon Coalition	006, 020	(4) and (6)(a) Oppose as recommend extending period for party to request hearing be reopened when dismissed by ALJ or Director, from 20 days to 60 days.	OAR 471-070-8080 provides for a late request, with good and sufficient cause, to reopen a hearing. A party unable to timely request reopening of a hearing could make a late request within 7calendar days after the cause of inability to request a timely hearing has ended.	No

	Aruna Masih, OR State Fire Fighters Council	018	(3)(a) Opposes as should cross reference good cause. Dismissal should only be permitted if party filed late and has no good cause for late filing.	Revised rule to add the ALJ can dismiss for untimely request filed without a statement of good cause as required by OAR 471-070-8025(3) in a late request for hearing.	Yes
471-070-8075 – Appeals: Reopening of a Hearing	Cassandra Gomez, A Better Balance; Lisa Kwon, Time to Care Oregon Coalition	006, 020	(2)(b)(B) Oppose as recommend deleting subsection which does not include failure to understand implications of a decision or notice to be considered "good cause". Alternative to deletion is to include additional qualifier language related to serious health condition impairing ability to understand.	Added clarification in (2)(a)(C) to include impaired ability to understand the decision or notice, due to health condition.	Yes
	Lisa Kwon, Time to Care Oregon Coalition	020	Oppose as recommend including examples for other sources of good cause such as employee is out of state and does not receive determination.	The draft rule allows for Office of Administrative Hearings to determine if good cause exists and the items listed are just some examples where good cause could exist. If going to be at another address for a long period of time, the claimant should update their address with the Paid Leave Oregon Division.	No
471-070-8080 – Appeals: Late Request to Reopen Hearing	Cassandra Gomez, A Better Balance; Lisa Kwon, Time to Care Oregon Coalition	006, 020	(2)(b)(B) Oppose as recommend deleting subsection which does not include failure to understand implications of a decision or notice to be considered "good cause". Alternative to deletion is to include additional qualifier language related to serious health	Added clarification in (2)(a)(C) to include impaired ability to understand the decision or notice, due to health condition.	Yes

			condition impairing ability to understand.		

General Comments:

Rule Number	Name & Affiliation	Exhibit Number	Comment Summary	Responses	Rule Change Yes/No
General Rule Comments	Daris Freeman, Unum; Bridget Caswell, Sedgwick	001, 008	Comment - Clarify whether reference to "days" is calendar or business days.	Clarified within the rules to clarify it is calendar days.	Yes
	Jessica Berdaguer, Swire Coca-Cola	001	Comment – Employers need more guidance on intermittent leave and what the letter provided by the state would tell the employer about the employee on leave.	The Paid Leave Oregon Division is still assessing the precise information that will be provided to employers, including the weekly benefit amount, dates of leave, etc. after an employee files a Paid Leave Oregon benefit application. The Division will take this feedback into consideration.	No
	Carol Reynolds, Coast Property Management	010	Comments - FMLA/OFLA leave should be used concurrently with Paid Leave Oregon leave. Employers should have access to state leave cases to record intermittent days the employee uses. Employee should be required to use accrued leave before using paid leave. Employee should make weekly claim similar to Unemployment Insurance.	The Paid Leave Oregon Division will take these comments into consideration when determining what information the employer should receive when an employee is on leave. If an employee's leave duration or work days change after the application is approved, they must submit a change request.	No

	Daris Freeman, Unum	011	Additional rules or guidance needed: ● Paid Leave Oregon interaction with OFLA ● Details on 2-week pregnancy entitlement ● Clarify how periods of holidays, school breaks, and manufacturing shut-downs will affect Paid Leave benefits ● Clarify whether qualifying events that began prior to 9/3/2023 will be eligible for benefits immediately	The Paid Leave Oregon Division appreciates the additional list and will continue to work on these items by either drafting an administrative rule(s), rule amendments, or include in instructions or guidebooks.	No
General Rule Comments	Sue Noebe, Rimini Street, Inc.;	004	Suggestion - Recommend clarify subject wages are UI wages up to $132,900 (or indexed limit) as the definition of wages is confusing.	The definition of wages were included in Batch 1 administrative rules; however, additional clarification will be provided in the employer guidebook that Paid Leave Oregon wages are the same as UI wages.	No
	Daris Freeman, Unum	001	Suggestion - Clarify how employee contribution limit works for equivalent plans – 60% of the state plan or 60% of the equivalent plan cost?	Per ORS 657B.200(5) the equivalent plan employer may assume all or part of the cost of the plan; however, the employee cannot pay more than 60% from what they would have paid under the state plan.	No

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Commenter	Commenter Affiliation	Rule Number	Summary Comments
Cassandra Gomez	A Better Balance	471-070-2205 - Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan	While many of the regulations regarding Equivalent Plans will work well as proposed, we suggest modifying many of these to make sure the department maintains proper oversight of employers with Equivalent Plans. In particular paragraph 4, which allows employers to submit a declaration of intent, be removed from its entirety. Employers should not have a workaround for not submitting equivalent plan applications on time. Employers without approved equivalent plans should adhere to the state PFMLI.
		471-070-1330 - Benefits: Job Protection	Amend paragraphs 1 and 8 so they are restored to how they were written in the last draft to require employers restore employee to previous position regardless of whether the employee is taking consecutive or nonconsecutive leave.
Breanna Scott	New York Life	471-070-2205 - Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan	Please look at how long the Declaration of Intent process can be used. The timeframe the rulemaking is taking, it is unlikely the employer will have a fully drafted policy prior to November will be tricky. Recommend use the Declaration of Intent process up until May 31st. (3)(a) of the rule is confusing if this also applies to the Declaration of Intent or not.
Daris Freeman	Unum	All rules	All the rules that reference days, make sure to clarify if they are calendar days or business days.
		471-070-1330 - Benefits: Job Protection	Not seeing anything that ties employee's requirement to provide the employer proper notice to their rate to restoration. Employee could not provide notice and still have job protections. Would like to see some type of tie between the notice requirements and restoration positions.
		471-070-2205 - Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan	Section 4(a)(A) - The employer "shall" deduct employee contributions beginning January 1, 2023. Recommend changing to "may" as some employers may not want to collect contributions from the employee prior to the equivalent plan starting.
		471-070-3040 - Contributions: Withholding of	Beginning January 1 2024 if an employer does not collect contributions they are liable but contributions begin January 1, 2023 so don't know if there is a typo or allowed the first year to retroactively deduct if they missed it.

		Employee Contributions	
		471-070-3040 - Contributions: Withholding of Employee Contributions	Section (1) says employers can't deduct more than the 60% of the contribution rate. The outstanding question is what does that mean for equivalent plans when the equivalent plan costs more than the state plan, can they still get 60% of the higher rate or 60% of what they would pay to the state or what the cost of the plan is?
Andrea Denton	City of Pendleton	471-070-3040 - Contributions: Withholding of Employee Contributions	If employer fails to deduct contributions then they cannot deduct from future earnings. Why not? Does that mean that the employer has to pay the employee contribution? If it is an oversight you cannot deduct it in a future check?
		471-070-1330 - Benefits: Job Protection	If an employee does not give employer notice, that feels like a substantive gap in the rules. Know intention is for OFLA and Paid Leave Oregon to run concurrently. Leave may be different from OFLA and should have notice to the employer requirement.
Paloma Sparks	Oregon Business and Industry	471-070-1330 - Benefits: Job Protection	Notice and job protections and agrees with Daris's comments previously. There is fear that employees will not tell the employer they are out on Paid Leave Oregon and will no show/no call and then later will claim job protection rights. They need to be more clearly linked.
		471-070-3100 - Contributions: Place of Performance	This is very complicated topic. The communication we've had about how we treat people who work remotely has been confusing and the rules don't address reality what the employers are facing. You have some employees working remotely some of the time and some of the time at the place of work. (e.g., 3 days at home and 2 days a week in the home). That is not incidental and doesn't fit. Make sure the rule is clear on that and make sure we aren't doing anything different from other states (Washington and California).
Jessica Berdaguer	Swire Coca-Cola	471-070-3100 - Contributions: Place of Performance	Mirror the comments earlier about the rules around work as we have employees working in Washington and Oregon and the rules are confusing.
		471-070-1330 - Benefits: Job Protection	Mirror the concerns raised about the gap in coordinating it with FMLA. This is the problem with Washington right now of knowing the reason for the leave and seeing if the leave qualifies.

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Mark Seibert	Employer in Portland, Oregon	General Rule Comment	How will the rulemaking allow for investigation, detection, and any civil actions that need to be taken when a claimant is fraudulently getting paid leave without having a vaild reason so it can be minimized or not happen? There will be people who will try to scam the system and a lot of good money could leak out with fraud.
Breanna Scott	New York Life	471-070-2230 - Equivalent Plans: Reporting Requirements	Section (3) of the rule, several questions on how would an employer track administrative costs and why is it important to the program? The premiums and contributions withheld make sense but administrative costs are confusing for employers to figure out and how to report.
		471-070-2230 - Equivalent Plans: Reporting Requirements	Section 3 of the rule that refers to balance of benefits approved but not paid is an odd thing for an employer to be able to track. This would be a difficult data point for employers to track and administrators to be able to track.
Daris Freeman	Unum	471-070-1300 - Benefits: Written Notice Poster to Employees of Rights and Duties	Section (2)(a) of the rule describes or poster "approved by the department". A lot of employers will take the poster/notice the department publishes and may want to customize it with their own information. I don't know if the department will want to see or approve all of them. It might be better to include a list of what data elements need to be included instead of looking every customized poster.
		471-070-2270 - Equivalent Plans: Proration of Benefit Amounts for Simultaneous Coverage	Section (3) of the rule the statement around prorating by the current days worked for each plan. Still working through scenarios and don't have a brilliant solution but don't know if this proration will truly work. Not sure workdays will provide the proration under the statute. Thinking through some other ideas and will provide them in the written comments.
Susan Hoeye	State of Oregon HR Legislature	471-070-1300 - Benefits: Written Notice Poster to Employees of Rights and Duties	Section (2)(b) of the rule states the notice needs to be sent through hand delivery or regular mail. Suggest reconsidering adding email as a way to send the notice.
Alli Schafsmaa	Brown and Brown Brokerage	471-070-1330 - Benefits: Job Protection	Section (6)(a) relating to an employer maintaining employer health care coverage. Clarify the wording that the employee pays only the same share should be clarified to the employee pays same share of premium costs that would have been required if not on leave. Will address if an employee is on leave over a new benefit year it will insure the employee is paying the appropriate amount if not on leave.

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Brycie Repphun	Represent Employers in the State of Oregon	471-070-2205 - Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan	Section (4)(a) of the rule, would like to make sure I understand the Declaration process for the equivalent plans. Is it true that the employer must submit the intent by November 30 to avoid paying contributions to the state starting January 1, 2023; however the employer must still deduct employee share of contributions in case the equivalent plan is not approved. Am I seeing that correctly within the rule?
		471-070-2205 - Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan	Are you expecting an employer to hold premiums in trust if the employer has decided they will cover the cost of the premiums for the employees?
		471-070-2205 - Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan	Can employers who plan to have an equivalent plan deduct contributions from employees beginning 1/1/23 like the state plan even though their plan doesn't begin until September?
Jessica Bolar	Standard Insurance	471-070-2205 - Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan	Section (4)(a) of the rule clarify the premiums collected in trust from the employee is for self-funded programs and not fully insured programs or readjust or ability to have fines and owe retroactive. How the employers come up with the funds is more for the employer and not affect the employees.
Sarah Ewing	TriMet	471-070-3100 - Contributions: Place of Performance	Due to telework, should consider a reciprocity agreement with Washington to make sure all employees are covered (e.g., workers comp has a reciprocity agreement). Have you worked with Washington?
Jaqueline Shipman	Southwestern Oregon Community College	471-070-3040 - Withholding of Employee Contributions	Paid Leave Oregon has the same definition as wages as Unemployment Insurance but the rule references "subject wages". Want to clarify wages and subject wages are the same thing?

Commenter	Commenter Affiliation	Rule Number	Comment Summary
Jan Montes	Caregiver	471-070-8015 - Appeals: Contested Case Proceedings Interpretation for Non-English-Speaking persons	Expand section (5) to require training and knowledge around cultural competency for the interpreter. I know that a lot of things are covered there, but i really feel strongly about that and that it addresses the factors in which an administrative judge would consider when choosing a qualified interpreter. The reason I say that is because sometimes we have these interpreters in our midst and I've been involved with them quite a bit in the community and in particular the Spanish speaking community in Oregon for many years and I noticed that we have highly trained people that can interpret and do it in a manner that is very technical. Have to remember that might not be relatable for everybody, the technical piece, and it might be very difficult to understand. So it's not just making sure that we have people who are able to interpret like that, as need to have culture competency and specific training. We might ant to know how long they have been in our community. Which in Oregon, the majority of the Latinos here or Hispanics some people say are from farm worker communities and may not have particular educational background to speak at higher level, just like any other community and we need to pay attention to that.
		471-070-8030 - Appeals: Notice of Hearing	I have some learning disabilities and I have noticed that other people have as well, when something is posted in certain situations, like rules, people tend to glaze over them. Providing access to somebody who can explain things or talk it over in a verbal manner, or a video explaining; otherwise I don't think people will understand exactly what is on the notice. If documents are sent via email, that could be difficult as emails get buried or others don't have email. So, in addition to displaying and emailing copies, in different languages, a more personalized method would be really important to workers. Workers should receive verbal notice from their employer, maybe with the Human Resources department. The places I have felt most comfortable with are who had accessible Human Resource department where I could call upon someone to guide me through and someone who understand the process and marginal communities will be more aware of their rights when they receive verbal notice instead of written. And further more in communities who are marginalized, there are many places they can turn to that speak and talk the way they are speaking. That might be able to support them understanding these rules.
Lisa Kwon	Family Forward Oregon	471-070-2205 - Equivalent Plans: Declaration of Intent to Obtain Approval of	Concerned with section (4). We believe that there should not be a work around solution or exception for employers who fail to meet their applications for equivalent plans in a timely manner, and we believe that employers who fail to comply with the rules and the deadlines shouldn't be operating or managing an equivalent plan. That is such an important benefit for workers. Especially paragraph 4A sections 1 & 2 requires employers to have submitted a Declaration of Intent to withhold contributions

		Equivalent Plan	from workers without submitting any contributions to the Department and we believe this contradicts the statute that states that all employers should submit employee and employer contributions unless they have an approved equivalent plan. Concerned around the Declaration of Intent in general because it's not specified in statute but particularly in Paragraph 4 and, if for whatever reason, the agency wants to keep the Declaration of Intent in the rules, then we at least recommend specifying that this is an interim solution and specifying when this solution or exception would end in the rules.
		471-070-2230 - Equivalent Plans: Reporting Requirements	Noticed that approved equivalent plans, or the word "approved" was deleted. We strongly recommend going back and putting back "approved" equivalent plans in this section.
		471-070-3040 - Contributions: Withholding of Employee Contributions	Just a minor comment, we think there is a typo here as section (2) states January 1, 2024 but we think you mean January 1, 2023; which is when contributions begin.
		471-070-1300 - Benefits: Written Notice Poster to Employees of Rights and Duties	This is a joint comment regarding written notice to employees of their rights and duties for both benefits and equivalent plans. There was an edit that deleted the line, "An employer's failure to display or provide notice as required under this rule is an unlawful employment practice as provided ORS 657B.070". Even though this is specified in the statute we recommend putting that line back in the rules. Just for extra clarity and a reminder that, that is a consequence for failing to display written notice of workers' rights.
		471-070-1330 - Benefits: Job Protection	Section (1) there was an edit that removed "regardless of whether that worker is taking consecutive leave or non-consecutive leave". Looked in the statute and didn't see a line that stated consecutive or non-consecutive leave so I was just wondering if Shannon you had a follow up on that or we can take it to email. But that was my only question as to why it was removed.

