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**TEMPORARY ADMINISTRATIVE ORDER**  
INCLUDING STATEMENT OF NEED & JUSTIFICATION

**BLI 14-2023**

CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

**FILED**

08/23/2023 2:19 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE  
& LEGISLATIVE COUNSEL

FILING CAPTION: Amends rules related to Oregon Family Leave Act and sick leave.

EFFECTIVE DATE: 09/03/2023 THROUGH 02/29/2024

AGENCY APPROVED DATE: 08/22/2023

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Filed By:  
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NEED FOR THE RULE(S):

These rules are needed to comply with recently-enacted legislation and the implementation of Paid Leave Oregon. Updating the rules before Paid Leave Oregon becomes operative on September 3, 2022, eliminates conflicts in the law and confusion for employees and employers.

JUSTIFICATION OF TEMPORARY FILING:

The Bureau of Labor and Industries finds that the failure to act promptly will result in serious prejudice to the public interest and the interests of employees and employers. Paid Leave Oregon, as well as related statutory amendments adopted in 2023, require changes to the law on or before September 3, 2023. In the absence of these changes, the administrative rules will not comply with Oregon statutory law. If the rules are not updated, employers and employees across the state will be misled regarding the state of the law. Conversely, updating the rules to account for Paid Leave Oregon and the related statutory amendments will provide clarity regarding the state of the law.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

No documents were relied upon.

RULES:

839-007-0000, 839-007-0020, 839-007-0045, 839-009-0210, 839-009-0240, 839-009-0270

AMEND: 839-007-0000

RULE TITLE: Definitions

RULE SUMMARY: Amends rule to comply with Chapter 203, Oregon Laws 2023, to clarify definitions and to eliminate unnecessary citations.

RULE TEXT:

As used in ORS 653.601 to 653.661 and these rules:

(1) "Affinity" has the meaning given that term in OAR 839-009-0210.

(2) "City with a population exceeding 500,000" means a city with a population exceeding 500,000 located within the state of Oregon.

(3) "Family member" means an individual who is related by affinity to the employee or an individual who is the employee's:

(a) Spouse or domestic partner;

(b) Child or the child's spouse or domestic partner;

(c) Parent or the parent's spouse or domestic partner;

(d) Sibling or stepsibling or the sibling's or stepsibling's spouse or domestic partner;

(e) Grandparent or the grandparent's spouse or domestic partner; or

(f) Grandchild or the grandchild's spouse or domestic partner.

(4) "Health care provider" has the meaning given that term in ORS 659A.150.

(5) "Hours worked" means all hours for which an employee is employed by and required to give to the employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place and all time the employee is suffered or permitted to work. "Hours worked" includes "work time" as defined in ORS 653.010 as well as overtime hours worked.

(6) "Parent" means:

(a) An employee's biological parent, adoptive parent, stepparent or current or former foster parent or a person who was or is the employee's legal guardian or with whom the employee was or is in a relationship of in loco parentis; or

(b) The parent of the employee's spouse or domestic partner who meets a description in subsection (a) of this section.

(7) "Regular rate of pay" means the regular hourly rate that an employee earns for the workweek in which the employee uses paid sick time and which is no less than the applicable statutory minimum wage rate. An employer must apply a consistent methodology when calculating the regular rates of pay to similarly situated employees. An employee's regular rate of pay shall be determined as follows:

(a) For employees paid on the basis of a single hourly rate, the regular rate of pay means the same hourly rate the employee would have earned for the period of time in which sick time is used.

(b) For employees who are paid multiple hourly rates of pay, the regular rate of pay means either:

(A) The wages the employee would have been paid, if known, for the period of time in which sick time is used; or

(B) The weighted average of all regular rates of pay during the previous pay period.

