

August 14, 2023

# Ready or Not, Here It Comes: Paid Leave Oregon!

## Labor, Employment & Benefits Legal Update

Whether or not employers are ready for it, Oregon's paid family and medical leave and wage replacement program is now accepting employee applications and will soon be paying benefits to eligible employees. Starting August 14, Oregon employees can apply for paid time off benefits provided by Paid Leave Oregon (PLO). PLO benefits will start on September 3. PLO was passed in 2019, but COVID-19 delayed its implementation. PLO will provide the broadest leave coverage and wage replacement benefits in the nation so employers should prepare for it. Below are answers to common questions that we have received from our employer clients.

### Is PLO actually starting? Or will it be delayed again?

PLO is currently set to begin accepting applications commencing on August 14 and paying benefits commencing on September 3. Rumors of another delay in benefit implementation have not come to fruition.

### What can employees use PLO for?

PLO allows eligible Oregon employees to take paid time off for:

- Family Leave – to care for a family member with a serious illness or injury, for pregnancy and childbirth, or for bonding time after the birth, adoption, or foster care placement of a child.
- Medical Leave – for an employee's own serious health condition.
- Safe Leave – for survivors of sexual assault, domestic violence, harassment, or stalking.

### How much paid leave do employees get?

Twelve weeks of paid leave in a 52-week period. PLO may be taken continuously or intermittently in increments of at least one workday. An additional four weeks of leave may be available under certain circumstances.

An employee's benefit amount is based on the employee's average wages from the previous year. Pay is retroactive from when an employee begins leave.

### Which employees are eligible?

Any employee who: (1) performs work in Oregon, (2) earned at least \$1,000 during the year before the employee applies for benefits, (3) contributes to the paid leave trust fund through paycheck deductions, (4) has a qualifying purpose for leave, (5) submits an application, (6) has not exceeded their maximum PLO benefit amounts in a benefit year, and (7) is not currently receiving paid benefits under workers' compensation or unemployment insurance.

Full-time, part-time, and seasonal employees are all eligible for leave. Self-employed individuals, tribal government employers, and independent contractors are not required to participate in PLO, but may be eligible if they choose to contribute to the program.

Oregon's PLO program has adopted rules for determining eligibility for employees who live and/or perform work in other states, including Washington. Under those rules, only employees who physically perform work in Oregon, at least part of the time, are eligible for PLO benefits.

### Who pays for PLO?

PLO is funded by a combination of employee and large employer contributions that are paid via payroll tax. Those contributions began on January 1. Large employers pay 40% of the contribution, while employees pay 60%. Employers with fewer than 25 employees are not required to pay any employer contribution.

### Do all employers have to let employees take PLO leave?

Yes. When an employee is approved by the Oregon Employment Department (OED) for PLO leave, all employers must grant the time off. This is true regardless of the employer's size and location, even if the employer is located outside the state of Oregon.

### How do employees apply and get approved for benefits?

PLO is run by the OED, the same agency that administers unemployment benefits. Employees apply for leave directly to the OED. Employees will be required to submit documentation to the OED to verify they have a qualifying need for family, medical, or safe leave.

Employees must submit their application no later than 30 days before they wish to start leave, or as soon as practicable. The OED will review the information and then approve or deny an employee's application.

### Do employers get notice when an employee applies for PLO?

Yes. Employees should provide notice to their employer of their need to take paid leave at least 30 days in advance of starting leave, or as soon as practicable. Employers may require employees to disclose what type of leave they are taking, an explanation of the need for leave, and the expected timing and duration of the leave. In emergencies, employees should notify employers that they require paid leave within 24 hours of the leave beginning.

The OED will also notify the employer directly and confirm the employee notified their employer. OED may reduce an employee's first weekly benefit payment for failing to comply with notice requirements.

### Can employers challenge an employee's PLO application?

Not really. The OED states employers may respond to a notice from the department about an employee's PLO application within 10 calendar days to report any errors in the information reported by the employee. While this gives an employer the opportunity to correct any mistakes or report false information, **it is the OED, not the employer**, who ultimately approves whether an employee is eligible for and entitled to take PLO. Employers cannot appeal the OED's PLO decisions.

It is too soon to tell how much scrutiny the OED will give employee applications. We anticipate the program will be popular with employees, and that the OED will have a large volume of requests to review so delays are possible.

### What do employers need to tell employees about PLO?

Employers must provide notice about PLO to employees at the time of hire, at the worksite, and whenever substantive changes to PLO occur.

## How does PLO work with unpaid benefits like OFLA and FMLA?

PLO is an entirely separate program from leave granted under the federal Family and Medical Leave Act (FMLA) and Oregon's Family Leave Act (OFLA). An employee's approval for PLO leave does not mean an employee is approved for leave under FMLA or OFLA and vice versa. If an employee needs to take leave for a qualifying reason under FMLA and/or OFLA, the employee must still engage in the employer's regular FMLA or OFLA certification process. Leaves taken under FMLA and/or OFLA remain unpaid.

In some circumstances, an employee's reason for leave under PLO may also qualify for unpaid leave under FMLA and OFLA. Legislation passed on June 1 confirms that if leave taken under PLO also qualifies for OFLA, the employee must take the leave concurrently.

## Are employers required to hold an employee's job open while they take PLO?

Generally, yes. Employers must provide job protection for employees on PLO leave if the employee has worked for the employer for at least 90 calendar days. When returning from leave, the employee is entitled to return to the position they held before the start of leave (if the position still exists).

If the position was eliminated, large employers are required to provide a position equal to the employee's prior position, including benefits, pay, and other employment conditions. Small businesses may be eligible for grants to hire a temporary employee while an employee is on PLO.

## Can employers adopt plans to replace PLO?

Yes, an employer who currently provides all employees with paid leave benefits that are the same or greater than PLO's requirements may apply to the OED for approval of an equivalent plan.

## What should employers do now?

- Make sure you've satisfied your obligations to provide your employees notice of the PLO program.
- Update existing PLO, OFLA, FMLA, and other leave policies to coordinate these benefits as necessary before September 3.
- This is a complex new benefits program. Consult with your employment counsel before eliminating a position for an employee who is on leave under PLO, denying job restoration rights, or replacing an employee taking PLO.
- Consider whether your organization may benefit from an equivalent plan to avoid the administrative challenges expected with PLO.

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Lane Powell's team of labor and employment attorneys is here to help your organization comply with state and local laws, and develop and implement the strategy that supports your business and your employees. For more information, contact [Courtney McFate](mailto:mcfatec@lanepowell.com) ([mcfatec@lanepowell.com](mailto:mcfatec@lanepowell.com)) or [Brenna McLaughlin](mailto:mclaughlinb@lanepowell.com) ([mclaughlinb@lanepowell.com](mailto:mclaughlinb@lanepowell.com)). Keep up-to-date by subscribing to Lane Powell's Legal Updates: [lanepowell.com/subscribe](https://lanepowell.com/subscribe).