

839-009-0210

Definitions

- (1) "Alternate duty" means work assigned to an employee that may consist of:
 - (a) The employee's same duties worked on a different schedule; or
 - (b) Different duties worked on the same or different schedule.
- (2) "Child," for the purposes of parental and sick child leave only (not for the purposes of serious health condition leave), means a biological, adopted, foster or stepchild, the child of an employee's same-gender domestic partner or a child with whom the employee is or was in a relationship of in loco parentis. The child must be:
 - (a) Under the age of 18; or
 - (b) An adult dependent child substantially limited by a physical or mental impairment as defined by ORS 659A.100(2)(d).
- (3) "Covered employer" means any employer employing 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar work weeks in the calendar year in which the leave is to be taken or in the calendar year immediately preceding the year in which the leave is to be taken.
- (4) "Domestic partner" means an individual joined in a domestic partnership.
- (5) "Domestic partnership" for the purposes of ORS chapter 659A means two individuals of the same sex who have received a Certificate of Registered Domestic Partnership from the State of Oregon in compliance with ORS 432.405(1) and rules adopted by the State Registrar of the Center for Health Statistics.
- (6) "Eligible employee" means an employee employed in the State of Oregon on the date OFLA leave begins. For eligibility of employees reemployed following a period of uniformed service, see subsections (c) and (d) of this section.
 - (a) For the purpose of taking parental leave, an employee must be employed by a covered employer for at least 180 calendar days immediately preceding the date on which OFLA leave begins.
 - (b) For purposes of taking all other types of OFLA leave, including pregnancy disability leave, an employee must have worked for a covered employer for an average of at least 25 hours per week during the 180 calendar days immediately preceding the date OFLA leave begins.
 - (A) In determining that an employee has been employed for the preceding 180 calendar days, the employer must count the number of days an employee is maintained on the payroll, including all time paid or unpaid. If an employee continues to be employed by a successor in interest to the original employer, the number of days worked are counted as continuous employment by a single employer.
 - (B) In determining 25 hours average per week, the employer must count actual hours worked using guidelines set out pursuant to the Fair Labor Standards Act (See 29 CFR Part 785).
 - (c) The federal Uniformed Services Employment and Reemployment Act, 38 USC 43 (USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. Federal Department of Labor regulation 20 CFR 1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and

those required by statute. Under USERRA, a reemployed service member would be eligible for leave under OFLA if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet OFLA's eligibility requirements. In the event that a service member is denied OFLA leave for failing to satisfy the OFLA days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under OFLA. [Note: USERRA also applies to leave under the federal Family and Medical Leave Act of 1993, 29 USC 2601-2654 (FMLA).]

(d) ORS 659A.082 – 659A.088 provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. If a reemployed service member was eligible for leave under OFLA prior to the date uniformed service began, OFLA's eligibility requirements are considered met.

(e) For the purpose of qualifying as an eligible employee, the employee need not work solely in the State of Oregon.

(7) "Family member" means the spouse, same-gender domestic partner, custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent, parent-in-law, parent of same-gender domestic partner, grandparent or grandchild of the employee, or a person with whom the employee is or was in a relationship of in loco parentis. It also includes the biological, adopted, foster or stepchild of an employee or the child of an employee's same-gender domestic partner. For the purposes of OFLA, an employee's child in any of these categories may be either a minor or an adult at the time serious health condition leave is taken.

(8) "FMLA" is the federal Family and Medical Leave Act, 29 USC 2601.

(9) "Foreseeable leave" means leave taken for a purpose set out in ORS 659A.159 that is not "unforeseeable leave" as defined in OAR 839-009-0210(21).

(10) "Foster child" means a child, not adopted, but being reared as a result of legal process, by a person other than the child's natural parent.

(11) "Gender" means an individual's assigned sex at birth, gender identity, or gender expression.

(12) "Gender expression" means the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with the individual's assigned sex at birth.

(13) "Gender identity" means an individual's gender-related identity, whether or not that identity is different from that traditionally associated with the individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

(14) "Health care provider" means:

(a) The person primarily responsible for providing health care to an eligible employee or to a family member of an eligible employee: and

(b) Who is a physician licensed to practice medicine or surgery, including a doctor of osteopathy; or

- (c) A podiatrist, a dentist, a clinical psychologist, an optometrist, a naturopath, a nurse practitioner, a licensed physician's assistant, a direct entry midwife, a nurse-midwife or a clinical social worker authorized to practice and perform within the scope of a professional license as provided by law; or
- (d) A Christian Science practitioner listed with the First Church of Christ Scientist in Boston, Mass: or
- (e) A chiropractor, but only to the extent that a chiropractor provides treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated to exist by X-rays.
- (15) "In loco parentis" means in the place of a parent, having financial and day-to-day responsibility for the care of a child. A legal or biological relationship is not required.
- (16) "Intermittent leave" means leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule.
- (17) "OFLA" is the Oregon Family Leave Act, ORS 659A.150 to 659A.186.
- (18) "OFLA leave" means a leave of absence for purposes described in ORS 659A.159 and OAR 839-009-0230(1) through (4). Except that "OFLA leave" does not include leave taken by an eligible employee who is unable to work because of a disabling compensable injury, as defined in ORS 656.005, unless the employee has refused a suitable offer of light duty or modified employment under ORS 659A.043(3)(a)(D) or 659A.046(3)(d). See ORS 659A.162, OAR 839-006-0131(2) and 839-006-0136(4).
- (19) "OFLA leave year," for calculating the OFLA leave year entitlement, means a calendar year (January to December), a fixed 12-month period such as a fiscal year, a 12-month period measured forward from the date of the employee's first OFLA leave, or a 12-month period measured backward from the date the employee uses any OFLA leave. The option selected must be applied to all employees. In the absence of an employer policy or collective bargaining agreement defining how an OFLA leave year will be measured, a calendar year will be used.
- (20) "Serious health condition" means an illness, injury, impairment or physical or mental condition of an employee or family member:
- (a) That requires inpatient care in a medical care facility such as a hospital, hospice or residential facility such as a nursing home. When a family member resides in a long-term residential care facility, leave applies only to:
 - (A) Transition periods spent moving the family member from one home or facility to another, including time to make arrangements for such transitions;
 - (B) Transportation or other assistance required for a family member to obtain care from a physician; or
 - (C) Serious health conditions as described in (b) through (h) of section (19) of this rule.
 - (b) That the treating health care provider judges to pose an imminent danger of death, or that is terminal in prognosis with a reasonable possibility of death in the near future;
 - (c) That requires constant or continuing care such as home care administered by a health care professional;
 - (d) That involves a period of incapacity. Incapacity is the inability to perform at least one essential job function, or to attend school or perform regular daily activities for more than three consecutive calendar days and any subsequent required treatment or recovery period relating to the same condition. This incapacity must involve:
 - (A) Two or more treatments by a health care provider; or
 - (B) One treatment plus a regimen of continuing care.

(e) That results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity, such as asthma, diabetes or epilepsy;

(f) That involves permanent or long-term incapacity due to a condition for which treatment may not be effective, such as Alzheimer's disease, a severe stroke or terminal stages of a disease. The employee or family member must be under the continuing care of a health care provider, but need not be receiving active treatment;

(g) That involves multiple treatments for restorative surgery or for a condition such as chemotherapy for cancer, physical therapy for arthritis, or dialysis for kidney disease that if not treated would likely result in incapacity of more than three days; or

(h) That involves any period of disability of a female due to pregnancy or childbirth or period of absence for prenatal care.