(c) For employees paid a salary, the regular rate of pay means the employee's total wages earned during the pay period covered by the salary divided by the number of hours agreed to be worked in the pay period which the salary is intended to compensate. For example, if an employee is paid a weekly salary of \$525 and it is understood that the salary is compensation for a regular work week of 35 hours, the employee's regular rate of pay is \$15 per hour (\$525 divided by 35 hours). For an employee paid a salary whose hours of work vary from work week to work week, for the purpose of calculating the regular rate of pay to be used for the payment of sick time, the employee is presumed to work 40 hours in each workweek.

(d) For employees paid on a commission or piece-rate basis only, the regular rate of pay means a rate of no less than the applicable statutory minimum wage.

(e) For employees paid an hourly, weekly or monthly wage and also paid on a piece-rate or commission basis, the regular rate of pay means the rate of pay equivalent to the employee's hourly, weekly or monthly wage or the applicable statutory minimum wage, whichever is greater.

(f) The regular rate of pay does not include:

(A) Overtime, holiday pay, or other premium rates. However, where an employee's regular rate of pay includes a differential meant to compensate the employee for work performed under differing conditions (for example, a shift differential for working at night), such a differential rate is not considered to be a premium;

(B) Bonuses or other types of incentive pay; and

(C) Tips.

(8) "Spouse" includes:

- (a) Individuals in a marriage recognized under state law in the state in which the marriage was entered into;
  - (b) Individuals in a marriage validly performed in a foreign jurisdiction;
  - (c) Individuals in a common law marriage that was entered into in a state that recognizes such marriages; and
  - (d) Individuals who have lawfully established a civil union, domestic partnership or similar relationship under the laws of any state. Individuals described in this subsection are not required to obtain a marriage license, establish a record of marriage or solemnize their relationship.
- (9) "Undue hardship" means significant difficulty for an employer's business and includes consideration of the impracticability of permitting sick time to be taken in hourly increments. Factors to consider in determining whether the use of sick time in hourly increments imposes an undue hardship on the employer include, but are not limited to:
- (a) The number of persons employed or working at the particular worksite and their qualifications or ability to timely relieve the employee using sick time, given the employer's operations; the total number of persons employed by the employer; the number, type and geographic separateness of the employer's worksites; and
  - (b) The effect of providing sick time in hourly increments on worksite operations involving: the startup or shutdown of machinery in continuous-operation industrial processes; intermittent and unpredictable workflow not in the control of the employer or employee; the perishable nature of materials used on the job; the perishable or live nature of products being harvested or processed; the time-sensitive or high-volume nature of the employer's operations, if such operations have a direct impact on the public; and the safety and health of other employees, patients, clients or the public.

STATUTORY/OTHER AUTHORITY: ORS 653.601-653.661, ORS 651.060

STATUTES/OTHER IMPLEMENTED: ORS 653.601-653.661

AMEND: 839-007-0020

RULE TITLE: Permissible Use of Sick Time

RULE SUMMARY: Amends rule to account for the implementation of Paid Leave Oregon.

RULE TEXT:

Pursuant to ORS 653.616 and these rules an employee may use sick time for any of the following:

- (1) For an employee's mental or physical illness, injury or health condition; need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; or need for preventive medical care.
- (2) For care of a family member with a mental or physical illness, injury or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or care of a family member who needs preventive medical care.
- (3) For the following purposes specified in ORS 659A.159:
  - (a) To care for an infant or newly adopted child under 18 years of age, or for a newly placed foster child under 18 years of age, or for an adopted or foster child older than 18 years of age if the child is incapable of self-care because of a mental or physical disability. Leave under this subsection must be completed within 12 months after birth or placement of the child, and an eligible employee is not entitled to any period of leave under this subsection after the expiration of 12 months after birth or placement of the child.
  - (b) To care for a family member with a serious health condition as defined in OAR 839-009-0210(20).
  - (c) To recover from or seek treatment for a serious health condition of the employee as defined in OAR 839-009-0210(20) that renders the employee unable to perform at least one of the essential functions of the employee's regular position.
  - (d) To care for a child of the employee who is suffering from an illness, injury or condition that is not a serious health condition as defined in OAR 839-009-0210(20), but that requires home care.
  - (e) To deal with the death of a family member within 60 days of the date on which the eligible employee receives notice of the death of a family member by:
    - (A) Attending the funeral or alternative to a funeral of the family member;
    - (B) Making arrangements necessitated by the death of the family member; or
    - (C) Grieving the death of the family member.
- (4) For the following purposes specified in ORS 659A.272:
  - (a) To seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the 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, harassment, sexual assault or stalking.
  - (b) To seek medical treatment for or to recover from injuries caused by domestic violence or sexual assault to or harassment or stalking of the eligible employee or the employee's minor child or dependent.
  - (c) To obtain, or to assist a minor child or dependent in obtaining, counseling from a licensed mental health professional related to an experience of domestic violence, harassment, sexual assault or stalking.
  - (d) To obtain services from a victim services provider for the eligible employee or the employee's minor child or dependent.
  - (e) To relocate, pursuant to OAR 839-009-0345, or take steps to secure an existing home to ensure the health and safety of the eligible employee or the employee's minor child or dependent.
- (5) To donate accrued sick time to another employee if the other employee uses the donated sick time for a purpose specified in this rule and the employer has a policy that allows an employee to donate sick time to a coworker for a purpose specified in this rule.
- (6) In the event of a public health emergency, including, but not limited to:
  - (a) Closure of the employee's place of business, or the school or place of care of the employee's child, by order of a public official due to a public health emergency;
  - (b) A determination by a lawful public health authority or by a health care provider that the presence of the employee or

the family member of the employee in the community would jeopardize the health of others, such that the employee must provide self-care or care for the family member;

(c) The exclusion of the employee from the workplace under any law or rule that requires the employer to exclude the employee from the workplace for health reasons;

(d) The following public health emergencies are permissible uses of sick leave unless the employee is employed as a first responder:

(A) An emergency evacuation order of level 2 (SET) or level 3 (GO) issued by a public official with the authority to do so, if the affected area subject to the order includes either the location of the employer's place of business or the employee's home address; or

(B) A determination by a public official with the authority to do so that the air quality index or heat index are at a level where continued exposure to such levels would jeopardize the health of the employee.

(7) For purposes authorized under ORS Chapter 657B.

(8) Sick time provided pursuant to the Oregon Family Leave Act in ORS 659A.159 or ORS Domestic Violence Leave in 659A.272 runs concurrently with sick time provided pursuant to ORS 653.601 to 653.661.

STATUTORY/OTHER AUTHORITY: ORS 651.060, ORS 653.601-653.661

STATUTES/OTHER IMPLEMENTED: ORS 653.601-653.661

RULE TITLE: Verification and Certification for Sick Time Use

RULE SUMMARY: Amends rule to allow the use of an attestation when an employee uses sick time to care for a person who is related by affinity, consistent with Chapter 203, Oregon Laws 2023.

RULE TEXT:

- (1) If an employee uses sick time for more than three consecutive scheduled workdays:
  - (a) For a purpose provided in ORS 653.616(1) or (2) or ORS 659A.159(1)(b)–(d) the employer may require the employee to provide verification within 15 calendar days from a health care provider of the need for the sick time.
  - (b) For purposes of ORS 653.616(4) for use of sick time for a purpose specified in ORS 659A.272 relating to domestic violence, sexual assault, harassment or stalking, the employer may require the employee to provide certification of the need for leave as provided in ORS 659A.280 and subsection (3) of this rule.
- (2) “Three consecutive scheduled workdays” means three consecutive scheduled workdays, not including scheduled days off. For example, if an employee is scheduled to work Monday, Wednesday, and Friday only, and the employee uses sick time for all three days, the employee has used sick time for three consecutive scheduled workdays.
- (3) Pursuant to ORS 659A.280, for purposes of certification of the need for leave for purposes of ORS 659A.272 relating to domestic violence, sexual assault, harassment or stalking, any of the following constitutes sufficient certification:
  - (a) A copy of a police report indicating that the eligible employee or the employee’s minor child or dependent was a victim of domestic violence, harassment, sexual assault or stalking;
  - (b) A copy of a protective order or other evidence from a court, administrative agency or attorney that the eligible employee appeared in or was preparing for a civil, criminal or administrative proceeding related to domestic violence, harassment, sexual assault or stalking; 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 employee’s minor child or dependent was undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, harassment, sexual assault or stalking.
- (4) If an employee commences sick time without providing prior notice required by the employer under OAR 839-007-0040:
  - (a) Medical verification shall be provided to the employer within 15 calendar days after the employer requests the verification; or
  - (b) Certification as specified in ORS 659A.280 and subsection (3) of this rule for the purposes of ORS 659A.272 relating to domestic violence, sexual assault, harassment or stalking shall be provided to the employer within a reasonable time after the employee receives the request for certification.
- (5) If the need for sick time is foreseeable and projected to last more than three scheduled workdays and an employee is required to provide notice under ORS 653.621 and OAR 839-007-0040, the employer may require that verification or certification be provided before the sick time commences or as soon as otherwise practicable.
- (6) An employer must pay any reasonable costs for providing any medical verification or certification required, including lost wages, that are not paid under a health benefit plan in which the employee is enrolled.
- (7) An employer may not require that any verification or certification required explain the nature of the illness or details related to the domestic violence, sexual assault, harassment, or stalking that necessitates the use of sick time.
- (8) If an employer obtains health information about an employee or an employee’s family member, such information shall be treated as confidential to the extent provided by law.
- (9) Pursuant to ORS 659A.280, all records and information kept by an employer regarding use of sick time for purposes related to domestic violence, harassment, sexual assault, or stalking, including the fact that the employee has requested or obtained use of sick time, are confidential and may not be released without the express permission of the employee, unless otherwise required by law.

(10) If an employee fails to provide verification or certification as required by ORS 653.626 and these rules, the employer is not required to pay for the use of sick time for the absence taken until the employee provides verification or certification verifying that the absence was for a qualifying reason as defined by ORS 653.616 and these rules. The employer may discipline the employee for violating policies and procedures but not for using sick time.

(11) If an employer reasonably suspects that an employee is abusing sick time, including engaging in a pattern of abuse, the employer may require verification from a health care provider of the need of the employee to use sick time, regardless of whether the employee has used sick time for more than three consecutive days. As used in this section, "pattern of abuse" includes, but is not limited to, repeated use of unscheduled sick time on or adjacent to weekends, holidays, vacation days or paydays.

(12) When an employee uses sick time to care for a family member who is related by affinity, the employer may require the employee to attest in writing that the employee and the person cared for have a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship.

STATUTORY/OTHER AUTHORITY: ORS 653.601-653.661, ORS 651.060

STATUTES/OTHER IMPLEMENTED: ORS 653.601-653.661

AMEND: 839-009-0210

RULE TITLE: OFLA: Definitions

RULE SUMMARY: Amends rule to account for Chapters 20 and 203, Oregon Laws 2023, to clarify terminology and make technical adjustments

RULE TEXT:

(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)(a) "Affinity" means a relationship for which there is a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship.

(b) The bond described in subsection (a) of this section may be demonstrated by, but is not limited to the following factors, with no single factor being determinative:

- (A) Shared personal financial responsibility, including shared leases, common ownership of real or personal property, joint liability for bills or beneficiary designations;
- (B) Emergency contact designation of the employee by the other individual in the relationship or the emergency contact designation of the other individual in the relationship by the employee;
- (C) The expectation to provide care because of the relationship or the prior provision of care;
- (D) Cohabitation and its duration and purpose;
- (E) Geographic proximity; and
- (F) Any other factor that demonstrates the existence of a family-like relationship.

