

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

Definitions related to contribution wages for Paid Family and Medical Leave Insurance program

Last Date and Time for Public Comment: March 1, 2022 at 5pm

<input type="checkbox"/> Hearing Date	Time	Address	Hearings Officer
February 23, 2022	3-5 PM		
February 28, 2022	9-11 AM	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 471-070-0400

Statutory Authority: ORS 657B.340

Other Authority:

Stats. Implemented: ORS 657B.010

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

471-070-0400: Wages: Definitions – Defines terms used by the Paid Family and Medical Leave Insurance (PFMLI) program related to wages used to calculate PFMLI contribution amounts.

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

In order to implement and administer the Paid Family and Medical Leave Insurance (PFMLI) program, the Oregon Employment Department is promulgating permanent administrative rules in accordance with ORS chapter 657B.

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□ 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 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 definition of wages 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.

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

In drafting the administrative rule related to definitions of wages, the PFMLI Division has been careful to ensure that we are thinking through any racial inequity that may occur. Due to historic exclusion and racial disparities, it is likely that Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander and other people of color and their businesses, experience discrimination and other barriers in learning about requirements of, and access to, governmental and other programs, which is a risk as PFMLI is implemented. Also based on history, the PFMLI Division is aware that the definition of agricultural labor and domestic services could disproportionately fall on Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander and other people of color owned businesses.

Are there strategies to mitigate the unintended consequences?

The PFMLI 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 paying PFMLI contributions. The PFMLI Division's goal is to ensure that there is equity for businesses and individuals as we implement PFMLI for Oregonians. The PFMLI Division will make the information, tools and processes accessible. The PFMLI Division is working with our technology vendor to ensure the registration process for businesses is accessible and is available in multiple languages, as well as having a paper process and staff ready to assist in the reporting and ongoing requirements. The PFMLI Division is putting information and mechanisms in place to ensure accountability and mitigate disparities. We will be creating Frequently Asked Questions, video instructions, guides that will address the Oregon combined payroll reporting process, specifically for agricultural and domestic service employers and making all materials available in multiple languages. Additionally, the PFMLI Division will be conducting focused outreach and engagement activities from now until implementation to marginalized communities, including English as a Second Language (ESL), Black, Indigenous, Latin/o/a/x, Asian and Pacific Islander communities. Finally, the Division will be monitoring a number of data elements, developing Key Performance Measures (KPMs), and reporting out regularly on equity in the PFMLI program ongoing. The department will also continuously explore ways to make changes within the policy and technology solution should disparities begin to arise in the program.

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Fiscal and Economic Impact:

Any fiscal or economic impact is the result of the statute being implemented. There is no fiscal or economic impact associated with the new administrative rule.

Statement of Cost of Compliance:

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

ORS chapter 657B requires state agencies, local governments and other public bodies to withhold from their employees' wages PFMLI 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 for PFMLI definitions regarding wage contributions has little to no effect on state agencies, local governments and other public bodies as the statute creates the requirements.

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. Since all, or nearly all, employees are eligible for PFMLI benefits, all, or nearly all, small business employers will be subject to the administrative rule.*

*Based on Unemployment Insurance 2020 Tax Wage file.

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

There is little to no effect on those subject to the administrative rule as the administrative rule tends to be clarifying in nature and does not affect projected reporting, recordkeeping or other administrative activities or costs.

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

None known

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 this rule, is statutorily required to have four members who represent employers, at least one of whom represents employers with fewer than 25 employees. The RAC was consulted when developing these rules.

The PFMLI Division also formed a contributions workgroup that consisted of 14 members appointed by the PFMLI Division Director. There are three PFMLI Advisory Committee members on the workgroup. The purpose of the contributions workgroup is to engage with representatives and stakeholders about specific aspects relating to contributions. The workgroup utilized the information and insights gathered in the course

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of its work to assist the PFMLI Advisory Committee in developing recommendations to provide the department as they relate to the implementation of the program and the administrative rules drafted for contributions. The workgroup met 12 times over the course of a year, the first meeting occurred in June 2020 and the last meeting occurred in January 2021.

Documents Relied Upon, and where they are available:

PFMLI statute - ORS chapter 657B (https://www.oregonlegislature.gov/bills_laws/ors/ors657B.html); Domestic Workers' Protection Act – ORS chapter 653 (https://www.oregonlegislature.gov/bills_laws/ors/ors653.html); House Bill 2168 during the 2021 Legislative Session (<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2168/Enrolled>); Oregon Bureau of Labor and Industries administrative rules, OAR Chapter 839, Division 20 (<https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=210125>)

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 December 2, 2021 and December 7, 2021 while developing these administrative rules and impact statements.

