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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

06/29/2022 4:18 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Administrative provisions related to Paid Family and Medical Leave Insurance (Paid Leave Oregon) contributions

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 08/01/2022 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:
Anne Friend
Rules Coordinator

HEARING(S)

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

DATE: 07/21/2022

TIME: 10:00 AM - 12:00 PM

OFFICER: Anne Friend

ADDRESS: PFMLI Rulemaking Hearing

Virtual Public Rulemaking Hearing

Director's Office

Salem, OR 97311

SPECIAL INSTRUCTIONS:

https://www.zoomgov.com/webinar/register/WN_EpE3b6HWSOeFDUxRGWDVJQ

DATE: 07/23/2022

TIME: 9:00 AM - 11:00 AM

OFFICER: Anne Friend

ADDRESS: PFMLI Rulemaking Hearing

Virtual Public Rulemaking Hearing

Director's Office

Salem, OR 97311

SPECIAL INSTRUCTIONS:

https://www.zoomgov.com/webinar/register/WN_bjoGwHGgTvKBn-E1rwwFqQ

DATE: 07/26/2022

TIME: 4:00 PM - 6:00 PM

OFFICER: Anne Friend

ADDRESS: PFMLI Rulemaking Hearing

Virtual Public Rulemaking Hearing

Director's Office

Salem, OR 97311

SPECIAL INSTRUCTIONS:

https://www.zoomgov.com/webinar/register/WN_AbRlqof2S2q5PFtyP84ufA

NEED FOR THE RULE(S)

In order to implement and administer the Paid Family and Medical Leave Insurance (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);
 - Domestic Workers' Protection Act – ORS chapter 653 (https://www.oregonlegislature.gov/bills_laws/ors/ors653.html); House Bill 2168 (<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2168/Enrolled>);
 - Oregon Bureau of Labor and Industries administrative rules, OAR Chapter 839, Division 20 (<https://secure.sos.state.or.us/oar>);
 - Oregon Employment Department Unemployment Insurance Taxes statute and administrative rules – ORS chapter 657 and OAR Chapter 839, Division 20 (<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=2338>);
 - Washington State's PFML administrative rules (WACs Chapter 192-500 through 192-810) (<https://app.leg.wa.gov/WAC/default.aspx?cite=192>);
 - 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.&chapter=22);
 - Massachusetts Paid Family and Medical Leave statutes and rules and regulations (<https://www.mass.gov/law-library/mass-general-laws>);
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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 Family and Medical Leave Insurance (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 contributions, the Paid Leave Oregon Division looked at the racial equity impact of the administrative rule 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 drafting OAR 471-070-0400 related to definitions of wages, the Paid Leave Oregon Division has been careful to ensure we think through any racial inequity that may occur, which includes for example what definition is used for agricultural labor and domestic services. The Division made sure the definition wasn't too broad as a broad definition could increase the potential number of agricultural labor employees for whom housing costs wouldn't count as subject wages, which would decrease Paid Leave Oregon contributions but also decrease benefit payouts. However, the Division tried to also keep in mind the confusion that employers and employees may have if significantly different definitions were used for programs.

In drafting the administrative rules related to contributions, tribal government election of coverage, and penalties, the Paid Leave Oregon Division has been careful to ensure that we are thinking through the racial inequity that may occur. Due to historic exclusion and racial disparities, it is likely that Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander and other people of color and their businesses, experience discrimination and other barriers in learning about requirements of, and access to, governmental and other programs, which is a risk as Paid Leave Oregon is implemented. Also based on history, the Paid Leave Oregon Division is aware that penalties could disproportionately fall on Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander and other people of color owned businesses as business owners are less likely to have staff resources dedicated to regulatory compliance, such as a human resource department. Lastly, racial equity disparities may arise around the misclassification of place of where the employee's work is performed – this negatively impacts a person's ability to take needed leave in Oregon.

Are there strategies to mitigate the unintended consequences?

The Paid Leave Oregon Division places a high priority on developing and maintaining a diverse and inclusive culture and ensuring there is equitable access to understanding and using the program for businesses and employees paying Paid Leave Oregon contributions. The Paid Leave Oregon Division's goal is to ensure that there is equity for businesses and individuals as we implement Paid Leave for Oregonians. Below are some strategies the Paid Leave Oregon Division will monitor to help mitigate unintended barriers for contributions:

- Have the information, tools, and processes accessible;
- Work with each tribal government individually to make sure the Paid Leave Oregon program is understood and the process for an intergovernmental agreement is smooth;
- Frequently asked questions and resource pages will be created to assist with explanation of contributions, place of performance, and tribal government elections;
- Widespread and targeted education and varied and accessible user support services;
- 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 areas and small businesses, which will include awareness raising about Paid Leave Oregon;
- 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;
- Monitor a number of data elements, develop Key Performance Measures (KPMs), and report out regularly on equity in the Paid Leave Oregon program ongoing; and
- Continuously explore ways to make changes within the policy and technology solution should disparities begin to arise in the program.

