

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

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

Administrative hearing provisions related to Paid Family Medical Leave Insurance program

Last Date and Time for Public Comment: July 29, 2022 at 5pm

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

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 471-070-8005; OAR 471-070-8010; OAR 471-070-8015; OAR 471-070-8020; OAR 471-070-8025; OAR 471-070-8030; OAR 471-070-8035; OAR 471-070-8040; OAR 471-070-8045; OAR 471-070-8050; OAR 471-070-8055; OAR 471-070-8060; OAR 471-070-8065; OAR 471-070-8070; OAR 471-070-8075; 471-070-8080

Statutory Authority:

ORS 657B.340;

Other Authority:

Stats. Implemented:

ORS 657B.410;

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

OAR 471-070-8005: Appeals: Request for Hearing- Establishes procedures for requesting a hearing on an administrative decision related to the payment of Paid Family and Medical Leave Insurance benefits, that must be filed within 60 days after the administrative decision is issued. Establishes procedures for requesting a hearing on an administrative decision related to contributions, equivalent plans, or penalties within 20 days after the administrative decision is issued.

OAR 471-070-8010: Appeals: Assignment to Office of Administrative Hearings- Describes the appeal process and when the department will refer the hearing request to the Office of Administrative Hearings including communication requirements.

OAR 471-070-8015: Appeals: Contested Case Proceedings Interpretation for Non-English-speaking Persons- Sets out the process for obtaining and use of a “qualified interpreter” for a non-English-speaking person who is a party or witness in a Paid Family and Medical Leave Insurance contest case proceeding.

OAR 471-070-8020: Appeals: Contested Case Proceedings Interpretation for Individuals with a Disability- Sets out the process for obtaining and use of an “assistive communication device” or a “qualified interpreter” designed to facilitate communication by an individual with a disability who is a party or witness in a Paid Family and Medical Leave Insurance contest case proceeding.

OAR 471-070-8025: Appeals: Late Request for Hearing- Describes the process for which a late request for hearing can be filed including the definition for “good cause”.

OAR 471-070-8030: Appeals: Notice of Hearing- Describes the notification requirements for a Notice of Hearing and/or determination or decision. Also, allows an administrative law judge’s ability to consolidate two or more hearings.

OAR 471-070-8035: Appeals: Subpoenas- Establishes procedures for parties or the administrative law judge to issue a subpoena requiring a person to appear at a scheduled hearing or produce documents.

OAR 471-070-8040: Appeals: Postponement of Hearing- Establishes procedures for requesting a postponement of a hearing for good cause that are beyond the reasonable control or no postponement would result in undue hardship.

OAR 471-070-8045: Appeals: Telephone and Video Conference Hearings- Establishes procedures and timelines to hold a hearing or portion of a hearing by telephone or video conference.

OAR 471-070-8050: Appeals: The Hearing- Describes the purpose of a hearing is to inquire on the matters and issues and submit testimony and evidence to the administrative law judge. The hearings will be recorded on video, audio, or stenographically and the administrative law judge must make a decision on the facts and law involved.

OAR 471-070-8055: Appeals: Continuance of Hearing- Establishes the procedures for a party to request or administrative law judge to grant a continuance of the hearing.

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OAR 471-070-8060: Appeals: Office of Administrative Hearings Transmittal of Questions- Establishes when and how the Office of Administrative Hearings administrative law judge may ask questions to the department.

OAR 471-070-8065: Appeals: Administrative Law Judge's Decision- Describes how the administrative law judge must issue a decision in writing to all parties included in the hearing and what must be included in the decision.

OAR 471-070-8070: Appeals: Dismissals of Requests for Hearing- Establishes procedures for parties to request a withdrawal of a hearing request and describes that administrative law judge's authority to issue a dismissal of a request for hearing.

OAR 471-070-8075: Appeals: Reopening of a Hearing- Describes the process and requirements for a request to reopen a hearing, which can be filed within 20 days of the date of mailing of the hearing decision as long as there is good cause with factors beyond an interested party's reasonable control for reopening.

OAR 471-070-8080: Appeals: Late Request to Reopen Hearing- Describes the process and requirements for which a late request to reopen a hearing may be filed where a party has good cause with factors beyond a party's reasonable control for failing to request a reopening within the time allowed.

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

In order to implement and administer the PFMLI program, the Oregon Employment Department is promulgating permanent administrative rules in accordance with ORS chapter 657B. ORS 657B.410 makes appeals of PFMLI determinations by the department subject to contested case provisions under ORS chapter 183. As allowed by ORS 183.630(2), the Oregon Employment Department has submitted a request to the Oregon Department of Justice (DOJ) and the Attorney General (AG) for an exemption for the PFMLI program from the Attorney General's Model Rules for contested cases. The proposed procedural rules for PFMLI contested cases are modeled on the Employment Department's procedural rules for Unemployment Insurance program hearings, modified where appropriate to be consistent with statutes in ORS chapter 183 and ORS chapter 657B. The Attorney General's final decision on the requested exemption from the Model Rules of procedure will not be made until the PFMLI contested case rules are in final form, but the PFMLI program is consulting closely with DOJ, as well as consulting with the Chief Administrative Law Judge of the Office of Administrative Hearings (OAH) and others on the proposed rules. PFMLI program will diligently pursue the exemption and believes that if the AG has any concerns that might prevent such an exemption, that they can be addressed to her satisfaction before the rules are adopted.