(21) "Unforeseeable leave" means leave taken as a result of:

(a) An unexpected serious health condition of an employee or family member of an employee; or

(b) An unexpected illness, injury or condition of a child of the employee that requires home care; or

(c) A premature birth or a placement for adoption or foster care the exact date of which cannot be previously determined with certainty.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150-659A.186, 659A.043, 659A.046

839-009-0220

Relationship of OFLA to FMLA

(1) Leave taken under FMLA counts as OFLA leave provided the employee is also eligible for OFLA leave.

(2) Provisions of OFLA will be construed to the extent possible in a manner that is consistent with any similar provisions of FMLA; however, employers subject to both OFLA and FMLA must apply the provision that is more beneficial to the employee's circumstances.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

839-009-0240

Length of Leave and Other Conditions

(1) An eligible employee is entitled to as much as 12 weeks of OFLA leave in any one-year period except that:

(a) An eligible female employee may take up to 12 weeks of pregnancy disability leave in addition to 12 weeks of OFLA leave for any leave purpose;

(b) An eligible employee taking the entire 12 weeks of OFLA leave for parental leave may take an additional 12 weeks of sick child leave within the same leave year. If the employee uses less than 12 weeks of parental leave, however, no additional sick child leave is available, except for the balance of the initial 12 weeks. The employee may also use this balance for any other OFLA leave purpose.

(2) An eligible female employee may take up to 36 weeks of OFLA leave in one leave year that includes up to 12 weeks of pregnancy disability leave, followed by 12 weeks of parental leave, and 12 weeks of sick child leave.

- (3) An eligible employee may take up to 24 weeks of OFLA leave in one leave year under the following circumstances:
- (a) The employee takes 12 weeks of parental leave, followed by:
 - (b) Twelve weeks of sick child leave.
 - (4) When two eligible family members work for the same covered employer, both employees may take OFLA leave at the same time only under the following circumstances:
 - (a) One employee needs to care for the other employee suffering from a serious health condition; or
 - (b) One employee needs to care for a child suffering from a serious health condition while the other employee is also suffering from a serious health condition; or
 - (c) Both family members are suffering from a serious health condition; or
 - (d) The employer allows concurrent leave.
 - (5) Unless the employer approves otherwise, parental leave must be taken in one uninterrupted period, and must be completed within 12 months of the birth, adoption or placement of the child. An exception must be made to allow parental leave to effectuate adoption or foster placement of the child. Such leave need not be taken in one, uninterrupted period with any additional parental leave.
 - (6) The birth, adoption or foster placement of multiple children at one time entitles the employee to take only one 12-week period of parental leave.
 - (7) Sick child leave need not be provided to an eligible employee by a covered employer if another family member, including a non-custodial biological parent, is willing and able to care for the child.
 - (8) A covered employer may not reduce the amount of OFLA leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005.
 - (a) If an employee uses OFLA leave for a workplace injury pending acceptance of a workers' compensation claim, upon acceptance of the claim any OFLA leave used for the workplace injury must be restored to the employee. If the claim is denied, OFLA leave will be deducted from the employee's entitlement.
 - (A) If the employer uses a rolling forward leave year, a fixed leave year or a calendar leave year, and a worker's compensation claim is first denied and then accepted, the employer must restore any OFLA leave taken in the leave year in which the worker's compensation claim is accepted.
 - (b) An employee must be eligible under OAR 839-009-0210(6) in order to use OFLA leave following a period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005.
 - (9) Notwithstanding section (8) of this rule, the employer may reduce the amount of OFLA leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005 after the employee has refused a suitable offer of light duty or modified employment under ORS 659A.043(3)(a)(D) or 659A.046(3)(d). See ORS 659A.043(4), 659A.046(5), 659A.162, OAR 839-006-0131(2) and 839-006-0136(4).
 - (10) For the purpose of intermittent leave, OFLA leave entitlement is calculated for an employee by multiplying the number of hours the employee normally works per week by 12. (For example, an employee normally employed to work 30 hours per week is entitled to 12 times 30 hours, or a total of 360 hours OFLA leave.)

(a) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 months worked prior to the beginning of the leave period must be used for calculating the employee's normal work week. (For example, an employee working an average of 25 hours per week is entitled to 12 times 25 hours, or a total of 300 hours OFLA leave.)

(b) If an employee takes intermittent or reduced work schedule OFLA leave, only the actual number of hours of leave taken may be counted toward the 12 weeks of OFLA leave to which the employee is entitled.

(11) An employee who has previously qualified for and taken some portion of OFLA leave must requalify as an "eligible employee" as defined in OAR 839-009-0210(6) each time the employee begins additional OFLA leave within the same leave year. Exceptions:

(a) An employee who has been granted OFLA leave for a qualifying serious health condition of the employee or family member need not requalify under OAR 839-009-0210(6) each time leave for the same purpose (the same individual and the same serious health condition) is taken.

(b) A female employee who has been granted OFLA pregnancy disability leave need not requalify under OAR 839-009-0210(6) for an additional 12 weeks of leave within the same leave year for any OFLA leave purpose.

(c) An employee who has taken 12 weeks of OFLA parental leave, need not requalify under OAR 839-009-0210(6) for up to an additional 12 weeks of leave within the same leave year when used for the purposes of OFLA sick child leave.

(12) An exempt employee is a salaried executive, administrative or professional employee under the federal Fair Labor Standards Act (see 29 CFR Part 541 through 541.315) or the state minimum wage and overtime laws (ORS chapters 652 and 653).

(a) When OFLA leave is also covered by FMLA and the employee takes intermittent leave in blocks of less than one day, the employer may reduce the employee's salary for the part-day absence without the loss of the employee's exempt status in accordance with OAR 839-020-0004(30)(a).

(b) When OFLA leave is not covered by FMLA (e.g., the employer has 25 to 49 employees, the leave is taken for a sick child, for the serious health condition of a parent-in-law, for the serious health condition of a registered domestic partner or for the serious health condition of a registered domestic partner's parents), and the employee takes intermittent leave in blocks of less than one day, an employer will jeopardize the employee's exempt status if the employer reduces the employee's salary for the part-day absence.

(13) The requirements of OFLA do not apply to any employer offering eligible employees a nondiscriminatory cafeteria plan, as defined by section 125 of the Internal Revenue Code of 1986, that provides as one of its options employee leave at least as generous as the leave required by OFLA.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150-659A.186, 659A.043, 659A.046

839-009-0245

Intermittent Leave and Alternate Duty

(1) An employer may transfer an employee on intermittent OFLA leave or a reduced work schedule into an alternate position with the same or different duties to accommodate the leave, provided the following exist:

(a) The employee accepts the transfer position voluntarily and without coercion;