Commenter	Commenter Affiliation	Rule Number	Comment Summary
Teresa Hoard-Jackson	SEIU	471-070-1300 - Benefits: Written Notice Poster to Employees of Rights and Duties	SEUI enthusiastically supports portions of the proposed rules and would like to suggest some changes in favor of worker wellbeing. We have four major concerns with the proposed rules. A previous deleted line of section (6) stated "an employer's failure to display or provide notice as required under this rule is an unlawful employment practice as provided in ORS 657B.070". SEIU strongly recommends restating this line so that it restores employee's right to a lawful workplace, holds employers accountable for failure to provide written notice of workers' rights, and gives employees recourse when this rule is violated.
		471-070-1330 - Benefits: Job Protection	Section (4) currently defines "equivalent position" as "a position that is virtually identical to the employee's former position in terms of employment benefits, pay, and working conditions, including privileges, perks and status." This current definition neglects to mention location as a guaranteed right when defining the type of position to which an employee can be restored. Therefore, SEIU strongly recommends adding location and within 20 miles to the rules when describing the employee's current or virtually equivalent position to ensure further job protection under the Paid Leave program. By not being specific about the location and job site radius, employers could place employees far away from their former job site, forcing many to relocate in order to keep their job which adds an increased financial and resource burden on workers. If moving is impractical or unaffordable people would be able to take the equivalent position which would in effect, force workers to quit. This is contrary to the spirit of the law.
		471-070-1330 - Benefits: Job Protection	Section (7) currently allows an employer to require the employee to follow the employers established leave policy of reporting any leave changes to their status. Requiring an employee to frequently report their status while on leave places undue restriction on the employee when they need it most. We believe this restriction was not originally intended by the Paid Leave Family statute, so it should be appropriately reevaluated to give the employee more time to dedicate to caring for themselves or their loved ones.
		471- 070-1560 - Benefits: Disqualification and Penalties for	SEIU strongly opposes, and recommends the removal of section (4). In short, workers should not be at fault for overpayment from the agency if all relevant information was submitted to the department. The current formulation of the rules will financially harm low income claimants if the

		Claimant Misrepresentation	Employment Department does not properly use their tools to determine benefits.
Dalia Andrade	Family Forward Oregon	471-070-8015 - Appeals: Contested Case Proceedings Interpretation for Non-English-Speaking persons	Section (5) addresses the factors in which an administrative judge should consider when choosing a qualified interpreter. I strongly recommend adding a subsection also requiring trained or knowledge around cultural competency for the interpreter. Growing up, I often interpreted for my parents. Spanish was their first and primary language. I also had clinical experience as a volunteer interpreter with Salem free clinics. Throughout my experience I have learned how important it is to have empathy. I was an interpreter communicating the patients' needs, and being a true voice is a critical part of interpreting. Part of that requires an understanding of the persons' culture, understanding cultural nuances, that is why empathy and culture responsiveness is important.
		471-070-8030 - Appeals: Notice of Hearing	Aside from displaying and emailing copies in different languages, workers should also receive a verbal notice from their employer. Marginalized communities will be more aware of the rest if they receive a verbal notice instead of written. Verbal notice is important for those who have difficulties reading, it can also make a difference for those who have verbal communication issues to allow it to make it more clear for them and allow for opportunity for them to ask questions if those come up by that time.
Gina Rutledge	MetLife	471-070-2270 - Equivalent Plans: Proration of Benefit Amounts for Simultaneous Coverage	Many times, employees do not always share that they have more than one job, especially with their employers. Trying to coordinate benefits may be difficult. The state may have more information about the employee having multiple jobs than an equivalent plan administrator or even the employer who's sponsoring the equivalent plan. We just want to make sure we protect the individual employee and their rights to take benefits and also just understand what would happen if they only applied for benefits in one area because they may not recognize they need to apply for benefits in more than one. Should the equivalent plan always check with the state when a claim comes in? How do we do that?
		471-070-2270 - Equivalent Plans: Proration of Benefit Amounts for Simultaneous Coverage	Can the proration be based on the wages earned and the work schedule of the equivalent plan sponsor? That's really the only information that the employer would be able to confirm. The employee would submit a claim, we would check information on the employer like was it a work day. Was the person scheduled to work? How much money did they normally earn at their job? So that we could calculate the benefit appropriately and prorate it. There is just some

			ambiguity on what that proration would look like. Is it based on the work schedule and the wages earned at the employer that is sponsoring the equivalent plan? Again, our goal here is to protect the claimant because they may not let their employer know that they have more than one job, or that they have to take care of someone if they have to be away for a certain period of time. I know you're trying to coordinate a work day based on the employee and we do strongly recommend you look at the work day based on the employer, if the employer has that person on the schedule and would have given them wages for a day worked versus looking at the employee being the person. The employer is also the one in charge of contributions so it's based on the wages from that employer so it does make sense that the benefits would be based on the employer paying wages or the employer scheduling that time for the employee to be there or absent based on a qualifying event.
Breanna Scott	New York Life	471- 070-1560 - Benefits: Disqualification and Penalties for Claimant Misrepresentation	Section (3) I think it would be very helpful to clarify that there can be multiple occurrences per application in terms of willfulness representation. I think the intent in terms of counting up all the different occurrences is you can have many occurrences of willfulness representation within one claim event and that it is not specific to one claim event. As worded, I think that's pretty confusing for folks what an occurrence truly means. Just a recommendation to clarify that with some text, maybe something like, "this means there can be multiple occurrences in one application" or something to that effect so that it is clear to employees and employers.
		General Rule Comment	When planned rulemaking activities that are occurring right now are wrapped up, do you intend to have a consolidated collection of all the various rules and statutes? For example, model language for employers to reference as they're thinking about developing their policies or should we plan on educating people that they will need to go in to these different batches of rules to make sure they are accounting for everything?
Brent Cartwright	Small Employer	471-070-2230 - Equivalent Plans: Reporting Requirements	Just trying to understand a bit better the reporting requirements. I have been able to identify there are quarterly tax reports as well as you have to provide employee benefit applications with their current status of pending/approved. What are the reporting requirements if you were to have an equivalent plan? Just trying to understand how much time and effort it would take for an employer if they were to have an equivalent plan.

From: Sue Noebe <snoebe@riministreet.com>
Sent: Thursday, July 7, 2022 8:00 AM
To: OED_RULES * OED <OED_RULES@employ.oregon.gov>

Subject: OR Paid Leave- Subject Wages

Good Morning-
Contributions_Batch_4_Admin_Rules_Compilation_website.pdf (oregon.gov)

I have reviewed the draft admin rules. I really appreciate the examples provided under 471-070-3100 Contributions: Place of Performance. This will answer many of the employer questions regarding employee eligibility to participate.
I recommend clarification on the wages subject to the OR Paid Leave contribution. If it is OR unemployment wages up to the wage limit 132,900 (determined annually) please state the UI wages are the subject wages. We typically receive the majority of questions on the definition of wages, rules for employee eligibility to participate in the plan and the paid leave contribution rules for employee /employer.

Thank you so much for the opportunity to provide feedback.

Sue

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From: Cassandra Gomez <cgomez@abetterbalance.org>
Sent: Thursday, July 21, 2022 10:51 AM
To: OED_RULES * OED <OED_RULES@employ.oregon.gov>
Cc: Sherry Leiwant <sleiwant@abetterbalance.org>
Subject: A Better Balance Comment on PFMLI Batch 4 Regulations

To the Oregon Employment Department,

I write to submit the attached comment on behalf of A Better Balance regarding batch 4 of the proposed paid family and medical leave insurance regulations in relation to appeals, benefits, contributions, and equivalent plans. Please let us know if you have any questions or if we can provide any further assistance.

Sincerely,
Cassandra Gomez
--
Cassandra Gomez (she/her)
Staff Attorney

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July 21, 2022

Karen Humelbaugh
Director, Paid Leave Oregon
Oregon Employment Department
875 Union St. NE
Salem, OR 97311

Submitted via e-mail to rules@employ.oregon.gov

Re: Comments on Batch 4 of Proposed Paid Family and Medical Leave Insurance Regulations regarding Appeals, Benefits, Contributions, and Equivalent Plans

Dear Director Humelbaugh:

We thank you for the opportunity to comment on the proposed regulations regarding the Paid Family and Medical Leave Insurance program. A Better Balance, a national nonprofit advocacy organization, uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Through legislative advocacy, direct legal services and strategic litigation, and public education, our expert legal team combats discrimination against pregnant workers and caregivers and advances supportive policies like paid sick time, paid family and medical leave, fair scheduling, and accessible, quality childcare and eldercare. When we value the work of providing care, which has been long marginalized due to sexism and racism, our communities and our nation are healthier and stronger.

To that end, we have been leaders in the fight for workplace leave laws around the country for over a decade. A Better Balance has been proud to work with advocates in Oregon to enact and implement the paid family and medical leave program. We thank the Oregon Employment Department for considering our enclosed comments on Batch 4 of the proposed paid family and medical leave insurance regulations regarding appeals, benefits, contributions, and equivalent plans.

We thank the department and express our support for the following regulatory provisions:

471-070-0400 – Wages: Definitions
In general, we think that the proposed definitions throughout § 471-070-0400 will work well for the paid family and medical leave insurance (PFMLI) program because they are largely based off of existing definitions from Oregon's unemployment insurance law. In particular, we are glad

that the department has amended the definition of "vacation pay" since the last batch of proposed regulations was released so that it uses "sick pay," which is a defined term within this section. However, we recommend consulting with organizations that work directly with agricultural workers and domestic workers to ensure that the proposed definitions for "agricultural labor" and "domestic service" will work well for workers. This is an especially important consideration because both domestic workers and agricultural workers have, unfortunately, been historically carved out of statutory employment protections throughout the United States.

471-070-1000 – Benefits: Definitions [Amended]
Generally, the proposed definitions throughout § 471-070-1000 should work well for the PFMLI program. The definition for "eligible employee's average weekly wage" closely aligns with the statutory definition at Or. Rev. Stat. § 657B.010(12) and the other definitions throughout this section are closely aligned with similar definitions from the Washington State paid family and medical leave insurance regulations.

471-070-1510 – Benefits: Repayment of Overpaid Benefits; Interest
We are glad that paragraphs (1) and (2) of § 471-070-1510 of these proposed regulations have been amended since the last draft of proposed regulations to account for the possibility that there may not be an assessment for overpayment of benefits in certain circumstances. This is made clear by the use of "may" instead of "shall" in both paragraphs, and throughout this section generally. As written, whether or not an assessment is issued for an overpayment of benefits is discretionary, matching the statute at Or. Rev. Stat. § 657B.120(4), which explains that the director "may" seek repayment for an overpayment of benefits.

We are very glad that § 471-070-1510(3)(a) of these proposed regulations has been amended since the last draft of proposed regulations to no longer include the phrase "regardless of intent," which would have held workers liable for benefit overpayments in instances of unintended errors. The PFMLI law at Or. Rev. Stat. § 657B.120(3), the section of the statute regarding erroneous payments, explicitly uses a willful standard, which requires that the worker intended to err, provide a false statement, or fail to report a material fact to obtain PFMLI benefits. Additionally, we are glad that this paragraph was amended to use "may" because as explained above, the penalties and assessments for overpayment are largely discretionary pursuant to the statute. As proposed, this provision is more closely aligned with the PFMLI statute.

We are also very glad that § 471-070-1510(4)(b) of these proposed regulations has been amended since the last draft of proposed regulations to delete a reference to "administrative and court costs." A previous draft of these proposed regulations concerningly suggested that workers may be liable for the payment of administrative and court costs, a severe liability not authorized by the PFMLI statute. Removal of the reference to administrative and court costs in this draft of proposed regulations is very important, as workers should have access to administrative and judicial remedies without potentially being held liable for these costs under any circumstances.

471-070-8005 – Appeals: Request for Hearing
Generally, we think that the proposed regulations at § 471-070-8005 will work well for the PFMLI program. In particular, we appreciate that pursuant to § 471-070-8005(1), a form may not be needed to request a hearing in certain circumstances. This exception will increase access to

hearings on appeal. We are also glad to see that under § 471-070-8005(2), requests for a hearing pursuant Or. Rev. Stat. §§ 657B.100 and 657B.120 can be filed for up to 60 days after the administrative decision is filed. The 60-day filing allowance coupled with the option to file a request for a hearing on the department's website pursuant to § 471-070-8005(2)(c) will ensure that workers have meaningful access to appeals hearings.

471-070-8025(1)(a) – Appeals: Late Request for Hearing; 471-070-8075(2)(a) – Appeals: Reopening of a Hearing; 471-070-8080(2)(a) – Appeals: Late Request to Reopen Hearing
We are very glad to see that throughout the proposed regulations regarding appeals, every instance where the term "good cause" is defined (471-070-8025(1)(a); 471-070-8075(2)(a); and 471-070-8080(2)(a)) has been amended since the last draft of proposed regulations to include a person's "incapacity or limiting health condition." This is especially important in the context of paid family and medical leave, as many workers may have good cause for failing to timely file a request for a hearing due to being incapacitated or being physically unable to file the request.

471-070-2220 – Equivalent Plans: Plan Requirements [Amended]
We are glad to see that § 471-070-2220(12) has been amended since the last draft of proposed regulations to require that benefit claims approvals issued by an equivalent plan must include a statement indicating how the employee can contact the department regarding their average weekly wage amount. This will be important information to include so that workers who are covered by equivalent plans are aware that they can and should contact the department with questions or concerns.

Generally, both paragraphs (12) and (14) of § 471-070-2220 should work well as proposed. However, these paragraphs appear to be just a fragment of this section, and should be accompanied by additional requirements for equivalent plans, which were published by the department in August 2021.

