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ARCHIVES DIVISION

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**NOTICE OF PROPOSED RULEMAKING**  
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 471  
EMPLOYMENT DEPARTMENT

**FILED**

07/26/2022 9:52 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Administrative provisions related to Paid Leave Oregon program benefits

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 08/31/2022 11:55 PM

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

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Filed By:  
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HEARING(S)

*Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.*

DATE: 08/23/2022

TIME: 9:00 AM - 11:00 AM

OFFICER: Anne Friend

ADDRESS: Virtual

Oregon Employment Department

Director's Office

Salem, OR 97311

SPECIAL INSTRUCTIONS:

Zoom link to register: [https://www.zoomgov.com/webinar/register/WN\\_xqNk-RkqTCOvbanRMFbF-g](https://www.zoomgov.com/webinar/register/WN_xqNk-RkqTCOvbanRMFbF-g)

DATE: 08/25/2022

TIME: 4:00 PM - 6:00 PM

OFFICER: Anne Friend

ADDRESS: Virtual

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SPECIAL INSTRUCTIONS:

Zoom link to register: [https://www.zoomgov.com/webinar/register/WN\\_02UEFEw0T4SlIIng8QhhKA](https://www.zoomgov.com/webinar/register/WN_02UEFEw0T4SlIIng8QhhKA)

NEED FOR THE RULE(S)

In order to implement and administer the Paid Leave Oregon program, the Oregon Employment Department is promulgating permanent administrative rules in accordance with ORS chapter 657B.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

- Paid Leave Oregon statute – ORS chapter 657B ([https://www.oregonlegislature.gov/bills\\_laws/ors/ors657B.html](https://www.oregonlegislature.gov/bills_laws/ors/ors657B.html));

- Oregon Labor, Employment, and Unlawful Discrimination statutes – ORS chapter 659A (<https://www.oregonlegislature.gov/b>)
- Oregon Family Leave Act (OFLA) statutes and administrative rules – ORS chapter 659A and OAR chapter 839, Division 9 (<http>)
- Family and Medical Leave Act (FMLA) statute and regulations – 29 USC Ch. 28 and Treas. Reg. 29 CFR part 825 (<https://uscod>  
<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-C/part-825>);
- Oregon Employment Department Unemployment Insurance Taxes statute and administrative rules – ORS chapter 657 and OAR chapter 839, Division 9 (<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=2338>);
- Workers' Compensation statutes and administrative rules – ORS chapter 656 and OAR chapter 436 (<https://www.oregonlegis>  
<https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=76>);
- Washington State's PFML administrative rules (WACs Chapter 192-500 through 192-810) (<https://app.leg.wa.gov/WAC/defa>)
- California Disability Insurance/Paid Family Leave (UIC 2601 to 3308 and rules and regulations 22 22R [[https://leginfo.legislature.ca.gov/faces/codes\\_displayexpandedbranch.xhtml?tocCode=UIC&division=1.&title=&part=2.&chapt](https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=UIC&division=1.&title=&part=2.&chapt)  
<https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I05076D10D4B711DE8879F8>])
- Connecticut Paid Family & Medical Leave Act statute and regulations ([https://www.cga.ct.gov/current/pub/chap\\_557.htm#se](https://www.cga.ct.gov/current/pub/chap_557.htm#se))
- District of Columbia (DC) Paid Family Leave statutes and rules and regulations – (<https://code.dccouncil.us/us/dc/council/cod>  
<https://www.dcregs.dc.gov/Common/DCMR/AgencyChapterList.aspx?AgencyID=45>);
- Massachusetts Paid Family and Medical Leave statutes and rules and regulations (<https://www.mass.gov/law-library/mass-ge>)
- New Jersey Temporary Disability and Family Leave Insurance statutes and rules and regulations (<https://casetext.com/statute>  
<https://casetext.com/regulation/new-jersey-administrative-code/title-12-labor-and-workforce-development>);
- New York Short-Term Disability/Paid Family Leave statutes and rules and regulations [<https://www.nysenate.gov/legislation/>  
<https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I0bfea200ad0d11dda763>  
and
- Rhode Island Temporary Disability/Caregiver Insurance statues and rules and regulations (<http://webserver.rilin.state.ri.us/ST>)

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#### STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

By providing paid and job protected leave, Paid Leave Oregon will allow those who do not currently have access to and cannot afford to care for themselves or their ailing family members, deal with the challenges of domestic violence and similar challenges, or bond with a new child in their family, to take that time off and still receive an income. This program will provide a much needed benefit to underserved populations and help to combat the insidious impact of historical and current injustice and inequities that families of color face when trying to access government programs.

A commitment to equity acknowledges that not all people, or all communities, are starting from the same place due to historic and current systems of oppression. Equity is the effort to provide different levels of support based on an individual's or group's needs in order to achieve fairness in outcomes. Equity actionably empowers communities most impacted by systemic oppression and requires the redistribution of resources, power, and opportunity to those communities. While adopting our administrative rules for processing of benefit applications, decisions on benefits, and payment of benefits, the Paid Leave Oregon Division looked at the racial equity impact of the administrative rules and answered the below questions.

What are the racial equity impacts of this particular rule, policy, or decision and who will benefit from or be burdened?

