

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

Amending, adopting, and repealing Paid Leave Oregon administrative rules relating to contributions and recovery.

Last Date and Time for Public Comment: [June 30, 2023, at 11:59 PM]

June 22 (2-4 PM), June 26 (9-11 AM), and June 28 (4-6 PM)	Virtual via Zoom	Anne Friend	
<input type="checkbox"/> Hearing Date	Time	Address	Hearings Officer

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:

Adopting OAR 471-070-0470, 471-070-5200, 471-070-5210

Amending OAR 471-070-0010, 471-070-3000, 471-070-3040, 471-070-8530, 471-070-8540

Repealing OAR 471-070-3310

Statutory Authority:
ORS 657B.340

Other Authority: none

Stats. Implemented:
ORS 84.052, 657B.010, 657B.040, 657B.120, 657B.150, 657B.210, 657B.240, 657B.300, 657B.320, 657B.330, 657B.340, 657B.370, 657B.430, 657B.910, 657B.920

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- RULE SUMMARY:** *Include a summary for each rule included in this filing.*

Adopting

OAR 471-070-0470 – Wages: Paid Leave Oregon Benefits – Clarifies that Paid Leave Oregon benefits issued by the Employment Department, employer or administrator through an approved equivalent plan, is not considered wages for Paid Leave Oregon contribution purposes.

OAR 471-070-5200 – Due Dates for Balances Owed to the Department - Explains that unless otherwise specified by law, balances owed to Paid Leave Oregon are due as of the date the decision causing the balance owed becomes final.

OAR 471-070-5210 – Application of Payments - Clarifies the order in which payments are applied to all outstanding debts under ORS chapter 657B. Similar language for contribution debts was previously listed in OAR 471-070-3310; however, that rule is being repealed so the order applies to all outstanding debts.

Amending

OAR 471-070-0010 – Definitions – Amends the administrative rule to define “final” which means a decision made by the department is final unless an individual files an appeal within the allowed appeal timeframe. Also defines what a volunteer is for purposes of who would not be considered an employee for Paid Leave Oregon purposes.

OAR 471-070-3000 – Contributions: Definitions – Amends the administrative rule to remove the definition of “legal fees” as this will now be included in OAR 471-070-3010 and will no longer be limited to contributions only.

OAR 471-070-3040 – Contributions: Withholding of Employee Contributions – Amends the administrative rule to clarify when the rounding shall occur when calculating the Paid Leave Oregon employer and employee contributions.

OAR 471-070-8530 – Good Cause for Failure to File Reports or Pay Contributions – Amends the administrative rule to expand when Paid Leave Oregon will find an employer had “good cause” for failure to file combined payroll reports or pay paid leave contributions to include payments and reports incorrectly filed with another jurisdiction.

OAR 471-070-8540 – Penalty Amount When Employer Fails to File Report – Amends the administrative rule to specify the penalty is determined final within 20 calendar days from the date the department assessed the late filing penalty, unless the employer requests a hearing before the 20 calendar days.

Repealing

OAR 471-070-3310 – Contributions: Application of Payments – Repealing this rule as the content will be added to a new administrative rule relating to all debts owing under ORS chapter 657B and not just contribution debt.

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

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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. The rules will clarify that contributions shall not be paid on Paid Leave Oregon benefit payments, how contribution calculations shall be rounded, when personal income tax withholding will occur, and when adjustments are considered final.

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 under-resourced and underserved populations and will 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.

Paid Leave Oregon contributions rules seek to provide guidance and clarity to Oregon workers and employers. The rules clarify who owes Paid Leave contributions, when, and in what amounts. Contributions rules also guide administrative decision processes as well as defining our collections policies and practices. Clear, easily accessible rules will make it easier for employers and employees to understand both what is expected of them, and the potential consequences for rule violation.

While adopting our administrative rules for contributions, Paid Leave Oregon 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?

Paid Leave Oregon recognizes that due in part 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 specific discrimination and other barriers in learning about the requirements of, and accessing support for, governmental and other programs. Recognizing a need for transparency, a number of our proposed contributions rule changes and additions clarify when payments are subject to contributions and how to complete the contributions formula. Creating a contribution formula that is easy to understand and follow, with concrete rules regarding how to complete the formula and clear definitions throughout all rules, will particularly benefit small employers without dedicated payroll and HR departments. These employers may have struggled under a more complex formula and without needed definitions. Additionally, because employer errors in this area may have a direct, potentially negative, impact on workers, workers will also benefit from clear guidelines that are easy for their employers to follow.