We support the following provisions, with suggested modifications:

471-070-3040 – Contributions: Withholding of Employee Contributions
We are glad that the proposed regulation at paragraph (1) of § 471-070-3040 is in line with the PFMLI statute at Or. Rev. Stat. § 657B.150(2)(b). This provision will work well as proposed. However, throughout § 471-070-3040**,** there are several minor amendments that we recommend incorporating to ensure that employee contributions are properly withheld.

Importantly, we urge the department to correct paragraph (2) of § 471-070-3040, so that it references "January 1, 2023," rather than "2024." Currently, the proposed regulations are written to suggest that contributions will be withheld beginning January 1, 2024. However, pursuant to H.B. 3398, 81st Leg. (Or. 2021), the section of the PFMLI law that requires contributions (Or. Rev. Stat. § 657B.150) will become effective on January 1, 2023. Thus, to reflect the actual start day that contributions begin, § 471-070-3040(2) should be amended so that it opens with "Beginning January 1, 2023."

We recommend amending the language at § 471-070-3040(3) in the proposed regulations to eliminate the requirement that employers that have elected to pay employees' contributions, in

whole or in part, must enter into a written agreement with the employee. Pursuant to the PFMLI statute, no such agreement is needed as "an employer may [unilaterally] elect to pay the required employee contributions, in whole or in part, as an employer-offered benefit." Or. Rev. Stat. § 657B.150(5). Thus, we recommend removing the requirement that an agreement be in place. Instead, employers who pay employees' contributions in whole or in part should, ideally, give notice to their employees of the employer-offered benefit, as was provided for in the previous draft of proposed regulations.

Lastly, we strongly recommend deleting paragraph (5) from § 471-070-3040, which, as proposed, would potentially allow employers to deduct from employee wages more than the maximum deduction allowed pursuant to the PFMLI statute at ORS § 657B.150(2)(b) (which is 60% of the total contribution). Under no circumstances should the maximum deduction allowed pursuant to the statute be waived. Paragraph (5) also concerningly would allow employers to recoup contributions paid by the employer on the employee's behalf "until the proper employee contribution amount is collected." This language could set employees up to be financially liable for contributions well past the pay period in which the contributions should have been collected. At minimum, we suggest revising this second sentence of paragraph (5) to make it clear that employers cannot collect employee contributions for a pay period more than a month beyond that pay period. To ensure that employees never have to contribute more than the statutorily required rate, and can reliably understand their PFMLI contributions, we strongly advise the department to delete § 471-070-3040(5), or revise it as suggested herein.

471-070-8540 – Contributions: Penalty Amount When Employer Fails to File Report
We strongly recommend amending paragraph (1) of § 471-070-8540 so that it is clear that the department may assess late filing penalties when employers fail to timely pay their contributions. Specifically, we recommend amending paragraph (1) to read as follows:

> (1) If an employer fails to file all required reports or pay all required contributions 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.

Pursuant to the PFMLI statute (ORS §§ 657B.150(12)), reports and contributions are to be submitted together to the department, so employers who do not timely pay contributions should be subject to fines, just as employers who fail to timely submit reports are under the proposed regulations. This amendment would also match the text of the previous draft of proposed regulations.

471-070-1300 – Benefits: Written Notice Poster to Employees of Rights and Duties; 471-070-2330 – Equivalent Plans: Written Notice Poster to Employees of Rights and Duties
We are very glad that paragraph (2)(b) of § 471-070-1300 and paragraph (3)(b) of § 471-070-2330, which require that notice for remote employees be delivered via hand delivery, regular mail, or electronic delivery to each employee's individual worksite, have been included in the proposed regulations. While §§ 471-070-1300(2)(a) and 471-070-2330(3)(a) are closely modeled after the posting regulations for the Oregon Family Leave Act (OFLA) at OAR 839-009-0300(1), the divergence from the OFLA regulations at paragraphs (2)(b) and (3)(b) to address remote

work posting requirements will be exceedingly helpful as modern-day workplaces continue to evolve.

We also appreciate that §§ 471-070-1300(3)(a) and 471-070-2330(4)(a) regarding the language requirements for employer posters require that the employer provide notice in the language typically used to communicate with the employee, matching the PFMLI statute at Or. Rev. Stat. § 657B.440(2). Additionally, §§ 471-070-1300(3)(a) and 471-070-2330(4)(a) helpfully specify that if an employer uses more than one language to communicate with employees at a worksite, then the employer must display copies of the notice in each of the languages typically used. These provisions will ensure that all employees have meaningful access to adequate notice of their rights.

However, we recommend amending these posting requirements pursuant to both §§ 471-070-1300 and 471-070-2330 to specify that electronic posting is supplemental to workplace posting requirements, but may not satisfy posting requirements. This clarification will be particularly important in more traditional, in-person workplaces, where many employees may not have sufficient access to electronic communications or postings. Additionally, this amendment would closely match the posting regulations for OFLA at OAR 839-009-0300(2). We recommend clarifying that electronic notice may be supplemental to on-site posting requirements, as was explained in a previous draft of these proposed regulations.

In both §§ 471-070-1300 and 471-070-2330, we also strongly recommend specifying that an employer's failure to display or provide notice under this rule constitutes an "unlawful employment practice" pursuant to Or. Rev. Stat. § 657B.070. This specification was included in the previous draft of proposed regulations, and importantly recognized that failure to post statutorily required notice amounts to an employment practice that violates the rights and protections afforded to workers pursuant to the PFMLI law.

471-070-1330 – Benefits: Job Protection

In general, the provisions of § 471-070-1330 are closely modeled after the job protection regulations for OFLA at OAR 839-009-0270, and many of these provisions should work well as proposed. However, we have several suggestions that would make these proposed regulations stronger and more in-line with the PFMLI statute. In particular, we are glad to see that § 471-070-1330(5)(c) has been amended to delete the language suggesting that an employee on leave has "no greater right to a job or other employment benefits than if the employee had not taken PFMLI leave," as was included in the previous draft of proposed regulations. While most employees who are not on leave can be terminated at any point in time for any reason that would not violate any laws, employees who are on leave have an affirmative right to reinstatement pursuant to Or. Rev. Stat. § 657B.060, meaning that they cannot be terminated while on leave. Thus, we are glad that this provision now recognizes that employees on leave do have greater rights to their job than employees who are not on leave.

We are also glad that pursuant to § 471-070-1330(6)(c), in instances where employers pay the employee's portion of health care benefit premiums while an employee is on leave, the employer "must receive permission from the employee to deduct from their pay until the amount is repaid." This is a helpful and important provision to include to ensure that workers maintain

autonomy over their wages and that employers cannot unilaterally deduct from a worker's wages.

We also appreciate that the department amended the provision currently labeled as § 471-070-1330(10) in the proposed regulations to clarify that "[i]t is an unlawful employment practice to discriminate against an eligible employee who has invoked any provision of ORS chapter 657B or this rule." This provision now more closely matches the statute at Or. Rev. Stat. § 657B.060(4), which states that "[i]t is an unlawful employment practice to discriminate against an eligible employee who has invoked any provision of this chapter," rather than more narrowly "any provision of ORS § 657B.060 or this rule," as previously proposed.

We recommend amending § 471-070-1330 to specify that if an equivalent position is not available at the employee's former job site upon the employee's return from leave, then the employee must be restored to a position within 20 miles of their former job site. This provision, which was included in the previous draft of proposed regulations, would mirror the requirement from the OFLA regulations at OAR 839-009-0270(4)(b), and would help to ensure that workers have meaningful access to job protection as required by the statute.

We suggest that the department amend paragraph (1) of § 471-070-1330 so that it is restored to how it was written in the last draft of proposed regulations to state that employers must restore an employee returning from leave to the employee's former position "regardless of whether that employee is taking consecutive or nonconsecutive leave." This is an important clarification to include to ensure that job protection applies to employees regardless of whether leave is consecutive or nonconsecutive. Importantly, the PFMLI statute (Or. Rev. Stat. § 657B.060) requires that all eligible employees who have been employed by their employer for at least 90 days before taking leave be restored to their job upon returning from leave—the statute creates no exception to job protection based on whether leave is consecutive or nonconsecutive, and the regulations should be clear here.

Pursuant to § 471-070-1330(7) of the proposed regulations, employers may require employees to follow their leave policy regarding reporting changes to the employee's leave status. We strongly advise striking § 471-070-1330(7), which is directly borrowed from the OFLA regulations regarding job protection at OAR 839-009-0270(7), from the proposed PFMLI regulations. Unlike OFLA, which references employers policies several times, the PFMLI statute only references employer policies once to say that the law does not "preempt, limit or otherwise diminish the applicability of any employer policy . . . that provides for greater use of family leave, medical leave or safe leave . . . ." An employer policy that requires an employee to report their status while on leave would place a restriction on the employee during leave that was not intended by the law. This provision is especially concerning given the department's other proposed regulations, which will require employees to regularly certify their status with the department while on leave. Workers utilize paid family and medical leave during periods where their attention must be devoted to caring for themselves or their family members—allowing employers to require that workers satisfy employer reporting requirements while on leave is burdensome and unnecessarily interferes with a worker's leave period. We strongly recommend deleting § 471-070-1330(7).

We strongly recommend restoring § 471-070-1330(8) so that it is as proposed in the previous draft of proposed regulations. Concerningly, in this current draft of proposed regulations, paragraph (8) has been amended to state that if an employee gives clear notice of the intent to not return to work from a period of paid family and medical leave, then "the employer's obligations under ORS chapter 657B to restore the employee's position and maintain any health care benefits cease on the date [] the notice is given to the employer." However, pursuant to the PFMLI statute at Or. Rev. Stat. § 657B.060(2), "[d]uring a period in which an eligible employee takes leave . . . , the employer shall maintain any health care benefits the employee had prior to taking such leave for the duration of the leave, as if the employee had continued in employment continuously during the period of leave." This statutory entitlement to the continuation of health care benefits during a period of paid family and medical leave comes without exception, and is afforded even to employees who do not intend to return to their position of employment upon the completion of their leave period. All workers must be able to rely on the statutory entitlement to the continuation of their health care benefits, especially while they're experiencing a need for paid family and medical leave. Thus, we recommend that paragraph (8) be restored to read as follows:

> (8) If an employee gives clear notice of intent in writing not to return to work from PFMLI leave, the employee is entitled to complete the approved PFMLI leave, providing that the original need for PFMLI leave still exists. The employee remains entitled to all the rights and protections provided under ORS chapter 657B and OAR chapter 839, except that:
>
> (a) The employer's obligations under PFMLI to restore the employee's position and to restore benefits upon the completion of leave cease, except to the extent required by other state or federal law; and
>
> (b) The employer is not required to hold a position vacant or available for the employee who gives unequivocal notice of intent not to return.

We also recommend slightly amending § 471-070-1330(9) of the proposed regulations so that it does not include the word "consecutive" between "90" and "calendar days." As written, this provision would only afford the job protections provided by the PFMLI statute to eligible employees employed by their employer "for at least 90 consecutive calendar days prior to taking PFMLI leave." However, pursuant to Or. Rev. Stat. § 657.060(7), the statute's job protections apply to eligible employees employed by their employer "for at least 90 days before taking leave"—the statute does not require that the 90-day period be consecutive. This distinction will be particularly important for workers who may have a temporary break in employment with an employer, such as seasonal workers who are later rehired by an employer. To comply with the statutory standard for job protection, this section should be amended accordingly.

Lastly, we recommend restoring the provision labeled as § 471-070-1330(10) in the previous draft of proposed regulations. That paragraph, which matched the substance of the OFLA regulations regarding job protection at OAR 839-009-0270(9), helpfully explained that employers cannot used the provisions of the rules regarding job protection as a subterfuge to

avoid their statutory responsibilities. We recommend restoring that provision to read as previously proposed:

> (10) An employer may not use the provisions of this rule as a subterfuge to avoid the employer's responsibilities under ORS chapter 657B.

471-070-1410 – Benefits: Initial and Amended Monetary Determinations
In general, we think that § 471-070-1410 regarding benefit determinations will work well as proposed. In particular, we appreciate that § 471-070-1410(3) specifies that workers have 60 days to request a hearing regarding a benefit determination or redetermination under this section. However, we recommend also clarifying in this section that in instances where a worker has requested a redetermination, but the department's investigation pursuant to § 471-070-1410(2)(b) results in the department reissuing their initial determination (or otherwise stating that the department will not be amending its decision), the worker has 60 days from the department's reissuance of their initial determination (or equivalent statement from the department) to request a hearing. This is a needed clarification because the proposed regulations currently only specify the timeline for requesting a hearing following the initial benefit determination or the amended benefit determination.

471-070-1500 – Benefits: Review of Overpaid Benefits
We are glad to see that the department has shifted § 471-070-1500(2)(b) since the last draft of proposed regulations to use "may" instead of "shall." This minor change is an important one as it accounts for the possibility that there may not be an assessment of interest for overpayment of benefits in circumstances where the department chooses not to pursue it.

We are also glad to see the inclusion of § 471-070-1500(6), which states that the department may consider "factors which may affect the claimant's ability to report all relevant information to the department" in deciding if the claimant is liable for a benefit overpayment. This will be an important consideration in the context of PFMLI, as there may be legitimate circumstances that serve as a barrier for workers in submitting documentation to the department.

However, we strongly recommend removing § 471-070-1500(4), which states that a claimant may be held liable for the repayment of benefits they were not entitled to if they should reasonably have known the payment was improper "even though all relevant information was provided before a decision was issued." A claimant's duty under the PFMLI statute is to submit an application for PFMLI benefits that accurately reflects their need for benefits and their wage circumstances—the department is armed with all tools necessary to properly determine benefits. The inclusion of § 471-070-1500(4) in these proposed regulations unfairly allows for the department to shift their errors onto claimants to the detriment of workers who are on leave to care for themselves or their family. We strongly recommend deleting § 471-070-1500(4), as workers should not be considered to be at fault for overpayment when all relevant information was submitted to the department.

471-070-1560 – Benefits: Disqualification and Penalties for Claimant Misrepresentation
We are concerned with § 471-070-1560(3)(e), which states that in instances of forgery or "identity theft," the maximum penalty of 30% will be imposed against a claimant's benefits, regardless of the number of occurrences of willful false statement or willful failures to report material facts. It is our understanding that some undocumented workers may be using false social security numbers, and may be adversely impacted by this provision. To avoid an unintended inequitable outcome, we recommend eliminating § 471-070-1560(3)(e).

Additionally, we recommend providing further guidance on how the department will count each time a claimant willfully fails to report a material fact pursuant to paragraph (3). This is unclear in the proposed regulations.

471-070-8015 – Appeals: Contested Case Proceedings Interpretation for Non-English-Speaking Persons
Currently, the definition of "non-English-speaking person" provided in § 471-070-8015(2)(a) is defined as "a person who, by reason of place of birth, national origin, or culture, speaks a language other than English and does not speak English at all or with adequate ability to communicate effectively in the proceedings." We recommend amending the definition of "non-English-speaking person" to also include a person who prefers to speak another language. While we understand that the proffered definition is based off of the definition of a "limited English proficient person" in the unemployment insurance appeals regulations at OAR 471-040-0007(2)(a), incorporating persons who prefer to speak another language will ensure that whether workers have an "adequate ability to communicate effectively in the proceedings" is not a barrier that workers must overcome before having access to a hearing in their preferred language.

