

Secretary of State
NOTICE OF PROPOSED RULEMAKING FILING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

Oregon Employment Department, Paid Leave Oregon Division		471	
Agency and Division Name		Administrative Rules Chapter Number	
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RULE CAPTION

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

Last Date and Time for Public Comment: TBD

<input type="checkbox"/> Hearing Date	Time	Address	Hearings Officer
TBD		Virtual	Anne Friend

RULEMAKING ACTION

List each rule number separately (000-000-0000) below. Attach proposed, tracked changed text for each rule at the end of the filing.

In the matter of:

Amending OAR 471-070-3150; and 471-070-3160

Adopting OAR 471-070-8000

Statutory Authority: ORS 183.452 and 657B.340

Other Authority:

Stats. Implemented: ORS 183.452, 657B.360, and 657B.410

RULE SUMMARY:

471-070-3150: Employer Size: Definitions - Defines terms used by the Paid Family and Medical Leave Insurance Division necessary to regulate contributions and award assistance grants. Makes the temporary rule permanent.

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471-070-3160: Employer Size: Method to Determine Number of Employees Employed by an Employer - Establishes a method for how to determine whether an employer has fewer than 25 employees for the Paid Family and Medical Leave Insurance program. The method is averaging over 12 months. Makes the temporary rule permanent.

471-070-8000: Appeals: Department Representation in Hearing – Establishes that an officer or employee of the Oregon Employment Department may represent the department in certain hearings for Paid Family and Medical Leave Insurance. Makes the temporary rule permanent.

Need for Rule(s): Why do we need this rule?

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

The Attorney General (AG) may consent to representation of an agency in contested case hearings by an agency representative. The agency wishing to be represented by agency representatives must adopt a rule authorizing the representation. The Employment Department (Department) has a well-developed process with agency representatives representing the Department in Unemployment Insurance contested case hearings before the Office of Administrative Hearings. Representation by agency representatives for the Paid Leave Oregon program, administered by the Department, will avoid undue duplication of processes and hearings and provide better service to the public. As allowed by ORS 183.452, the Department submitted a request to the Oregon Department of Justice and the AG for use of agency representation. The AG issued a final decision to allow employees of the Department to represent the Department in appeals on XXXXX.

Racial Equity Impact:

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 iniquity 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 employer size and representation, 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 the administrative rules, the Paid Leave Oregon Division has been careful to ensure that we think through any racial inequity that may occur. Today, many small-business services and supports are easily

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accessible to white-owned and English-speaking businesses. Due to historic exclusion and racial disparities, Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander and other people of color and their small businesses, experience discrimination and other barriers in learning about requirements of, and access to, governmental and other programs, at a higher rate than their white counterparts. Therefore, it is important to determine the employer size as closely as possible without creating additional barriers like reporting requirements.

In developing the method for determining whether an employer has fewer than 25 employees, the Paid Leave Oregon Division determined the employer count includes out-of-state employees to achieve equity across the program. This will ensure a more solid trust fund is established and that all large businesses, not just large businesses with staff only in Oregon, are paying their fair share of the employer-portion of the contribution rate and will support equity in rate-paying for Oregon based employers and employees. The Division also incorporated a more accurate reflection of the true number of employees an employer has by taking into account the employee count each month instead of quarterly but didn't go too far in the calculation that it took more reporting requirements for the businesses than necessary. Employers already use the monthly employee count when reporting for Unemployment Insurance purposes so counting employees monthly will not create additional reporting barriers.

While the statute, ORS 657B.410, requires an appeal process with the Office of Administrative Hearings (OAH), the Division understands the appeal process in itself can cause stress, anxiety, barriers, and biases. The appeal process can cause stress, anxiety, barriers, and biases specifically for people of color, for speakers of diverse languages, for individuals with a disability, for regions without reliable internet services, for women experiencing domestic violence, stalking, harassment and others. Allowing the Oregon Employment Department (Department) to represent themselves instead of the Department of Justice (DOJ) attorneys, will hopefully reduce some of the stress and anxiety when the claimant is attending the hearing, particularly claimants of color and their small businesses as the appeal shall create a less intimidating experience as they will not hear or see that an attorney is representing the Department. Requiring the Department to be represented by the DOJ in all hearings would add both to the cost of administering the program and the employer and worker contributions required to support the program, which would negatively impact business owners of color and who are more likely to have less revenue than their white counterparts. Having the DOJ represent in all hearings could also create a more confrontational, intimidating experience for those who believe the Department's original decision as wrong and wish to challenge it.