- (b) The transfer is temporary, lasts no longer than necessary to accommodate the leave and has equivalent pay and benefits;
 - (c) The transfer is compliant with applicable collective bargaining agreements, as well as with state and federal law, providing all the employee protections found in FMLA regulations 29 CFR Part 825;
 - (d) Transfer to an alternate position is used only when there is no other reasonable option available that would allow the employee to use intermittent leave or reduced work schedule; and
 - (e) The transfer is not used to discourage the employee from taking intermittent or reduced work schedule leave, or to create a hardship for the employee.
- (2) An employee transferred, as provided in section (1)(a) through (e) of this rule, to an alternate position for the purpose of a reduced work schedule must be returned to the employee's former position when the employee notifies the employer that the employee is ready to return to the former position at the end of the alternate duty leave.
- (3) OFLA leave time for an employee on intermittent leave or a reduced work schedule is the difference between the number of hours the employee normally works and the number of hours the employee actually works during the intermittent leave or reduced work schedule. When it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work during a shift, such as when a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, the entire period of work from which the employee is forced to be absent is designated as OFLA leave and counts against the employee's OFLA entitlement.
- (4) Holidays or days in which the employer's business is not in operation are not counted toward intermittent or reduced work schedule OFLA leave.
- (5) An employer may transfer an employee recovering from a serious health condition to an alternate position that accommodates the serious health condition provided:
- (a) The employee accepts the position voluntarily and without coercion;
 - (b) The transfer is temporary, lasts no longer than necessary and has equivalent pay and benefits;
 - (c) The transfer is compliant with applicable collective bargaining agreements, as well as with state and federal law, providing all the employee protections found in FMLA regulations 29 CFR Part 825; and
 - (d) The transfer is not used to discourage the employee from taking OFLA leave for a serious health condition, or to create a hardship for the employee.
- (6) An employee is not on OFLA leave if the employee has been transferred -- as provided in section (5)(a) through (d) of this rule -- to an alternate position for the purpose of alternate work duties that the employee is able to perform within the limitations of the employee's own serious health condition, but not requiring a reduced work week. An employee working in an alternate position retains the right to return to the employee's original position unless all OFLA leave taken in that leave year plus the period of time worked in the alternate position exceed 12 weeks.
- (7) An alternate position accommodating an employee's serious health condition may result in the employee working fewer hours than the employee worked in the original position. The employee's OFLA leave is the difference between the number of hours the employee worked in the original position and the number of hours the employee actually works in the alternate position.
- (8) Intermittent leave for school teachers is subject to the special rules in OAR 839-009-0290.

Stat. Auth.: ORS 659A.805 & 659A.162
Stats. Implemented: ORS 659A.150 - 659A.186

839-009-0250

Notice by Employee; Designation by Employer; Notice by Employer Regarding Eligibility or Qualification

(1) Except in situations described in sections (2) and (3) of this rule, a covered employer may require an eligible employee to give 30 days written notice of the need for foreseeable leave, including an explanation of the need for leave, before starting OFLA leave. The employee is not required to specify that the request is for OFLA leave.

(a) An employee able to give advance notice of the need to take OFLA leave must follow the employer's known, reasonable and customary procedures for requesting any kind of leave, absent unusual circumstances.

(b) An employer may request additional information to determine that a requested leave qualifies for designation as OFLA leave, except in cases of parental leave (no medical verification required) or sick child leave (no medical verification may be required until after three occurrences).

(c) The employer may provisionally designate an absence as OFLA leave until sufficient information is received to make a determination. An employee who calls in sick without providing further information will not be considered to have provided sufficient notice to trigger an employer's obligations under OFLA.

(d) An employee on OFLA leave who needs to take more leave than originally authorized must give the employer reasonable notice prior to the end of the authorized leave, following the employer's known, reasonable and customary procedures for requesting any kind of leave. However, when an authorized period of OFLA leave has ended and an employee does not return to work, an employer having reason to believe the continuing absence may qualify as OFLA leave must request additional information, and may not treat a continuing absence as unauthorized unless requested information is not provided or does not support OFLA qualification.

(2) When an employee is unable to give the employer 30 days notice but has some advance notice of the need for leave, the employee must give the employer as much advance notice as is practicable.

(3) When taking OFLA leave in an unforeseeable situation, an employee must give verbal or written notice within 24 hours before or after commencement of the leave. This notice may be given by any other person on behalf of an employee taking unanticipated OFLA leave. The employer may require written notice by the employee within three days of the employee's return to work.

(4) If an employee fails to give notice as required by sections (1), (2), and (3) of this rule or the employer's policies:

(a) The employer may reduce the period of unused OFLA leave by an amount no greater than the number of days of leave the employee has taken without providing timely notice of leave. This reduction of leave may not exceed three weeks in a one-year leave period (see ORS 659A.165(4)); and

(b) The employee may also be subject to disciplinary action under an employer's uniformly applied policy or practice. This practice must be consistent with the employer's discipline for similar violations of comparable rules.

(5) When an employee requests OFLA leave, or when the employer acquires knowledge that an employee's leave may be for an OFLA-qualifying reason, the employer must notify the employee within five business days whether the employee is eligible and qualifies to take OFLA leave absent extenuating circumstances. All OFLA absences for the same qualifying reason are considered a single leave event and employee qualification as to that reason for leave does not change during the applicable 12-month period unless the reason is no longer qualifying. If an employer determines that an employee does not qualify for OFLA leave for the reason requested, the employer must notify the employee in writing that the employee does not qualify.

(a) The written notice that the employee does not qualify must state that the employee is ineligible or the reason for requested leave does not qualify for OFLA leave and at least one reason why the employee is not eligible or the reason does not qualify for leave.

(b) If an employer determines that an employee does not qualify for OFLA leave for the reason requested because a medical verification is incomplete or insufficient, the written notice that the employee does not qualify must state what additional information is required to make the verification complete or sufficient, and the employee must be afforded a reasonable period of time to correct the deficiency.

(6) When an employee fails to respond to reasonable employer requests for medical verification of the employee's requested reason for leave to determine whether the leave is OFLA qualifying, the employer may deny use of OFLA leave until medical verification is received.

(7) An employer may not reduce an employee's available OFLA leave or take disciplinary action unless the employer has posted the required Bureau of Labor and Industries Family Leave Act notice or the employer can otherwise establish that the employee had actual knowledge of the notice requirement.

(8) Federal regulations prohibit reducing the leave period under FMLA, but allow an employer to delay the start of leave because of improper notice (see 29 CFR Section 825.304).

(9) When an employee is subject to both FMLA and OFLA, the employer must apply the discipline available under (4)(a), (b) or (6) of this rule that is most beneficial to the employee's individual circumstances.

(10) An employee who refuses an offer of employment under ORS 659A.043(3)(a)(D) or 659A.046(3)(d) and who otherwise is entitled to OFLA leave under 659A.150 to 659A.186:

(a) Automatically commences a period of OFLA leave upon refusing the offer of employment; and

(b) Need not give notice to the employer that would otherwise be required by this rule that the employee is commencing a period of leave. See ORS 659A.162, OAR 839-006-0131(2) and OAR 839-006-0136(4).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150-659A.186, 659A.043, 659A.046

839-009-0260

Medical Verification and Scheduling of Treatment

(1) An employer may require an employee to provide medical verification of the need for OFLA leave, except that an employer may not require medical verification for parental leave. All requests for medical verification must be in writing and must state the consequences for failure to provide the requested medical verification.

(2) Consistent with ORS 659A.306, the employer must pay the cost of any medical verification not covered by insurance or another benefit plan.