Currently, under § 471-070-8015(3)(a), any party or witness may request a proceeding with an interpreter who is not certified under ORS § 45.291. We strongly recommend amending § 471-070-8015(3)(a) so that only the requesting party may waive their right to a certified interpreter. This is especially important as persons with disabilities should have access to certified interpreters unless they otherwise desire. Similarly, we recommend amending § 471-070-8015(3)(c) so that only the person who requested the interpreter—not any dissatisfied party—can request a different interpreter if dissatisfied with an interpreter.

Additionally, pursuant to § 471-070-8015(7)(b), the request for an interpreter must be made no later than 14 calendar days before the proceeding. We strongly recommend amending this requirement so that an interpreter must be requested no later than 7 calendar days before the proceeding by the non-English-speaking person, rather than requiring adherence to the current requirement of no later than 14 calendar days before the proceeding. This is a needed change because pursuant to the proposed regulations at § 471-070-8030, workers may only receive 14 days' notice of a hearing, and in some cases, they may receive less than 14 days' notice. This slight amendment to the time allotted to workers to request an interpreter will ensure that they are able to access vital language resources so that they can meaningfully partake in PFMLI hearings.

471-070-8020 – Appeals: Contested Case Proceedings Interpretation for Individuals with a Disability

Pursuant to § 471-070-8015(7) in relation to contested case proceedings interpretation for non-English speaking persons, the department is required to provide notice to the Office of Administrative Hearings (OAH) if the department has knowledge that a non-English-speaking person needs an interpreter. We strongly recommend amending § 471-070-8020 to include a like requirement that the department notify OAH when it has knowledge that a person with a disability needs an interpreter or assistive communication device. The department should be responsible for proactively ensuring that all individuals who need language assistance receive it and the department is especially well-suited to understand a worker's communication needs after presumably having corresponded with the worker while the worker's application for benefits was under review.

As above at § 471-070-8015(7)(b), pursuant to § 471-070-8020(5), the request for an interpreter must be made no later than 14 calendar days before the proceeding. We strongly recommend amending this requirement so that an interpreter must be requested no later than 7 calendar days before the proceeding by the person with a disability, rather than requiring adherence to the current requirement of no later than 14 calendar days before the proceeding. This is a needed change because pursuant to the proposed regulations at § 471-070-8030, workers may only receive 14 days' notice of a hearing, and in some cases, they may receive less than 14 days' notice.

471-070-8030 – Appeals: Notice of Hearing

We are very glad to see that § 471-070-8030(2)(c), which was included in the previous draft of proposed regulations and would have required that employers be notified when a request for a hearing related to a benefit claim is filed, has been removed from these proposed regulations. Only the director of the department and the claimant should receive notice of said filings as employers are not an appropriate party to a hearing regarding a benefit claim. As provided by Or. Rev. Stat. § 657B.410, only a covered individual may appeal a paid leave claim or benefit determination. Additionally, Or. Rev. Stat. § 657B.410 lists instances where an employer has the right to appeal, namely following a final decision by the director regarding approval or denial of an application for approval of an equivalent plan; benefit determinations are not included. Further, the PFMLI context is different from, for example, unemployment insurance, where employers have a stake in the process because of the impact of UI claims on the rates they must pay for coverage (pursuant to the PFMLI law, rates do not change because of claims)—it would be both unusual and extremely concerning to make employers a party to a worker's benefit determination appeal.

However, we recommend amending § 471-070-8030(3), which incorrectly suggests that other than for hearings in relation to "a benefit claim" pursuant to § 471-070-8030(2)(c), only the director and the employer are parties to all other hearings. Pursuant to Or. Rev. Stat. § 657B.410, covered individuals are a party to a hearing with the director in relation to a claim or benefits decision as well as a determination in relation to disqualification for benefits or repayment of benefits. For example, if a covered individual is disqualified from benefits because the director has determined that they willfully made a false statement pursuant to Or. Rev. Stat. § 657B.120(3), the individual is entitled to appeal their disqualification pursuant to Or. Rev. Stat. §

657B.410. Thus, we strongly recommend that this provision be amended to recognize the full scope of a covered individual's rights to appeal pursuant to the statute.

471-070-8065 – Appeals: Administrative Law Judge's Decision
While § 471-070-8065 will generally work well for PFMLI appeals, we strongly recommend amending § 471-070-8065(4) to also require that a decision issued by an administrative law judge or notice of an administrative law judge's decision include notice to the parties that the administrative law judge's decision is subject to judicial review within 60 days pursuant to Or. Rev. Stat. § 657B.410(2). Workers should be informed of their access to judicial review in instances where the administrative law judge's determination is undesirable.

471-070-8070 – Appeals: Dismissals of Requests for Hearing
Pursuant to § 471-070-8070(4) and (6)(a), a party whose request for a hearing has been dismissed has 20 days to request to reopen the hearing. While we understand that this timeline is based off of existing Employment Department regulations for unemployment insurance appeals at OAR 471-040-0040, we recommend extending this timeline to at least 60 days, as covered individuals who may wish to reopen a hearing may be unable to respond within such a short timeline given the circumstances for which they need paid family or medical leave. Workers taking paid family and medical leave may be recovering from a serious health condition, helping a family member to recover from a serious health condition, or welcoming a new child—a timeline that works in the context of unemployment insurance may not work for PFMLI hearings because PFMLI claimants are preoccupied with major life moments. As such, we recommend extending the timeline here to at least 60 days.

471-070-8075 – Appeals: Reopening of a Hearing; 471-070-8080 – Appeals: Late Request to Reopen Hearing
Both §§ 471-070-8075 and 471-075-8080 are substantively similar to existing Employment Department regulations for unemployment insurance appeals at OAR 471-040-0040. We suggest considering, however, whether excluding the failure to understand the implications of a decision or notice from the definition of good cause pursuant to §§ 471-070-8075(2)(b)(B) and 471-075-8080(2)(b)(B) is appropriate in the context of paid family and medical leave. Particularly in the case of workers on medical leave, there may be legitimate medical reasons why a worker would fail to comprehend a decision or notice from the department. To ensure that no worker is unable to claim benefits for failure to understand a decision or notice, we recommend striking both §§ 471-070-8075(2)(b)(B) and 471-075-8080(2)(b)(B). Alternatively, if striking both §§ 471-070-8075(2)(b)(B) and 471-075-8080(2)(b)(B) is not possible, we recommend amending it to read as follows:

> (b) Good cause does not include: . . .
> (B) Not understanding the implications of a decision or notice when it is received, unless, at the time of receipt, the party has or is recovering from a serious health condition that might impair their ability to understand the implications of a decision or notice.

We are concerned with the following provisions, which require modifications:

471-070-2205 – Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan

We are very glad that § 471-070-2205(3)(a) is written to be clear that only employers with approved equivalent plans are "exempt" from paying contributions otherwise required under the state PFMLI plan. This is in line with the PFMLI statute, which is clear that only employers with approved equivalent plans do not have to pay contributions to the PFMLI fund (Or. Rev. Stat. § 657B.210(4)); all other employers, including those who have applied for approval of an equivalent plan but have not yet had their plan approved by the department, are required to remit contributions pursuant to Or. Rev. Stat. § 657B.150(1)(a). However, for § 471-070-2205(3)(a) to work as drafted in these proposed regulations, we urge the department to delete § 471-070-2205(9), which would delay the effective date of § 471-070-2205(3)(a) until September 3, 2023, rendering the compliance dates provided for in § 471-070-2205(3)(a) moot. For § 471-070-2205(3)(a) to work as intended, it must become effective upon adoption.

We are also very glad that § 471-070-2205(3)(b) is clear that employers that submit an equivalent plan application on or after June 1, 2023 are liable for all contributions required prior to the effective date of the equivalent plan. As explained above, this is in line with the PFMLI statute, which requires that contributions be remitted from all employers except those with approved equivalent plans. Similarly, we are very glad that § 471-070-2205(7) is clear that employers with approved equivalent plans that are cancelled must remit contributions due for periods beginning on or after January 1, 2023, and explicitly states that employers cannot charge said contributions to employees. These are important safeguards to include in these regulations.

We strongly suggest that § 471-070-2205(4), which allows employers that are "unable" to submit an application for an equivalent plan to instead submit a "Declaration of Intent" as an "interim solution," be deleted from these proposed regulations in its entirety. Foundationally, there should be no work-around pathway for employers who fail to timely submit their applications for equivalent plans to effectively subvert the statutory requirement to receive approval of the equivalent plan prior to its operation—such employers are merely employers without approved equivalent plans and should adhere to the state paid family and medical leave program as established pursuant to Or. Rev. Stat. § 657B.340. Additionally, it is deeply concerning that the department has proposed accepting "Declarations of Intent" from employers who have failed to comply with the department's clear deadlines for applications. Employers who are not able to comply with deadlines that have been established years in advance should not be entrusted with operating equivalent plans that provide such vital benefits to workers. While we would strongly advocate for deleting § 471-070-2205(4) in its entirety, at minimum, if § 471-070-2205(4) is kept intact, we urge the department to amend this provision to make clear that it is temporary. Under no circumstances should declarations of intent be available to employers beyond the first year of the PFMLI program's operation.

While we are strongly opposed to § 471-070-2205(4) as a whole, a few of the subsections therein are particularly troublesome. First, we are vehemently opposed to § 471-070-2205(4)(a)(1) and (2) which require employers who have submitted a declaration of intent to withhold contributions from employees without submitting employee or employer contributions to the

PFMLI Fund established pursuant to Or. Rev. Stat. § 657B.430. This is contrary to the statute, which requires that all employers submit employer and employee contributions once contributions are required unless and until they have an *approved* equivalent plan (or unless the employer is exempt from providing employer contributions pursuant to Or. Rev. Stat. § 657B.150(4)(a)). Or. Rev. Stat. §§ 657B.210(4), 657B.150(1)(a). Additionally, pursuant to § 471-070-2205(4)(a)(2), contributions collected by an employer who has merely submitted a declaration of intent will not have to be remitted to the department, unless the department does not receive an equivalent plan application from the employer or the Declaration of Intent is cancelled. As a bare minimum, we urge the department to amend § 471-070-2205(4)(a)(2) to require that contributions collected pursuant to § 471-070-2205(4)(a)(1) be paid if the application for an equivalent plan is not approved.

Further, it is extremely concerning that § 471-070-2205(4)(b) has been amended so that employers whose applications for equivalent plans are denied are no longer required to remit contributions owed to the department. A previous draft of these proposed regulations provided that "[i]f the employer has been denied or has not received approval for an equivalent plan by Jun[e] 30, 2023 the employer is responsible for paying employer and employee contribution payments due." At minimum, this requirement should be included in the regulations so that employers whose applications are denied or have not been approved by the department, in addition to employers who never submit an application for an equivalent plan, must also remit all contributions owed.

We also strongly advise amending § 471-070-2205(6) to read "shall cancel" rather than "may cancel" in accordance with the PFMLI statute at Or. Rev. Stat. § 657B.220(2), which states that the director "shall" terminate a plan that is not compliant with the law. All of the grounds for cancellation listed in § 471-070-2205(6) would be in violation of the statutory requirements for approved equivalent plans, and therefore the department is required to cancel or terminate them pursuant to the PFMLI statute.

471-070-2230 – Equivalent Plans: Reporting Requirements

In general, throughout § 471-070-2230, we strongly suggest specifying that the department is referring to employers with *approved* equivalent plans. We are particularly concerned about instances where "approved" has not been included ahead of "equivalent plan," such as in § 471-070-2230(4). Pursuant to the PFMLI statute, under no circumstances should an equivalent plan be operating without the department's approval.

We also strongly recommend reverting § 471-070-2230(2) to as it was in the previous draft of proposed regulations to require quarterly reporting instead of annual reporting as written in the current draft of proposed regulations. A quarterly reporting requirement will allow the department to better monitor equivalent plans, and respond to any issues more quickly than would be allowed under an annual reporting schedule. Additionally, the contents of the report required pursuant to § 471-070-2230(2)(a)-(c) should be amended to require detailed information about each individual claimant, including those who are denied by the equivalent plan, as was required from a previous batch of regulations issued by the department in September 2021. This information will be extremely valuable to the department in overseeing the equivalent plans to ensure they are fulfilling their obligations to workers.

As above, we strongly recommend amending § 471-070-2230(3) to require quarterly reporting. We also recommend further amending this provision so that the financial information to be reported pursuant to § 471-070-2230(3) is required even if an employer with an approved equivalent plan is covering the full cost. As currently drafted, § 471-070-2230(3) would only require financial information to be reported by employers that assume "only part of the costs of the approved equivalent plan." However, the department should monitor the financial information of all equivalent plans to ensure that they are financially viable.

Additionally, at § 471-070-2230(4), the proposed regulation specifies information that may be requested of equivalent plan employers by the department. We recommend amending this provision to include "amount of leave taken during that benefit year and the qualifying leave purpose, if applicable," as included in the previous batch of proposed regulations, in place of "the duration of leave remaining in the benefit year," which is currently used at § 471-070-2230(4)(d). This amendment would help the department to ensure that workers are able to take the full amount of leave to which they are entitled in instances where workers transition from coverage under an approved equivalent plan to state plan coverage.

471-070-2250 – Equivalent Plans: Employee Coverage Requirements

In § 471-070-2250, we recommend reinserting paragraph (4), which was included in the previous draft of proposed regulations. That paragraph importantly provided that employers with an approved equivalent plan that does not immediately cover all employees must request information from the department regarding a new employee's previous PFMLI coverage—this information can then be used by the employer to determine whether they must immediately cover the employee under the equivalent plan pursuant to Or. Rev. Stat. § 657B.250(2)(b). We recommend reinserting this paragraph so that equivalent plan employers are required to seek information from the department to determine when a new employee must be covered under their plan pursuant to the PFMLI law's portability requirements. At the very least, we recommend specifying that the department will give the information needed here to employers with an approved equivalent plan.

We also strongly suggest reinserting § 471-070-2250(5) and (6), which were included in the previous batch of regulations. Section 471-070-2250(5) explained that employers with equivalent plans may still have contributions due to the PFMLI fund under certain circumstances, such as if a current employee is still covered under the state PFMLI plan before transitioning to coverage under the employer's equivalent plan. Section 471-070-2250(6) went on to explain that employers may be assessed penalties if they failed to remit contributions pursuant to § 471-070-2250(5). These provisions are both important to include to ensure that the portability of benefits and coverage for workers consecutively covered by different plans is executed properly pursuant to the statutory requirements at Or. Rev. Stat. § 657B.250.

