

Secretary of State  
Certificate and Order for Filing  
**PERMANENT ADMINISTRATIVE RULES**

I certify that the attached copies\* are true, full and correct copies of the PERMANENT Rule(s) adopted on [ 12/28/07 ] by the  
Bureau of Labor and Industries Civil Rights Division  
Date prior to or same as filing date  
839

Agency and Division Administrative Rules Chapter Number

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to become effective [ 1/1/08 ]. Rulemaking Notice was published in the [ 10/07 ] Oregon Bulletin.\*\*  
Date upon filing or later Month and Year

**RULE CAPTION**

Implementing statutory amendments to OFLA, injured worker and discrimination law; clarifying rule amendments.

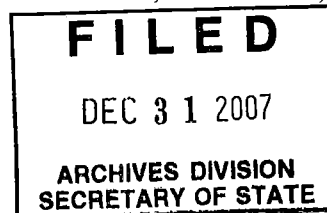
**Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.**

**RULEMAKING ACTION**

List each rule number separately (000-000-0000)

Secure approval of new rule numbers (Adopted or Renumbered rules) with the Administrative Rules Unit prior to filing.

**AMEND:** 839-006-0131; 839-006-0136; 839-009-0210; 839-009-0240; 839-009-0250; 839-009-0260; 839-009-0280;  
839-009-0320



Stat. Auth.: ORS 659A.805

Other Auth.: HB 2247, HB 2460, HB 2485, HB 2635, Oregon Legislature 2007

Stats. Implemented: Oregon Laws 2007, Chapter 365, Sections 11, 12 and 13; Chapters 633, 635, 777 Section 1

**RULE SUMMARY**

The rules will implement newly enacted statutory amendments to the Oregon Family Leave Act (OFLA):  
Prohibiting worker's compensation absence from running concurrently with an OFLA absence (HB 2460);  
Making grandparents and grandchildren family members for purposes of OFLA (HB 2635);  
Clarifying that it is unlawful to discriminate or retaliate against an employee for invoking OFLA (HB 2635);  
Entitling employees to use accrued paid sick leave for OFLA (HB 2247).

The rules will implement newly enacted statutory amendments to injured worker law providing that nurse practitioners may release injured workers for reemployment or reinstatement (HB 2247).

Dan Gardner

12/28/07

Authorized Signer Printed name Date  
\*With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules. \*\*The Oregon Bulletin is published the 1st of each month and updates rules found in the OAR Compilation. For publication in Bulletin, rule and notice filings must be submitted by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a weekend or legal holiday, when filings are accepted until 5:00 pm on the preceding workday. ARC 930-2005

BL 1 44-2007

### **839-006-0131**

#### **Loss of Reinstatement Rights Under ORS 659A.043**

(1) An injured worker meeting the requirements for reinstatement under ORS 659A.043 loses the right to reinstatement to the worker's former position when any of the following occurs:

- (a) A medical determination by the attending physician or, after an appeal of such determination, by a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656, that the worker cannot return to the former position of employment;
- (b) The worker is eligible for and participates in vocational assistance under ORS 656.340;
- (c) The worker accepts suitable employment with another employer after becoming medically stationary;
- (d) The worker refuses a bona fide offer from the employer of light duty or modified employment which is suitable prior to becoming medically stationary, except as provided under section (2) of this rule;
- (e) Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician or an authorized nurse practitioner has released the worker for employment unless the worker requests reinstatement within that time period;
- (f) Three years elapse from the date of injury;
- (g) The worker is discharged for bonafide reasons not connected with the injury and for which others are or would be discharged; or
- (h) The worker clearly and unequivocally abandons employment with the employer.

(2) A worker who refuses an offer of employment under subsection (1)(d) of this rule and who otherwise is entitled to Oregon Family Leave Act (OFLA) leave under ORS 659A.150 to ORS 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 under OAR 839-009-0250 that the employee is commencing a period of OFLA leave. See ORS 659A.162 and ORS 659A.043.

(3) The right to reinstatement does not apply to:

- (a) A worker hired on a temporary basis as a replacement for an injured worker;
- (b) A seasonal worker hired for and actually employed for less than six months in a calendar year; or
- (c) A worker whose employment at the time of injury resulted from referral to short-term employment from a hiring hall operating pursuant to a collective bargaining agreement.

Stat. Auth.: ORS 659A.805

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

### **839-006-0136**

#### **Loss of Reemployment Rights Under ORS 659A.046**

An injured worker meeting the requirements for reemployment under ORS 659A.046 loses the right to reemployment to an available, suitable position when any of the following occurs:

- (1) A medical determination by the attending physician or authorized nurse practitioner or, after an appeal of such determination, by a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656, that the worker cannot return to any position of reemployment with the employer.
- (2) The worker is eligible for and participates in vocational assistance under ORS 656.340;
- (3) The worker accepts suitable employment with another employer after becoming medically stationary;
- (4) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary. Except that a worker who refuses an offer of employment under this section, and who otherwise is entitled to Oregon Family Leave Act (OFLA) leave under ORS 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 under OAR 839-009-0250 that the employee is commencing a period of OFLA leave. See ORS 659A.162 and ORS 659A.046;
- (5) Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician or authorized nurse practitioner has released the worker for reemployment unless the worker requests reemployment within that time period;
- (6) Three years elapse from the date of injury;
- (7) The worker is discharged for bona fide reasons not connected with the injury and for which others are or would be discharged; or
- (8) The worker clearly and unequivocally abandons employment with the employer.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.046, ORS 659A.150 to 659A.186

**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 Oregon Laws, 2007, Chapter 99 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 subsection (c) 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 be employed by 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) 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) "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.