- (3) When an employer requires eligible employees to give advance written notice of a foreseeable need for leave and an eligible employee gives such notice, the employer may require the employee to provide medical verification of the need for OFLA leave before the leave starts.
- (4) When an employee commences unforeseeable OFLA leave as defined in ORS 659A.165(2) without prior notice, the employee must provide medical verification within 15 days of the employer's request for verification.
- (5) If an employer determines that a medical verification provided by an employee is incomplete or insufficient, the employer must provide written notice that states the verification is incomplete or insufficient and the additional information needed to make it complete or sufficient.
- (6) When an employee fails to respond to reasonable employer requests for medical verification of the employee's eligibility for foreseeable leave to determine whether the leave is OFLA qualifying, the employer may deny use of OFLA leave until complete or sufficient medical verification is received.
- (7) An employer may not delay the use of OFLA leave when medical verification is not received before the commencement of unforeseeable leave. The employer may designate the leave as provisionally approved, subject to medical verification.
- (8) If an employee submits medical verification signed by a health care provider, the employer may not directly request additional information from the employee or family member's health care provider. However, with permission from the employee or family member, a health care provider representing the employer may contact the employee or family member's health care provider to clarify or authenticate the medical verification.
- (9) An employer may not request subsequent medical verifications more often than every 30 days and then only in connection with the employee's absence except when:
 - (a) Circumstances described by the previous medical verification have changed significantly (e.g., the duration or frequency of absences, the severity of conditions, or complications); or
 - (b) The employer receives information that casts doubt upon the employee's stated reason for the absence.
- (10) If an employee requests OFLA leave for any purpose except parental leave, the employer may require the employee to obtain the opinion of a second health care provider designated by the employer, at the employer's expense. If the opinion of the second provider conflicts with the medical verification provided by the employee, the employer may require the two providers to designate a third health care provider to provide an opinion at the employer's expense (see ORS 659A.168). The opinion of the third provider is binding on both the employer and the employee.
- (11) Upon request by the employee, the employer is required to provide the employee with a copy of any second and third medical opinions required under section 10 of this rule. Absent extenuating circumstances, the requested copies must be provided within five business days after the receipt of the employee's request.
- (12) When OFLA is taken for the employee's serious health condition, the employer may require the employee to present verification from the employee's health care provider that the employee is able to resume work before restoring the employee to work. The employer may not require the employee to obtain a second opinion about the employee's ability to return to work after taking OFLA leave. (see OAR 839-009-0270(7)).
- (13) If an employee has taken sick child leave on all or any part of three separate days during a leave year, the employer may require medical verification from a health care provider on the fourth day or subsequent occurrence of sick child leave within that leave year. The employer must pay the cost of the verification not covered by insurance or another benefit plan (see ORS

659A.306). The opinion of the health care provider is binding, and the employer may not require the employee to obtain a second opinion.

(14) When possible, an employee must make a reasonable effort to schedule medical treatment or supervision at times that will minimize disruption of the employer's operation.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

839-009-0265

Medical Verification in Languages Other than English

(1) In circumstances in which an employee or family member needs to obtain medical verification in a foreign country, the employer shall accept a medical verification as well as second and third opinions from a health care provider who practices in that country.

(2) When a medical verification by a health care provider is in a language other than English, the employer may request that the employee provide a written translation of the verification.

(a) The employee's request for OFLA leave may not be denied on the basis of failure of a good faith effort to obtain translation of a medical verification.

(b) The employer may not deny the employee access to translation resources available to the employer (for instance, bilingual personnel or computer programs).

(c) The employer must request the translation as soon as is practicable upon learning that an employee's circumstances may result in a medical verification being issued in a language other than English.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

839-009-0270

Job Protection

(1) An employer must restore an employee returning from OFLA leave, including intermittent and alternative duty leave, to the employee's former position if the job still exists, even if it has been filled during the employee's OFLA leave. The former position is the position held by the employee at the time OFLA leave began, regardless of whether the job has been renamed or reclassified. (For example, a delivery driver must be returned to the same route, at the same rate of pay and benefits, driving the same truck, delivering the same goods, on the same shift and working from the same location as when the driver started OFLA leave.)

(2) Any worker hired during an eligible employee's leave to perform the same work that the eligible employee performed before the leave was taken is a replacement worker. When the eligible employee notifies the employer that the employee is ready to return to work, the employer must give that employee the opportunity to work any hours that the replacement worker would otherwise have been scheduled to work.

(3) The employee is not entitled to return to the former position if the employee would have been bumped if OFLA leave had not been taken.

(4) If the position held by the employee at the time OFLA leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.

(a) An available position is a position that is vacant or not permanently filled.

(b) An equivalent position is a position that is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee's former job site, the employee may be restored to an equivalent position within 20 miles of the former job site.

- (5) Unless the terms of a collective bargaining agreement, other agreement or the employer's policy provide otherwise:
- (a) An employee on OFLA leave does not accrue seniority, production bonuses or other benefits that would accrue while the employee is working;
 - (b) An employee has no greater right to a job or other employment benefits than if the employee had not taken OFLA leave; and
 - (c) An employee is subject to layoff the same as similarly situated employees not taking OFLA leave.
- (6) Except for benefits used while on OFLA leave, benefits an employee was entitled to prior to starting OFLA leave must be restored in full upon the employee's return to work. (For example, an employer's medical insurance requires a three-month waiting period for health insurance coverage. An employee works seven months, takes OFLA leave for 12 weeks and returns to work with health problems. The employee must be covered immediately at the same level of coverage, with the same benefits as before the commencement of the OFLA leave.) The benefits do not have to be restored, however, if such benefits have been eliminated or changed for similarly situated employees. This applies to all benefit provisions.
- (a) An employer electing to continue health or other insurance coverage for an employee on OFLA leave may require that the employee pay only the same share of health or other insurance premium during the leave that the employee paid prior to the leave.
 - (b) If an employee cannot or will not pay such costs, the employer may elect to discontinue benefit coverage, unless to do so would render the employer unable to restore the employee to full benefit coverage as required in section (6) of this rule.
 - (c) If an employer pays any portion of any employee's benefit coverage for employees on non-OFLA leave, the employer must pay that portion during OFLA leave.
 - (d) If the employer pays (directly or indirectly, voluntarily or as required by state or federal statute) any part of the employee's share of health or other insurance premium while an employee is on OFLA leave, the employer may deduct up to 10 percent of the employee's gross pay each pay period after the employee returns to work until the amount is repaid.
 - (e) If an employee fails to return to work -- unless the failure to return to work is because of a serious health condition for which the employee would be entitled to OFLA leave or another circumstance beyond the employee's control -- the employer may recover the employee's share of benefits paid by the employer. The employer may use any legal means to collect the amount owed for the employee's share of benefits paid by the employer, including deducting the amount from the employee's final paycheck.
- (7) An employer may require an employee to follow the employer's established leave policy regarding periodic reporting to the employer of the employee's current status. Before restoring the employee to work after taking OFLA leave for the employee's own serious health condition, the employer may require the employee to present verification from the employee's health care provider that the employee is able to resume work, provided such requirement is applied pursuant to a uniformly applied practice or policy of the employer.
- (a) Pursuant to ORS 659A.168(1), the employer is responsible for any co-pay or other out-of-pocket costs incurred by the employee in providing the verification.
 - (b) The employer may not require the employee to obtain a second opinion.
- (8) If an employee gives unequivocal notice of intent not to return to work from OFLA leave:
- (a) The employee is entitled to complete the approved OFLA leave, providing that the original need for OFLA leave still exists. The employee remains entitled to all the rights and protections

under OFLA, including but not limited to, the use of vacation, sick leave and health benefits pursuant to OAR 839-009-0270 and 839-009-0280, except that:

(A) The employer's obligations under OFLA to restore the employee's position and to restore benefits upon the completion of leave cease, except as required by federal COBRA law, 29 USC 1161 et seq.; and

(B) The employer is not required to hold a position vacant or available for the employee who gives unequivocal notice of intent not to return.

(9) An employer may not use the provisions of this section as a subterfuge to avoid the employer's responsibilities under OFLA.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

839-009-0280

Use of Paid Leave

(1) Except as provided in this rule or the terms of a collective bargaining agreement, an agreement between the eligible employee and the covered employer, or an employer policy, OFLA leave is not required to be granted with pay.

(2) An employee eligible to take OFLA leave is entitled to use accrued paid sick leave, personal leave, vacation leave or any other paid leave that is offered in lieu of vacation leave, during the period of OFLA leave. As used in this rule, accrued paid sick leave does not include disability insurance or disability benefits.