In accordance with ORS 657B.010 through ORS 657B.120, the Paid Leave Oregon Division administrative rules are intended to provide details on aspects of Paid Leave Oregon benefits, such as when a written notice poster must be provided to the employees about Paid Leave Oregon benefits, job protection, department's benefit determinations, overpaid benefits, and penalty amounts. The administrative rules on the state plan's Paid Leave Oregon benefits seek to ensure that employees have timely and equitable access to benefits when an eligible employee has made contributions to the Paid Leave Oregon Trust Fund established under ORS chapter 657B. The Paid Leave Oregon Division recognizes the administration of benefits is the heart of the program and the administrative rules were developed with a focus on

accessibility and compensation as well as a racial equity lens into potential structural barriers that may hinder use of the Paid Leave Oregon program.

An equitable program requires identification of and strategies to overcome structural barriers or burdens. The Paid Leave Oregon Division started by using universal language that is consistent with terms and processes used for Unemployment Insurance, Oregon Family Leave Act (OFLA), Family Medical Leave Act (FMLA), and the Oregon Department of Revenue where appropriate, and simplified complexities where possible within the Paid Leave Oregon benefit administrative rules. The consistency of the language helps employees and employers in understanding and use of the program and helps the Paid Leave Oregon Division in its ability to translate consistently into other languages.

These are just a few examples of potential racial equity impact from the benefit administrative rules. The requirements established in these benefit rules could also have an equity impact for employees access to the state Paid Leave Oregon plan, potentially impacting Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander, women, people with disabilities, LGBTQIA+ communities, migrant workers, socio-economically disadvantaged people, individuals with limited English proficiency, new immigrant communities, and individuals with non-technical experience or resources to navigate these requirements due to systemic and institutional barriers. While the rules aim to ensure equitable benefits for employees, these may not be sufficient to prevent all barriers for those employees, who may have an equity impact as identified above.

Are there strategies to mitigate the unintended consequences?

Individuals may experience cultural biases, fear of a state program, and systemic barriers in accessing and coverage of health care systems. While the statute and the draft rule requires job protection, the Division understand that processes related to job protection can cause stress, anxiety, barriers, and biases. Below are some strategies the Paid Leave Oregon Division has implemented or plans to implement within or related to the draft administrative rules to mitigate unintended consequences:

- Written notice poster must be given to each employee assigned to remote work and upon the hiring of each new employee;
- Written notice poster must be displayed in the language the employer typically uses to communicate with the employee, and the employer must display copies of the notice in each of the languages the employer would typically use to communicate; and
- Frequently asked questions and resource pages will be created to assist with explanation of the rules.

Below are some strategies the Paid Leave Oregon Division will monitor to help mitigate the above unintended barriers of the use of benefits:

- Widespread and targeted education and varied and accessible user support services;
- Instructions and employee guidebooks will be in plain language and seek to provide materials in multiple languages for employers and employees;
- Guidebooks will be supplemented with frequently asked questions, instructional videos, and other tools;
- Staff will be trained to support employees, employers, health providers, insurers, and community members, with the aim to enable all to understand the Paid Leave Oregon plan and complete the application and administration requirements and thus help mitigate the equity impact;
- Conduct focused outreach and engagement activities from now until implementation with employers and employees, with a focus on immigrant or non-English speaking individuals, Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander, and other people of color owned businesses, and rural or small businesses, which will include awareness raising about Paid Leave Oregon benefits;
- Conduct regular program evaluation of benefit use, including analysis of demographics such as race, gender, and age;

- Monitor and develop safeguards within the application process, continually checking for errors and/or immediate action to notifications sent to claimants;
  - Review program evaluation data and build transparency in the program design; and
  - Provide ongoing anti-bias and trauma-informed training for benefit staff.
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#### FISCAL AND ECONOMIC IMPACT:

Most of the proposed rules do not have a fiscal or economic impact for Paid Leave Oregon benefits as there are no additional fees included. However, OAR 471-070-1510 requires 1.5% interest to accrue beginning 60 days after the administrative decision regarding the overpayment is final and the overpayment has not been repaid. The fiscal impact to the Paid Leave Oregon Trust Fund is indeterminate as it depends on how many benefit overpayments are not paid within 60 days.

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#### COST OF COMPLIANCE:

*(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).*

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

The administrative rules on Paid Leave Oregon benefits will likely have an impact on state agencies, local governments, and other public bodies because their employees (claimants) may be eligible for Paid Leave Oregon benefits. The state agencies, units of local government, and the public may need to provide additional information requested by the department to verify claimant information and accept leave notices from their employees.

The state agencies, local governments, and the public will also be impacted by the requirement to provide a notice poster to each employee as required in OAR 471-070-1300. The notice poster is required to be provided by statute; however, the rule states how the notice poster must be delivered to remote workers.

OAR 471-070-1300 related to job protection also will impact state agencies, local governments, and the public as it expands on the statute related to job protection, specifically what job the employee will go back to if the job was eliminated while the employee was out on leave. Job protection is required for all eligible employees who have been employed by the employer for at least 90 consecutive days prior to taking Paid Leave Oregon time.

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

###### a. Estimate the number and type of small businesses subject to the rule:

Oregon has approximately 126,000 small businesses with fewer than 50 employees that employ 33.62 percent of the state's workforce. Oregon has approximately 120,000 small businesses with fewer than 25 employees that employ 24.19 percent of the state's workforce.\* It is likely that all small businesses will have employees take Paid Leave Oregon leave at some point; therefore, the benefit rules will apply to their employees as well as all the employees receiving a notice poster.

\*Based on Unemployment Insurance 2020 Tax Wage file.

