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To: **Shannon Ball, Paid Leave Oregon, Oregon Employment Department**

From: **Paloma Sparks, Oregon Business & Industry**

Date: **May 24, 2022**

RE: **OBI Comments Batch 4 Rules**

Thank you for the opportunity to submit comments on the latest round of PFMLI rules. I am writing on behalf of employers generally, and for Oregon Business & Industry's 1,600+ member companies in particular.

First, let me be clear that we appreciate how much work has gone into attempting to build such a complex program from the ground-up. Since the passage of HB 2005, we have had many questions with no easy answers. The latest round is certainly no exception.

The batch 4 rules are alarming to employers, particularly those who had hoped to have an equivalent plan or who will be subject to the Oregon Family Leave Act (OFLA) and/or the Family Medical Leave Act (FMLA). Rather than provide more clarity, if unchanged, the current rules will create incredible confusion and needless burdens for employers and employees. We urge you to consider our comments and suggested changes below and attached. I have also attached documents showing legislative intent when the law was passed.

The legislature could have simply amended OFLA. And at times, we really wish they had. Instead, they created an entirely new statutory scheme. While OFLA may be useful as a guide, it cannot be the basis for these rules until or unless the two laws are merged legislatively.

While we understand the instinct to simply copy certain provisions out of OFLA, those are very different laws. As it currently stands, the legislature has chosen to create a patchwork of leave laws – and PFMLI and OFLA differ significantly in many respects. The most important differences is that employers with fewer than 25 employees are covered by PFMLI, and not by OFLA. When that decision was made, a crucial piece was creating a different standard for job protection for employers with fewer than 25 employees. Please make sure the rules do not deviate from the statutory language or borrow from OFLA when creating standards for those smaller employers.

Had the legislature intended to duplicate the job protection standards in OFLA, they would have simply referenced those statutes. Instead, they crafted separate language. We think that is intentional and must be taken into consideration when crafting these rules. The current rule rewords the statute in ways that are inconsistent with intent.

We are also concerned at how these rules treat equivalent plans. They reflect a fundamental misunderstanding of how that system was intended to operate. These plans are not merely a subsidiary of the state plan. Instead, they are an *alternative* to the state plan. Employers who choose to have an equivalent plan are, in part, doing so to relieve themselves and their

employees of the burden of having to navigate the state system. As currently drafted, the rules undermine that purpose.

If an employer has an equivalent plan they shouldn't be required to provide constant information to the state plan. Instead, beyond general usage reporting, only when issues arise should such data and information be required.

The rules should presume that most employees are working in standard ways and then create exception processes for employees who have multiple jobs. Instead, the current rule is a maze of burdensome reporting requirements to address the issue that only 4.6% of employees could possibly face. The vast majority of employees (over 95%) will **never** need these rules, but they create a huge disincentive to employers to give those employees the option of a much easier to navigate system – and one they are likely already accustomed to.

No other state has contemplated such a complicated burden for equivalent plans. The plans must ensure that employees have the same rights and benefits as under the state plan. We never contemplated having to report every 14 days. Again, the rules presume that OED must control equivalent plans, but that was never the intent. We urge you to remove the majority of the proposed OAR 471-070-2230. If this provision and several others related to equivalent plans are not changed significantly, the rules will effectively invalidate legislative intent around equivalent plans.

Similarly, when looking at benefit years and simultaneous coverage for equivalent plans, we believe the division has made this much more complicated than necessary. Employers care about making sure we are aligning with the law and making sure we are tracking leave for liability purposes. If we don't care that an employee may be eligible for benefits early under an equivalent plan, why should the division? Most employees aren't going to be hopping from job to job every year. Again, we urge you to create standards to address the majority of claim circumstances and then create exception processes as needed.

Finally, based on conversations with OED and PFMLI staff, I believe we are about to go down a disastrous path of failing to address aligning OFLA and PFMLI in these rules, particularly as it pertains to the benefit year. If that is the case, the rules must more clearly address ORS 657B.020(2) which addresses the maximum amount of leave for OFLA and PFMLI.

We urge you to take a step back and view these rules from a distance and consider how they will impact employers with multiple demands and employees who may be facing medical crises. These rules should prioritize simplifying the process for the vast majority of situations rather than narrowly focusing on situations which may not even arise. We look forward to continued discussions about how we can better address some of these remaining issues in these proposed rules.

Thank you for your consideration.