Paid Leave Oregon understands that the appeals process in itself can cause specific stress, anxiety, and barriers for people of color, speakers of diverse languages, individuals with a disability, those living in regions without reliable or fast mail and internet service, for women experiencing sexual assault, domestic

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violence, stalking, harassment, those who have been justice system involved, and many others. Because of the extensive impact this area of Paid Leave governance can have, particular care is being taken to provide strong, easy to understand definitions within our appeals process. A transparent process with concrete terms will encourage engagement and develop trust in the agency and Paid Leave program.

Paid Leave is aware that penalties may, and historically have, disproportionately fallen on minority business owners who are less likely to have staff resources dedicated to regulatory compliance. Additionally, unexpected expenses, including government penalties, have a particularly burdening effect on new, small, or already-struggling businesses that may lack capital and may face discrimination when applying for short-term bank loans. Rules allowing the waiver of penalties for good cause have been established and are being added to. These waivers will likely benefit both employers and the agency, as they provide an opportunity for employers to come into compliance when unplanned, unexpected, or unavoidable complications impact expected contributions and education is a more appropriate agency response.

Paid Leave Oregon recognizes the ongoing disparity in debt collection activity in Oregon, with some reports indicating that communities of color are sent to collections at rates over twice those of their white counterparts (1). Oregon workers and employers owing balances to Paid Leave Oregon have a right to fair and equal collections practices. Our rules surrounding payments, including their due dates and application of payments received, are designed to provide clear and consistent guidance for both claimants and internal staff. However, while the order of payment application is standard across agencies and within the debt collection industry, the order specified does place a burden on the debtor and creates a barrier to debt repayment by potentially extending the amount of time the principle balance remains. By applying payments to principle last, the debtor is subject to greater total interest than if the payment were to be applied evenly or to the principle balance first. This will create an especially difficult burden on low-income debtors, who will be more burdened by a higher effective interest rate.

The Paid Leave Oregon division recognize that racial disparities, discrimination and inequities across society is evidence of institutional racism that is often invisible and sometimes unintentional, but inherent elements of policy development. While the rules aim to ensure equitable benefits for employees, these may not be sufficient to prevent barriers for those who may have an equity impact as identified above. We recognize the importance of acknowledging and understanding racial and ethnic disparities in access to and use of paid leave is vital in developing inclusive rules and policies. In addition, until the Paid Leave program develops its own measurable data, we continue to gather relative data from other states and draw experience from established benefit programs.

Are there strategies to mitigate the unintended consequences?

It is important to recognize that complex bureaucratic processes often have built-in barriers, such as the dispute process, and the legal language used, that disproportionately impact those who are non-native English speakers and individuals who are socioeconomically disadvantaged. Furthermore, due to historical exclusion and systemic racism, communities of color, in particular Black, Latino/a/x or Indigenous persons in the U.S may not fully trust the legal system and government processes.¹ As policymakers consider legislation, however, they can help mitigate some of these concerns. Increased access to paid family, medical, and safe leave requires addressing disparities in access and enhancing racial equity by broadening

¹ <https://www.politico.com/news/magazine/2022/12/18/black-mistrust-healthcare-00060324>
<https://www.mprnews.org/story/2019/12/16/native-american-leaders-work-to-overcome-community-mistrust-of-census>

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worker coverage, expanding eligibility criteria, increasing wage replacement rates, and ensuring job and anti-retaliation protections.²

Paid Leave Oregon's goal is to ensure that there is equity for businesses and individuals as we implement Paid Leave for Oregonians. The 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. Below are some strategies the Paid Leave Oregon Division has implemented or plans to implement within the draft administrative rules to mitigate unintended consequences:

- Providing focused outreach and engagement activities, including a specific campaigning on contributions requirements, key dates, and subjectivity, and any time there are changes to law and/or policy
- Developing a contributions calculator for employees to estimate their contribution amount
- Conducting focused outreach and engagement activities now and after implementation with employers and employees, with a focus on immigrant 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 increasing general and specific awareness about Paid Leave Oregon;
- Providing instructions, guidebooks, and all other materials in plain language, in multiple languages, and in alternative formats such as video;
- Providing supplemental materials to guidebooks such as a, "frequently asked questions," section on our website, instructional videos, and other tools in order to accommodate different learning styles; monitoring usage to inform gaps in initial and continued messaging
- Evaluating ongoing debt collection practices, once started, to determine what, if any, impact payment application practices and debt waiver policies are having on narrowing historic racial gaps within collections
- Establishing and using an equity framework to standardize review processes to ensure that all new and ongoing processes, procedures, rules, and related communications are furthering program equity
- Collaborating with the division's data team to gather and analyze information for any gaps or trends on groups impacted by contributions or accessing assistance grants
- Monitoring a number of data elements related to contributions, appeals, and collections in order to determine if and what disparate outcomes historically marginalized groups are facing in Paid Leave
- Developing Key Performance Measures (KPMs), and report out regularly on equity disparate impacts in the Paid Leave Oregon program
- Continuously explore ways to make changes within the policy and technology sections should disparities begin to arise in the program
- Having instructions in plain language and easy to use tools that allows more individuals ability to file for benefits, understand how application process works, and be better equipped to complete the process
- Creating video instructions in several languages to give direction for Frances Online

² <https://www.urban.org/sites/default/files/2022-07/Access%20to%20Paid%20Leave%20Is%20Lowest%20among%20Workers%20with%20the%20Greatest%20Needs.pdf>

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- Providing widespread and prioritized instruction with varied and accessible user support services that meet the needs of the public
- Building a universal glossary of terms that is the same across the division to help with delivering consistent information to lessen confusion among division employees and the public
- Committing to, and then provide, ongoing anti-racism and trauma-informed care training to assist staff in understanding, identifying, and eliminating negative impacts that Paid Leave policy, procedures, and rules may otherwise have on already marginalized groups

Fiscal and Economic Impact:

Any fiscal or economic impact is the result of the statute being implemented as contributions are prescribed per statute. The proposed administrative rules just provide further clarification so there is no fiscal or economic impact associated with these new and amended administrative rules.

Statement of Cost of Compliance:

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

ORS 657B requires state agencies, local governments and other public bodies to withhold from their employees' 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 rule related to how the contribution calculation is rounded when withholding the contributions from employee's paychecks will impact state agencies, local governments, and public bodies that have employees. This rounding may already be occurring and therefore, the rule may just provide further clarification.

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

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

In the second quarter of 2022, Oregon had approximately 113,900 small businesses with fewer than 50 employees that employ 34 percent of the state's workforce. Oregon has approximately 107,500 small businesses with fewer than 25 employees that employ 24 percent of the state's workforce.*

Based on the percentage of small businesses electing to offer an equivalent plan to their employees in Washington State's Paid Leave program, it is estimated for Oregon that, of the 126,000 small businesses, approximately 371 small business employers will submit an application to have a Paid Leave Oregon equivalent plan instead of participating in the state plan.

* Source: Oregon Unemployment Insurance Wage Records

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

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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.

If small business has an approved equivalent plan, the administrative rule regarding Paid Leave Oregon benefit payments not being considered wages, may have a positive impact as the small business will not have to withhold Paid Leave Oregon contributions on the benefits paid.

The administrative rule related to how the contribution calculation is rounded when withholding the contributions from employee's paychecks provides further clarification as to how the contributions shall be calculated. This rounding may already be occurring and therefore, the rule may just provide further clarification and not additional administrative activity.

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

The department is not anticipating any equipment or supplies that will be required for compliance. There may be increased labor for employers regarding the rounding of contributions but likely this task is already occurring since contributions began January 1, 2023.

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.

Small businesses may also sign up to participate in our community engagement events (out of 507 town halls there were 20,775 attendees), receive Paid Leave Oregon emails (107,307 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.

Documents Relied Upon, and where they are available:

- Paid Leave Oregon statute – ORS chapter 657B (https://www.oregonlegislature.gov/bills_laws/ors/ors657B.html);
- Oregon Employment Department Unemployment Insurance Taxes statute and administrative rules – ORS chapter 657 and OAR Chapter 471, Division 31 (https://www.oregonlegislature.gov/bills_laws/ors/ors657.html and <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>); and
- Oregon Department of Revenue Administrative rules related to withholding - OAR Chapter 150, Division 316 (<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=448>)

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

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PROPOSED RULE LANGUAGE

- Final Draft of Rule Language to be filed:** the individual rule language documents are on separate Word docs as they are too long.

DRAFT