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

ORS 657B.440 requires the employer to provide written notice to each employee of the duties and rights of Paid Leave Oregon and requires at a minimum what the notice must include and that it must be in the language the employer typically uses. OAR 471-070-1300 requires the employer to display the notice poster in each building or if an employee works remotely, to be provided by hand delivery to the remote employee via regular mail, or through an electronic delivery method. Because the statute requires the written notice poster be provided and in the language the employer typically uses, the administrative draft rule creates the administrative activity of providing the written notice poster to each employee, specifically when assigned to remote work.

The administrative cost to provide the written notice poster to employees depends on how many employees work in the building or worksite and how many work remotely. It also depends on how the employer will deliver the notice poster to the remote work employees by using hand deliver, regular mail, or through an electronic delivery method. The first method of delivering the written notice poster by hand when the employee is in the office on their first day or when they begin working remotely would create no additional cost as the employee and employer are already in the office and providing a notice poster is already required by statute. The second method of delivering the written notice poster by regular mail would create cost for use of an envelope and the stamp, which the Department estimates is less than \$1 per notice poster (\$0.58 for standard-sized letter and the cost of an envelope) plus the administrative time to send the notice to the employee. The third method of delivering the notice poster through an electronic delivery method would create no additional cost other than the administrative time to send the electronic information to the employee.

OAR 471-070-1300 related to job protection also will impact small businesses as it expands on the statute related to job protection for employees of a small business. Specifically, the rule specifies when the employee could begin working once the employer was notified they were ready to return to work. Job protection is statutorily required for all eligible employees who have been employed by the employer for at least 90 consecutive days prior to taking Paid Leave Oregon time.

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

It will take, on average, well under an hour to hand deliver, mail, or send electronically the written notice poster to each employee working remotely.

The requirement of job protection and governing replacement workers while the employee is on leave is a requirement per statute (ORS 657B.060) and the rule does not require additional administration.

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#### DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Paid Leave Oregon Advisory Committee, which serves as the Rulemaking Advisory Committee (RAC) for these rules, is statutorily required to have four members represent employers, at least one of whom represents employers with fewer than 25 employees. The RAC was consulted when developing these rules.

The Paid Leave Oregon Division also formed a benefits workgroup that consisted of 15 members appointed by the Paid Leave Oregon Division Director, which consisted of employee and business representatives. There are three Paid Leave Oregon Advisory Committee members on the workgroup. The purpose of the benefit workgroup is to engage with representatives and stakeholders about specific aspects relating to Paid Leave Oregon benefits in Oregon. The workgroup utilized the information and insights it gathered in the course of its work to assist the Paid Leave Oregon Advisory Committee in developing recommendations to provide to the department as it relates to the implementation of the program and the administrative rules drafted for benefits. The workgroup met 14 times over the course of a year, the first meeting occurred in July 2020 and the last meeting occurred in October 2021. We also emailed materials to the

workgroup in November 2021 and requested feedback.

Small businesses may also sign up to participate in our town halls (out of five town halls there were 724 attendees), receive Paid Leave Oregon emails (105,000 unique emails are on the Paid Leave Oregon email distribution list), listen to Paid Leave Oregon Advisory Committee meetings (about 30 attendees at each meeting), attend RAC meetings (on average between 100-150 attendees each meeting), and are invited to provide feedback on the proposed draft rules.

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WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

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RULES PROPOSED:

471-070-1000, 471-070-1300, 471-070-1330, 471-070-1410, 471-070-1500, 471-070-1510, 471-070-1520, 471-070-1550, 471-070-1560

AMEND: 471-070-1000

RULE SUMMARY: Amend the rule to define eligible employee's average weekly wage, willful false statement, and willful failure to report a material fact, which are terms used in the Paid Leave Oregon program rules related to benefits.

CHANGES TO RULE:

471-070-1000

Benefits: Definitions

(1) "Application" means the process in which an individual submits the required information and documentation described in OAR 471-070-1100 to request benefits for a period of leave. Approval of an application establishes a claim.¶

(2) "Average weekly wage" means the amount calculated by the department as the state average weekly covered wage under ORS 657.150 (4)(e) as determined not more than once per year. The average weekly wage is:¶

(a) Set for each fiscal year beginning July 1 and ending June 30 of the following year;¶

(b) Applied for the calculation of weekly benefit amounts starting the first full week following July 1;¶

(c) Applied for the entire benefit year after a new benefit year is established, even if the average weekly wage amount changes when the new fiscal year begins.¶

(3) "Benefit year" means a period of 52 consecutive weeks beginning on the Sunday immediately preceding the day that family, medical, or safe leave commences for the claimant, except that the benefit year shall be 53 weeks if a 52-week benefit year would result in an overlap of any quarter of the base year of a previously filed valid claim. A claimant may only have one valid benefit year at a time.¶

(4) "Calendar quarter" means the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31.¶

(5) "Care," as the term is used in ORS 657B.010(17)(a)(B), means physical or psychological assistance as used for leave taken to care for a family member with a serious health condition.¶

(a) "Physical assistance" means assistance attending to a family member's basic medical, activities of daily living, safety, or nutritional needs when that family member is unable to attend to those needs themselves, or transporting the family member to a health care provider when the family member is unable to transport themselves.¶

(b) "Psychological assistance" means providing comfort, reassurance, companionship to a family member, or completing administrative tasks for the family member, or arranging for changes in the family member's care, such as, but not limited to, transfer to a nursing home.¶

