

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

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

Amending Paid Leave Oregon administrative rules relating to equivalent plans.

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

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|---|------------------|-------------|------------------|
| 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:

Amending OAR 471-070-2200, 471-070-2210, 471-070-2220 471-070-2400, 471-070-2450, 471-070-2460

Statutory Authority:

ORS 657B.210, 657B.240, 657B.340, 657B.420

Other Authority: none

Stats. Implemented:

ORS 183.635, 657B.210, 657B.220, 657B.230, 657B.240, 657B.260, 657B.420

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

Amending

OAR 471-070-2200 – Equivalent Plans: Definitions – Amends the administrative rule to align the definition of “successor in interest” with the definition used in OAR 471-070-3130.

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OAR 471-070-2210 – Equivalent Plans: Application Requirements and Effective Date – Amends the administrative rule to clarify the timeframe the equivalent plan employer has to respond to the department’s request for further information. The timeframe is 14 calendar days for request sent by mail and 10 calendar days if request is sent by telephone, email, or other electronic means.

OAR 471-070-2220 – Equivalent Plans: Plan Requirements – Amends the administrative rule to increase the timeframe an employee can appeal an equivalent plan employer denial from 20 calendar days to 60 calendar days. This will align with the appeal timeframe in OAR 471-070-8005.

OAR 471-070-2400 – Equivalent Plans: Disputes between an Equivalent Plan Employer and Employee, Request for Hearing – Amends the administrative rule to increase the appeal timeframe to appeal the employer and employee dispute to the department from 20 calendar days to 60 calendar days. This will align with the appeal timeframe in OAR 471-070-8005.

OAR 471-070-2450 – Equivalent Plans: Termination by the Departments – Amends the administrative rule to expand the reason the department may terminate an equivalent plan if a business closure occurs. Specifies the appeal timeframe for the employer to appeal the notice of termination is 20 calendar days. Clarifies when contributions collected from employees that are still in the employer’s trust must be paid to the department and become final once the plan is terminated and the employer receives an invoice from the department for contributions due.

OAR 471-070-2460 – Equivalent Plans: Employer Withdrawal – Amends the administrative rule to clarify when contributions collected from employees that are still in the employer’s trust must be paid to the department and become final once the plan is withdrawn and the employer receives an invoice from the department for contributions due.

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 administrative rules in accordance with ORS chapter 657B. These amended rules provide further guidance for timeframes for equivalent plan employers to respond to letters and expands the timeframe for appeals of an equivalent plan dispute to the department. The amended rules also clarify when the employee contributions are due to the Paid Leave Oregon Trust Fund when an approved equivalent plan is withdrawn or terminated.

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

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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 equivalent plans provide employers flexibility to decide if offering paid family, medical, and safe leave benefits to their employees through an employer administered or fully insured plan would be preferred to the state plan. This has potential advantages for employers, such as cost savings, ability to maintain existing benefits program if equivalent to the state plan, and an opportunity to provide higher benefits than the state plan, and thus be a more competitive employer. While employees covered by an equivalent plan must receive benefits that are equal to or greater than the state plan, it is the employer, insurance provider, or third party administrator and not Paid Leave Oregon that is responsible for the administration of the equivalent plan, including processing of claim applications, decisions on claims, and payment of benefits.

Paid Leave Oregon recognizes that employees covered by equivalent plans may face barriers in accessing benefits through their employer, such as denial of valid claims and non-payment of approved claims. These barriers may have a disproportionate impact on Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander, and other people of color, immigrants and non-native English speaking individuals. These racial groups may be more likely to experience discrimination and bias in decision-making on claims, including claim approval and receiving any or all eligible paid leave benefits. Furthermore, individuals who are socioeconomically disadvantaged, meaning persons who have less access to social and economic resources, may face barriers to accessing and understanding paid leave benefits for a variety of reasons including language barriers and access to reliable technology.

The administrative rules on equivalent plans seek to ensure that employers approved to offer benefits through an equivalent plan are able to sufficiently administer the plan while still being in compliance and that their employees have equitable access to benefits under the state plan or an equivalent plan. The amended administrative rule specifies the timeframe for employers to respond to department requests for information. Also clarifies when employee contributions have to be paid to the department in the case of plan termination and withdrawal, and how interest accrues on employee contributions due. In addition, the amended rules clarify the meaning of a successor in interest. On the employee side, the rule amendments extend the timeframe for employees filing equivalent plan disputes.

While amending the above outlined administrative rules for equivalent plans, Paid Leave Oregon 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 rule amendments on equivalent plans, Paid Leave Oregon has been careful to think through racial inequities that may occur. A number of the proposed rule amendments clarify department expectations for employers. All employers may likely benefit by providing clear timeframes for responding to information requests and specifying when contributions are due and their accrued interest amounts related to plan withdrawal and termination. The amendments may also benefit small businesses that have less ability to navigate structural barriers like locating missing information. The same benefit also applies to clarifying the definition of successor in interest and aligning the meaning across administrative

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rules. In addition to providing clear information, the rule on response timeframes further allows more time to respond for employers that do not use electronic communication and thereby takes into account lack of access to technology. This is relevant from an equity perspective because the digital divide particularly burdens Black, Indigenous, and other people of color living at or below the minimum income standard and those living in rural areas, as well as persons with a disability.

