

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 provisions related to Paid Family Medical Leave Insurance program benefits

Last Date and Time for Public Comment: May 30, 2022 at 5pm

<input type="checkbox"/> Hearing Date	Time	Address	Hearings Officer
May 19, 2022	9-11 AM		
May 21, 2022	10 AM - Noon		
May 24, 2022	4-6 PM	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 471-070-1000; 471-070-1010; 471-070-1020; 471-070-1030; 471-070-1100; 471-070-1110; 471-070-1120; 471-070-1130; 471-070-1200; 471-070-1210; 471-070-1220; 471-070-1230; 471-070-1310; 471-070-1320; 471-070-1420; 471-070-1430; 471-070-1440; 471-070-1450; and 471-070-1460

Statutory Authority:

ORS 293.525; 657B.040, 657B.090, 657B.100, 657B.340,

Other Authority:

Stats. Implemented:

ORS 293.525, 657B.010, 657B.015, 657B.020, 657B.040, 657B.050, 657B.090, 657B.100, 657B.120

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

471-070-1000: Benefits: Definitions – Defines terms in the Paid Family and Medical Leave Insurance program’s rules related to program benefits.

471-070-1010: Benefits: Eligibility and Qualification for Benefits – Clarifies when certain employees, self-employed individuals that have elected coverage, and employees of tribal governments where the tribal government has elected coverage are eligible for Paid Family and Medical Leave Insurance benefits.

471-070-1020: Benefits: Assignment of Wages and Income – Clarifies the assignment of covered income and covered wages into specific calendar quarters.

471-070-1030: Benefits: Maximum Amount of Benefits in a Benefit Year – Establishes a maximum amount of Paid Family and Medical Leave Insurance benefits a claimant is eligible to receive in a single benefit year.

471-070-1100: Benefits: Application for Benefits – Clarifies the application process and manner an individual must use when applying for Paid Family and Medical Leave Insurance benefits.

471-070-1110: Benefits: Verification of Family Leave to Care for and Bond with a Child – Clarifies the method for verifying a request to take Paid Family and Medical Leave Insurance leave when the qualifying purpose is related to family leave to care for and bond with a child.

471-070-1120: Benefits: Verification of a Serious Health Condition – Clarifies the method for verifying a request to take Paid Family and Medical Leave Insurance leave when the qualifying purpose is related to family leave or medical leave due to a serious health condition.

471-070-1130: Benefits: Verification of Safe Leave – Clarifies the method for verifying a request to take Paid Family and Medical Leave Insurance leave when the qualifying purpose is related to safe leave.

471-070-1200: Benefits: Claim Processing; Additional Information – Establishes timelines for the claimant to respond to requests for additional information from the Oregon Employment Department.

471-070-1210: Benefits: Updates to Application for Leave; Additional Claims – Clarifies situations when the claimant must alter information provided on the initial application for benefits.

471-070-1220: Benefits: Cancellation of a Claim – Establishes a method for a claim for Paid Family and Medical Leave Insurance benefits to be cancelled.

471-070-1230: Benefits: Administrative Decisions on Applications and Weekly Leave Reports – Establishes procedures for the Oregon Employment Department when issuing an administrative decision on an application or a weekly leave report for the Paid Family and Medical Leave Insurance benefits. Written notice of the decision will be provided to the interested parties.

471-070-1310: Benefits: Employee Notice to Employers Prior to Commencing Leave – Clarifies situations when an employee is and is not required to provide a written notice to their employer at least 30 calendar days before commencing paid family, medical, or safe leave. Clarifies the manner the written notice must be

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issued and the penalty amount of 25 percent of the first weekly benefit amount if the written notice isn't issued.

471-070-1320: Benefits: Communication to Employers and Employee Application for Benefits – Clarifies the employer will be notified by the Oregon Employment Department when a claimant is taking leave once a claim for Paid Family and Medical Leave Insurance benefits has been approved and establishes timelines for the employer to respond to the provided notice.

471-070-1420: Benefits: Leave Periods and Increments – Clarifies that leave periods may be taken in consecutive and nonconsecutive periods when claiming Paid Family and Medical Leave Insurance benefits and describes the small leave increment.

471-070-1430: Benefits: Weekly Leave Report – Describes the process for a claimant to submit a weekly leave report in order to claim Paid Family and Medical Leave Insurance benefits for the week captured in the report.

471-070-1440: Benefits: Weekly Benefit Proration – Describes how the weekly benefit amount will be prorated when Paid Family and Medical Leave is taken in an increment less than a work week.

471-070-1450: Benefits: Benefit Payments – Establishes methods for the Oregon Employment Department to issue Paid Family and Medical Leave Insurance benefit payments to claimants.

471-070-1460: Benefits: Lost, Stolen, or Destroyed Benefit Checks – Clarifies procedures for when Paid Family and Medical Leave Insurance benefit checks are lost, stolen, destroyed, or forged.

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.

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 processing of claims applications, decisions on claims, and payment of benefits, the PFMLI Division looked at the racial equity impact of the administrative rule 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.

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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 PFMLI Division administrative rules are intended to provide details on aspects of PFMLI benefits, like who is eligible for benefits, how to file an application, how to file a weekly leave report, what verification is needed, what communication is required to employers, and penalty amounts. The administrative rules on the state plan's PFMLI benefits seeks to ensure that employees have timely and equitable access to benefits when an eligible employee has made contributions to the PFMLI Trust Fund established under ORS chapter 657B. The PFMLI 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 PFMLI program.

An equitable program requires identification of and strategies to overcome structural barriers or burdens. PFMLI 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 PFMLI benefit administrative rules. The consistency of the language helps employees and employers in understanding and use of the program and helps the PFMLI Division in its ability to translate consistently into other languages.