(6) "Child" as the term is used for family leave to care for and bond with a child during the first year after the child's birth, foster placement, or adoption, and as the term is used for a safe leave purpose described in ORS 659A.272, means an individual described in ORS 657B.010(6) and that is:¶

(a) Under the age of 18; or¶

(b) Age 18 or older as an adult dependent substantially limited by a physical or mental impairment as defined by ORS 659A.104.¶

(7) "Claim" means a period of Paid Family and Medical Leave Insurance (PFMLI) benefits that starts with an approved application for benefits and continues through the duration of the approved leave until the approved leave or benefit amount has been exhausted or the approved timeframe for the leave has been reached. A claimant may have multiple claims in a benefit year, but may not be approved for more than the allowable benefit or leave amount as described in OAR 471-070-1030.¶

- (8) "Claimant" means an individual who has submitted an application or established a claim for benefits.¶
- (9) "Domestic violence," as the term is used for a safe leave purpose described in ORS 659A.272, means abuse or the threat of abuse, as abuse is defined in ORS 107.705.¶
- (10) "Eligible employee's average weekly wage" means an amount calculated by the department by dividing the total wages earned by an eligible employee during the base year by 52 weeks.¶
- (11) "Harassment," as the term is used for a safe leave purpose described in ORS 659A.272, means the crime of harassment described in ORS 166.065.¶
- (12) "Health care provider" means:¶
- (a) A person who is primarily responsible for providing health care to the claimant or the family member of the claimant before or during a period of PFMLI leave, who is licensed or certified to practice in accordance with the laws of the state or country in which they practice, who is performing within the scope of the person's professional license or certificate, and who is:¶
    - (A) A chiropractic physician, but only to the extent the chiropractic physician provides treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated to exist by X-rays;¶
    - (B) A dentist;¶
    - (C) A direct entry midwife;¶
    - (D) A naturopath;¶
    - (E) A nurse practitioner;¶
    - (F) A nurse practitioner specializing in nurse-midwifery;¶
    - (G) An optometrist;¶
    - (H) A physician;¶
    - (I) A physician's assistant;¶
    - (J) A psychologist;¶
    - (K) A registered nurse; or¶
    - (L) A regulated social worker.¶
  - (b) A person who is primarily responsible for the treatment of the claimant or the family member of the claimant solely through spiritual means before or during a period of PFMLI leave, including but not limited to a Christian Science practitioner.¶
- (13) "Serious health condition" means an illness, injury, impairment, or physical or mental condition of a claimant or their family member that:¶
- (a) Requires inpatient care in a medical care facility such as, but not limited to, a hospital, hospice, or residential facility such as, but not limited to, a nursing home or inpatient substance abuse treatment center;¶
  - (b) In the medical judgment of the treating health care provider poses an imminent danger of death, or that is terminal in prognosis with a reasonable possibility of death in the near future;¶
  - (c) Requires constant or continuing care, including home care administered by a health care professional;¶
  - (d) Involves a period of incapacity. "Incapacity" is the inability to perform at least one essential job function, or to attend school or perform regular daily activities for more than three consecutive calendar days. A period of incapacity includes any subsequent required treatment or recovery period relating to the same condition. The incapacity must involve one of the following:¶
    - (A) Two or more treatments by a health care provider; or¶
    - (B) One treatment plus a regimen of continuing care.¶
  - (e) Results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity, such as, but not limited to, asthma, diabetes, or epilepsy;¶
  - (f) Involves permanent or long-term incapacity due to a condition for which treatment may not be effective, such as, but not limited to, Alzheimer's Disease, a severe stroke, or terminal stages of a disease. The employee or family member must be under the continuing care of a health care provider, but need not be receiving active treatment;¶
  - (g) Involves multiple treatments for restorative surgery or for a condition such as, but not limited to, chemotherapy for cancer, physical therapy for arthritis, or dialysis for kidney disease that if not treated would likely result in incapacity of more than three calendar days;¶
  - (h) Involves any period of disability due to pregnancy, childbirth, miscarriage or stillbirth, or period of absence for prenatal care; or¶
  - (i) Involves any period of absence from work for the donation of a body part, organ, or tissue, including preoperative or diagnostic services, surgery, post-operative treatment, and recovery.¶
- (14) "Sexual Assault," as the term is used for a safe leave purpose described in ORS 659A.272, means any sexual offense or the threat of a sexual offense as described in ORS 163.305 to 163.467, 163.472 or 163.525.¶
- (15) "Stalking," as the term is used for a safe leave purpose described in ORS 659A.272, means:¶
- (a) The crime of stalking or the threat of the crime of stalking as described in ORS 163.732; or¶
  - (b) A situation that results in a victim obtaining a court's stalking protective order or a temporary court's stalking

protective order under ORS 30.866.¶

(156) "Subject Wages" means PFMLI wages that are paid and reported for an employee, as defined in ORS 657B.010(13), or an employee of a tribal government who has elected coverage under ORS 657B.130.¶

(167) "Willful" and "willfully" means a knowing and intentional act or omission.¶

(18) "Willful false statement" means any occurrence where:¶

(a) A claimant or employer made a statement or submitted information that is false;¶

(b) The claimant or employer knew or should have known the statement or information was false when making or submitting it;¶

(c) The statement or submission concerned a fact that was material to the rights and responsibilities of either the claimant or the employer under ORS chapter 657B; and¶