FISCAL AND ECONOMIC IMPACT:

Any fiscal or economic impact is the result of the statute being implemented as tribal government elections and place of performance are prescribed per statute. The proposed administrative rules just provide further clarification so there is no fiscal or economic impact associated with these new administrative rules. OAR 471-070-3340 providing that refunds of \$10 or less will not be refunded unless the individual requests the refund in writing will have a fiscal impact. However, since the program has not begun yet, the Division is unable to determine the fiscal impact to the Paid Leave Oregon Trust Fund as the Division doesn't know how many overpaid refunds there will be that are less than \$10.

OAR 471-070-8540 imposing a penalty amount when the employer fails to file a report is already in statute, the rule just clarifies the minimum amount of \$100 and provides an example.

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)):

ORS chapter 657B requires state agencies, local governments and other public bodies to withhold from their employees' subject wages Paid Leave Oregon contributions and to remit payment of the contributions quarterly on the Oregon combined quarterly payroll report that is submitted to the Oregon Employment Department. The administrative rules with Paid Leave Oregon definitions regarding tribal government elections and successor in interest have little to no effect on state agencies, local governments and other public bodies as they will likely not be impacted by the draft administrative rules as they are not tribal governments and are not likely to be successors in interest.

The administrative rules related to employer contributions, withholding of employee contributions, place of performance, overpayment refunds, and penalty amounts will likely have an impact on state agencies, local governments, and other public bodies. While the statute requires state agencies to withhold employee contributions and defines place of performance, the administrative rules provide further guidance. Any employers that have employees that perform work within and outside of Oregon, will need to determine the employee's place of performance to determine if the employer and employee should be contributing to the Paid Leave Oregon program for subject wages. They will also be impacted if the employer fails to deduct the maximum allowable employee contribution as in that circumstance the employer is considered to have elected to pay that portion.

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% of the state's workforce. Oregon has approximately 120,000 small businesses with fewer than 25 employees that employ 24.19% of the state's workforce. Since all employees, regardless of the employer's size, that are working in Oregon or that have employer's with base operation in Oregon will have subject wages requiring Paid Leave Oregon contributions, all, or nearly all, small business employers that have an employee will be subject to these administrative rules.*

*Based on from Unemployment Insurance 2020 Tax Wage file.

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

There is little to no effect on those subject to the administrative rules as the administrative rules tends to be clarifying in nature from what is already required by statute and does not affect projected reporting, recordkeeping, or other administrative activities or costs. Keeping the definitions aligned, when possible, with existing state programs, reduces the cost of compliance by not having to report using multiple definitions of "wages."

For OAR 471-070-3130, related to successor in interest of a business with liability for unpaid contributions, the statute requires the successor in interest to pay the total amount due within 10 days. The proposed administrative rule clarifies that if you are a partial successor in interest, the unpaid contribution liability stays with the predecessor business. No additional reporting or recordkeeping is required for this rule that isn't already required by statute.

For OAR 471-070-3340, specifying that refunds of \$10 or less will not be refunded unless the individual requests the refund in writing could require the small business to write for the refund if they overpaid. However, the Division does not know how many small businesses will overpay as the Oregon Quarterly Combined Payroll Report will describe the calculation of how to determine how much the business should pay so the likelihood of a small business overpaying is small.

c. Equipment, supplies, labor and increased administration required for compliance: None known

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), is statutorily required to have a four members represent employers, with 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 contributions workgroup that consisted of 14 members appointed by the Paid Leave Oregon Division director. There are three Paid Leave Oregon Advisory Committee members on the workgroup. The purpose of the contributions workgroup is to engage with representatives and stakeholders about specific aspects relating to contributions. The workgroup utilized the information and insights gathered in the course of its work to assist the Paid Leave Oregon Advisory Committee in developing recommendations to provide the department as they relate to the implementation of the program and the administrative rules drafted for contributions. The workgroup met 12 times over the course of a year, the first meeting occurred in June 2020 and the last meeting occurred in January 2021.