471-070-2270 – Equivalent Plans: Proration of Benefit Amounts for Simultaneous Coverage

In general, we recommend amending § 471-070-2270 to clarify that a worker may take leave from one employer, while still working for another. Pursuant to the PFMLI statute, workers should be able to decide the job(s) from which they are taking leave during a given leave period.

In some cases, a worker with more than one job may only need leave from one job. For example, a worker who needs medical leave from a more physically demanding job but is able to safely continue a second, less physically demanding job given that worker's health needs, or a worker who is sharing care responsibilities for a seriously ill parent with a sibling and is only needed during certain times, and thus only needs to take leave from their day job. In those circumstances, a worker should not be required to choose between taking leave they do not need (and may not qualify for) or forfeiting the leave they do need. Section 471-070-2270 should be amended to clarify that workers with multiple jobs may only be taking leave from one job.

Additionally, we recommend amending § 471-070-2270(3) so that in instances where a worker has simultaneous coverage and takes leave from more than one employer, benefits will be prorated based on the proportion of a worker's wages yielded from each employer. For example, if Worker A works for Employer 1 during the day where she earns most of her income, and she works for Employer 2 on the weekends for supplemental income, and Employer 1 has an approved equivalent plan while Employer 2 is covered by the state PFMLI plan, then the majority of Worker A's benefits should be paid for by Employer 1. Prorating benefits in proportion to the worker's wages yielded from each employer will prevent the potential for a burdensome drain on the PFMLI fund.

*** * ***

We thank the Employment Department for the tremendous amount of work it has put into drafting these proposed regulations. With Oregon's paid family and medical leave insurance program set to begin collecting contributions starting on January 1, 2023 and paying benefits starting on September 3, 2023, it is critical that the regulations uphold the intent of the law, and work for workers. Thank you for giving us the opportunity to submit this comment. Please do not hesitate to contact A Better Balance at cgomez@abetterbalance.org if we can provide any additional assistance.

Sincerely,

A Better Balance

My name is Bridget Caswell and I'm Director Product Compliance and Statutory Administration with Sedgwick, a Third-Party Administrator who will be handling Paid Leave Oregon Equivalent Plans. We will also be assisting employers who direct their employees to the state with their administration of job protection. We have reviewed the batch four draft rules and have the following comments:

- 471-070-1330(6)(a) - Benefits: Job Protection - An employer continuing health care insurance coverage for an employee on PFMLI leave may require that the employee pay only the same share of premium costs during the leave that the employee paid prior to the leave.

When an employee is on leave, they may cross over to a new year for health insurance benefits. As such, their health insurance contribution amount can change. This amount is usually higher, but it could potentially be lower as well (especially if the employee changes health insurance plans). Our recommendation is to have language that states the employee may be required to pay only the amount of premium the employee would have been required to pay if not on leave.

- 471-070-1500 - Benefits: Review of Overpaid Benefits; 471-070-1510 - Benefits: Repayment of Overpaid Benefits; Interest; 471-070-1520 - Benefits: Waiving Recovery of Overpayments

This is a very detailed process for the handling of overpaid benefits. Will equivalent plans be required to follow this process? If not, what process can they employ? If there is a rule stated specifically for the state but there is no equivalent plan process, will the equivalent plan be required to follow the state plan?

- 471-070-1560 - Benefits: Disqualification and Penalties for Claimant Misrepresentation

The law at ORS 657B.120(3)(a) states a covered individual is disqualified from claiming benefits for one year if they make a false statement. However, this rule states the covered individual will be disqualified from claiming benefits for a period of 52 consecutive weeks. Is one year defined as 52 consecutive weeks? Is this definition only for this process or for the entire program? If so, a definition should be provided in the definitions section. If not, then why is there is a different definition of a year found here?

- 471-070-2205 (4)(a)(2) - Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan - The employer shall hold any moneys collected under this section in trust for the State of Oregon but will not be required to pay employer contributions or remit the withheld employee contributions to the department…

The contributions for equivalent plans who file a Declaration of Intent must be held in a trust per the rule. However, based on a question asked to the state, the representative stated the money did not need to be held in a trust. Because this is a different process than any other state has required, please provide all details to what is required for an equivalent plan filing a Declaration of Intent.

- 471-070-2230 - Equivalent Plans: Reporting Requirements

The list of reporting requirements is extensive. While it is understandable to want to ensure equivalent plans are administering claims appropriately and have the proper financial resources to pay the claims, the amount of work on Oregon to process these reports will be substantial. It may be beneficial to all parties to reduce the reporting requirements where possible to distill only the most essential information. As presented, this will be a burden on employers, their TPAs, and the state to process the reports.

- 471-070-2230 (2) Employers with an approved equivalent plan must also file annual aggregate benefit usage reports with the department online or in another format approved by the department. The report is due on or before the last day of the month that follows the close of the calendar year or along with the application for reapproval process.

Please clarify when this report is due. Because of the use of "or," the report could be due at either point in time or both points in time. Equivalent plans need to know when this report needs to be produced. If it needs to be produced at both points, this will be a hardship for employers and their TPAs.

- 471-070-2270(3) - Equivalent Plans: Proration of Benefit Amounts for Simultaneous Coverage - Each equivalent plan is required to pay benefit amounts that are equal to or greater than the benefits offered under the Oregon PFMLI program as described in OAR 471-070-2260 and ORS 657B.050 and applicable administrative rules.
- The department may provide information to equivalent plan employers or administrators regarding prorated benefits. Benefit amounts shall be prorated under each respective plan by prorating by the current days worked for each respective plan. The Oregon PFMLI program shall pay benefits based on the prorated amount and equivalent plans shall pay benefits equal to or greater than the prorated amount.

If the rule stays as written, please provide many examples for how this works. Equivalent plans will need to have as much information as possible to determine how simultaneous coverage will work with their employees. The California DE 2040 (Employer's Guide to Voluntary Plan Procedures) has a section on simultaneous coverage. They have provided four examples, shown here:

Examples:

1. The claimant has three employers at the time their disability or family leave began, two SDI and one VP. SDI would pay half of the SDI benefit amount; the VP would pay the other half of the SDI benefit amount, plus the difference (if any) between the SDI and the VP benefit amounts. The difference could be because the VP paid benefits at a higher WBA.
2. The claimant works for two VP employers and one SDI employer. SDI would pay one-third of the SDI benefit amount; each VP would pay one-third of the SDI benefit amount, plus the difference (if any) between the SDI and the VP benefit amounts.
3. The claimant works for one VP and one SDI employer. The claimant has only worked for the VP employer for four months and for the SDI employer for one month. The claimant has no prior California earnings subject to SDI tax, and therefore has an invalid award with SDI and will not receive benefits. However, if the text provisions of the VP allow immediate coverage based upon current earnings and not the typical base period earnings, the VP would be liable for the entire payment of benefits.
4. If the claimant works for a VP employer and an exempt employer, such as the federal government,the VP is liable for one-half of the SDI benefit amount

Please provide examples similar to these to fully explain how this rule should be implemented by equivalent plans. Using the number of days is confusing and unfamiliar to those who administer benefits for voluntary/private/equivalent plans for other state plans. We need a lot more information in order to ensure processing is correct. California, as noted above, requires each liable plan must pay an equal share of the benefit amount. See also 22 CCR § 3253-1. New York disability benefits requires the proportion of benefits to be based on the average weekly wage of the employee. NY WCL §204(2)(b).

Our recommendation is using the California model. In this model, it is a simple equal share of the benefit amount plus the additional benefit amount paid by the equivalent plan.

- 471-070-3100 Contributions: Place of Performance

Please provide further detail in your examples. Example 2 states: “The employee works temporarily in Idaho for the employer for two weeks, and then returns to work in Oregon for the employer. The employment is localized within Oregon and all wages earned in Oregon and Idaho are PFMLI subject wages.” Example 4 states: “Kaitlynn never performs any service in Illinois other than work that is very temporary in nature.” Two weeks is often seen as a very temporary in nature posting. We need additional information to differentiate a two week post and very temporary in nature service.

- 471-070-8030 - Appeals: Notice of Hearing

The employer and TPA is not notified for a benefit claim in the draft rules. The TPA is not notified for all other cases. For the benefit claim, the employer and TPA are interested parties in the claim. They need to know the status of the claim for providing job protection under this act. Further, they may be providing their own benefits that may provide an additional monetary benefit while the employee’s claim is

pending, depending on the employer's plan. The employee will be adversely affected if the employer is not aware of the status of the employee's claim during a benefit hearing. For all other claims, the TPA is often the party that needs to know what the status of the claim is and not the employer. The employer has hired the TPA to handling the claim through all phases and would only refer the hearing notice back to the TPA. By providing the notice directly to the TPA, this will reduce an additional step for the employer that may often be forgotten. Again, while it will benefit the employer and TPA, this will only help the employee. When all correct parties have the information they need, it ensures a smoother process for the employee.

- General recommendations
    - Add a section on the requirements for notice to an employer. If an employee has a concurrent OFLA or federal FMLA leave, then there could be inconsistencies between how those leaves and Paid Leave Oregon is administered. The notice requirements under FMLA are known to employees and employers and are fair to all parties.
    - Clarify what type of "days" are being used in the rules. Calendar days or business days?

Carol Reynolds

Jul 21, 2022, 1:02 PM PDT

I'm the HR Specialist and Leave Administrator for Coast Property Management, headquartered in Everett, WA, and we have several employees in Oregon. I just attended the rulemaking session for Batch 4 and I have the same concerns that the leave admin for Swire-Coca Cola had.

There are grey areas in the rules with the Washington Paid Family Leave that make it easy for employees to stack their leaves. If they qualify for FMLA, they want to take the FMLA 12 weeks and then when that is exhausted, they think they can take another 12 weeks of Paid Leave from WA. There is nothing in the rules saying that the leaves must be used concurrently even though that is our policy, and the law was meant to be used concurrently. This creates a hardship for employers to provide job protections for 6 months.

There is no way to manage their claims with ESD, particularly Intermittent leaves. Employers should have access to the state leave employee cases so we can record how many intermittent days/hours have been used.

We have requirement for employees to use their accruals while on FMLA. ESD is telling employees that we are violating labor laws by requiring this, however it is allowable under the FMLA. FMLA laws should take precedence.

I would like to see the leaves be required to run concurrently. If the employee has no accruals, then Oregon will start paying benefits right away. But if they have accruals, they should be required to use them under the FMLA and then the paid leave will start paying benefits once they are exhausted. They should still make their weekly claims, similar to unemployment and then OR Paid leave could prorate their benefits if they received pay from their employer or pay their full benefit if they had no earnings.

These grey areas are putting employers at risk of lawsuits. I hope more Washington employers are helping Oregon identify these grey areas so they won’t become a problem once employees are able to use the paid leave.

2211 Congress Street
Portland, ME 04122
207 575 2211
unum.com

July 27, 2022

Oregon Employment Department, Paid Leave Oregon

To Whom it May Concern:

We appreciate the opportunity to provide feedback on Paid Leave Oregon's draft Paid Family and Medical Leave regulations.

We want to thank Paid Leave Oregon (PLO) for their receptivity to our previous comments, especially in relation to Equivalent Plans. We recognize the significant changes made to the Batch 4 rules between the RAC meeting and public hearings. We acknowledge the tremendous amount of work put into these rules and are grateful for the revised direction.

Enclosed are our comments regarding the revised Batch 4 rules. We want to emphasize that all recommendations are consistent with the OR PFMLI statute. Our comments are meant to offer clarity where we would like additional guidance from PLO or suggest certain edits based on our experience with other state programs and employer benefit plans.

Thank you for your consideration. I look forward to the opportunity to discuss our comments and suggestions with you directly and/or through the rulemaking hearing process. Please contact me at dfreeman3@unum.com or 423/294-4763 if you have questions.

Sincerely,

Daris Freeman
AVP, Legal Counsel
Unum Insurance Company

BENEFITS

471-070-1300 Benefits: Written Notice Poster to Employees of Rights and Duties

(2)(a) specifies that employers must display PLO's notice poster or another poster "approved by the department." Many employers may want to customize the poster to include additional information unique to their business. To save administrative work for both employers and PLO, we recommend this rule be modified to require the employer to post either PLO's notice poster or another poster containing a specified list of data elements. This is how PLO approached the notice poster for equivalent plans in proposed rule 471-070-2330.

471-070-1330 Benefits: Job Protection

The protections provided to employees by the Paid Leave Oregon program are extremely important. They are what provide employees the peace of mind to take the leave they need when experiencing a personal or family event. However, it's important that employees continue to follow their employer's policies and procedures related to being absent from work, either on a continuous basis or for individual intermittent absences. 657B.040 clearly outlines that employees must provide proper notice to their employers when they will be out of work for a qualifying event. The statutory consequence for not providing proper notice is a reduction in the benefit amount, but benefits are still payable. Based on that, the protections outlined in statute and here in proposed rule 471-070-1330 would still apply. That results in an employee being able to essentially be a no-call no-show to work then file for benefits retroactively (471-070-1100 allows applications anytime within 30 days of start of leave and up to one year after start of leave if good cause) and be guaranteed reinstatement. We don't believe the intent of the original legislation or PLO is to allow employees to disregard their employer's policies. As such, we recommend PLO modify this rule to include language that the protections do not apply if the employee has not provided proper notice as outlined in 657B.040.

(2) requires an employer to return an employee to work "the day following the date the eligible employee notified the employer they were ready to end their leave." This is a timeframe that many employers may not be able to meet. Often, administrative steps must be taken to return an employee to work (e.g. security access) that may take a full day to process. Under the currently proposed rule, an employee could call their employer late Monday afternoon and the employer could be required to return them to work Tuesday morning. We recommend PLO adopt the same or similar language used by the federal FMLA in 825.311 that allows employers to require "reasonable notice (i.e. within two business days)." This would allow employers to align Paid Leave Oregon procedures with existing leave policies as well as provide sufficient time to administratively return an employee to work. This would also then be consistent with subsection (7) of this same proposed rule which specifies the employer may require an employee to follow established leave policies regarding changes to the employee's leave status.

(6)(a) specifies that where an employer is continuing health care insurance coverage for an employee, the employee can only be charged the same share of premium costs that they would have paid prior to leave. This is inconsistent with 67B.060(2) which specifies the obligations for continuing health care benefits are to be "as if the employee had continued in employment continuously during the period of leave." We recommend PLO adopt similar

language for this rule as it accounts for any possible change in premium during a leave of absence.

471-070-1410 Benefits: Initial and Amended Monetary Determinations

(1)(a)(A) is missing words or has additional words that shouldn't be there as the text doesn't make sense in its current form. As a result, we are unable to review for any comments. For reference:

- Proposed rule: The total amount of subject wages and for an individual that elected coverage under OAR 471-070-2010, taxable income from self-employment paid to or earned by the claimant during the base year or alternate base year.
- Prior text reviewed in RAC: The total amount of subject wages and taxable income from self-employment who elected under OAR 471-070-2010 paid to or earned by the claimant during the base year or alternate base year.