(3) An employer may require an employee to use available paid leave during OFLA leave that would otherwise be unpaid, and may determine the order in which paid leave is to be used if to do so is consistent with a collective bargaining agreement or other written agreement between the eligible employee and the covered employer or an employer policy. The employer may exercise these prerogatives only if:

(a) Prior to the commencement of OFLA leave, the employer provides written notice to the employee that accrued paid leave is to be used during OFLA leave; or

(b) Within two business days of the employee's notice of unanticipated or emergency leave, the employer provides written notice to the employee.

(4) An eligible employee or covered employer may choose to have the employee's OFLA leave run concurrently with a type of paid or unpaid leave not referenced in these rules, as provided or allowed under an employer policy, except that an employer may not reduce the amount of OFLA leave available to an eligible employee by any period the employee is unable to work because of a disabling compensable injury, as defined in ORS 656.005 (see ORS 659A.162(6)).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 656.240, 659A.150 - 659A.186

839-009-0290

Special Rules for Public School Teachers

(1) The provisions of this section apply only to employees of a school district, employed principally as instructors in public kindergartens, elementary schools, secondary schools or education service districts.

(2) If a public school teacher requests foreseeable OFLA leave for a serious health condition of the employee or the employee's family member, and the teacher will be absent more than 20

percent of the total number of working days in the period during which the leave would occur, the employer may require the teacher to elect one of the following options:

(a) To take OFLA leave for one uninterrupted period of time to complete medical treatment.

(School holidays and school vacation days are not counted as OFLA leave); or

(b) To transfer temporarily into an available alternative position that better accommodates periodic absences.

(3) If a teacher begins OFLA leave more than five weeks before the end of the academic term because of the teacher's own serious health condition, the employer may require the teacher to remain on leave until the end of the term if:

(a) The OFLA leave is at least three weeks long; and

(b) The teacher's return to work would occur within three weeks of the end of the term.

(4) If a teacher begins OFLA leave within five weeks of the end of the academic term for parental leave or the serious health condition of a family member, the employer may require the teacher to remain on OFLA leave through the end of the term if:

(a) The leave is at least two weeks long; and

(b) The teacher's return would occur within the last two weeks of the term.

(5) If a teacher begins OFLA leave within three weeks of the end of the academic term for parental leave or to care for a family member with a serious health condition and the leave is greater than five working days, the employer may require the teacher to remain on family leave until the end of the term.

(6) If a teacher takes OFLA leave to the end of the school year and continues the leave at the beginning of the next school term, the leave is consecutive rather than intermittent leave.

(a) The period between the end of the school term and the beginning of the next school term, when a teacher would not have been required to report for duty, is not counted against the teacher's OFLA leave entitlement.

(b) A teacher on OFLA leave at the end of the school term must be provided with the same benefits during the period between school terms that the teacher would normally receive if no OFLA leave were taken.

(7) If a teacher is required by the employer to remain on leave to the end of the academic term, only the period of leave the teacher requested can be charged against the teacher's OFLA leave entitlement.

(8) Nothing in these rules prohibits the employer from allowing the teacher to work as a substitute or in some other paid capacity during the weeks prior to the end of term under subsection (4) or (5) of this rule.

(9) Full-time employees covered by this rule, and who have been maintained on the payroll by a school district during 180 consecutive calendar days, are thereafter deemed to have been employed by that school district for an average of at least 25 hours per week during the 180 days immediately preceding the date any OFLA leave begins.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

839-009-0300

Postings

(1) Each covered employer must display the Bureau of Labor and Industries Family Leave Act notice. The notice must be displayed in each building or worksite in an area that is accessible to

and regularly frequented by employees. Failure to post the Family Leave Act notice is an unlawful employment practice as provided in ORS 659A.001(12).

(2) Electronic posting of the Family Leave Act notice is not sufficient to satisfy posting requirements, but may supplement worksite posting.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Leave for Victims of Domestic Violence, Sexual Assault or Stalking

839-009-0325

Purpose and Scope

(1) The Civil Rights Division of the Bureau of Labor and Industries (“division”) enforces ORS 659A.270 to 659A.285 which require leave for victims of domestic violence, sexual assault or stalking. These rules implement and interpret ORS 659A.270 to 659A.285.

(2) The division enforces ORS 659A.290, requiring employers to provide safety accommodation for, and prohibiting discrimination or retaliation against, victims of domestic violence, sexual assault or stalking. The rules implementing and interpreting ORS 659A.290 are found at OAR 839-005-0160 and 839-005-0170.

(3) ORS 659A.190 to 659A.198 provide for leave for crime victims to attend criminal proceedings. The division does not enforce ORS 659A.190 to 659A.198.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 to 659A.285

839-009-0335

Relationship of ORS 659A.270 to 659A.285, Leave for Victims of Domestic Violence, Sexual Assault or Stalking, to OFLA

To the extent the employee's need for leave under ORS 659A.270 to 659A.285 is also covered by the Oregon Family Leave Act (OFLA), the employer may run the two types of leave concurrently.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 - 659A.285

839-009-0340

Definitions

(1) "Covered employer" means an employer who employs 6 or more individuals in the State of Oregon for each working day during each of 20 or more calendar workweeks in the calendar year in which an eligible employee takes leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking or in the calendar year immediately preceding the year in which an eligible employee takes the leave.

(2) "Eligible employee" means an employee who is employed in the State of Oregon on the date leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking begins; and

(a) Worked an average of more than 25 hours per week for a covered employer for at least 180 calendar days immediately preceding the date the employee takes the leave.

(A) In determining that an employee has been employed for the preceding 180 calendar days, the employer must count the number of days an employee is maintained on the payroll, including all time paid or unpaid. If an employee continues to be employed by a successor in interest to the

original employer, the number of days worked are counted as continuous employment by a single employer.

(B) In determining more than 25 hours average per week, the employer must count actual hours worked using guidelines set out pursuant to the Fair Labor Standards Act (See 29 CFR Part 785).

(C) For the purpose of qualifying as an eligible employee, the employee need not perform work solely in the State of Oregon.

(D) Eligibility of employees reemployed following a period of uniformed service:

(i) The federal Uniformed Services Employment and Reemployment Act, 38 USC 43

(USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. Federal Department of Labor regulation 20 CFR 1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. Under USERRA, a reemployed service member would be eligible for leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet the eligibility requirements of these rules. In the event that a service member is denied leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking for failing to satisfy the days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under these statutes.

(ii) ORS 659A.082 – 659A.088 provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. If a reemployed service member was eligible for leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking prior to the date uniformed service began, the leave eligibility requirements are considered met.

(b) Is a victim of domestic violence, sexual assault or stalking or is the parent or guardian of a minor child or dependent who is the victim of domestic violence, sexual assault or stalking.

(3) "Dependent" means an adult dependent child substantially limited by a physical or mental impairment as defined by ORS 659A.100(2)(d) or any adult of whom the employee has guardianship.

(4) "Foster child" means a child, not adopted, but being reared as a result of legal process, by a person other than the child's natural parent.

(5) "Health Care Professional" means a physician or other health care practitioner who is licensed, certified or otherwise authorized by law to provide health care services.