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.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

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

ADOPT: 471-070-0010

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

CHANGES TO RULE:

471-070-0010

Definitions

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

Statutory/Other Authority: ORS 657B.340

Statutes/Other Implemented: ORS 657B.340

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

CHANGES TO RULE:

471-070-0400

Wages: Definitions

(1) Agricultural labor¶¶

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

(A) Cultivating and tillage of the soil;¶¶

(B) Dairying;¶¶

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

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

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

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

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

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

(3) Domestic service¶¶

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

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

(A) A parent or spouse of the employer;¶¶

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

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

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

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

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

(G) Individuals employed by organizations licensed as required by ORS 443.015 or 443.315;¶¶

(H) Individuals performing companionship services exempt from the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C 201 et seq.);¶¶

(I) Persons who perform house sitting duties that do not involve domestic service;¶¶

(J) Persons who provide domestic service in exchange for an in-kind good or service; and¶¶

(K) Services of those not of a household nature, such as services performed as a private secretary, tutor, nurse, or certified nursing assistant, even though performed in the employer's private home.¶¶

(4) "Employing unit" has the same definition as "employer" as provided by ORS 657B.010(14).¶¶

(5) "Employment" means any service performed by an employee for an employer for remuneration or under any contract of hire, written or oral, expressed, or implied.¶¶

(6) "Holiday" means any of the holidays listed in ORS 187.010(1)(b)-(k) and (2), 187.020 and any holiday

designated by the employer, union contract, or otherwise.¶

(7) "Holiday pay" means any remuneration that an employer pays an employee for a holiday, including, but not limited to, full or partial paid time off or additional pay for work on a holiday. ¶

(8) "Paid time off" means compensated time away from work provided by an employer that the employee can choose to use for any reason, including, but not limited to, vacation, sickness, and personal time.¶

(9) "Private home," as used in section (3) of this rule, means a fixed place of abode of an individual household. A separate and distinct dwelling unit maintained by a household in an apartment, house, hotel, or other similar establishment may constitute a private home, provided it is a place in which a person resides with the intention of residence or has so resided with the intention of returning. If a dwelling unit of an individual or family is used primarily as a boarding house for the purpose of supplying lodging to the public as a business enterprise, only that portion of the premises occupied by the individual or family may be considered a private home for the purposes of this rule.¶

(10) "Sick pay" means remuneration paid by an employer to an employee for time away from work due to sickness, unless excluded as a fringe benefit under ORS 657.115.¶

(11) "Stand-by pay" means remuneration paid by an employer to an employee who is required to be immediately available for work.¶

(12) "Vacation pay" means remuneration paid by an employer to an employee for time away from work provided by an employer to an employee to use for any reason the employee chooses but does not include leave for sick pay, compensatory time, holiday, or other special leave.

Statutory/Other Authority: ORS 657B.340

Statutes/Other Implemented: ORS 657B.010

ADOPT: 471-070-2100

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

CHANGES TO RULE:

471-070-2100

Tribal Government: Election Requirements and Effective Date

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

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

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

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

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

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

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

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

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

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

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

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

Statutory/Other Authority: ORS 657B.130

Statutes/Other Implemented: ORS 657B.150, ORS 657B.130

ADOPT: 471-070-2180

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

CHANGES TO RULE:

471-070-2180

Tribal Government: Termination of Elective Coverage

(1) A tribal government may terminate elective coverage by filing a written notice with the department requesting a termination of the intergovernmental agreement.¶

(2) A tribal government can terminate elective coverage any time after the coverage has been in effect for three years or longer. The termination shall take effect 30 days after the notice to terminate is received by the department, unless a later date is requested by the tribal government in the written notice.¶

(3) A tribal government may terminate elective coverage that has been in effect for less than three years if a voluntary or involuntary bankruptcy petition has been filed for the covered business. The termination shall take effect on the date the department receives the written notice and supporting documentation of the bankruptcy petition.¶

(4) All contributions payable are due immediately upon termination of coverage.¶

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

Statutory/Other Authority: ORS 657B.130

Statutes/Other Implemented: ORS 657B.130

ADOPT: 471-070-3040

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

CHANGES TO RULE:

471-070-3040

Contributions: Withholding of Employee Contributions

(1) An employer may not deduct from the employee's subject wages more than the maximum allowable amount of 60 percent of the total contribution rate described in OAR 471-070-3010 for a pay period rounded to the nearest cent.¶

(2) Beginning January 1, 2024; if an employer fails to deduct the maximum allowable employee share of the contribution rate for a pay period, the employer is liable to pay that portion of the employee share under ORS 657B.150(5) or ORS 657B.210(5) for that pay period. ¶

(3) An employer that elects to pay the employee's contribution, in whole or in part, must enter a written agreement, policy, or collective bargaining agreement with the employee specifying that the employer is electing to pay the employee contribution, and the employer is liable for that portion of the employee contribution. The employer must give written notice, updated policy, or updated collective bargaining agreement to the employee at least one pay period in advance of any reduction of the elected payment amount. ¶

(4) If an employer has elected to pay the employee portion of contributions due under ORS 657B.150(5), the employer may not deduct this amount from a future paycheck of the employee.¶

(5) Section (1) and (2) of this rule do not apply if an employer was unable to deduct the maximum allowable employee share of the contribution rate for a pay period due to a lack of sufficient employee wages for that pay period. The employer may recoup the amount paid by the employer on the employee's behalf through an agreement or by the employer's policy until the proper employee contribution amount is collected.