(3) "Child," means the eligible employee's biological, adopted, foster or step child, the child of the employee's spouse or domestic partner or a child with whom the employee is or was in a relationship of in loco parentis. For purposes of parental leave and sick child leave only, 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.104

(1)(a), (3), and (4).

(4) "Child Care Provider" for the purpose of sick child leave during a statewide public health emergency declared by a public health official means a place of care or person who cares for a child.

(a) A person who cares for a child includes but is not limited to individuals paid to provide child care, for example nannies, au pairs, and babysitters or individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

(b) Place of care is a physical location in which care is provided for a child including but not limited to day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs. The physical location does not have to be solely dedicated to such care.

(5) "Closure" for the purpose of sick child leave during a statewide public health emergency declared by a public health official means a closure that is ongoing, intermittent, or recurring and restricts physical access to the child's school or child care provider.

(6) "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 year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken.

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

(8) "Domestic partnership" for the purposes of ORS chapter 659A means two individuals who have received a Certificate of Registered Domestic Partnership from the State of Oregon in compliance with ORS 432.173 and rules adopted by the State Registrar of the Center for Health Statistics.

(9) "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 federal Fair Labor Standards Act. (See 29 CFR §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. U.S. 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.
- (10) "Family member" means an individual related to an eligible employee by affinity or an individual who is an eligible employee's:
- (a) Spouse or domestic partner;
  - (b) Child or the child's spouse or domestic partner;
  - (c) Parent or the parent's spouse or domestic partner;
  - (d) Sibling or stepsibling or the sibling's or stepsibling's spouse or domestic partner;
  - (e) Grandparent or the grandparent's spouse or domestic partner; or
  - (f) Grandchild or the grandchild's spouse or domestic partner.
- (11) "FMLA" is the federal Family and Medical Leave Act, 29 USC §2601.
- (12) "Foreseeable leave" means leave taken for a purpose set out in ORS 659A.159 that is not "unforeseeable leave."

- (13) "Foster child" means a child, not adopted, but being reared as a result of legal process, by a person other than the child's biological parent.
- (14) "Gender" means an individual's assigned sex at birth, gender identity, or gender expression.
- (15) "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.
- (16) "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.
- (17) "Health care provider" has the meaning given that term in ORS 659A.150.
- (18) "In loco parentis" means in the place of a parent, having financial or day-to-day responsibility for the care of a child. A legal or biological relationship is not required.
- (19) "Intermittent leave" means leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule including but not limited to sick child leave taken requiring an altered or reduced work schedule because the intermittent or recurring closure of a child's school or child care provider due to a statewide public health emergency declared by a public health official.
- (20) "OFLA" is the Oregon Family Leave Act, ORS 659A.150 to 659A.186.
- (21) "OFLA leave" means a leave of absence for purposes described in ORS 659A.159 and OAR 839-009-0230(1) through (5). Except that "OFLA leave" does not include leave taken by an eligible employee who is unable to work because of a compensable injury, as defined in ORS 656.005, unless the employee refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary under ORS 659A.043(3)(a)(D) and 659A.043(4) or 659A.046(3)(d) and 659A.046(5). See ORS 659A.162, OAR 839-006-0131(2) and 839-006-0136(4).
- (22) "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.
- (23) "Parent" means:
- (a) An eligible employee's biological parent, adoptive parent, stepparent or current or former foster parent or a person who was or is the eligible employee's legal guardian or with whom the eligible employee was or is in a relationship of in loco parentis; or
  - (b) The parent of the eligible employee's spouse or domestic partner who meets a description in subsection (a) of this section.
- (24) "Public health emergency" has the meaning given that term in ORS 659A.150.
- (25) "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 this paragraph.
  - (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 due to pregnancy, including pregnancy termination, childbirth or a period of absence for prenatal care.