(d) The claimant or employer made the statement or submitted the information with the intent that the department would rely on the statement or information when taking action.¶

(19) "Willful failure to report a material fact" means any occurrence where:¶

(a) A claimant or employer omit or fails to disclose information;¶

(b) The claimant or employer knew or should have known that the information should have been provided;¶

(c) The information concerned a fact that was material to the rights and responsibilities of either the claimant or the employer under ORS chapter 657B; and¶

(d) The claimant or employer omitted or did not disclose the information with the intent that the department would take action based on other information or lack of information.¶

(20) "Work day" means any day on which an employee performs any work for an employer and is an increment of a work week. The number of work days in a work week is based on the average number of work days worked by an employee at all employment. There are a maximum of seven work days in a work week. If a work day spans two calendar days, such as a shift beginning on day one at 10 p.m. and ending on the next day at 5 a.m., the work day will count on the calendar day in which the shift began.¶

(217) "Work week" means a seven day period beginning on a Sunday at 12:01 a.m. and ending on the following Saturday at midnight. If a claimant works a variable or irregular schedule, the number of work days in a work week is determined by counting the total number of work days worked in the preceding 12 work weeks and dividing the total by 12 and rounding down to the nearest whole number. If the employee has not been employed by the employer for at least 12 weeks, the number of weeks the employee has been employed from the date of hire to the first day of leave shall replace 12 in the calculation.

Statutory/Other Authority: ORS 657B.340, ORS 657B.090

Statutes/Other Implemented: ORS 657B.090, 657B.010



ADOPT: 471-070-1300

RULE SUMMARY: Clarifies when the written notice poster must be displayed or delivered to remote worker by the employer and in what language.

CHANGES TO RULE:

471-070-1300

Benefits: Written Notice Poster to Employees of Rights and Duties

(1) The director shall make available to employers a model Paid Family and Medical Leave Insurance (PFMLI) notice poster that meets the requirements of ORS 657B.440.

(2)(a) Each employer must display the department's notice poster, or another poster approved by the department, in each of the employer's buildings or worksites in an area that is accessible to and regularly frequented by employees; and

(b) An employer with employee(s) assigned to remote work must provide, by hand delivery, regular mail, or through an electronic delivery method, a copy of the department's notice poster, or another poster approved by the department, to each employee assigned to remote work. The notice poster must be delivered or sent to each employee assigned to remote work upon the employee's hire or assignment to remote work.

(3)(a) For employers that have employee(s) working in buildings or worksites, the notice poster displayed under (2)(a) of this rule by the employer must be displayed in the language the employer typically uses to communicate with the employee. If the employer uses more than one language to communicate with employees assigned to a building or worksite, then the employer must display copies of the notice poster in each of the languages that the employer would typically use to communicate with the employees assigned to that building or worksite; and

(b) For employers that have employee(s) assigned to remote work, the notice poster provided under (2)(b) of this rule by the employer must be provided in the language the employer typically uses to communicate with each employee assigned to remote work.

(4) An employer offering an equivalent plan approved under ORS 657B.210 must follow the employer notice poster requirements specified in OAR 471-070-2330.

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

Statutory/Other Authority: ORS 657B.340, 675B.440

Statutes/Other Implemented: 675B.440, ORS 657B.070

RULE SUMMARY: Clarifies when an employer must restore an employee returning from leave due to being off for the Paid Family and Medical Leave Insurance program to the employee's former position. Requires employers to maintain health care benefits the employee had prior to taking leave.

CHANGES TO RULE:

471-070-1330

Benefits: Job Protection

(1) An employer must restore an employee returning from Paid Family and Medical Leave Insurance (PFMLI) leave to the employee's former position, if the position still exists, even if the former position has been filled by a replacement worker during the employee's PFMLI leave. The employee's former position is the position held by the employee at the time PFMLI leave commenced, regardless of whether the job has been renamed or reclassified. (For example, a delivery driver must be returned to the same route, at the same rate of pay and benefits, on the same shift, and working from the same location as when the driver started PFMLI leave.)¶

(2) For the purposes of this rule, any worker hired or reassigned during an eligible employee's leave to perform the same work in the same position that the eligible employee held before the leave was taken is a replacement worker. When the eligible employee on PFMLI leave notifies the employer that the eligible employee is ready to return to work, the employer must give the eligible employee the opportunity to work any hours that the replacement worker would otherwise have been scheduled to work beginning on the day following the date the eligible employee notified the employer they were ready to end their leave and return to work.¶

(3) The employee is not entitled to return to the former position if the employee would have been terminated or reassigned from their current position to another position if PFMLI leave had not been taken.¶

(4) If the position held by the employee at the time PFMLI leave began has been eliminated, and not merely renamed or reclassified, then:¶

(a) If the employer is a large employer as defined in OAR 471-070-3150, the employer must restore the employee to any available, equivalent position for which the employee is qualified.¶

(A) An available position is a position that is vacant or not permanently filled.¶

(B) An equivalent position is 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. It must involve substantially the same or similar duties and responsibilities, which must entail equivalent skill, effort, responsibility, and authority.¶

(b) If the employer is a small employer as defined in OAR 471-070-3150, the employer may, at the employer's discretion and based on business necessity, restore the employee to a different position. The different position must offer the same employment benefits, pay, and working conditions, including privileges, perks, and status as the employee's former position and must have similar job duties and responsibilities as the employee's former position.¶

