

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

Administrative provisions related to Paid Leave Oregon program benefits

Last Date and Time for Public Comment: August 31, 2022 at 11:59 p.m.

<input type="checkbox"/> Hearing Date	Time	Address	Hearings Officer
August 23, 2022	9 – 11 a.m.	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:

Adopting: OAR 471-070-1300; OAR 471-070-1330; OAR 471-070-1410; OAR 471-070-1500; OAR 471-070-1510; OAR 471-070-1520; OAR 471-070-1550; OAR 471-070-1560

Amending: OAR 471-070-1000

Statutory Authority:

ORS 657B.090, 657B.100, 657B.120, 657B.340, 657B.440

Other Authority:

Stats. Implemented:

ORS 657B.010, 657B.050, 657B.060, 657B.070, 657B.090, 657B.100, 657B.120, 657B.440

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

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OAR 471-070-1000: Benefits: Definitions- Amends the rule to define eligible employee's average weekly wage, willful false statement, and willful failure to report a material fact, which are terms used in the Paid Leave Oregon program's rules related to benefits.

OAR 471-070-1300: Benefits: Written Notice Poster to Employees of Rights and Duties- Clarifies when the written notice poster must be displayed or delivered to remote worker by the employer and in what language.

OAR 471-070-1330: Benefits: Job Protection- Clarifies that an employer must restore an employee returning from paid leave to the employee's former position. Requires employers to maintain health care benefits the employee had prior to taking leave.

OAR 471-070-1410: Benefits: Initial and Amended Monetary Determinations- Clarifies the process for how the department will examine a benefit application and issue an initial determination for the benefit year.

OAR 471-070-1500: Benefits: Review of Overpaid Benefits- Clarifies the process of the department's review of an overpaid benefit amount to determine the cause of the overpayment.

OAR 471-070-1510: Benefits: Repayment of Overpaid Benefits; Interest- Clarifies the process for repayment of an overpaid benefit through the deduction of future benefits or through collection.

OAR 471-070-1520: Benefits: Waiving Recovery of Overpayments- Clarifies when the director may waive the amount of overpaid benefits. Clarifies that a claimant may request another waiver if the waiver is denied by the department if their situation significantly changes.

OAR 471-070-1550: Benefits: Penalties for Employer Misrepresentation- Clarifies when the director may assess a civil penalty of up to \$1,000 against an employer each time the employer makes or causes to be made a willful false statement or willful failure to report material facts.

OAR 471-070-1560: Benefits: Disqualification and Penalties for Claimant Misrepresentation- Clarifies that a claimant is disqualified from receiving Paid Leave Oregon benefits when they willfully make a false statement or willfully fail to report a material fact in order to receive Paid Leave Oregon benefits for a period of 52 consecutive weeks.

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.

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

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help to combat the insidious impact of historical and current injustice and inequities that families of color face when trying to access government programs.

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

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

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

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

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

Are there strategies to mitigate the unintended consequences?

Individuals may experience cultural biases, fear of a state program, and systemic barriers in accessing and coverage of health care systems. While the statute and the draft rule requires job protection, the Division

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understand that processes related to job protection can cause stress, anxiety, barriers, and biases. Below are some strategies the Paid Leave Oregon Division has implemented or plans to implement within or related to the draft administrative rules to mitigate unintended consequences:

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

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

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

Fiscal and Economic Impact:

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

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 Paid Leave Oregon benefits will likely have an impact on state agencies, local governments, and other public bodies because their employees (claimants) may be eligible for Paid Leave

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Oregon benefits. The state agencies, units of local government, and the public may need to provide additional information requested by the department to verify claimant information and accept leave notices from their employees.

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

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

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

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

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

*Based on Unemployment Insurance 2020 Tax Wage file.

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

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

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

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standard-sized letter¹ and the cost of an envelope) plus the administrative time to send the notice to the employee. The third method of delivering the notice poster through an electronic delivery method would create no additional cost other than the administrative time to send the electronic information to the employee.

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

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

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

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

Describe how small businesses were involved in the development of these rule(s).

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

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

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

Documents Relied Upon, and where they are available:

¹ <https://www.usps.com/business/prices.htm>

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- Paid Leave Oregon statute – ORS chapter 657B (https://www.oregonlegislature.gov/bills_laws/ors/ors657B.html);
- Oregon Labor, Employment, and Unlawful Discrimination statutes – ORS chapter 659A (https://www.oregonlegislature.gov/bills_laws/ors/ors659A.html);
- Oregon Family Leave Act (OFLA) statutes and administrative rules – ORS chapter 659A and OAR chapter 839, Division 9 (<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=3834>);
- Family and Medical Leave Act (FMLA) statute and regulations – 29 USC Ch. 28 and Treas. Reg. 29 CFR part 825 (<https://uscode.house.gov/view.xhtml?path=/prelim@title29/chapter28&edition=prelim> and <https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-C/part-825>);
- Oregon Employment Department Unemployment Insurance Taxes statute and administrative rules – ORS chapter 657 and OAR Chapter 471, Division 31 (https://www.oregonlegislature.gov/bills_laws/ors/ors657.html and <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=2338>);
- Workers’ Compensation statutes and administrative rules – ORS chapter 656 and OAR chapter 436 (https://www.oregonlegislature.gov/bills_laws/ors/ors656.html and <https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=76>);
- Washington State’s PFML administrative rules (WACs Chapter 192-500 through 192-810) (<https://app.leg.wa.gov/WAC/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=&article= and [https://www.cga.ct.gov/current/pub/chap_557.htm#sec_31-49e](https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I05076D10D4B711DE8879F88E8B0DAAAE&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)]);• Connecticut Paid Family & Medical Leave Act statute and regulations (<a href=) and <https://www.cga.ct.gov/2019/ACT/pa/pdf/2019PA-00025-R00SB-00001-PA.pdf>);
- District of Columbia (DC) Paid Family Leave statutes and rules and regulations – (<https://code.dccouncil.us/us/dc/council/code/titles/32/chapters/5/subchapters/IV/> and <https://www.dcregs.dc.gov/Common/DCMR/AgencyChapterList.aspx?AgencyID=45>);
- Massachusetts Paid Family and Medical Leave statutes and rules and regulations (<https://www.mass.gov/law-library/mass-general-laws-c175m> and <https://www.mass.gov/regulations/458-CMR-200-family-and-medical-leave>);
- New Jersey Temporary Disability and Family Leave Insurance statutes and rules and regulations (<https://casetext.com/statute/new-jersey-statutes/title-43-pensions-and-retirement-and-unemployment-compensation/chapter-4321> and <https://casetext.com/regulation/new-jersey-administrative-code/title-12-labor-and-workforce-development>);
- New York Short-Term Disability/Paid Family Leave statutes and rules and regulations [<https://www.nysenate.gov/legislation/laws/WKC/A9> and [7](https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I0bfea200ad0d11dda763b337bd8cd8ca&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)]; and</div><div data-bbox=)

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- Rhode Island Temporary Disability/Caregiver Insurance statutes and rules and regulations (<http://webserver.rilin.state.ri.us/Statutes/TITLE28/INDEX.HTM> and <https://rules.sos.ri.gov/regulations/part/260-40-05-1>).

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

The Paid Leave Oregon Advisory Committee, as required by ORS 657B.380, serves as the RAC and was consulted on May 17, 2022 while developing these administrative rules and impact statements.

PROPOSED RULE LANGUAGE

- Final Draft of Rule Language to be filed:**
- Rule Number:
- Rule Language to be filed: (Insert final rule language to be filed here. No tracked changes)