The nature of the administrative appeal process is intended to have a second independent review to assure decisions are fair and in compliance with the governing statutes and administrative rules by the OAH. While the OAH will have the authority to make rulings/decisions on Paid Leave Oregon appeals, the Paid Leave Oregon Division commits to monitoring and evaluating the programs use, the decisions issued by OAH, non-utilization of processes (appeals), the effects of litigation with new administrative rules, appeal outcomes, and case law created.

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 equitable outcomes for businesses and individuals as we implement Paid Leave for Oregonians. The complexity of the legal system and language differences produce barriers and bias across the board. Individuals may experience cultural biases, prejudice, inherent fears of the legal system, and preconceived

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ideas about adverse consequences based on race and financial status. Below are some strategies the Paid Leave Oregon Division has implemented or plans to implement within the draft administrative rules to mitigate unintended consequences:

- Create a one-pager in plain language on how to calculate employer size;
- Create frequently asked questions and resources page in plain language to assist with explanation of employer size;
- Have the information and tools more accessible that allows more individuals ability to file an appeal, understand how Paid Leave Oregon appeal process works, and be better equipped to complete the process;
- Make the Division's processes transparent; therefore, making the program more accessible;
- Widespread and prioritized instruction and varied and accessible user support services;
- Conduct focused outreach and engagement activities from now until implementation with payroll vendors and employers, prioritizing immigrants and speakers of diverse languages, 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 raising awareness about Paid Leave Oregon and how the employer size is calculated;
- Build a universal glossary of terms that is consistent with the judicial system by using the same appeal language as Unemployment Insurance and the model rules for contested cases;
- Collaborate with data team to make sure we are gathering enough information to further analyze who is appealing;
- Review court case decisions and contested case decisions timely to determine if changes are needed in the Division's administrative rules, internal procedures, or a statutory change is needed in ORS 657B;
- Monitor a number of data elements, develop Key Performance Measures (KPMs), and report out regularly on potential inequitable gaps in service and accessibility in the Paid Leave Oregon program; and
- Continuously explore ways to make changes within the policy and technology solution when racial disparities begin to arise in the program

The Paid Leave Oregon Division also plans to provide ongoing anti-bias and trauma-informed training for staff to assist staff in understanding and identifying racial equity impacts in our policies and procedures.

Fiscal and Economic Impact:

The fiscal or economic impact associated with amending the method to determine the employer size, is estimated to change about 2,500 businesses from a large business to a small business. While this means some employers that would have been required to pay their share of contributions will now have the option not to, the impact is indeterminate. Because the Paid Leave Oregon program has not begun, all projections are estimates and the impact is indeterminate as it depends on how many employers are really changed from large too small. Additionally, it is indeterminate how many small employers will opt to pay the employer contributions so they can be eligible for small employer assistance grants.

There is no fiscal or economic impact associated with the new administrative rule for representative by a Department employee. The fiscal and economic impact of appeals being represented by a Department employee was already built in when the statute was passed and no additional impact is anticipated due to the draft administrative rule. Failure to promulgate this rule, however, would result in a fiscal impact, in that it

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would create additional costs for the Department in administering the Paid Leave Oregon program since the Department of Justice would charge for all the time spent representing the Employment Department in hearings.

Statement of Cost of Compliance:

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

The administrative rules on employer size will only impact state agencies, units of local government and the public if they are close to 25 employees on average over the course of a year.