(26) "Spouse" includes:

(a) Individuals in a marriage recognized under state law in the state in which the marriage was entered into;

(b) Individuals in a marriage validly performed in a foreign jurisdiction;

(c) Individuals in a common law marriage that was entered into in a state that recognizes such marriages; and

(d) Individuals who have lawfully established a civil union, domestic partnership or similar relationship under the laws of any state. Individuals described in this subsection are not required to obtain a marriage license, establish a record of marriage or solemnize their relationship.

(27) "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;

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

(d) The death of a family member.

STATUTORY/OTHER AUTHORITY: ORS 659A.805, ORS 651.060

STATUTES/OTHER IMPLEMENTED: ORS 659A.150 - 659A.186, ORS 659A.043, ORS 659A.046

AMEND: 839-009-0240

RULE TITLE: OFLA: Length of Leave and Other Conditions of OFLA Leave

RULE SUMMARY: Amends rule to comply with Chapter 203, Oregon Laws 2023, clarify terminology and make technical adjustments.

RULE TEXT:

Except as otherwise provided in ORS Chapter 657B:

- (1) An eligible employee is entitled to up to a total of 12 weeks of OFLA leave in any one-year period.
- (2) In addition to the 12 weeks of leave authorized by ORS 659A.162 (1), an eligible employee may take a total of 12 weeks of leave within the same leave year for an illness, injury or condition related to pregnancy or childbirth that disables the employee from performing any available job duties offered by the employer. The employee may use all or part of the 12 weeks of leave authorized by 659A.162(1) and all or part of the 12 weeks of pregnancy disability leave in any order. The employee need not exhaust either type of leave in order to use the other.
- (3) An eligible employee taking the entire 12 weeks of OFLA leave authorized by ORS 659A.162 (1) 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 that the balance of the 12 weeks of OFLA leave authorized by ORS 659A.162 may be used for sick child leave or for any OFLA leave purpose.
- (4) An eligible employee may take up to 36 weeks of OFLA leave in one leave year that includes up to 12 weeks of pregnancy disability leave, 12 weeks of parental leave, and up to 12 weeks of sick child leave.
- (5) 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) Up to 12 weeks of sick child leave.
  - (6) An eligible employee taking leave under ORS 659A.159(1)(e) and OAR 839-009-0230(5) to deal with the death of a family member is entitled to take up to a total of two weeks of OFLA leave for that purpose.
    - (a) An eligible employee is entitled to take up to two weeks of OFLA leave upon the death of each family member of the employee within any one-year period, except that the leave taken to deal with the deaths of family members may not exceed the total in ORS 659A.162(1) and subsection (1) of this rule.
    - (b) A covered employer may not require an eligible employee to take multiple leave periods concurrently if more than one family member of the employee dies during the one year period. If multiple family members of an eligible employee die concurrently, an eligible employee may take up to two weeks of leave for the death of each family member.
    - (c) All leave taken under ORS 659A.159 (1)(e) and OAR 839-009-0230(5) shall be counted toward the total period of OFLA leave authorized in ORS 659A.162(1) and subsection (1) of this rule.
    - (d) All leave taken for the death of a family member must be completed within 60 days of the date on which the eligible employee receives notice of the death of the family member. Notice of the death of a family member may be by any means and from any source.
  - (7) Two or more eligible employees who are family members of each other as defined in OAR 839-009-0210, working for the same covered employer, may take OFLA leave at the same time with that covered employer only under the following circumstances:
    - (a) One eligible family member needs to care for another eligible family member who is suffering from a serious health condition;
    - (b) One eligible family member needs to care for a child suffering from a serious or non-serious health condition while another eligible family member is suffering from a serious health condition;
    - (c) Two or more eligible family members are suffering from one or more serious health conditions;
    - (d) The employer allows family members to take concurrent leave; or
    - (e) The eligible family members are taking leave for the death of a family member pursuant to ORS 659A.159(1)(e) and OAR 839-009-0230(5).
- (8) Unless the covered employer approves otherwise, parental leave shall be taken in one uninterrupted period, and

shall be completed within 12 months of the birth, adoption or placement of the child. Exceptions shall be made:

(a) To allow intermittent parental leave to effectuate adoption or foster placement of a child. Parental leave taken to effectuate adoption or foster placement of a child is part of the total amount of parental leave available to the employee, but need not be taken in one, uninterrupted period with any remaining parental leave taken after the actual placement of the child.