(5)(a) Unless the terms of a collective bargaining agreement, other employment agreement, or the employer's policy provides otherwise, an employee on PFMLI leave is not entitled to accrue employment benefits during a period of leave. Employment benefits include but are not limited to: accrual of seniority, production bonuses, or other non-health-care-related benefits that would accrue while the employee is working;¶

(b) Benefits an employee was entitled to prior to starting PFMLI leave, including, but not limited to seniority or pension rights, must be restored in full upon the employee's return to work. The benefits do not have to be restored, however, if such benefits have been eliminated or changed for similarly situated employees;¶

(c) An employee is not entitled to a right, benefit, or position of employment other than a right, benefit, or position to which the employee would have been entitled to if the employee had not taken PFMLI leave; and¶

(d) An employee is subject to layoff on the same terms or under the same conditions as similarly situated employees who have not taken PFMLI leave.¶

(6) During any PFMLI leave, an employer must 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.¶

(a) 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.¶

(b) If an employee cannot or will not pay their share of the premium costs, the employer may elect to discontinue health care benefit coverage, unless doing so would render the employer unable to restore the employee to full benefit coverage once the employee returns to work. If coverage lapses because an employee has not made required premium payments, upon the employee's return from PFMLI leave the employer must restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and

the premium payment(s) had not been missed, including family or dependent coverage. In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including being subject to any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.<sup>¶</sup>

(c) If the employer pays (directly or indirectly, voluntarily or as required by state or federal statute) any part of the employee's share of health or other insurance premium while an employee is on PFMLI leave, the employer must receive permission from the employee to deduct from their pay until the amount is repaid. The employer may deduct up to 10 percent of the employee's gross pay each pay period after the employee returns to work until the amount is repaid.<sup>¶</sup>

(d) If an employee fails to return to work - unless the failure to return to work is because of a serious health condition or safe leave for which the employee would be entitled to PFMLI leave or another circumstance beyond the employee's control - the employer may recover the employee's share of benefits paid by the employer. The employer may use any legal means to collect the amount owed for the employee's share of benefits paid by the employer, including deducting the amount from the employee's final paycheck.<sup>¶</sup>

(7) An employer may require an employee to follow the employer's established leave policy regarding reporting to the employer any changes to the employee's leave status.<sup>¶</sup>

(8) If an employee gives clear notice of intent in writing not to return to work from PFMLI leave, except as required by other state or federal law, the employer's obligations under ORS chapter 657B to restore the employee's position and maintain any health care benefits cease on the date of the notice is given to the employer.<sup>¶</sup>

(9) The protections provided under ORS 657B.060 and this rule apply only to an eligible employee who was employed by the employer for at least 90 consecutive calendar days prior to taking PFMLI leave.<sup>¶</sup>

(10) It is an unlawful employment practice to discriminate against an eligible employee who has invoked any provision of ORS chapter 657B or this rule. An employee who alleges a violation of any provision of ORS chapter 657B or this rule may bring a civil action under ORS 659A.885 or may file a complaint with the Commissioner of the Bureau of Labor and Industries in the manner provided by ORS 659A.820.

Statutory/Other Authority: ORS 657B.340

Statutes/Other Implemented: ORS 657B.060, 675B.070

ADOPT: 471-070-1410

RULE SUMMARY: Clarifies the process for how the department will examine a benefit application and issue an initial determination for the benefit year.

CHANGES TO RULE:

471-070-1410

Benefits: Initial and Amended Monetary Determinations

(1)(a) When a claimant files an application for benefits as described in OAR 471-070-1100, which establishes a new benefit year, the department shall examine the application for benefits and, on the basis of information available, shall make an initial determination of:

(A) 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;

(B) Whether or not the amount in section (1)(a)(A) of this rule is sufficient to meet the eligibility requirement under OAR 471-070-1010(1)(b); and

(C) The claimant's weekly benefit amount under ORS 657B.050, provided the claimant is eligible for benefits under section (1)(a)(B) of this rule.

(b) The department's initial determination shall be applicable to all weeks of the benefit year respecting which the claim was filed, except that the department's determination may be amended with respect to any week or weeks of the benefit year as described under section (2) of this rule.

(c) The department shall notify the claimant of the initial determination made under this section.

(2)(a) A claimant who receives an initial determination under section (1) of this rule may request that the determination be amended. Upon receipt of such a request, the department will investigate by examining records of wages and income submitted to the department by the claimant, employers, and state agencies in an attempt to locate or remove subject wages or taxable income from self-employment alleged by the claimant to be missing or reported incorrectly.

(b) If, as the result of an investigation, the subject wages or taxable income from self-employment either make a previously ineligible claimant eligible for benefits, or increase or decrease the weekly benefit amount of a previously approved claim, then the department will issue an amended determination.

(c) The amended determination shall replace the initial determination made under section (1) of this rule and shall be applicable to all weeks of the benefit year respecting which the claim was filed.

(d) If, as the result of an investigation, all or part of the requested wages or income are not included in the determination, the department will so notify the claimant.

(3) Unless the claimant files a request for hearing with the department regarding the initial or amended determination, the determination shall become final once the time for requesting a hearing has passed. The department shall pay or deny benefits in accordance with the determination, unless otherwise provided by law. The request for hearing must be filed not later than 60 days after the delivery of the initial or amended determination unless the department mails the determination, in which case the request for hearing must be filed not later than 60 days after the date the determination is mailed to the last-known address of the claimant.