CONTRIBUTIONS

471-070-3040 Contributions: Withholding of Employee Contributions

(2) specifies that beginning January 1, 2024, employers must pay any contributions that would have been owed by their employees but they did not properly deduct. What about employee contributions not properly deducted during 2023? Under subsection (1) of this same rule, it's clear an employer can't ever deduct more than the allowable deduction from an employee's wages. Reading these two subsections together, it could be interpreted that if employee deductions are not properly made during 2023, they will be "forgiven" as they can't be retroactively deducted from the employee's wages but neither is the employer liable for them under (2). If this is not the intent of this proposed rule, we recommend appropriate edits. However, if this is correct, no changes are needed.

EQUIVALENT PLANS

471-070-2205 Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan

(4)(a)(A) states that beginning January 1, 2023, an employer "shall" deduct employee contributions. We recommend PLO edit this to read that an employer "may" deduct employer contributions as some employers may choose to pay their employee's portion.

In addition, in discussing Contributions rule 471-070-3040 with member of PLO, it is our understanding that employers will be permitted to retroactively deduct employee contributions during 2023. If this is the case, it's inconsistent to require employers to take employee deductions beginning January 1, 2023 and held in trust. If the equivalent plan does not get approved, those employers can then retroactively deduct the contributions in the rare situation that it's needed.

471-070-2220 Equivalent Plans: Plan Requirements

We recommend the first sentence of (13) be edited to include an administrator:

- "Provide an appeal process to review benefit decisions when requested by an employee that also requires the employer *or administrator* to issue a written decision."

471-070-2230 Equivalent Plans: Reporting Requirements

We do not have any concerns from an administrator perspective. However, we encourage PLO reach out to the members of their Advisory Committee that represent the employer community to determine the feasibility of some of the reporting requirements. Specifically, the Administrative Cost requirement may be challenging for small employers in particular.

471-070-2270 Equivalent Plans: Proration of Benefit Amounts for Simultaneous Coverage

(3) states that "benefit amounts shall be prorated under each respective plan by prorating by the current days worked for each respective plan." We do not believe the current proposed method will result in appropriate proration. Here's an example to think about:

- An employee works a full time job during the day then tends bar during happy hour for 2 hours each night. That employee works 5 days/week at job one (40 hours) and 5 days/week at job two (10 hours). In this scenario, will the state assume 10 total working days and then prorate? If so, it would be a 50/50 split for benefits. The resulting proration isn't consistent with the work.

Although the employee ultimately receives the same total benefit regardless of the method of proration, by definition, proration should result in a proportional distribution, which the current proposal does not provide. Hours worked is a possible alternative method. In this example, it would result in an 80/20 split and shouldn't be particularly complicated to administer. Another alternative would be to use current wages to determine the appropriate percentage of each plan. Although current wages are not used to determine average weekly wage, they are what determines the employee's current contributions to each plan. As such, if benefits are prorated based on current wages, each plan may be paying an appropriate percentage based on the current contributions funding such benefits.

Additional rules or guidance recommended:

There are some items that still need to be clarified but may be accomplished through administrative guidance rather than rulemaking (if rulemaking is complete). Those items are:

- Detailed rules regarding how PFMLI interacts with OFLA. 657B.020(2) indicates there will be limitations placed on PFMLI if OFLA is also taken but it's not clear how that will work considering OFLA can provide up to 36 weeks of leave depending on the circumstances.
- More details on how the 2-week pregnancy entitlement will work, what is required, does it run first or only if the other 12 weeks has been exhausted, etc. Here are some scenarios to consider:
    - On January 1, 2024, employee requires 8 weeks of leave for a serious health condition with a pregnancy that results in incapacity (e.g. c-section recovery). On May 1, 2024, the same employee requires 5 weeks of leave for back

surgery & recovery. How and when does the extra 2-week pregnancy entitlement apply?
    - On January 1, 2024, employee requires 6 weeks of leave for a serious health condition with a pregnancy that results in incapacity (i.e. standard post-partum recovery). The employee then requests as much bonding/parental leave as is available. Does the employee have 6 weeks of leave remaining or 8 weeks?
- Clarification on non-working periods, for example school breaks, holidays, manufacturing shut-downs, etc. Employees are not scheduled to be at work during that time so would there be no benefits? Or are there still benefits if the employee is losing income during that period? Some examples:
    - School teachers who are offered the ability to teach summer school classes during summer break. They decline due to a PLO qualifying reason. Had they not had a qualifying event, they would have accepted the summer school position and earned additional income. Can that employee take PLO in this situation? They turned down the additional work so there's no actual absence, but there is lost income.
    - Employee is on PLO for the month of November. Their employer observes Thanksgiving Day and the following Friday as a holiday and employees are not expected at work. However, employees cannot collect holiday pay under the employer's policy if on leave immediately preceding and following a holiday. Will PLO pay the full benefit for that week?
    - Employee is on leave from June 15 through August 1. They work for a manufacturing company that shuts down for maintenance for 2 weeks in July. The employee is not expected to be at work. Do their PLO benefits continue during those 2 weeks? Does the employer's policy regarding wages come into play?
- Clarification on whether qualifying events that began prior to the effective date of Paid Leave Oregon will be eligible for benefits starting September 3, 2023. For example:
    - Employee had a baby February 1, 2023. She took 24 weeks of unpaid leave under Oregon Family Leave Act and concurrently received 6 weeks of paid parental leave from her employer. Can the employee take 12 weeks of family leave under Paid Leave Oregon as long as she takes leave between September 3, 2023 and January 31, 2024 (12 months after birth)?
    - Employee had knee replacement surgery August 15, 2023 and is medically supported to be out of work for 12 weeks. Can the employee begin receiving benefits from Paid Leave Oregon as of September 3, 2023?

ACLI
Financial Security for Life

Cindy Goff
Vice President, Supplemental Benefits and Group Insurance
101 Constitution Ave. NW, Suite 700
Washington, DC 20004

August 1, 2022

Oregon Employment Department/Paid Leave Oregon
P.O. Box 14151
Salem, OR 97311
via email: to OED_Rules@employ.oregon.gov.

RE: Comments regarding Paid Leave Oregon's draft PFML Regulations – Batch 4 Parts 1 and 2

To whom it may concern,

I am writing on behalf of the American Council of Life Insurers and our member companies that are stakeholders in the development of paid family and medical leave programs in Oregon and throughout the country. ACLI is the leading trade association representing the life insurance industry in the United States. Financial security is ACLI members' core business. 90 million families rely on the life insurance industry for financial protection and retirement security. We offer the following comments regarding Batch 4 Parts 1 and 2 for your consideration.

In this letter, we offer the top two priority comments and then include other recommendations to clarify and offer best practices based on experience in other states.

- 471-070-2205 (4)(a)(A) Payroll Deduction Requirement
  - This section indicates that employers are required to withhold employee contributions beginning January 1, 2023 until the equivalent plan application is approved. As ORS 657B.150(5) allows employers to pay all or part of the employee contributions, and some employers may wish to pay the full cost of the program, we suggest that the requirement that the employer "shall" withhold employee contributions be changed to "may". Suggested language changes are below:

> (4)(a) If an employer is unable to submit an equivalent plan application by the dates described in section (3)(a) of this rule, the department is allowing an interim solution under which the employer may submit a signed and certified Declaration of Intent acknowledging and agreeing to the following conditions:
>
> (A) Beginning January 1, 2023, and continuing until the department has approved the equivalent plan application, the employer ~~shall~~ may deduct employee contributions from the subject wages of each employee in an amount that is equal to 60 percent of the total contribution rate determined in OAR 471-070-3010.

(B) The employer shall hold any moneys collected under this section in trust for the State of Oregon but will not be required to pay employer contributions or remit the withheld employee contributions to the department, unless the department does not receive an equivalent plan application as described in section (3) of this rule or the Declaration of Intent is cancelled as described in this subsection and sections (5) and (6) of this rule.
(C) The employer must submit the Declaration of Intent to the department no later than November 30, 2022.
(D) The employer must submit an equivalent plan application no later than the May 31, 2023, deadline as described in section (3) of this rule.

(b) If an equivalent plan application is not received by the department by May 31, 2023, the Declaration of Intent is cancelled and no longer effective. The employer is then responsible for paying an amount equal to the sum of all unpaid employer contributions and ~~remitting~~ all unpaid employee contributions due ~~that were held in trust for the State of Oregon~~ for periods beginning on or after January 1, 2023, and is subject to penalties and interest as described in section (6) of this rule.

(5) An employer that submitted an equivalent plan application or a Declaration of Intent as described in sections (3) and (4) of this rule, may cancel the request for approval or the Declaration of Intent by contacting the department. The employer is then responsible for paying and remitting an amount equal to the sum of all unpaid employer and employee contribution payments due for periods beginning on or after January 1, 2023 and is subject to penalties and interest as described in section (7) of this rule.

- 471-070-2205(3)(a): Equivalent plan availability and application
  - We first want to express our gratitude for the inclusion of the ability of employers to submit a Declaration of Intent according to the outline you have specified in the proposed rule. We believe this option demonstrates recognition to those employers interested in maintaining or accessing private options that their preferences are important.
  - To that end we have made suggestions to the Oregon Department of Financial Regulation (DFR) on other ideas to speed up the filing and approval process such as not requiring rate filings (which are not required on disability income products in OR and are not necessary as a consumer protection mechanism for PFML equivalent plans since the employee contribution is capped and rates will closely align with the state rate), and ideas for standardization of filing checklists to make it easier for the DFR to review filings for inclusiveness of all PFML requirements.
  - One area of remaining concern in the timing process is related to exemption from quarterly contribution payments for those opting for equivalent plans. To be exempt from paying required quarterly contribution payments to the Oregon PFMLI program in accordance with ORS 657B.150 and OAR 471-070-3030(6), an employer that is going to provide its employees with an equivalent plan as of September 3, 2023, must receive approval of an equivalent plan application. The equivalent plan application must be submitted to the department by November 30, 2022 and approved by December 31, 2022. We understand that the equivalent plan

application will need to be supported by a copy of the fully insured policy for a fully insured equivalent plan or the plan document for an employer-administered equivalent plan. Typically, carriers are not expected to issue policies until the plan is effective, or until 9/3/23. It would be a significant challenge for a carrier to issue a policy first to support an employer's equivalent plan application since the policy is typically among the last steps in the implementation process. This is to avoid a misimpression that coverage is in effect prior to the policy effective date. Also, carriers have to gather plan parameters and other structure to be able to accurately build the policy. As a result, it's commonplace for a policy to not be issued until right before the plan is active.

- We therefore recommend that employers be allowed to submit a sample policy as supporting documentation for an equivalent plan application until 9/3/23.

Clarifying Recommendations

To enhance clarity of other rules in Batch 4, we offer the following recommendations in the order in which they appear in the proposed rule.

- 471-070-1500 Benefits: Review of Overpaid Benefits
  - We request confirmation that equivalent plans will be able to use a similar process that is no more restrictive to recuperate overpayments (regardless of whether that is clarified in the benefits or equivalent plan sections).

- 471-070-1560(1) Applicability of claimant misrepresentation provision to equivalent plans
  - This section states that it is unlawful for a claimant to willfully make false statements or fail to report material facts. Because employers with equivalent plans should have recourse to report claimants who fraudulently obtain PFML benefits we recommend adding a provision that explicitly specifies that this section applies to equivalent plans and that employers may report fraudulent claims to Paid Leave Oregon for further investigation.

- 471-070-2200: Definition of "administrative costs" and 741-070-2230(3): Employer Reporting Requirements for administrative costs
  - We recommend that this requirement only be placed on employer-administered equivalent plans since the state will be receiving quarterly reports showing the employee contributions taken, if any. We submit that this is unnecessary for an employer using a fully insured equivalent plan as they are not bearing the financial risk for that plan, only paying premium. Whereas the relevant administration fees would only be charged for an employer taking on the responsibility in an employer-administered equivalent plan.

- 471-070-2205(7)(b): Penalties and Interest
  - For the sake of transparency and predictability for the employer, we recommend that Paid Leave Oregon specify what penalties and interest will be charged for failure to secure an equivalent plan and how such penalties will be applied.

- 471-070-2220(13): Equivalent Plan Requirements
  - We recommend adding the words "or administrator" after the words "also requires the employer …". This recognizes that often an employer is relying on an administrator to perform these functions.

- 471-070-2230(2): Employer Reporting Requirements
  - We recommend the annual claims report be submitted by March 31 of each respective year. Currently, the rules require reports to be submitted 30 days after the year end but that does not provide employers with enough time to coordinate payments for opened but time not yet reported and therefore benefits not yet paid. We recommend following a similar timeframe as other states by requiring that all of these reports be filed at the end of the quarter following the close of the calendar year.

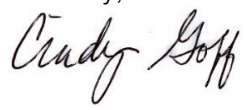
- 471-070-2250(1)(c) Employee Coverage Requirements
  - We request clarification as to whether and how contributions would be made to the state program for any employee who would need state coverage from hire date to day 30 if the employee does not qualify for equivalent plan for 30 days per (1)(c). All employees who were not previously covered as described under subsections (a) or (b) of this section must be covered by the employer's equivalent plan within 30 days of their start date. Will the state be foregoing contributions for that 30-day period similar to Washington?

- 471-070-2260 Benefit Amounts
  - We request confirmation that removing the language regarding the establishment of a benefit year gives equivalent plans the option of having their own benefit year versus reaching out to the state regarding prior claims, since it can be perceived as a better plan if the equivalent plan offers more time than the state's minimum weeks of coverage.

- 471-070-8030(2): Appeals – Notice of Hearing
  - We request that Equivalent Plan Administrators be added to the list of parties to be notified of a hearing.

We want to thank you again for your inclusive process and for the many opportunities you have given us to comment. Please don't hesitate to contact me if you need more information or would like to ask me or the ACLI members any questions. We look forward to our continued participation in this important work.

Sincerely,



Cindy Goff
(612) 242-3390

cc: John Mangan, ACLI
Steve Clayburn, ACLI
Jill Rickard, ACLI

From: David Henretty <dhenretty@oregonlawcenter.org>
Sent: Monday, August 1, 2022 4:10 PM
To: OED_RULES * OED <OED_RULES@employ.oregon.gov>
Cc: Laurie Hoefer <laurie.hoefer@lasoregon.org>; Julie Samples <jsamples@oregonlawcenter.org>
Subject: Rulemaking comments re PFMLI appeals

Ms. Friend,

Please find attached comments submitted by Legal Aid Services of Oregon and Oregon Law Center regarding the PFMLI proposed rules for appeals. Please don't hesitate to let us know if you have any problems accessing the document. Thank you.