- (6) "Immediate Family" means spouse, domestic partner, father, mother, sibling, child, stepchild, grandparent, or any person who had the same primary residence as the victim at the time of the domestic violence, sexual assault or stalking.
- (7) "In loco parentis" means in the place of a parent, having financial and day-to-day responsibility for the care of a child. A legal or biological relationship is not required.
- (8) "Intermittent leave" means leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule.
- (9) "Law Enforcement Officer" means all police, corrections, and parole and probation officers who are included in the Public Safety Standards and Training Act as described in ORS 181.610 and 181.651.
- (10) "Minor Child," means a biological, adopted, foster or stepchild, or a child with whom the employee is or was in a relationship of in loco parentis. It also includes the biological, adopted, foster or stepchild of an employee's registered domestic partner. The minor child must be under the age of 18.
- (11) "Parent or Guardian" means a custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent or an employee who is or was in relationship of in loco parentis with a minor child or a dependent with whom the employee is or was in a relationship of in loco parentis.
- (12) "Protective Order" means an order authorized by ORS 30.866, 107.095(1)(c), 107.700 to 107.735, 124.005 to 124.040 or 163.730 to 163.750 or any other order that restrains an individual from contact with an eligible employee or the employee's minor child or dependent.
- (13) "Reasonable Leave" means any amount of leave that does not cause an undue hardship on a covered employer's business.
- (14) "Victim of Domestic Violence" means:
- (a) An individual who has been threatened with abuse or who is a victim of abuse, as defined in ORS 107.705; or
 - (b) Any other person who has suffered financial, social, psychological or physical harm as a result of domestic violence committed against the victim as defined in (a), including a member of the victim's immediate family.
 - (c) In no event will the alleged perpetrator of the domestic violence be considered a victim for the purposes of these rules.
- (15) "Victims Services Provider" means a prosecutor-based victim assistance program or a nonprofit program offering safety planning, counseling, support or advocacy related to domestic violence, sexual assault or stalking.
- (16) "Victim of Sexual Assault" means:
- (a) An individual against whom a sexual offense has been threatened or committed as described in ORS 163.305 to 163.467 or 163.525; or
 - (b) Any other person who has suffered financial, social, psychological or physical harm as a result of a sexual assault committed against the victim as defined in (a), including a member of the victim's immediate family.
 - (c) In no event will the alleged perpetrator of the sexual offense be considered a victim for the purposes of these rules.
- (17) "Victim of Stalking" means:
- (a) An individual against whom stalking has been threatened or committed as described in ORS 163.732; or

(b) Any other person who has suffered financial, social, psychological or physical harm as a result of a stalking committed against the victim as defined in (a), including a member of the victim's immediate family.

(c) In no event will the alleged perpetrator of the stalking be considered a victim for the purposes of these rules.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270-659A.285

839-009-0345

Purposes for Taking Leave

(1) A covered employer must allow an eligible employee to take reasonable leave from employment for any of the following purposes:

(a) To seek legal or law enforcement assistance or remedies to ensure the health and safety of the eligible employee or the eligible employee's minor child or dependent, including preparing for and participating in protective order proceedings or other civil or criminal legal proceedings related to domestic violence, sexual assault or stalking.

(b) To seek medical treatment for or to recover from injuries caused by domestic violence or sexual assault to or stalking of the eligible employee or the eligible employee's minor child or dependent.

(c) To obtain, or to assist the eligible employee's minor child or dependent in obtaining counseling from a licensed mental health professional related to an experience of domestic violence, sexual assault or stalking.

(d) To obtain services from a victim services provider for the eligible employee or the eligible employee's minor child or dependent.

(e) To relocate or take steps to secure an existing home to ensure the health and safety of the eligible employee or the eligible employee's minor child or dependent. Relocate includes:

(A) Transition periods spent moving the eligible employee or the eligible employee's minor child or dependent from one home or facility to another, including but not limited to time to pack and make security or other arrangements for such transitions related to domestic violence, sexual assault or stalking;

(B) Transportation or other assistance required for an eligible employee or the eligible employee's minor child or dependent related to the domestic violence, sexual assault or stalking.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270-659A.285

839-009-0350

Length of Leave and Other Conditions

(1) A covered employer must allow an eligible employee to take reasonable leave and may only limit the amount of leave an eligible employee takes if the eligible employee's leave creates an undue hardship on the covered employer's business.

(2) An eligible employee must follow the covered employer's known, reasonable, and customary procedures regarding periodic reporting to the covered employer of the eligible employee's current status.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270-659A.285

839-009-0355

Undue Hardship

(1) Undue Hardship means a significant difficulty and expense to a covered employer's business and includes consideration of the size of the covered employer's business and the covered employer's critical need for the eligible employee. Other factors to consider in determining whether granting leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking will cause an undue hardship on a covered employer's business include, but are not limited to:

- (a) The length of leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking requested and the relative cost to a covered employer's business;
- (b) The overall financial resources of the covered employer's facility or facilities, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility if the leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking were granted;
- (c) The overall financial resources of the covered employer, the overall size of the business of the covered employer with respect to the number of its employees and the number, type and location of the covered employer's facilities;
- (d) The type of operations conducted by the covered employer, including the composition, structure and functions of the covered employer's workforce.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270-659A.285

839-009-0360

Intermittent Leave and Alternate Duty

(1) An eligible employee may take leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking in multiple blocks of time and/or requiring an altered or reduced work schedule.

(2) A covered employer may transfer an employee on intermittent leave or a reduced work schedule into an alternate position with the same or different duties to accommodate the leave, provided the following exist:

- (a) The eligible employee accepts the transfer position voluntarily and without coercion;
- (b) The transfer is temporary, lasts no longer than necessary to accommodate the leave and has equivalent pay and benefits;
- (c) Transfer to an alternate position is used only when there is no other reasonable option available that would allow the eligible employee to use intermittent leave or reduced work schedule; and
- (d) The transfer is not used to discourage the eligible employee from taking intermittent or reduced work schedule leave, or to create a hardship for the eligible employee.

(3) An eligible employee transferred to an alternate position for the purpose of a reduced work schedule under section (2)(a) through (d) of this rule must be returned to the eligible employee's former position when the eligible employee notifies the employer that the eligible employee is ready to return to the former position.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270-659A.285

839-009-0362

Notice by Employee

- (1) An eligible employee seeking leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking will give the covered employer reasonable advance notice of the employee's intention to take leave unless giving the advance notice is not feasible.
- (2) When taking leave in an unanticipated or emergency situation, an eligible employee must give oral or written notice as soon as is practicable. This notice may be given by any other person on behalf of an eligible employee taking unanticipated leave.
- (3) An eligible employee able to give advance notice of the need to take leave must follow the covered employer's known, reasonable and customary procedures for requesting any kind of leave;
- (4) The covered employer may require the eligible employee to provide certification that:
 - (a) The eligible employee or the eligible employee's minor child or dependent is a victim of domestic violence, sexual assault or stalking as defined in OAR 839-009-0340(14), (16) and (17); and
 - (b) The leave taken is for one of the purposes identified in OAR 839-009-0345.
- (5) Any of the following constitutes sufficient certification:
 - (a) A copy of a police report indicating that the eligible employee or the eligible employee's minor child or dependent was a victim or alleged victim of domestic violence, sexual assault or stalking as defined in OAR 839-009-0340(14), (16) and (17); or
 - (b) A copy of a protective order or other evidence from a court or attorney that the eligible employee appeared in or is preparing for a civil or criminal proceeding related to domestic violence, sexual assault or stalking as defined in OAR 839-009-0340(14), (16) and (17); or
 - (c) Documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the eligible employee or the eligible employee's minor child or dependent is undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, sexual assault or stalking as defined in OAR 839-009-0340(14), (16) and (17).
- (6) Consistent with ORS 659A.306, the covered employer must pay the cost of any medical verification related to OAR 839-009-0345(1)(b) and (c) not covered by insurance or other benefit plan.
- (7) The eligible employee will provide the certification within a reasonable time after receiving the covered employer's written request for the certification.
- (8) The covered employer may provisionally designate an absence as leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking until sufficient certification is received, if requested, to make a determination.
- (9) An eligible employee on leave who needs to take more leave than originally authorized should give the covered employer notice as soon as is practicable prior to the end of the authorized leave, following the covered employer's known, reasonable and customary procedures for requesting any kind of leave. However, when an authorized period of leave has ended and an eligible employee does not return to work, a covered employer having reason to believe the continuing absence may qualify as leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking may request additional information. If the covered employer requests additional information the eligible employee will provide the requested information as soon as is practicable. The covered employer may not treat a continuing

absence as unauthorized unless requested information is not provided or does not support leave qualification.