PROPOSED RULE LANGUAGE

- Final Draft of Rule Language to be filed:** [The exact rule language needs to be listed below. The Rules Coordinator will copy/paste from this language into the Secretary of State's database for rulemaking. This must be 100% correct. If multiple rules are being filed, follow the same layout below for each individual rule.] (This document is needed in addition to documents created within a program or division. This is the official filing document.)
- Rule Number:
- Rule Language to be filed: (Insert final rule language to be filed here. No tracked changes)

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RULE CAPTION

Administrative provisions related to Paid Family Medical Leave Insurance program employer equivalent plans

Last Date and Time for Public Comment: March 1, 2022 at 5pm

Hearing Date	Time	Address	Hearings Officer
February 23, 2022	3-5 PM		
February 28, 2022	9-11 AM	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 471-070-2200; 471-070-2210; 471-070-2220; 471-070-2230; 471-070-2240; 471-070-2280; 471-070-2400; 471-070-2450; 471-070-2455; and 471-070-2460.

Statutory Authority: ORS 657B.210, 657B.220, 657B.240, 657B.260, 657B.340, and 657B.420

Other Authority:

Stats. Implemented: ORS 183.635, 657B.210, 657B.220, 657B.230, 657B.240, 657B.250, 657B.260, 657B.340, and 657B.420

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

471-070-2200: Equivalent Plans: Definitions - Defines terms used in the Paid Family and Medical Leave Insurance (PFMLI) program's rules governing employer equivalent plans.

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471-070-2210: Equivalent Plans: Application Requirements and Effective Date - Clarifies the application requirements for approval of an employer's Paid Family and Medical Leave equivalent plan and establishes a timeline for the application.

471-070-2220: Equivalent Plans: Plan Requirements - Clarifies the requirements that an employer's Paid Family and Medical Leave equivalent plan needs to meet to qualify for approval.

471-070-2230: Equivalent Plans: Reporting Requirements – Clarifies the reporting requirements for an employer's Paid Family and Medical Leave equivalent plan.

471-070-2240: Equivalent Plans: Recordkeeping and Department Review - Clarifies the responsibility of employers to retain certain records related to the management of their Paid Family and Medical Leave equivalent plan.

471-070-2280: Equivalent Plans: Solvency Documentation, Deposit, Bond, or Letter of Credit – Clarifies that employers with employer-administered equivalent plans must furnish a deposit, bond, or irrevocable letter of credit.

471-070-2400: Equivalent Plans: Disputes between an Equivalent Plan Employer and Employee, Request for Hearing – Clarifies the dispute resolution process for equivalent plan employers and their employees.

471-070-2450: Equivalent Plans: Termination by the Department - Clarifies when and how the department may terminate a previously approved Paid Family and Medical Leave equivalent plan.

471-070-2455: Equivalent Plans: Termination by Successor in Interest - Clarifies when and how a successor in interest is permitted to terminate a Paid Family and Medical Leave equivalent plan that was in effect at the time of acquisition.

471-070-2460: Equivalent Plans: Employer Withdrawal - Clarifies when and how an employer may withdraw an approved Paid Family and Medical Leave equivalent plan.

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 or bond with a new child in their family to take that time off and still receive an income. This program will provide much needed benefit to underserved populations and help to combat the insidious impact of historical and current injustice and iniquity that families of color face when trying to access government programs. While developing our administrative rules for equivalent plans, the PFMLI Division looked at the racial equity impact of these administrative rules and answered the below questions.

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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 drafting these administrative rules related to the adoption of equivalent plans, the PFMLI Division has been careful to ensure that we are thinking through the racial inequity that may occur. Due to systemic barriers and racial disparities, it is more likely that Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander, and other people of color owned businesses may not understand the full breadth of options related to the PFMLI program, including the option to apply for approval and manage a PFMLI equivalent plan instead of using the state PFMLI plan. Additionally, the PFMLI Division believes awareness of the equivalent plan statute and administrative rules, navigating the equivalent plan application and fee process, as well as the annual renewal process, could potentially be a difficult process for non-English speaking or Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander and other people of color owned businesses.

Are there strategies to mitigate the unintended consequences?