Racial Equity Impact:

By providing paid and job protected leave, PFMLI 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. While adopting our administrative rules for appealing the decision

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made by the department, the PFMLI Division looked at the racial equity impact of the administrative rules and answered the below questions.

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.

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

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 nature of the administrative appeal process is intended to have a second independent review to assure decisions are fair, equitable, and in compliance with the governing statutes and administrative rules. While the OAH will have the authority to make rulings/decisions on PFMLI appeals, the PFMLI 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.

In 2021, Washington's Paid Leave program conducted a non-utilization study of their paid leave program¹. Below is some information gathered from the study:

Gender:

- Those who identified as female had higher rates of approval and receipt of benefits.
- Those who identified as male, nonbinary, or who preferred not to disclose their gender, had higher rates of denial and of approval without receipt of benefits.

Racial-Ethnic Identity:

- Those who identified as white, East Asian, and who preferred not to disclose their racial-ethnicity identity had higher rates of approval and receipt of benefits.
- Those who identified as Native Hawaiian, American Indian or Alaska Native, and Black or African American had the highest rates of denial.

Age:

- Customers ages 30 to 39 had higher rates of approval and receipt of benefits, likely related to the high numbers of approved bonding and pregnancy complication claims. Customers ages 18 to 29, 40 to 49, and 50 to 59 had lower rates of approval and receipt of benefits, aside from those whose age was not available.
- Aside from customers whose ages weren't available, customers ages 18 to 29 had the highest rates of denial.

Are there strategies to mitigate the unintended consequences?

¹ https://paidleave.wa.gov/app/uploads/2021/07/WA-Paid-Leave_Nonutilization-Study_July-2021_FINAL.pdf

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

- Specific/direct outreach with resource tools describing the appeal and hearing process and providing assistance in multiple languages as determined by the department's equity framework;
- Build a universal glossary of terms that is consistent with the judicial system;
- Provide a qualified interpreter free of charge in contested case hearings for people who request language assistance and ensure that all parties are informed of this right.
- Provide an assistive communication device or qualified interpreter free of charge in contested case hearings upon request and ensure that all parties are informed of this right;
- Allow for postponement of hearings in certain circumstances;
- Expand the benefit appeals timeframe from 20 days to 60 days to allow more time for individuals to learn the appeal process and submit a request for hearing;
- Expand the way an appeal request can be submitted to make it easier for individuals to appeal (via mail, fax, e-mail, in person, or through the department's secured website);
- Provide different ways to appear for a hearing (i.e. telephone, in-person, and video conferences).

Inexperience, misinterpretation of law, inconsistent procedures, and lack of managerial oversight may all contribute to a poor quality hearing. Below are some strategies the PFMLI program will monitor to help mitigate these unintended consequences of a poor quality hearing:

- Conduct regular program evaluation, including analysis of demographics such as race, gender, and age;
- Develop core steps in reviewing the outcome of contested cases. Include steps that could identify bias, influence, or incorrect interpretation of statutes;
- 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 and develop safeguard tools within building the process of the application in the system, continually checking for errors and/or immediate action to default notifications; and
- Review program evaluation data and build transparency in the program design.

The PFMLI program also plans to provide ongoing anti-bias and trauma-informed training for rulemaking staff and ongoing community engagement to help determine racial equity impacts.

Fiscal and Economic Impact:

Any fiscal or economic impact for PFMLI appeals is the result of the statute being implemented. There is no fiscal or economic impact associated with these new 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)):

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The administrative rules on PFMLI appeals 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 need to appeal within 20 days and provide additional information to explain why the adjustment made by the department is incorrect.

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 that five percent or 6,000 (120,000 small businesses x 5%) of 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.

*Based on Unemployment Insurance 2020 Tax Wage file.

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

Small businesses that disagree with a contribution determination made by the department will need to request an administrative hearing appeal in writing within 20 days after the administrative decision is issued. Along with an appeal, the small business must provide evidence or reasoning why it disagrees with the department's determination.

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

Small businesses that disagree with a contribution determination made by the department will have increased administration in the filing of the appeal and attending the hearing. This will likely take Human Resource, Payroll, or Administrative staff to submit the appeal and attend the hearing. Per the Bureau of Labor Statistics report released September 16, 2021*, the total national compensation (wages, salaries and benefits) for a professional and related occupation for an employer for private industry workers is \$56.24 per hour. Each appeal is different, so the hours needed for the appeal may vary. The estimated time to gather the evidence or reasoning why the employer disagrees with the department's determination and submit the appeal to the department via mail, fax, e-mail, in person, or through the department's secured website is one hour. The estimated time an administrative hearing takes with the department and OAH is five hours. Therefore, the submission and attendance of an appeal is estimated to take six hours or \$337.44 (6 hours x \$56.24).

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

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

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The PFMLI 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 PFMLI emails (105,000 on the PFMLI email distribution list), listen to PFMLI 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:

- PFMLI 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>);and
- 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>)

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

The PFMLI Advisory Committee, as required by ORS 657B.380, serves as the RAC and was consulted on May 10, 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)