(b) To allow parental leave to attend the birth of or give birth to the employee's child. Such leave need not be taken in one, uninterrupted period with any remaining parental leave taken after the birth of the child.

(9) 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.

(10) A covered employer need not grant sick child leave to an eligible employee if another family member of the child is willing and able to care for the child.

(11) 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.

(b) If a worker's compensation claim is first denied and then accepted, the employer must restore any OFLA leave taken for the condition covered by worker's compensation in the leave year in which the worker's compensation claim is accepted.

(c) Notwithstanding 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).

(d) An employee unable to work for an employer because of a disabling compensable injury arising out of and in the course of employment for that employer, but who is also employed by and able to work for another employer, may be eligible and qualify to use OFLA leave under the other employer.

(12) 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 intermittent leave; an employee normally employed to work 50 hours per week is entitled to 12 times 50 hours, or a total of 600 hours OFLA intermittent 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.

(13) 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 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 each time the employee takes leave for the same individual and the same serious health condition during the same leave year.

(b) An eligible employee taking, in any order, some or all of 12 weeks of OFLA pregnancy disability leave and some or all of 12 weeks of OFLA leave for any other purpose, need not requalify under OAR 839-009-0210 each time she takes OFLA leave within the same leave year.

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

(d) An employee unable to work because of a disabling compensable injury as defined in ORS 656.005 need not requalify under OAR 839-009-0210 in order to use OFLA leave following a period the employee is off work due to the compensable injury.

(e) An employee who has taken serious health condition leave to care for a family member who dies during the employee's serious health condition leave, need not requalify under OAR 839-009-0210 to take leave for the death of that family member.

(14) An exempt employee is a salaried executive, administrative or professional employee under the federal Fair Labor Standards Act (see 29 CFR § 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, if done in accordance with 29 CFR § 825.206, 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 or for the death of a family member), 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.

(15) 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.

(16) ORS 659A.150 to 659A.186 and these rules do not limit any right of an employee to any leave that is similar to the leave described in 695A.159(1) and OAR 839-009-0230 and to which the employee may be entitled under any agreement between the employer and the employee, collective bargaining agreement or employer policy.

(17) When an eligible employee uses sick time to care for a family member who is related by affinity, the employer may require the employee to attest in writing that the employee and the person cared for have a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship.

STATUTORY/OTHER AUTHORITY: ORS 659A.805

STATUTES/OTHER IMPLEMENTED: ORS 659A.150 - 659A.186, ORS 659A.043, ORS 659A.046

AMEND: 839-009-0270

RULE TITLE: OFLA: Job Protection

RULE SUMMARY: Amends rule to comply with Chapter 203, Oregon Laws 2023.

RULE TEXT:

(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 50 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 non-health-related benefits that would accrue while the employee is working;

(b) Benefits an employee was entitled to prior to starting OFLA 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;

(c) An employee has no greater right to a job or other employment benefits than if the employee had not taken OFLA leave; and

(d) An employee is subject to layoff the same as similarly situated employees not taking OFLA leave.

(6) During any OFLA leave, an employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.

(a) An employer continuing 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. If coverage lapses because an employee has not made required premium payments, upon the employee's return from OFLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be

liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

(c) 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.

(d) 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)(a) If an employee gives unequivocal notice of intent not to return to work from OFLA leave:

(b) 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.

STATUTORY/OTHER AUTHORITY: ORS 659A.805, ORS 651.060

STATUTES/OTHER IMPLEMENTED: ORS 659A.150 - 659A.186