The administrative rule on Paid Leave Oregon representation will likely have an impact on state agencies, local governments, and other public bodies if needing to appeal a decision made by the Department on contributions. The state agencies, units of local government, and the public may have a Department employee represent Paid Leave Oregon in the appeal, making it easier to work with the Department.

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 estimated of the 6,000 (126,000 small businesses with fewer than 50 employees minus 120,000 small businesses with fewer than 25 employees), 2,500 businesses may switch from being a large business to a small business for Paid Leave Oregon purposes.

It is estimated that five percent of or 6,000 (120,000 small businesses x 5%) small businesses will have a contribution adjustment made by the Department. Of those 6,000 businesses that the contributions are adjusted, it is estimated that 10 percent or 600 (6,000 small businesses adjusted x 10%) will appeal. This estimate was based on Unemployment Insurance data but increased slightly due to Paid Leave Oregon being a new program and more businesses are covered under the Paid Leave Oregon program than Unemployment Insurance

*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:

The administrative rule that requires calculating a headcount of the average number of employees for the pay period that includes the 12th of each month from the last calendar year, will require employers to keep track of their payroll records for the year to determine the count. The count should still include all out-of-state employees and subtract the number of replacement workers, which will requiring some reporting and recordkeeping. For many employers, this may be the same amount that is already reported on the Oregon combined payroll report for Unemployment Insurance. It is estimated that determining the headcount each year, will take approximately one hour to complete. Per the Bureau of Labor Statistics report released September 16, 2021*, the total compensation (wages, salaries and benefits) for a professional and related

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occupation for an employer for private industry workers is \$56.24 per hour. Each small business is different, so the amount of time the reporting requirements and recordkeeping may take will vary.

*<https://www.bls.gov/news.release/pdf/ecec.pdf>

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

It is estimated that one additional hour of labor is needed to determine the headcount once each year.

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.

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 email addresses are in 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.

The rule amendments for employer size is an amendment to a previously promulgated rules, and the changes are being made because, despite the robust employer involvement in the previously promulgated rules, small businesses raised concerns more recently about the rule impact in community engagement conversations, leading to the amendments today.

Documents Relied Upon, and where they are available:

- Paid Leave Oregon statute - ORS chapter 657B (https://www.oregonlegislature.gov/bills_laws/ors/ors657B.html);
- Unemployment Insurance (<https://www.oregon.gov/employ/unemployment/pages/default.aspx>);
- Workers' Benefit Fund (<https://www.oregon.gov/dcbs/pages/wbf.aspx>);
- Oregon Sick Time (<https://www.oregon.gov/boli/workers/pages/sick-time.aspx>);
- Oregon Family Leave Act (OFLA) (<https://www.oregon.gov/boli/workers/pages/oregon-family-leave.aspx>);
- Federal Medical Leave Act (FMLA) (<https://www.dol.gov/agencies/whd/fmla>);
- Oregon Administrative Procedures Act contested cases statute and administrative rules – ORS chapter 183 and OAR Chapter 137, Division 3 (https://www.oregonlegislature.gov/bills_laws/ors/ors183.html and <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=283>); and
- Washington State's Paid Leave program and administrative rules were used to compare their small employer count (<https://apps.leg.wa.gov/wac/default.aspx?cite=192-560-020>; <https://apps.leg.wa.gov/wac/default.aspx?cite=192-560-030>)

Was an Administrative Rule Advisory Committee consulted?: **YES or NO**
If no, why not?

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The Paid Leave Oregon Advisory Committee, as required by ORS 657B.380, serves as the RAC and was consulted on December 7, 2022 while developing these administrative rules and impact statements.

PROPOSED RULE LANGUAGE

- Final Draft of Rule Language to be filed:** [The exact rule language needs to be listed below. The Rules Coordinator will copy/paste from this language into the Secretary of State's database for rulemaking. This must be 100% correct. If multiple rules are being filed, follow the same layout below for each individual rule.] (This document is needed in addition to documents created within a program or division. This is the official filing document.)

- Rule Number:

- Rule Language to be filed: (Insert final rule language to be filed here. No tracked changes)

DRAFT