

August 31, 2022

Mr. David Gerstenfeld
Acting Director
Oregon Employment Department
875 Union St. NE
Salem, OR 97311
Submitted Electronically

RE: ERIC Written Testimony on Proposed Rules – Oregon Paid Family and Medical Leave Insurance (Paid Leave Oregon) Benefits – Batch 5

Dear Acting Director Gerstenfeld:

The ERISA Industry Committee (“ERIC”) appreciates the opportunity to comment on the proposed rules contained in “Oregon Paid Family and Medical Leave Insurance (Paid Leave Oregon) Benefits – Batch 5” issued by the Oregon Employment Department on July 18, 2022 (“Proposed Rules”).

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation policies at the federal, state, and local levels. Oregonians likely engage with an ERIC member company when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

With member companies that are leaders in every sector of the economy, ERIC advocates for legislative and regulatory policies that improve the ability of employers to continue providing high quality and cost-efficient employee benefits programs to workers across the state of Oregon, including valuable paid leave benefits like sick, family and medical, maternity, bereavement, and many others. In fact, ERIC previously [submitted regulatory comments](#) on draft administrative rules governing Paid Leave Oregon exemptions for equivalent employer plans. Because our member companies already offer a wide range of generous paid leave benefits for their nationwide workforces voluntarily, the administration of state paid leave programs must be clear, concise, and designed not to negatively impact the value or quality of benefits that employees are ultimately able to enjoy from multiple sources.

ERIC is appreciative of efforts by the Department to establish regulations that bring greater clarity to the design and administration of Paid Leave Oregon. However, there are several areas of the Proposed Rules that should be developed further to prevent unnecessary compliance complications, facilitate coordination of overlapping benefits, and ensure more effective paid leave experiences for employers and employees alike. On behalf of our member companies,

ERIC offers the following comments regarding the Proposed Rules and urges modifying the rules to avoid negative effects on employer interaction with Paid Leave Oregon.

Comments

The Proposed Definition of “Eligible Employee’s Average Weekly Wage” Should Clarify Wage Calculation Periods for Seasonal and Interim Employees Within a Base Year to Avoid Overlapping or Reduced Program Benefits

A major concern of employers with the administration of new state paid leave programs is the process of calculating and tracking the level of benefit wage replacement that is available to their eligible employees. This concern is all the more present for employee cohorts who do not work consistently throughout the year, who work for more than one employer, or whose total annual income is not properly captured during a typical base year under Paid Leave Oregon.

The definition featured in Proposed Rule 471-070-1000 (Benefits: Definitions [Amended]) frames an Eligible Employee’s average weekly wage as “*an amount calculated by the Department by dividing the total wages earned by an eligible employee during the base year by 52 weeks.*” While an employee may work for an employer for enough hours in a year to become eligible for Paid Leave Oregon benefits through that employer, this work may be condensed into a number of months or even weeks within a base year. For seasonal or interim employees, the wages earned during these consolidated periods do not reflect the total annual income generated by a worker throughout the year, and therefore do not reflect the level of wage replacement benefits that a worker should be eligible to receive if they need to take time off under Paid Leave Oregon.

Because the proposed standard limits an employee’s calculable average weekly wages to those earned through the position of employment from which they are taking leave, the paid leave benefits ultimately available to that employee via the state program would provide substantially lower wage replacement than intended. The resulting benefits shortfall and administrative complexity would ultimately discourage many workers from relying on Paid Leave Oregon and place additional pressure on supplemental, employer-provided benefits to make up the difference.

For example, if an employee works for an employer for the first three months of every year and needs to take time off under Paid Leave Oregon during those three months, their weekly average wage would be calculated by dividing their average wages during this period by 52 (weeks) instead of by the time period during which those wages were actually earned. In such an instance, any paid leave wage replacement benefits the employee would be eligible for would be based on misrepresented average wages from

only one part of the year.

ERIC therefore strongly encourages the Department to develop the proposed definition of an “Eligible Employee’s average weekly wage” further to include a calculation that considers the time period in which an employee’s wages from a particular employer were earned. Alternatively, ERIC encourages the Department to develop additional regulatory guidance for how contributions and benefit calculation are coordinated and administered for workers employed by multiple employers within a base year. Such rules are directed to be developed under Section 43(10)(b) of the Oregon Family Leave Act. Until this interaction is clarified, there is a substantial risk for Paid Leave Oregon program benefits to be miscalculated, improperly paid, or administered inefficiently.

Employee Job Protection Standards Should Be Revised to Avoid Limiting the Equivalent Positions Available to an Employee Returning from Leave by Using Concrete Terms and Conditions of Employment

ERIC and our member companies fully appreciate the importance of protecting an employee’s job while they take paid time off. We further understand that employment roles often change and that it is critical for employees to be able to return from paid leave to an equivalent position when their former role has been eliminated or restructured. This is especially the case as workforce dynamics continue to evolve post-pandemic. The Proposed Rules do not reflect these realities and thus should be revised to remove any regulatory language that would either unnecessarily reduce the number of equivalent positions available to an employee returning from leave or create arbitrary standards that employers must ensure are incorporated into such an equivalent position.