David

David Henretty (he/him)
State Support Unit Attorney
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BY ELECTRONIC MAIL: rules@employ.oregon.gov

August 1, 2022

Anne Friend
Rules Coordinator
Employment Department
875 Union Street NE
Salem, OR 97311

RE: Batch 4: Appeals

Dear Ms. Friend:

We write to comment on the proposed Batch 4: Appeals rules for Oregon's PFMLI program. Providing paid family medical leave is critical to support low and middle income families during time of need. It also provides stability to our communities. We support the department's overall goals and strategies and appreciate the department's thoughtfulness in building this program. We thank you for the opportunity to provide our feedback.

Legal Aid Services of Oregon and the Oregon Law Center provide free civil legal services to low-income Oregonians. Their Farmworker Programs help agricultural workers protect their rights in the workplace and community. Each year, our staff speak with migrant, seasonal and year-round workers and their families across the state of Oregon about their experiences accessing different community resources.

OAR 471-070-8005

(1) – We support not requiring requests for hearing to be made only on the department form. We ask that the department further define "otherwise expresses a present intent to appeal" to include contacting the department with questions or concerns about not receiving benefits or correspondence received.

(2) – We support providing at least 60 days to request a hearing after the administrative decision. We believe it is important that people are able to make their request in person at an OED office to avoid having to wait on the phone at the WorkSource Oregon office. We also ask that people be allowed to submit their request via text, and that when filing by email, text, or secured website, that an automatic response be generated confirming submission.

OAR 471-070-8010

(3) – We ask that people also be notified of the process by which to obtain copies of the documents and records in the possession of the department relevant to the administrative decision.

OAR 471-070-8015

(2)(a) - We suggest including language that makes clear that the determination of whether a person is adequately able to communicate in English is made by the non-English speaking person and not the department.

(4)(d) – We suggest changing "may" to "shall" when party is not satisfied with the interpreter,

and that the non-English speaking person be informed of the ability to inform judge if they do not feel the interpreter is communicating adequately and of their right to request to change interpreter.

(4)(e) – If an interpreter is needed to assist the Judge in determining whether good cause exists, then the non-English speaking person should have access to a substitute interpreter at least for the purpose of assisting the Judge in making the good cause determination, as it could be prejudicial to the non-English speaking person to rely on the interpreter who they are indicating is not adequate.

(5) – We suggest adding clarification that formal experience as interpreter may not be needed. For example, a person who speaks MesoAmerican language may not have interpreter available who is court certified but has ability to interpret adequately

(7) - There should be more guidance as to what constitutes when the department is "on notice" that a person needs an interpreter, such as when a party communicates with the department in a language other than English. For example, some claimants may file a claim for benefits on-line in English with help from family members who speak English and who assist them to apply due to language and/or literacy benefits even though the claimant may call or otherwise communicate with the department in their primary language that is not English. This should be noted such that if there is a need for a hearing, the department will provide the interpreter and not assume the person speaks English just because the application was filed in English.

We strongly suggest that the 14 day notice be shortened to 7 days.

We ask that the need to request the interpreter and the deadline be clearly written in the correspondence and easy to request in the sample form requesting a hearing included with the denial notice.

We support allowing for waiver of the 14 day notice for good cause.

We ask for a broader definition of "good cause," specifically including factors connected with language. For example, "good cause" shall include

> “Inadequate or lack of notice, non-language compliant notices, and thwarted attempts to file due to technological, disability-related or language access barriers."

Thank you for considering these comments.

Respectfully,

LEGAL AID SERVICES OF OREGON
Laurie Hoefer, laurie.hoefer@lasoregon.org

OREGON LAW CENTER
Julie Samples, jsamples@oregonlawcenter.org
David Henretty, dhenretty@oregonlawcenter.org

From: Aruna Masih <aruna@bennetthartman.com>
Sent: Monday, August 1, 2022 4:55 PM
To: OED_RULES * OED <OED_RULES@employ.oregon.gov>
Cc: Karl Koenig (karlk@osffc.org) <karlk@osffc.org>
Subject: PFMLI Batch 4 Rules - OSFFC Comments

Dear Rules Coordinator,

I am writing on behalf of the Oregon State Fire Fighters Council (OSFFC) to provide input regarding Batch 4 of the proposed rules regarding Equivalent Plans, Contributions, and Appeals for the Paid Family and Medical Leave Insurance. The OSFFC supports the comments submitted by others in the Time to Care coalition.

In addition, OSFFC offers the following input which may not have been addressed by others:

Contributions:

471-070-3040(4) – should clarify that nothing in this section is intended change any obligations employers may have under the Public Employee Collective Bargaining Act (PECBA)

471-070-3040(5) – should not reduce any rights employees may currently have under ORS 652.610 which does not allow an employer to make deductions from employee wages based solely on an "employer policy."

471-070-8540 – should be amended to cover a failure to file contributions and any penalties for that violation as provided for in ORS 657B.910.

Equivalent Plans:

471-070-2205(4)(a)(A) – mandatory deduction does not take into account a situation in which a labor organization may have bargained a pick-up of the contribution under ORS 657B.210(5)(a)

471-070-2230(2)and (3) – the word "and" should replace "or" in the phrase "calendar year or along with application for reapproval process."

471-070-2250(1)(c) – does not appear to cover the situation when the whole group starts off as being covered under an "equivalent plan"

471-070-2260(3)(a) – appears to include information that should already be in the possession of the employer and may create some opportunity to for intimidation of employees early in the process.

471-070-2270(2) – there may be legitimate reasons why an employee would only file with one but not all plans and the rule should account for that. Examples include "own-occupation" disability.

Appeals:

471-070-8010(2) –the ALJ should not be permitted to dismiss if there is new evidence that wasn't available before

471-070-8030 –While it may be rare, opportunity for employee labor organization to intervene should be provided.

471-070-8035 –There doesn't appear to be any reference regarding the right to go to circuit court to enforce subpoenas.

471-070-8045 (4) – If a party has to get their exhibits in to everyone 7 days before the hearing, and they only get the hearing notice 14 days before the hearing under 471-070-8030(1), they will only have 7 days to prepare their evidence. While such tight timelines might be acceptable in an unemployment hearing, employees in need of leave may not be able to meet these tight timelines.

471-070-8050(5)(d) – the ALJ's explanation of the issues should be "on the record" so that the rights on appeal are protected if the ALJ makes an error that causes harm to the employee

471-070-8050(6) –Reference to in camera review on privilege issues should be made.

471-070-8050(7) – What does it mean that the ALJ "may offer" evidence; they are the decision-maker

471-070-8065 (4) – the ALJ decision should include a section on evidentiary rulings.

471-070-8070(3)(a) – Cross-reference should be made to good cause; dismissal should only be permitted upon a finding that the party failed to timely file AND there is no good cause for that failure. This is especially important if the timelines will be short.

Thank you for your attention this matter and to the concerns of the community.

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From: Lisa Kwon <lisakwon@familyforward.org>
Sent: Monday, August 1, 2022 5:45 PM
To: OED_RULES * OED <OED_RULES@employ.oregon.gov>; BALL Shannon L * OED <Shannon.L.BALL@employ.oregon.gov>; HUMELBAUGH Karen M <karen.m.humelbaugh@employ.oregon.gov>
Cc: Courtney Helstein <courtney@familyforward.org>
Subject: Batch 4 Rules Written Comments from Time to Care Oregon

Good evening,

Please see attached the Time to Care coalition's written feedback to the Batch 4 rules. I am happy to answer any follow up questions-- thank you.

Best,
Lisa

Lisa Kwon (she/her)
Policy Manager
Family Forward Oregon & Family Forward Action
PO Box 15146, Portland, OR 97293
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Join our Facebook group, Movement for Mamas & Caregivers, where we are sharing resources and working together to fight for racial, gender, and economic justice.

Time to Care OREGON

August 1, 2022
To: Karen Humelbaugh and PFMLI Policy Team, Oregon Employment Department
From: Time to Care Oregon Coalition
RE: PFML Batch 4 Draft Rules

Thank you for the opportunity to provide feedback on Batch 4 of proposed rules regarding Equivalent Plans, Contributions, and Appeals for Paid Leave Oregon. Family Forward Oregon is submitting this feedback on behalf of Time to Care Oregon, a coalition of community based organizations and labor unions serving low wage workers, caregivers, families, and immigrant communities, who worked to pass our state's historic paid family and medical leave program in 2019.

We acknowledge and appreciate the changes the department has made to this current batch of rules based on our previous written feedback. However, we continue to have serious concerns over the multiple exceptions for employers under equivalent plans, specifically regarding declaration of intents and reporting requirements. We strongly suggest that the equivalent plan reporting requirements rules align with the same reporting requirements for the state program, which means that employers must report *quarterly* aggregate financial and benefit usage reports. This information around accessibility will be crucial to collect especially in the beginning stages of the program.

Thank you for your consideration of our coalition's feedback.

Equivalent Plans

471-070-2200 – Equivalent Plans: Definitions [Amended]

We support the proposed definitions as written. As previously flagged, Declaration of Intent is not a defined term in the PFMLI statute but is fine as proposed. We are concerned, however, with the function of declarations of intent, as explained below.

471-070-2205 – Equivalent Plans: Declaration of Intent to Obtain Approval of Equivalent Plan

We are glad that the department clarified that approved equivalent plans that are approved prior to September 3, 2023 become effective on September 3, 2023, as previously suggested.

We appreciate the amendments to paragraph (3)(a) because the PFMLI statute is clear that only employers with *approved* equivalent plans do not have to pay contributions to the PFMLI fund (ORS § 657B.210(4)); all other employers, including those who have applied for approval of an

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equivalent plan but have not yet had their plan approved by the department, are required to remit contributions pursuant to ORS § 657B.150(1)(a).

We appreciate the amendment to paragraph (3)(b) to make it clear that employers that submit an equivalent plan application on or after June 1, 2023 are liable for all contributions required prior to the effective date of the equivalent plan.

We strongly advise deleting paragraph (4) in its entirety. There should be no work-around solution for employers who fail to timely submit their applications for equivalent plans—employers who fail to comply with deadlines should not be entrusted with operating equivalent plans that provide such vital benefits to workers.

- We are vehemently opposed to paragraphs (4)(a)(1), (2) which requires employers who have submitted a declaration of intent to withhold contributions from employees without submitting employee or employer contributions to the department. This is contrary to the statute, which requires that all employers submit employer and employee contributions once contributions are required unless and until they have an *approved* equivalent plan. ORS §§ 657B.210 (4), 657B.150(1)(a). The submission of a declaration of intent does not equate to approval of an equivalent plan—this paragraph should be deleted pursuant to the PFMLI statute.
- Additionally, (4)(a)(2) states that contributions collected by an employer who has merely submitted a declaration of intent "will not be required to . . . [be] remit[ted] . . . to the department, unless the department does not receive an equivalent plan application . . . or the Declaration of Intent is cancelled . . . ." As a bare minimum, we urge the department to amend this paragraph to require contributions to be paid to the PFMLI fund if the application for an equivalent plan is not approved.
- It is extremely concerning that paragraph (4)(b) has been amended so that employers whose applications for equivalent plans are denied are no longer required to remit contributions owed to the department. At minimum, this requirement should be included in the regulations so that employers whose applications are denied or have not been approved by the department, in addition to employers who never submit an application for an equivalent plan, must also remit all contributions owed.

As previously explained, we advise amending paragraph (6) to read "shall cancel" rather than "may cancel" in accordance with ORS 657B.220(2), which states that the director

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"shall" terminate a plan that is not compliant with the law. All of the grounds for cancellation listed in paragraph (6) would be in violation of the requirements for approved equivalent plans, and therefore the department is required to cancel or terminate them pursuant to the PFMLI statute.

We strongly approve of paragraph (7), which requires that employers with approved private plans that are cancelled must remit contributions due for periods beginning on or after January 1, 2023 and explicitly states that employers cannot charge said contributions to employees. These are important safeguards to include in these regulations.

We strongly advise deleting paragraph (9), which would delay the effective date of section (3) until Sept. 3, 2023, rendering the compliance dates moot.

471-070-2230 – Equivalent Plans: Reporting Requirements

Throughout the amended language in this section, we strongly advise specifying that the department means employers with approved equivalent plans. We are particularly concerned about instances where "approved" has been deleted, such as in paragraph (4). Under no circumstances should an equivalent plan be operating without the department's approval.

We strongly recommend reverting paragraph (2) to as it was before. Reporting should be quarterly instead of annually, as it is for all other employers.

- Additionally, the contents of the report at (2)(a)-(c) should be amended to require detailed information about each individual claimant, including those who are denied by the private plan, as was required from a previous batch of regulations in September 2021. This information will be extremely valuable to the department in overseeing the equivalent plans to ensure they are fulfilling their obligations to workers.

Similarly, in paragraph (3), we strongly recommend requiring reporting quarterly. Additionally, this information should be required even if the employer is covering the full cost—the department must monitor all private plans to ensure that workers under the plan have access to paid family and medical leave as provided pursuant to the statute.

In paragraph (4), we strongly recommend including "amount of leave taken during that benefit year and the qualifying leave purpose, if applicable," as included in the previous batch of regs, in place of "the duration of leave remaining in the benefit year," which is currently used. This'll be important so that the department ensures that workers are able to take

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the full amount of leave to which they are entitled in instances where workers transition from coverage under an approved equivalent plan to state plan coverage.

471-070-2250 – Equivalent Plans: Employee Coverage Requirements

We strongly recommend reinserting paragraph (4) as drafted in the previous draft rules, so that employees have coverage under a private plan as soon as they are statutorily required to have coverage. That paragraph importantly provided that employers with an approved equivalent plan that does not immediately cover all employees must request information from the department regarding a new employee's previous PFMLI coverage—this information can then be used by the employer to determine whether they must immediately cover the employee under the equivalent plan pursuant to ORS 657B.250(2)(b). At the very least, we recommend specifying that the department will give this information to employers with an approved private plan.

We strongly suggest reinserting the paragraphs labeled as (5) and (6) in the previous batch of regulations, which explain that employers with private plans may still have contributions due to the PFMLI fund under certain circumstances.

471-070-2270 – Equivalent Plans: Proration of Benefit Amounts for Simultaneous Coverage

We strongly recommend that paragraphs (3) and (4) be amended to clarify that a worker may take leave from one employer, while still working for another. Thus, whether a worker's benefits are "prorated" will differ depending on an employee's specific leave circumstances. With this amendment incorporated, an example of a worker's benefits while on leave from one job but not another would be helpful.

Additionally, in instances where a worker has simultaneous coverage and takes leave from more than one employer, we recommend prorating benefits based on the proportion of a worker's wages yielded from each employer. For example, if Worker A works for Employer 1 during the day where she earns most of her income, and she works for Employer 2 on the weekends for supplemental income, and Employer 1 has an approved equivalent plan while Employer 2 is covered by the state PFMLI plan, then the majority of Worker A's benefits should be paid for by Employer 1. Prorating benefits in proportion to the worker's wages yielded from each employer will prevent a burdensome drain on the PFMLI fund.