Statutory/Other Authority: ORS 657B.340

Statutes/Other Implemented: ORS 657B.150, 657B.210

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

CHANGES TO RULE:

471-070-3100

Contributions: Place of Performance

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

(a) Performed entirely within Oregon; or ¶

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

(2) An employee's service performed outside of Oregon shall be considered incidental to the employee's service performed in Oregon if majority of the employee's service is localized within Oregon and the service outside of Oregon is temporary or transitory in nature or consists of isolated transactions and the services are not localized in any other state or territory. Factors that the department may consider in determining service is temporary or transitory in nature include: ¶

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

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

(c) Whether the employee will return to performing services in Oregon upon completion of the services performed outside of Oregon. ¶

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

Example 2: A storm hits Idaho. An employer in Oregon dispatches an employee who typically lives and works in Oregon to help with repair work. 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 3: Shannon works for an employer located in Oregon but works remotely on a permanent basis from a home office in California. Shannon never performs any service in Oregon. Even though the work is directed from Oregon, the service is entirely performed at Shannon's home in California. Therefore, the wages earned by Shannon are not PFMLI subject wages as wages are localized in California. ¶

Example 4: Kaitlynn works for an employer located in Illinois but works remotely on a permanent basis from a home office in Oregon. Kaitlynn never performs any service in Illinois other than work that is very temporary in nature. Even though the work is directed from Illinois, the service is entirely performed at Kaitlynn's home office in Oregon. Therefore, the wages earned by Kaitlynn are PFMLI subject wages. ¶

(3) If an employee performs services in Oregon and another state(s), but the service is not localized in any state or territory and the service is not covered in any other state or territory, look if the base of operations are in Oregon. Base of operations is an established location from where the employee starts work and customarily returns to perform services under the terms of the contract with the employer. ¶

Example 5: Ryan is a truck driver who leaves each week in their eighteen wheeler from their home base in Dillard, Oregon, picks up supplies in Northern California and delivers the supplies to Tacoma, Washington. Ryan performs some service in Oregon; driving up and down I-5, changing the oil in their eighteen wheeler and performing maintenance, as well as performing service in California and Washington. Ryan's base of operation is Dillard, Oregon, as the place they leave from and return to. All of Ryan's wages earned are PFMLI subject wages. ¶

(4) If section (2) or (3) of this rule does not determine where the employee's service is localized, consider the place from which the service is directed or controlled is in Oregon. Direction and control is considered as basic authority and overall control rather than immediate supervision by a manager or foreman. ¶

Example 6: Lois works for an Oregon employer that has a retail store in Oregon and Washington. Lois works at both locations equal amount of time throughout the year. However, Lois's work is directed from the Oregon headquarters. Therefore, all the wages earned by Lois in Oregon and Washington are considered PFMLI subject wages. ¶

(5) If section (2), (3), and (4) of this rule does not determine where the employee's service is localized, then consider if the employee's residence is in Oregon to determine the employee's wages are earned services in Oregon. ¶

Example 7: Andrew works for a Washington employer that dispatches Andrew, who lives in Medford, Oregon, on calls to repair furnaces throughout Oregon, Idaho, and California. Andrew doesn't know where the work will be

performed from day to day or each week. Andrew's work is directed from Washington, but no service is performed there. The services performed in Idaho and California would be considered incidental to Andrew's service in Oregon, since Andrew's residence is in Oregon. All of Andrew's wages earned are PFMLI subject wages based on Andrew's residency in Oregon.

Statutory/Other Authority: ORS 657B.340

Statutes/Other Implemented: ORS 657B.175

ADOPT: 471-070-3130

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

CHANGES TO RULE:

471-070-3130

Contributions: Successor in Interest Unpaid Contribution Liability

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

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

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

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

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

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

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

Statutory/Other Authority: ORS 657B.150

Statutes/Other Implemented: ORS 657B.150

ADOPT: 471-070-3340

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

CHANGES TO RULE:

471-070-3340

Contributions: Overpayment Refunds

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

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

Statutory/Other Authority: ORS 657B.340

Statutes/Other Implemented: ORS 293.445

ADOPT: 471-070-8540

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

CHANGES TO RULE:

471-070-8540

Penalty Amount When Employer Fails to File Report

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

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

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

Statutory/Other Authority: ORS 657B.340

Statutes/Other Implemented: ORS 657B.92