Section 4 of Proposed Rule 471-070-1330 (Benefits: Job Protection) requires large employers to restore an employee returning from leave whose former position has been eliminated to an equivalent position that is “virtually identical to the employee's former position in terms of employment benefits, pay, and working conditions, including privileges, perks, and status.” It further requires that such an equivalent position must “involve substantially the same or similar duties and responsibilities, which must entail equivalent skill, effort, responsibility, and authority.” This array of required equivalent employment standards is not only convoluted but does not provide further definition of what these terms actually mean or how they should be interpreted by employers expected to comply.

The equivalent position standard originally outlined in Section 10(1)(a) of the Oregon Family Leave Act simply states that an employee returning from leave whose position no longer exists must be restored to “any available equivalent position with

equivalent employment benefits, pay and other terms and conditions of employment.” It follows logically that an equivalent position would need to feature similar hours, pay, benefits, and other “terms or conditions of employment” to not equate to a demotion or transfer of position for an employee; however, forcing employers to build out and provide equivalent jobs at scale based on subjective standards such as how skillful a role is or the level of authority a position appears to offer is bound to generate varied practices and create potential conflict between employers and their employees returning from leave.

Similarly, previous iterations of Proposed Rule 471-070-1330 (Benefits: Job Protection) had included even further limiting language that placed geographic requirements on the equivalent positions available to employees returning from leave. As outlined earlier, establishing arbitrary standards such as a specified location requirement would ultimately reduce the equivalent positions available to employees returning from leave, place unnecessary compliance burdens on employers already managing staffing concerns, and ultimately undermine the efficacy of Paid Leave Oregon as a whole.

ERIC therefore strongly encourages the Department to streamline and simplify the proposed equivalent position standards to solely focus on measurable terms and conditions of employment which can be directly compared and predictably provided for employees returning from paid leave. At the same time, we oppose the reintroduction of regulatory language from previous iterations of this Proposed Rule or similar language that would place additional requirements on the form or function of equivalent employment positions that must be provided to such employees.

The Department Should Share Benefit Determination Information with Employers When a Paid Leave Oregon Claim is Filed to Facilitate the Coordination and Administration of Related Employee Benefits

It is critical for benefits offered through Paid Leave Oregon to be administered in a way that allows employees to access related paid leave benefits which may be offered voluntarily by their employer, including paid sick leave, paid vacation leave, or supplemental paid family and medical leave. Unfortunately, regulatory efforts to date have not provided employers with the information or guidelines needed to continue designing and providing these additional benefits to their workforces.

Because many employers seek to “top-off” the limited wage replacement benefits that their employees would be eligible to receive through the state program, they must at minimum be given updated data on the level of benefits an employee is expected to receive from Paid Leave Oregon. Without this most basic information, employers are unable to consistently calculate the difference between state program wage replacement and the full wages an employee would have received had they not taken leave. The result

would be an impossible guessing game for employers, guaranteeing widespread overpayments and causing administrative inefficiencies that would ultimately discourage employers from attempting to provide such supplemental benefits in the first place.

Similarly, if an employee were to choose to access other available paid leave benefit sources concurrently, such as paid sick leave or employer-provided vacation time, this coordination process would not happen in isolation; the employer would need to be aware of and be able to work off of the level of benefits to be supplemented in the first place. Unless the interaction between overlapping benefits is clarified, the paid leave ultimately available to Oregonians may eventually be reduced in practice over time.

The text of the proposed rule would leave employers without the information needed to coordinate these benefits. Section 1(a) of Proposed Rule 471-070-1410 (Benefits: Initial and Amended Monetary Determinations) outlines the process by which the Department is to determine an employee's total subject wages, benefit eligibility, and weekly benefit amount when an employee files a claim for Paid Leave Oregon benefits. Section 1(c) of the same Proposed Rule then requires the Department to notify the claimant of this determination. While this process provides the employee with an official statement of state program benefits that can be expected, it leaves the employer – which may be seeking to provide wage replacement beyond this determination – completely out of the loop. The result is an inefficient and unreliable administrative practice that ultimately dampens the ability of employers to continue improving paid leave benefits throughout the state.

Fortunately, the regulatory fix for this informational disparity is relatively simple: ERIC strongly encourages the Department to amend Proposed Rule 471-070-1410 to provide employers with a similar notification of the Department's benefit determination so that supplemental employee benefits may be properly designed and administered. Alternatively, ERIC recommends that the Department develop further regulatory guidance addressing the use by employees of supplemental paid leave benefits concurrently with Paid Leave Oregon benefits. While ERIC is appreciative of efforts by the Department to establish common standards among various paid leave sources, employers remain unable to adequately plan for the coordinated administration of these overlapping benefits without the changes outlined above.

Conclusion

ERIC appreciates the opportunity to provide regulatory comments on the Proposed Rules, addressing administrative standards that are critical to ensuring a workable rollout of Paid Leave Oregon and securing access to more valuable paid leave benefits for Oregonians. Several concerns threaten to cause notable complications for both employers and employees in the

future. ERIC therefore strongly recommends that the Department make the revisions outlined above and continue development of the Proposed Rules in order to improve the administration and quality of Paid Leave Oregon benefits.

If you have any questions concerning our regulatory comments or would like to discuss ways in which administrative burdens can be minimized for employers and employees alike, please contact us at (202) 789-1400 or jgelfand@eric.org.

Sincerely,

A handwritten signature in blue ink that reads "James P. Gelfand". The signature is written in a cursive, flowing style.

James Gelfand
President