471-070-2330 – Equivalent Plans: Written Notice Poster to Employees of Rights and Duties

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Generally, this section closely matches the requirements of the proposed regulations at OAR 471-0700-1300 regarding written notice to employees for employers covered under the state plan. We appreciate subsection (3)(b), which requires that notice for remote employees be delivered via hand delivery or regular mail to each employee's individual worksite.

We recommend restoring the provision from paragraph (4) that explained that electronic posting is supplemental but does not satisfy posting requirements. This closely matched the posting regulations for OFLA at OAR 839-009-0300(2).

We strongly recommend bringing back paragraph (7), which clarifies that failure to display or provide notice under this rule is an "unlawful employment practice" pursuant to ORS § 657B.070. The department's understanding that failure to provide notice is equivalent to interference with a right to which workers are entitled under the PFMLI law is important.

Contributions

471-070-0400 Wages: Definitions

The impact of the "agricultural labor" definition means that many agricultural workers will be treated worse than any workers in the context of this leave program. Other workers, like construction workers, will have the value of any non-cash remuneration, such as housing provided by the employer, included in their wages such that their potential benefit level would be higher. Agricultural workers who fall within the definition will not have any non-cash remuneration included as wages so their potential benefit levels will not reflect these values.

Historically, our laws include many incidences of treating agricultural workers and domestic workers differently than other workers, which is rooted in racism. **We oppose treating agricultural workers differently than other workers, except in situations where specific support or assistance is being provided to agricultural workers to work to overcome or remedy past harm and exclusion.** At this time, we understand the statutory constraints and understand that the department needs to define 'agricultural labor'. We note that there are many different definitions of agriculture or agricultural worker throughout state and federal laws and regulations. **We support the most restricted definition of agricultural worker such that it negatively impacts as few workers as possible.**

In addition, we strongly suggest that the rules clarify that an employer may not evict an employee from employer-provided housing during that employee's approved leave. If it were to be allowed, it would serve as a form of prohibited retaliation and have negative impacts on the employee's safety and health and that of his or her family.

471-070-0010 Contributions: Definitions

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We support the proposed definitions of "Paid Leave Oregon" and "Paid Leave" as written.

471-070-2100 Tribal Government: Election Requirements and Effective Date
471-070-2180 Tribal Government: Termination

We appreciate that the agency has accepted our suggestion and added paragraph 4 to specify the state the effective date of tribal government coverage in the first section.

471-070-3040 Contributions: Withholding of Employee Contributions

In paragraph (2), the date should be changed from January 1, 2024 to January 1, 2023.

We strongly approve of the proposed regulations at paragraph (2), (3), and (4). These provisions will prevent employers from unfairly charging employees for employee contributions that they failed to timely collect.

We strongly recommend deleting paragraph (5), which would potentially allow employers to deduct more than 60% of the total contribution rate from employee wages, which is the maximum deduction pursuant to the PFMLI statute at ORS 657B.150(2)(b). We believe that under no circumstances should the maximum deduction allowed pursuant to the statute be waived. Paragraph (5), would also concerningly allow employers to recoup contributions paid by the employer on the employee's behalf "until the proper employee contribution amount is collected." This language could set employees up to be financially liable for contributions well past the pay period in which the contributions should have been collected. **At minimum, we suggest revising this second sentence of paragraph (5) to make it clear that employers cannot collect employee contributions for a pay period more than a month beyond that pay period.** To ensure that employees never have to contribute more than the statutorily required rate, and can reliably understand their PFMLI contributions, we strongly advise the department to delete paragraph (5), or revise it as we suggest.

471-070-3100 Contributions: Place of Performance

Paragraph (1) matches the PFMLI statute at ORS 657B.175 and paragraph (2) closely aligns with the unemployment insurance statute at ORS 657.035(1). We support this section as written. Similar standards for determining which work is sufficiently connected to the state are used in many other state paid leave programs. We urge the adoption of a matching standard for work qualifications for the purpose of benefit determinations.

471-070-3130 Contributions: Successor in Interest Unpaid Contribution Liability

We support paragraphs (1) to (5) as written and have no concerns.

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471-070-3340 Contributions: Overpayment Refunds

We support this section as written.

471-070-8540 Penalty Amount When Employer Fails to File Report

We strongly recommend amending paragraph (1) so that it is clear that the department may assess late filing penalties when employers fail to timely pay their contributions. Specifically, we recommend amending paragraph (1) to read as follows:

> *(1) If an employer fails to file all required reports or pay all required contributions 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.*

Pursuant to the PFMLI statute (ORS §§ 657B.150(12)), reports and contributions are to be submitted together to the department, so employers who do not timely pay contributions should be subject to fines, just as employers who fail to timely submit reports are under the proposed regulations. This amendment would also match the text of the previous draft of proposed regulations.

Appeals

Appeals: Request for Hearings

In paragraph (1), we appreciate that a form may not be needed to request a hearing in certain circumstances. This exception will increase access to hearings on appeal.

In paragraph (2), we are glad to see that requests for a hearing pursuant to ORS §§ 657B.100 and 657B.120 can be filed for up to 60 days after the administrative decision is filed. We are also pleased to see that requests for a hearing can also be filed through the department's website, which is an acceptable method for filing different requests for hearing under this section of the proposed regulations.

We are also glad to see that pursuant to paragraph (5), non-contested benefit payments will not be stayed following a request for hearing. This will ensure that workers still have access to benefits to which they are entitled while matters in dispute are settled.

Appeals: Assignment to Office of Administrative Hearings

Throughout this section, we strongly recommend revisiting which parties may request hearings pursuant to the PMFLI statute and clarifying that the parties to a hearing will

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differ depending on the grounds for the hearing. Specifically, the PFMLI statute at ORS 657B.410 dictates instances where employers may request hearings and instances where a covered individual may request hearings. For example, pursuant to ORS 657B.410, only a covered individual—not an employer—may request a hearing regarding a PFMLI claim determination. In addition to being contrary to the statute, and as explained below, it would be both unusual and extremely concerning to allow employers to request a hearing regarding a worker's PFMLI benefit determination. Unlike, for example, unemployment insurance, where employers have a stake in the process because of the impact of UI claims on the rates they must pay for coverage, employer rates do not change because of PFMLI claims. Revising this section to be in line with the statute will ensure that the regulations are applied as intended by the law.

Appeals: Contested Case Proceedings Interpretation for Non- English speaking persons

In subsection (2)(a), we recommend amending the definition of "non-English-speaking person" to also include a person who prefers to speak another language. While we understand that the proffered definition is based off of the definition of a "limited English proficient person" in the unemployment insurance appeals regulations at OAR 471-040-0007(2)(a), this amendment will ensure that whether workers have an "adequate ability to communicate effectively in the proceedings" is not a barrier that workers must overcome before having access to a hearing in their preferred language. We appreciate the comprehensive definition of "qualified interpreter" at subsection (2)(b).

In paragraph (3), the proposed rules state that for conducting contested case proceedings under this rule, the department will "comply with the applicable provisions of ORS §§ 45.272 to 45.292." The statutory provisions seem fine and are mostly captured within these proposed regulations.

We are concerned about paragraph (4)(f), which would burden a worker with additional out of pocket costs for the purposes of hiring a substitute interpreter if the substitute interpreter is used for reasons beyond "good cause". If a non-English speaker is dissatisfied with an interpreter originally appointed by the judge, all costs to work with a substitute interpreter should be covered by the department. There may be many various reasons as to why an interpreter appointed by a judge won't be a good fit for the individual needing interpretation services, and the individual requesting a hearing should not bear the financial burden.

Pursuant to subsection (7)(b), the request for an interpreter must be made no later than 14 calendar days before the proceeding. **We strongly recommend amending this requirement so that an interpreter must be requested no later than 7 calendar days before the proceeding by the non-English-speaking person, rather than requiring adherence to the current requirement of no later than 14 calendar days before the proceeding.** This is a needed

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change because pursuant to the proposed rule at 471-070-8030, workers may only receive 14 days' notice of a hearing, and in some cases, they may receive less than 14 days' notice.

We are very glad to see that paragraph (7) requires the department to provide OAH notice of a non-English-speaking persons in need of an interpreter when the department is on notice of the need. **We recommend clarifying what it means for the department to be "on notice" that someone needs an interpreter.** The department should be responsible for proactively ensuring that all those who need language assistance receive it. The department is especially well-suited to understand a worker's language access needs after presumably having corresponded with the worker while the worker's application for benefits was under review.

Appeals: Contested Case Proceedings Interpretation for Individuals with a Disability

Here, we recommend adding a requirement, as provided pursuant to 471-070-8015(7), that the department provide OAH notice of a person with a disability's need for an interpreter when the department is on notice of the need, coupled with a clarification of what it means for the department to be "on notice" that someone needs an interpreter. The department should be responsible for proactively ensuring that all those who need interpretive assistance receive it. The department is especially well-suited to understand a worker's language access needs after presumably having corresponded with the worker while the worker's application for benefits was under review.

Currently, under subsection (3)(a), any party or witness may request proceeding with an interpreter who is not certified under ORS § 45.291. **We strongly recommend amending this subsection so that only the requesting party may waive their right to a certified interpreter.** This is especially important here, as persons with disabilities should have access to certified interpreters unless they otherwise desire. **Similarly, we recommend amending subsection (3)(c) so that only the person who requested an interpreter can request a different interpreter if dissatisfied with an interpreter.**

As above at 471-070-8015(7)(b), pursuant to subsection (6), the request for an interpreter must be made no later than 14 calendar days before the proceeding. **We strongly recommend amending this requirement so that an interpreter must be requested no later than 7 calendar days before the proceeding by the person with a disability, rather than requiring adherence to the current requirement of no later than 14 calendar days before the proceeding**. This is a needed change because pursuant to the proposed rule at 471-070-8030, workers may only receive 14 days' notice of a hearing, and in some cases, they may receive less than 14 days' notice.

Appeals: Late Request for Hearing

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We appreciate that the definition of "good cause" has been amended to include a person's inability to meet a deadline for health reasons or due to incapacity. We recommend that the draft rules also provide examples or references to other potential sources of good cause (for example, a worker who does not see a denial of a claim because the worker has gone to another state or country to urgently care for an ill loved one).

Appeals: Notice of Hearing

We appreciate and strongly support that the agency has removed paragraph 2(c), which included the employer as a party that should be notified of a hearing. The benefits appeals process should be between the worker and the state (or equivalent plan) and the employer should have *no* role.

We recommend amending paragraph (3), which incorrectly suggests that other than for hearings in relation to "a benefit claim" pursuant to paragraph (2)(c), only the director and the employer are parties to all other hearings. According to ORS 657B.410, covered individuals are a party to a hearing with the director in relation to a claim or benefits decision as well as a determination in relation to disqualification for benefits or repayment of benefits. For example, if a covered individual is disqualified from benefits because the director has determined that they willfully made a false statement pursuant to ORS 657B.120(3), the individual is entitled to appeal their disqualification pursuant to ORS 657B.410. Thus, we strongly recommend that this provision be amended to recognize the full scope of a covered individual's rights to appeal pursuant to the statute.

Appeals: Subpoenas

Paragraphs (2) through (7) of this section are substantively identical to existing Employment Department regulations for unemployment insurance appeals at OAR 471-040-0020(2)-(7) and are fine as written.

Appeals: Individually Identifiable Health Information

We support these proposed rules as written.

Appeals: Postponement of Hearing

We support these proposed rules as written.

Appeals: Telephone and Video Conference Hearings

We appreciate specifying in rule that hearings may be held over telephone or virtually, as opposed to being held solely in-person. We support these proposed rules as written.

Appeals: The Hearing

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We support these proposed rules as written.

Appeals: Continuance of Hearing

We support these proposed rules as written.

Appeals: Office of Administrative Hearings Transmittal of Questions

We support these proposed rules as written.

Appeals: Administrative Law Judge's Decision

We strongly recommend amending paragraph (4) to also require that the ALJ's decision, or notice of the ALJ's decision, include notice to the parties that the ALJ's decision is subject to judicial review within 60 days pursuant to ORS § 657B.410(2). Workers should be informed of their access to judicial review in instances where the ALJ's determination is undesirable.

Appeals: Dismissals of Requests for Hearing

Pursuant to both paragraph (4) and subsection (6)(a), a party whose request for a hearing has been dismissed has 20 days to request to reopen the hearing. While we understand that this timeline is based off of existing Employment Department regulations for unemployment insurance appeals at OAR 471-040-0040, **we recommend extending this timeline to at least 60 days, as covered individuals who may wish to reopen a hearing may be unable to respond within such a short timeline given the circumstances for which they need paid family or medical leave.**

Appeals: Reopening of a Hearing

We suggest considering in this section, whether excluding the failure to understand the implications of a decision or notice from the definition of good cause pursuant to subsection (2)(b)(B) is appropriate in the context of paid family and medical leave. Particularly in the case of workers on medical leave, there may be legitimate medical reasons why a worker would fail to comprehend a decision or notice. **To ensure that no worker is unable to claim benefits for failure to understand a decision or notice, we recommend striking subsection (2)(b)(B).** Alternatively, if striking subsection (2)(b)(B) is not possible, we recommend amending it to read as follows:

> (b) Good cause does not include: . . .
> (B) Not understanding the implications of a decision or notice when it is received, unless, at the time of receipt, the party has or is recovering from a serious health

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condition that might impair their ability to understand the implications of a decision or notice.

We appreciate that the definition of "good cause" in paragraph (2) has been amended to include a person's inability to meet a deadline for health reasons or due to incapacity. Paragraph (2) should also provide at least examples or references to other potential sources of good cause (for example, a worker who does not see a denial of a claim because the worker has gone to another state or country to urgently care for an ill loved one).

Appeals: Late Request to Reopen Hearing

We suggest considering in this section, whether excluding the failure to understand the implications of a decision or notice from the definition of good cause pursuant to subsection (2)(b)(B) is appropriate in the context of paid family and medical leave. Particularly in the case of workers on medical leave, there may be legitimate medical reasons why a worker would fail to comprehend a decision or notice. **To ensure that no worker is unable to claim benefits for failure to understand a decision or notice, we recommend striking subsection (2)(b)(B).** Alternatively, if striking subsection (2)(b)(B) is not possible, we recommend amending it to read as follows:

(b) Good cause does not include: . . .
(B) Not understanding the implications of a decision or notice when it is received, unless, at the time of receipt, the party has or is recovering from a serious health condition that might impair their ability to understand the implications of a decision or notice.

We appreciate that the definition of "good cause" in paragraph (2) has also been amended here to include a person's inability to meet a deadline for health reasons or due to incapacity.

Thank you for your consideration of our feedback.

Sincerely,

(Signed organizations below)

Time to Care OREGON