Historically marginalized groups face systemic barriers in accessing and coverage of health care systems. Those barriers include racism and discrimination that can result in underdiagnoses of serious health conditions, limited access to local health care services, and prohibitive costs for health care services. This impacts in particular Black, Indigenous, Latin/o/a/x people, Asian, Pacific Islander, women, people with disabilities, LGBTQIA+ communities, migrant workers, socio-economically disadvantaged people, individuals with limited English proficiency, and new immigrant communities.

Safe leave benefits are new to paid family leave programs in general. While there is not current PFMLI program data to reflect this, victims of Domestic Violence, Harassment, Sexual Assault, or Stalking (DVHSAS) face a number of structural barriers in reporting abuse and accessing support services, such as safety and privacy concerns, economic concerns/dependency, religious or cultural beliefs, bias or anticipated bias by police services or the court system, limited access to services, and fear of repercussions. Such barriers exist not only for accessing existing victim services, but potentially for accessing PFMLI benefits. The rates of DVHSAS among historically marginalized groups are higher, including Black, Latin/o/a/x, American Indian, and non-Hispanic multiracial women and men, lesbian and bisexual women and bisexual men, transgender individuals, and women with disabilities.¹

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 PFMLI 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-

¹ <https://www.socialsolutions.com/blog/domestic-violence-statistics/>.

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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?

The PFMLI Division seeks to mitigate the possible barriers identified primarily through widespread and targeted program of education and varied, accessible user support services. Instructions, Frequently Asked Questions (FAQ) and resource pages will be created to assist with explanation of the rules and the claim process. Requirements will be written in plain language, and the PFMLI Division will seek to provide these materials in multiple languages for employers and employees. The guidebooks will be supplemented with frequently asked questions, instructional videos, and other tools. Staff will be trained to support employees, employer's, health providers, insurers, and community members, with the aim of enabling all to understand the PFMLI program and complete the application and administration requirements and thus help mitigate the potential equity impact.

In an attempt to mitigate some of the potential systemic barriers in accessing and coverage of health care systems, the benefit administrative rules were written broadly for verification requirements; including a vast list of acceptable documents for demonstrating eligibility, which meets or exceeds other PFMLI programs; provides for out of state and out of country health providers to complete verification forms; and refrains from asking non-necessary medical questions.

In order to address safe leave structural barriers, the benefit administrative rules allow covered individuals to provide a self-attestation when unable, for good cause, to provide a verification document from a third party and provide an expanded timeframe for submitting benefit applications. This allows victims of DVHSAS to prioritize their safety and wellbeing first and apply for benefits when feasible without losing access to those benefits.

In addition, the division will be conducting 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 PFMLI benefits.

The PFMLI benefit rules aim to establish straightforward and streamlined processes for submitting claim applications and receiving benefits for eligible employees. Examples of such processes include establishing a benefit qualification at \$1,000 in covered wages or income if self-employed, the ability to submit applications online or via paper, and document options for leave verification. These support access for employees who could face barriers completing the application online or if faced with a complex application process.

Fiscal and Economic Impact:

Any fiscal or economic impact for PFMLI benefits 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:

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

The administrative rules on PFMLI benefits will likely have an impact on state agencies, local governments, and other public bodies because their employees (claimants) may be eligible for PFMLI 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.

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 PFMLI leave at some point; therefore, the benefit rules will apply to their employees.

*Based on Unemployment Insurance 2020 Tax Wage file.

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

The two benefit rules related to employee notice to employers prior to commencing leave and communication to employers about employee application for benefits gives businesses the opportunity to notify the department within seven calendar days of receiving a notice from the department. A response is not mandatory but the business can let the department know if the claimant did not provide the required notice per the business's written policy and procedures or any additional information. The department estimates the administrative cost to respond to the notice adds minimal administrative costs and should take well under an hour to respond. The department estimates the administrative cost to expand current written policies and procedures for PFMLI leave notice will take approximately two hours as the written policy and procedure is already required for OFLA and FMLA. If the business does not already have a written policy and procedure for notice requirements as they don't meet the OFLA requirements, the department estimates it will take approximately one day for the business to create a written policy and procedure.

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

It will take, on average, well under an hour to respond to any notice the department sends to a business about a claimant's benefit leave. The employer may respond to the notice electronically via our new Frances system, and there will be other options to respond via mail or telephone for employers without access to technology/equipment.

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

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.

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The PFMLI Division also formed a benefits workgroup that consisted of 15 members appointed by the PFMLI Division Director, which consisted of employee and business representatives. There are three PFMLI Advisory Committee members on the workgroup. The purpose of the benefit workgroup is to engage with representatives and stakeholders about specific aspects relating to PFMLI benefits in Oregon. The workgroup utilized the information and insights it gathered in the course of its work to assist the PFMLI 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, receive PFMLI emails, listen to PFMLI Advisory Committee meetings, attend RAC meetings, 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 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>);
- Oregon sick time administrative rules – OAR chapter 839, Division 7 (<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=3832>);
- 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>);
- Oregon sexual offenses statutes – ORS chapter 163 (https://www.oregonlegislature.gov/bills_laws/ors/ors163.html);
- 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://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I0507>]

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- Connecticut Paid Family & Medical Leave Act statute and regulations (https://www.cga.ct.gov/current/pub/chap_557.htm#sec_31-49e 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 [http://webserver.rilin.state.ri.us/Statutes/TITLE28/INDEX.HTM](https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I0bfea200ad0d11dda763b337bd8cd8ca&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)]; and• Rhode Island Temporary Disability/Caregiver Insurance statutes and rules and regulations (<a href=) 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 PFMLI Advisory Committee, as required by ORS 657B.380, serves as the RAC and was consulted on March 10, 2022 and March 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)