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

Statutory/Other Authority: ORS 657B.340, ORS 657B.100

Statutes/Other Implemented: ORS 657B.100, 657B.050

ADOPT: 471-070-1500

RULE SUMMARY: Clarifies the process of the department's review of an overpaid benefit amount to determine the cause of the overpayment.

CHANGES TO RULE:

471-070-1500

Benefits: Review of Overpaid Benefits

(1) The department may review an overpayment of benefits to determine the cause of the overpayment and whether the claimant is liable for repayment of the benefits and any applicable penalties.¶

(2) The department's review of the overpayment shall be used to determine whether:¶

(a) The overpayment may be waived under ORS 657B.120(5);¶

(b) Interest may be applied under OAR 471-070-1510(3) to any amount owed;¶

(c) Penalties shall be applied under ORS 657B.120(3)(b); and¶

(d) The claimant shall be disqualified from claiming benefits under ORS 657B.120(3)(a);¶

(3) The department shall review information provided by the claimant or other parties and from the department's records in making its determination under this rule.¶

(4) The claimant may be held liable for repayment of benefits they were not entitled to, even though all relevant information was provided before a decision was issued, when the claimant should reasonably have known the payment was improper.¶

(5) The claimant will always be liable for repayment of benefits when an overpayment is the result of a claimant willfully making a false statement or willfully failing to report a material fact in order to obtain Paid Family and Medical Leave Insurance benefits.¶

(6) In deciding if a claimant is liable for repayment of benefits, the department may also consider factors which may affect the claimant's ability to report all relevant information to the department.

Statutory/Other Authority: ORS 657B.340, ORS 657B.120

Statutes/Other Implemented: ORS 657B.120

ADOPT: 471-070-1510

RULE SUMMARY: Clarifies the process for repayment of an overpaid benefit through the deduction of future benefits or through collection.

CHANGES TO RULE:

471-070-1510

Benefits: Repayment of Overpaid Benefits; Interest

(1) The director may issue an assessment to a claimant for an overpayment each time a claimant receives Paid Family and Medical Leave Insurance (PFMLI) benefits to which the claimant was not entitled.

(2) If the director determines that a claimant has received benefits to which the claimant was not entitled:

(a) The claimant may be required to repay the amount of benefits that the claimant was overpaid;

(b) The director may secure the repayment of the overpaid benefits through the deduction from future benefits otherwise payable to the claimant under ORS 657B.100; and

(c) The director may deduct all or any part of the claimant's future weekly benefits up to the amount of the prior overpayment.

(3)(a) If the department determines that a claimant is at fault for an overpayment, due to the claimant's error, false statement, or failure to report a material fact, then the claimant may be liable for interest on the overpayment amount. Interest that the claimant is liable for shall be paid and collected at the same time repayment of benefits is made by the individual, at the rate of one and a half percent per month or fraction of a month. Interest will accrue, beginning on the first day of the month that begins 60 days after the administrative decision establishing the overpayment becomes final.

(b) If the department determines that a claimant is not at fault for an overpayment, then the claimant shall not be liable for interest on the amount to be repaid as a result of the overpayment.

(4)(a) Deductions from PFMLI benefits under section (2)(b) of this rule shall be applied solely to the amount of overpaid benefits for which the claimant is liable.

(b) Amounts collected through other means shall be applied first to penalties, then interest, and then to the overpaid benefit amount.

(5) Deductions for the repayment of benefits paid erroneously may be deducted from benefits due to the claimant with no time limitations.

Statutory/Other Authority: ORS 657B.340, ORS 657B.120

Statutes/Other Implemented: ORS 657B.120

RULE SUMMARY: Clarifies when the director of the department may waive the amount of overpaid benefits. Clarifies the process a claimant may request if the waiver is denied by the department.

CHANGES TO RULE:

471-070-1520

Benefits: Waiver Recovery of Overpayments

(1) In accordance with ORS 657B.120(5), the director may waive, in whole or in part, the amount of Paid Family and Medical Leave Insurance (PFMLI) benefits if:

(a) The benefits were paid based on an error other than a willful provision of a false statement, nondisclosure of a material fact, or misrepresentation by a claimant, and

(b) Recovery would be against equity, good conscience, or administrative efficiency.

(2) The director may determine that recovery of overpaid benefits is against equity and good conscience if the individual requesting a waiver has limited means to repay the benefits and has total allowable household expenses that equal or exceed 90% of the total household income, not including PFMLI benefits received. The department will use the current year's Internal Revenue Service (IRS) Collection Financial Standards to determine total allowable household expenses. The director may allow expenses higher than those provided for in the IRS Collection Financial standards if the claimant requesting a waiver provides documentation showing that using those IRS Collection Financial Standards would leave the claimant unable to provide for basic living expenses.

(3) If the director grants a waiver, the department will stop collection activity of any overpaid benefits subject to the waiver. The department will give written notice of any waiver that is granted, indicating the amount of the overpaid benefits for which the waiver is granted.

(4) Waivers granted are effective the Sunday of the week in which the request for waiver was filed with the department. The date of the post mark from the United States Postal Service, a date stamp from an Employment Department office, an embedded fax date, or the electronic filing date as described in OAR 471-070-0850, whichever is earliest, will be used to determine the date of filing.

(5) If a request for waiver is denied, the department will notify the claimant of its decision. The claimant may submit another request for waiver if their situation changes significantly enough to establish that recovery of the benefits would be against equity and good conscience. No subsequent request for waiver of benefits may be granted, unless the claimant satisfactorily demonstrates in writing the significant change in financial situation and provides supporting documentation.