(10) All records and information kept by a covered employer regarding an eligible employee's leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking, including the fact that the eligible employee has requested or obtained such leave, are confidential and may not be released without the express permission of the eligible employee, unless otherwise required by law.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270-650A.285

839-009-0363

Use of Paid Leave

(1) Leave is unpaid leave unless otherwise provided by:

(a) A collective bargaining agreement;

(b) The terms of an agreement between the eligible employee and the covered employer; or

(c) A covered employer's policy.

(2) An eligible employee taking leave pursuant to an agreement between the eligible employee and the covered employer, a collective bargaining agreement or a covered employer policy may use any paid accrued vacation leave or may use any other paid leave that is offered by the covered employer in lieu of vacation leave during the period of leave.

(3) Subject to the terms of any agreement between the eligible employee and the covered employer or the terms of a collective bargaining agreement or a covered employer policy, the covered employer may determine the order in which paid accrued leave is to be used when more than one type of paid accrued leave is available to the employee.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270-659A.285

839-009-0365

Enforcement and Denial of leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking

(1) It is an unlawful employment practice for a covered employer to deny leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Sexual Assault or Stalking to an eligible employee or to discharge, threaten to discharge, demote, suspend, or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions, or privileges of employment because the employee inquires about, applies for, or takes leave as provided under ORS 659A.270 to 659A.285.

(2) A covered employer's duties and obligations under ORS 659A.270 to 659A.285 extend to a successor employer as defined in 29 CFR 825.107.

(3) It is an unlawful employment practice for a covered employer to count leave under ORS 659A.270 to 659A.285 against an employee in determining the employee's compliance with attendance policies or to count such leave against an employee when determining eligibility for bonuses based on attendance. An employee is entitled to continue eligibility for a bonus based on attendance upon return from leave under ORS 659A.270 to 659A.285 and may not be disqualified from the bonus as a result of taking leave.

(4) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts in violation of ORS 659A.270 to 659A.285 or to attempt to do so.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270-650A.285

Oregon Military Family Leave Act (OMFLA)

839-009-0370

Purpose and Scope

(1) The Civil Rights Division of the Bureau of Labor and Industries enforces the Oregon Military Family Leave Act, ORS 659A.090 – 659A.099 (OMFLA). Oregon Military Family Leave is leave taken by the spouse or domestic partner of a member of the Armed Forces of the United States, the National Guard, or the military reserve forces of the United States who has been called to active duty or notified of an impending call or order to active duty, or who is on leave from active duty during a period of military conflict. These rules implement and interpret OMFLA.

(2) These rules apply to complaints and inquiries received under the Oregon Military Family Leave Act, ORS 659A.090 – 659A.099, and under these rules.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0380

Definitions

(1) “Active duty or call to active duty status” means duty under a call or order to active duty, or notification of an impending call or order to active duty, during a contingency operation, pursuant to Title 10 of the United States Code.

(a) “Contingency operation” means a military operation that:

(A) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. (See 10 U.S.C. 101(a)(13))

(2) “Covered employer” means:

(a) The state, and a department, agency, board or commission of the state; and

(b) A local government, including but not limited to a county, city, town, municipal corporation, independent public corporation or political subdivision of the state.

(c) A person, firm, corporation, partnership, legal representative, or other business entity that engages in any business, industry, profession, or activity in the state of Oregon and that employs 25 or more individuals in the state of Oregon for each working day during each of 20 or more calendar workweeks in the calendar year in which an eligible employee takes OMFLA leave or in the calendar year immediately preceding the year in which an eligible employee takes OMFLA leave;

(3) "Domestic partner" means an individual joined in a domestic partnership.

(4) "Domestic partnership" for the purposes of ORS chapter 659A means two individuals of the same sex who have received a Certificate of Registered Domestic Partnership from the State of Oregon in compliance with ORS 432.405(1) and rules adopted by the State Registrar of the Center for Health Statistics.

(5) "Eligible employee" means an individual who performs services for compensation for an employer for an average of at least 20 hours per week and includes all individuals employed at any site owned or operated in Oregon by an employer, but does not include independent contractors.

(a) In determining an average of at least 20 hours per week, the employer must count actual hours worked using guidelines set out pursuant to the Fair Labor Standards Act. (See 29 CFR Part 785)

(b) For the purpose of qualifying as an eligible employee, the employee need not perform services solely in the state of Oregon.

(c) Eligibility of employees reemployed following a period of uniformed service: The federal Uniformed Services Employment and Reemployment Act, 38 USC 43 (USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. Federal Department of Labor regulation 20 CFR 1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. Under USERRA, a reemployed service member would be eligible for OMFLA leave if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet the eligibility requirements of these rules. In the event that a service member is denied OMFLA leave for failing to satisfy the days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under OMFLA.

(d) ORS 659A.082 – 659A.088 provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. If a reemployed service member was eligible for leave under OMFLA prior to the date uniformed service began, OMFLA's eligibility requirements are considered met.

(6) "Intermittent leave" means leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule.

(7) "Period of Military Conflict" means a period of war:

(a) Declared by the United States Congress;

(b) Declared by executive order of the President of the United States; or

(c) In which a reserve component of the Armed Forces of the United States is ordered to active duty pursuant to Title 32 of the United States Code or section 12301 or 12302 of Title 10 of the United States Code.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0390

Length of Leave

(1) During a period of military conflict, an employee who is a spouse or domestic partner of a member of the Armed Forces of the United States, the National Guard or the military reserve forces of the United States who has been notified of an impending call or order to active duty or who has been deployed, is entitled to a total of 14 days of unpaid leave per deployment that may be taken:

(a) After the military spouse or domestic partner has been notified of an impending call or order to active duty and before deployment; and/or

(b) When the military spouse or domestic partner is on leave from deployment.

(2) The 14 day entitlement is per deployment. If multiple deployments occur in an employee's OFLA leave year (see OAR 839-009-0240) the employee is entitled to use all OMFLA leave until OFLA leave entitlement is exhausted.

(3) The 14 days of unpaid leave to which the employee is entitled are individual days on which the employee, if working their normal schedule, would otherwise perform services for compensation for the employer. (Example: Employee normally works Monday through Friday. Employee is entitled to 14 days of leave, which if taken consecutively would be Monday through Friday on two consecutive weeks plus Monday through Thursday of the third week.)

(4) OMFLA leave need not be taken in one, uninterrupted period, but may be taken intermittently.

(a) For the purpose of intermittent leave, OMFLA leave is calculated for an employee by multiplying the number of hours the employee normally works per day by 14. (For example, an employee normally employed to work eight hours per day is entitled to 14 times eight hours, or a total of 112 hours of OMFLA leave.)

(b) If an employee's schedule varies from day to day, a daily average of the employee's hours must be used for calculating the employee's normal work day. For example, an employee working an average of six hours per day is entitled to 14 times six hours, or a total of 84 hours of OMFLA leave. An employee working an average of 10 hours per day is entitled to 14 times 10 hours, or 140 hours.