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

(11) "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.

(12) "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.

(13) "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.

(14) "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.

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

(16) "OFLA" is the Oregon Family Leave Act, ORS 659A.150 to 659A.186.

(17) "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 ORS 659A.046(3)(d). See ORS 659A.162, OAR 839-006-0131(2) and OAR 839-006-0136(4).

(18) "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.

(19) "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 14 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.

Stat. Auth.: ORS 659A.805

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

### **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 male employee may take up to 24 weeks of OFLA leave in one leave year, but only under the following circumstances:
  - (a) The male 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) Parental leave must be taken in one uninterrupted period -- unless the employer approves otherwise -- 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 ORS 659A.046(3)(d). See ORS 659A.043 (4), ORS 659A.046(5), ORS 659A.162, OAR 839-006-0131(2) and OAR 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 weeks 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 839-009-0210(4) 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(4) 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(4) 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(4) 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 same-sex domestic partner or for the serious health condition of a same-sex 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, ORS 659A.043, ORS 659A.046

### **839-009-0250**

#### **Notice by Employee; Designation by Employer**

(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, 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;
- (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 certification 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;
- (d) An employee on OFLA leave who needs to take more leave than originally authorized should 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, the employee is encouraged to give the employer as much advance notice as is practicable.
- (3) When taking OFLA leave in an unanticipated or emergency situation, an employee must give verbal or written notice within 24 hours of 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, the employer may reduce the period of unused OFLA leave by up to three weeks in that one-year leave period:
- (a) 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;
- (b) 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;
- (c) 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);
- (d) When an employee is subject to both FMLA and OFLA, the employer must apply the discipline available under (4)(a) or (c) of this rule that is most beneficial to the employee's individual circumstances.
- (5) An employee who refuses an offer of employment under ORS 659A.043(3)(a)(D) or ORS 659A.046(3)(d) and who otherwise is entitled to OFLA leave under ORS 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 OFLA 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, ORS 659A.043, ORS 659A.046

### **839-009-0260**

#### **Medical Verification and Scheduling of Treatment**

- (1) When an employee gives 30 days notice for OFLA leave, the employer may require the employee to provide medical verification of the need for OFLA leave before the leave starts.
  - (a) An employer may not require medical verification for parental leave.
  - (b) Consistent with ORS 659A.306, the employer must pay the cost of any medical verification not covered by insurance or other benefit plan.
- (2) If an employee's need for OFLA leave precludes giving 30 days notice, the employee must provide medical verification within 15 days of the employer's request for verification.
- (3) The employer must provide the employee with written notice of any requirement to provide medical verification of the need for leave and the consequences for failure to do so.
- (4) An employer may not delay the taking of an OFLA leave in the event that medical verification is not received prior to the commencement of (a) leave taken for unforeseen circumstances. The employer may designate the leave as provisionally approved subject to medical verification.



(5) If an employee submits medical verification signed by the health care provider, the employer may not directly request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical verification.

(6) An employer may not request subsequent medical verifications more often than every 30 days and only in connection with an absence by the employee except as stated in the FMLA regulations (see 29 CFR 825.308), including, for example, when:

(a) Circumstances described by the previous medical verification have changed significantly (e.g., the duration or frequency of absences, the severity of conditions, complications); or

(b) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(7) 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.306). The opinion of the third provider is binding on both the employer and the employee. 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 certification from the employee's health care provider that the employee is able to resume work. The employer may not require the employee to obtain a second opinion.

(8) If an employee has taken sick child leave on all or any part of three separate days during a leave year, the employer may, at its discretion, require medical verification 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 other benefit plan (see ORS 659A.306). The opinion of the health care provider is binding.

The employer may not require the employee to obtain a second opinion.

(9) 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

#### **839-009-0280**

##### **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.

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

(b) The employer provides written notice to the employee within two business days of the employee's notice of unanticipated or emergency leave that the employee will be required to use accrued paid leave.

(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

**839-009-0320**

**Enforcement and Retaliation**

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

(2) In accordance with the provisions of OFLA an eligible employee claiming a violation of the OFLA 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) Pursuant to ORS 659A.183, it is an unlawful employment practice for an employer to deny family leave to an eligible employee or 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 OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act.

(4) It is an unlawful employment practice for an employer to count OFLA leave against an employee in determining the employee's compliance with attendance policies or to count OFLA 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 OFLA leave and may not be disqualified from the bonus as a result of taking OFLA leave.

(5) Pursuant to ORS 659A.030(1)(f), it is an unlawful employment practice for an 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 the Oregon Family Leave Act.

(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 the Oregon Family Leave Act or to attempt to do so.

Stat. Auth.: ORS 659A.805

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