It is important to be aware of the fact that information and support for small businesses are generally more easily accessible to white-owned, native English speaking businesses than for business owners of color. 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 face greater barriers in learning about requirements of, and access to, government programs. This was for instance highlighted by the inequities for Black and Latino/a/x business owners in accessing COVID aid. Racial inequities in accessing information may further intersect with inequities for businesses owned by women or members of the LGBTQIA2S+ community and businesses that have less capital.

On the employee side, Paid Leave Oregon proposes to extend the timeframe for requesting a dispute resolution from 20 to 60 days of the equivalent plan employer's appeal decision. Extending the timeframe aligns with the timeframe for requesting an appeal under the state plan and ensures that the same requirements apply to employees covered by an equivalent plan and a state plan. Moreover, extending the appeal timeframe would benefit employees that require more time to understand the dispute process in order to put together an appeal request. This may have a huge impact on individuals such as those who are non-native English speakers or any persons needing help with filing an appeal.

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, regardless of the available timeframe. 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 worker coverage, expanding eligibility criteria, increasing wage replacement rates, and ensuring job and anti-retaliation protections.

The Paid Leave Oregon division recognizes 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?

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

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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:

- 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.
- Collaborating with the division's data team to gather and analyze information for any gaps or trends on equivalent plan approvals and denials, and demographics on disputing equivalent plan decisions and their outcomes.
- 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.
- Examining the root cause of factors that produce or perpetuate racial inequities to better understand gaps in the program and how to best address them.
- Collaborating with community members most impacted to develop strategies and give recommendations to leadership to remove or lower barriers to the appeals process.
- 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.
- 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.
- Centering the most impacted, those who have been historically underserved and under resourced by addressing practices, cultural norms, and structural barriers that create inequities.
- Commitment to open, ongoing and transparent dialogue with invested community members and policy makers.
- Continuing to build the website, forms, guidebooks, and any other public facing documents in all 12 languages.
- 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

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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 for Paid Leave Oregon benefits is the result of the statute being implemented. There is no fiscal or economic impact associated with these 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)):

The administrative rules on equivalent plans impacts the State as an employer, units of local government and the public if they choose to not participate in the state Paid Leave Oregon plan but rather provide their own approved Paid Leave Oregon equivalent plan to their employees. State agencies, local governments, and the public that has elected to have an equivalent plan will be impacted by these rule amendments by the timeframe to respond to the department's request for additional information and when the contributions shall be due if they terminate or withdraw their plan.

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.*

Since all employers are eligible to offer an equivalent plan instead of participating in the Paid Leave Oregon program, all small employers may be subject to these rules if they choose to offer an equivalent plan instead.

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:

The request to respond to the notices sent by the department within 10 to 14 calendar days will require an individual to respond quickly. The additional information that is needed to process the equivalent plan

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application can vary so the time needed to respond to the request can also vary. We estimate it will take approximately one hour to respond to the department's request for additional information.

The statute requires the employer to dispose the remaining employee contributions at the time of withdrawn or termination to the department. The administrative rule just clarifies how that will occur. The reporting requirements for payment of employee contributions the employer still has in trust after the equivalent plan is withdrawn or terminated will need to show how much was collected from the employees and how much was paid in expenses to arrive at a net amount. The department will then send an invoice to the employer that will need to be paid. The estimated time needed to compile the report depends on how many employee contributions were withheld and how many different administrative expenses occurred. The reporting and recordkeeping requirement is estimated to take on average four hours.

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

The timeframe to gather the sum of the amount of employee contributions withheld and the administrative expenses paid with the employee contributions to arrive at the net amount will depend on the number of employees the employer has. Per the Bureau of Labor Statistics report released March 17, 2023*, the total national compensation (wages, salaries and benefits) for a professional and related occupation for an employer for private industry workers is \$61.02 per hour. Each small business is different, so the hours needed for reporting requirements and recordkeeping may vary.

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

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 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 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>);
- Oregon Department of Consumer Business Services administrative rules and laws around insurance providers (<https://wcd.oregon.gov/laws/Pages/index.aspx>).

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- Oregon Public Broadcasting (<https://www.pbs.org/newshour/economy/the-system-was-never-created-for-us-business-owners-of-color-still-struggle-to-get-enough-covid-aid>)
- Politico Magazine (<https://www.politico.com/news/magazine/2022/12/18/black-mistrust-healthcare-00060324>)
- MPR News (<https://www.mprnews.org/story/2019/12/16/native-american-leaders-work-to-overcome-community-mistrust-of-census>)
- Urban Institute (<https://www.urban.org/sites/default/files/2022-07/Access%20to%20Paid%20Leave%20Is%20Lowest%20among%20Workers%20with%20the%20Greatest%20Needs.pdf>)

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

PROPOSED RULE LANGUAGE

- Final Draft of Rule Language to be filed is on individual rule language docs due to the length of the rules.