(c) If an employee takes intermittent OMFLA leave, only the actual number of hours of leave taken may be counted toward the hours of OMFLA leave to which the employee is entitled.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0400

Prohibited Discrimination

It is an unlawful employment practice for a covered employer to deny OMFLA leave to an eligible employee or to discharge, threaten to discharge, demote, suspend, or in any manner retaliate or in any way discriminate against any person with respect to hiring, promotion, compensation, tenure or any other terms, privileges or condition of employment because the

person inquires about OMFLA, submits a request for Oregon Military Family Leave, or invokes any provision of the Oregon Military Family Leave Act.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0410

Relationship of OMFLA to OFLA

Oregon Military Family Leave taken by an eligible employee is included in the total amount of leave authorized under ORS 659A.162(1) of the Oregon Family Leave Act.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0420

Relationship of OMFLA to FMLA

To the extent the employee's need for OMFLA leave is also covered by the Qualifying Exigency entitlements of the Family and Medical Leave Act (FMLA) under 29 CFR 825.126, the employer may run OMFLA leave and FMLA leave concurrently.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0430

Notice by Employee

(1) An eligible employee seeking Oregon Military Family Leave must provide the employer with notice of the intention to take leave within five business days of receiving official notice of an impending call or order to active duty or of a leave from deployment, or as soon as is practicable when official notice is provided fewer than five days before commencement of the leave.

(2) The active duty orders of a covered military member will generally specify if the service member is serving in support of a period of military conflict by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the military conflict (see OAR 839-009-0380(7)).

(3) An eligible employee's notice of intention to take OMFLA leave must follow the covered employer's known, customary, and uniformly applied procedures for requesting any kind of leave.

(a) The covered employer may require in writing that the eligible employee provide a photocopy of the service member's orders to verify that the leave is for the purpose defined in OAR 839-009-0380(7).

(b) The eligible employee will provide any required photocopy of the service member's orders within a reasonable time after receiving the covered employer's written request.

(c) The covered employer may provisionally designate an absence as OMFLA leave until any requested photocopy of the service member's orders is received.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0440

Use of Paid Leave for OMFLA

(1) Leave is unpaid unless otherwise provided by:

- (a) A collective bargaining agreement;
 - (b) The terms of an agreement between the eligible employee and the covered employer; or
 - (c) A covered employer's policy.
- (2) An employee eligible to take Oregon Military Family Leave is entitled to use accrued paid sick leave, personal leave, vacation leave or any other paid leave that is offered in lieu of vacation leave during the period of Oregon Military Family Leave. As used in this rule, accrued paid sick leave does not include disability insurance or disability benefits.
- (3) Subject to the terms of any agreement between the eligible employee and the covered employer or the terms of a collective bargaining agreement or a covered employer policy, the employee may determine the order in which paid accrued leave is to be used when more than one type of paid accrued leave is available to the employee.
- Stat. Auth.: ORS 659A.093(6)
Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0450

Job Protection

- (1) An employer must restore an employee returning from OMFLA leave, including intermittent and alternative duty leave, to the employee's former position if the job still exists, even if it has been filled during the employee's OMFLA leave. The former position is the position held by the employee at the time OMFLA leave began, regardless of whether the job has been renamed or reclassified. (For example, a delivery driver must be returned to the same route, at the same rate of pay and benefits, driving the same truck, delivering the same goods, on the same shift and working from the same location as when the driver started OMFLA leave.)
- (2) Any worker hired during an eligible employee's leave to perform the same work that the eligible employee performed before the leave was taken is a replacement worker. When the eligible employee notifies the employer that the employee is ready to return to work, the employer must give that employee the opportunity to work any hours that the replacement worker would otherwise have been scheduled to work.
- (3) The employee is not entitled to return to the former position if the employee would have been bumped if OMFLA leave had not been taken.
- (4) If the position held by the employee at the time OMFLA leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.
- (a) An available position is a position that is vacant or not permanently filled.
- (b) An equivalent position is a position that is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee's former job site, the employee may be restored to an equivalent position within 20 miles of the former job site.
- (5) Unless the terms of a collective bargaining agreement, other agreement or the employer's policy provide otherwise:
- (a) An employee on OMFLA leave does not accrue seniority, production bonuses or other benefits that would accrue while the employee is working;
 - (b) An employee has no greater right to a job or other employment benefits than if the employee had not taken OMFLA leave; and
 - (c) An employee is subject to layoff the same as similarly situated employees not taking OMFLA leave.

(6) Except for benefits used while on OMFLA leave, benefits an employee was entitled to prior to starting OMFLA leave must be restored in full upon the employee's return to work. The benefits do not have to be restored, however, if such benefits have been eliminated or changed for similarly situated employees. This applies to all benefit provisions.

(a) An employer electing to continue health or other insurance coverage for an employee on OMFLA leave may require that the employee pay only the same share of health or other insurance premium during the leave that the employee paid prior to the leave.

(b) If an employee cannot or will not pay such costs, the employer may elect to discontinue benefit coverage, unless to do so would render the employer unable to restore the employee to full benefit coverage as required in section (6) of this rule.

(c) If an employer pays any portion of any employee's benefit coverage for employees on non-OMFLA leave, the employer must pay that portion during OMFLA leave.

(d) If the employer pays (directly or indirectly, voluntarily or as required by state or federal statute) any part of the employee's share of health or other insurance premium while an employee is on OMFLA leave, the employer may deduct up to 10 percent of the employee's gross pay each pay period after the employee returns to work until the amount is repaid.

(e) Unless the cause is a serious health condition for which the employee would be entitled to OFLA leave or another circumstance beyond the employee's control, if an employee fails to return to work, the employer may recover the employee's share of benefits paid by the employer. The employer may use any legal means to collect the amount owed for the employee's share of benefits paid by the employer, including deducting the amount from the employee's final paycheck.

(8) If an employee gives unequivocal notice of intent not to return to work from OMFLA leave:

(a) The employee is entitled to complete the approved OMFLA leave, providing that the original need for OMFLA leave still exists. The employee remains entitled to all the rights and protections under OMFLA, including but not limited to, the use of vacation, sick leave and health benefits; except

(A) The employer's obligations under OMFLA to restore the employee's position and to restore benefits upon the completion of leave cease, except as required by federal COBRA laws, 29 USC 1161 et seq.; and

(B) The employer is not required to hold a position vacant or available for the employee giving unequivocal notice of intent not to return.

(9) An employer may not use the provisions of these rules as a subterfuge to avoid the employer's responsibilities under OMFLA.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099

839-009-0460

Enforcement and Retaliation

(1) A covered employer's duties and obligations under OMFLA extend to a successor employer as defined in 29 CFR 825.107.

(2) In accordance with the provisions of OMFLA an eligible employee claiming a violation of the OMFLA may file a complaint with the Civil Rights Division of the Bureau of Labor and Industries in the manner provided by ORS 659A.820.

(3) It is an unlawful employment practice for a covered employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of

employment because the person has inquired about OMFLA leave, submitted a request for OMFLA leave or invoked any provision of OMFLA.

(4) Pursuant to ORS 659A.030(1)(f), it is an unlawful employment practice for a covered employer to discharge, expel or otherwise discriminate against any person because the person has filed a complaint, testified or assisted in any proceeding in connection with OMFLA.

(5) It is an unlawful employment practice for a covered employer to count OMFLA leave against an employee in determining the employee's compliance with attendance policies, or to count OMFLA leave against an employee when determining eligibility for bonuses based on attendance.

(6) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts in violation of OMFLA or to attempt to do so.

Stat. Auth.: ORS 659A.093(6)

Stats. Implemented: ORS 659A.090 – 659A.099