(6) Overpaid benefits that have been recovered from the claimant prior to the filing of a waiver request will not be waived or refunded.

(7) If a person is paid more than once for the same week(s), recovery of only the amount in excess of the final entitlement is eligible to be waived.

(8) In applying ORS 657B.120(5), a waiver will not be granted if the overpayment is a result of a willful false statement or a willful failure to report a material fact as determined under ORS 657B.120(3).

(9) Overpayments caused by the negotiation of an original and a replacement check that were issued for the same period will not be waived.

(10) The determination whether to waive overpayments under ORS 657B.120(5) and this rule shall be made by employees authorized by the director by delegation and may be made with or without the request for a waiver from the claimant.

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

Statutory/Other Authority: ORS 657B.340, ORS 657B.120

Statutes/Other Implemented: ORS 657B.120

ADOPT: 471-070-1550

RULE SUMMARY: Clarifies when the director may assess a civil penalty of up to \$1,000 against an employer each time the employer makes or causes to be made a willful false statement or willful failure to report material facts.

CHANGES TO RULE:

471-070-1550

Benefits: Penalties for Employer Misrepresentation

(1) In accordance with ORS 657B.120(2), the director may assess a civil penalty of up to \$1,000 against an employer each time the employer makes or causes to be made a willful false statement or willful failure to report a material fact regarding the claim of an eligible employee or regarding an employee's eligibility for Paid Family and Medical Leave Insurance benefits.¶

(2) The director may consider the following mitigating and aggravating circumstances when determining whether to assess a civil penalty under section (1) of this rule and the amount assessed:¶

(a) Whether the employer knew or should have known they were making or causing to be made a false statement or failing to report a material fact;¶

(b) Prior violations, if any, of ORS chapter 657B by the employer;¶

(c) Whether a violation of ORS chapter 657B by the employer resulted in harm to an employee;¶

(d) Whether a violation of ORS chapter 657B by the employer resulted in erroneous or incorrect benefit or assistance grant payments;¶

(e) The magnitude and seriousness of a violation of ORS 657B.120(1).¶

(3) It is the responsibility of the employer to provide the director any mitigating evidence concerning liability for or the amount of the civil penalty to be assessed.¶

(4) The director shall consider all mitigating circumstances presented by the employer for the purpose of determining the amount of the civil penalty to be assessed.¶

(5) Any amount in penalties due under ORS 657B.120(2) and this rule may be collected by the director in a civil action against the employer brought in the name of the director.

Statutory/Other Authority: ORS 657B.340, ORS 657B.120

Statutes/Other Implemented: ORS 657B.120



ADOPT: 471-070-1560

RULE SUMMARY: Clarifies when a claimant is disqualified from receiving Paid Family and Medical Leave Insurance benefits when they willfully make a false statement or willfully fail to report a material fact in order to receive Paid Family and Medical Leave Insurance benefits for a period of 52 consecutive weeks.

CHANGES TO RULE:

471-070-1560

Benefits: Disqualification and Penalties for Claimant Misrepresentation

(1) In accordance with ORS 657B.120(3), it is unlawful for a claimant to willfully make a false statement or willfully fail to report a material fact in order to obtain Paid Family and Medical Leave Insurance (PFMLI) benefits.¶

(2) If the director determines that a claimant has made a willful false statement or a willful failure to report a material fact in order to obtain PFMLI benefits, then the claimant shall be:¶

(a) Disqualified from claiming benefits for a period of 52 consecutive weeks beginning from the date that the claimant made the willful false statement or willful failure to report the material fact;¶

(b) Assessed for any amount of benefits the claimant received to which the claimant was not entitled to; and¶

(c) Liable for a penalty under ORS 657B.120(3)(b).¶

(3) When determining the rate of the penalty imposed under ORS 657B.120(3)(b), the department will review the number of occurrences of willful false statement or willful failures to report material facts. An occurrence shall be counted each time a claimant willfully makes a false statement or willfully fails to report a material fact in order to obtain PFMLI benefits. The department shall use the date the claimant failed to report a material fact or willfully made a false statement or representation as the date of the occurrence. The penalty shall be imposed as follows:¶

(a) For the first occurrence, or the second occurrence within five years of any previous disqualification or imposition of a penalty, 15 percent of the total amount of benefits the claimant received to which the claimant was not entitled;¶

(b) For the third or fourth occurrence within five years of any previous disqualification or imposition of penalty, 20 percent of the total amount of benefits the claimant received to which the claimant was not entitled;¶

(c) For the fifth or sixth occurrence within five years of any previous disqualification or imposition of penalty, 25 percent of the total amount of benefits the claimant received to which the claimant was not entitled;¶

(d) For the seventh or greater occurrence within five years of any previous disqualification or imposition of penalty, 30 percent of the total amount of benefits the claimant received to which the claimant was not entitled;¶

(e) In cases of forgery or identity theft, 30 percent of the amount of benefits the claimant received to which the claimant was not entitled, regardless of the number of occurrences.¶

(4) Any amount subject to recovery and any penalty due under this rule, OAR 471-070-1510, and ORS 657B.120 may be collected by the director in a civil action against the claimant brought in the name of the director.

Statutory/Other Authority: ORS 657B.340, ORS 657B.120

Statutes/Other Implemented: ORS 657B.120