The PFMLI Division places a high priority on developing and maintaining a diverse and inclusive culture and ensuring there is equitable access to understand the equivalent plan process, administrative rules and procedures for all businesses. The PFMLI Division's goal is to ensure that there is equitable access in the process of a business choosing to apply and receive approval for a PFMLI equivalent plan instead of the state PFMLI plan. The PFMLI Division will make the information, tools and process accessible. The PFMLI Division is working with our technology vendor to ensure the registration process for businesses is accessible and available in multiple languages, as well as having a paper process and staff ready to assist in the application and ongoing requirements. The PFMLI Division will be creating Frequently Asked Questions, video instruction, an equivalent plan guide and other tools to expand awareness and education making all materials available in multiple languages to mitigate some of the disparities. Lastly, the division will be conducting focused outreach and engagement activities from now until implementation to marginalized communities.

Fiscal and Economic Impact:

Based on the percentage of businesses electing to offer an equivalent plan to their employees in Washington State's PFML program, it is anticipated that the department will receive approximately 90 applications for equivalent plans each year. Per the administrative rule, each application requires a \$250 fee. This will have an anticipated economic impact of \$22,500 (90 x \$250) per calendar year.

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 could impact the State as an employer, units of local government and the public if they choose to not participate in the state PFMLI plan but rather provide their own approved PFMLI equivalent plan to 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:

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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.* Since all, or nearly all, employees are eligible for PFMLI benefits, all, or nearly all, small employers will be subject to these rules.

Based on the percentage of small businesses electing to offer an equivalent plan to their employees in Washington State's PFML program, it is estimated for Oregon that, of the 126,000 small businesses, approximately 59 small business employers will submit an application to have a PFMLI equivalent plan instead of participating in the state plan.

*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 wanting to provide a PFMLI equivalent plan to their employees will need to submit an application to the Oregon Employment Department along with a copy of the equivalent plan. For six years, the employer must keep records with information relating to the equivalent plan (including records of employees who took leave, duration of leave, and benefit amount paid). ORS 657B.210(11) describes that an equivalent plan employer must maintain all reports, information, and records relating to the approved equivalent plan in the manner established by administrative rule. Federal law requires that all records relevant to insurance benefits provided to employees must be maintained for no less than six years. Since an employer could purchase an equivalent plan through an insurance company and already have a requirement to retain records for six years, the administrative rules clarify that all equivalent plan employers must keep their records for six years so all equivalent plan employers are treated equally.

The cost to maintain the records for six years depends on how the employer will store the records, electronically or paper format, and therefore the cost varies.

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

Small businesses will need to make sure the equivalent plan provides benefits that are equal to or greater than the state PFMLI plan and meets all the reporting and recordkeeping requirements provided in administrative rules. This will likely take Human Resource, Payroll or Administrative staff to comply with the equivalent plan reporting requirements and payment of benefits. Per the Bureau of Labor Statistics report released September 16, 2021*, the total compensation (wages, salaries and benefits) for a professional and related occupation for an employer for private industry workers is \$56.24 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 PFMLI 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.

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The PFMLI Division also formed an equivalent plan workgroup that consisted of 14 members appointed by the PFMLI Division Director. There are three PFMLI Advisory Committee members on the workgroup. The purpose of the equivalent plan workgroup is to engage with representatives and stakeholders about specific aspects relating to equivalent plans. 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 equivalent plans. The workgroup met 10 times over the course of a year, the first meeting occurred in March 2020 and the last meeting occurred in February 2021.

Documents Relied Upon, and where they are available:

Oregon Employment Department Unemployment Insurance Taxes administrative rules, OAR Chapter 471, Division 31 (<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=2338>); Washington State's PFML equivalent plan administrative rules (WACs Chapter 192-530 <https://app.leg.wa.gov/wac/default.aspx?cite=192-530>) and their voluntary plan guide (<file:///C:/Users/balls/Downloads/VoluntaryPlanGuide7.0.pdf>); Employee Retirement Income Security Act (ERISA) under the U.S. Department of Labor for regulations on retirement and insurance programs (<https://www.dol.gov/general/topic/retirement/erisa>); CFR 29 U.S. Code 1027 (<https://www.law.cornell.edu/uscode/text/29/1027>); Oregon Department of Consumer Business Services administrative rules and laws around insurance providers (<https://wcd.oregon.gov/laws/Pages/index.aspx>).

**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 December 2, 2021 and December 7, 2021 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)