



Commissioner Brad Avakian
Bureau of Labor and Industries

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BOLI Brief: Implementing OFLA Under New FMLA Rules

How federal rule changes to the Family Medical Leave Act impact the application of the Oregon Family Leave Act

Family Medical Leave Background

State and federal law both require certain employers to provide up to 12 weeks of leave a year to employees for a serious health condition of the employee or family member or for the birth or adoption of a child. The Oregon Family Leave Act (OFLA) applies to employers of 25 or more while the federal Family & Medical Leave Act (FMLA) applies to employers of 50 or more. Generally, OFLA and FMLA provide 12 weeks of unpaid leave per year for the following purposes:

- For the birth, adoption or placement of a child (parental leave);
- To care for a family member with a serious health condition or the employee's own serious health condition (serious health condition leave).
- For a pregnancy disability or prenatal care (pregnancy disability leave).

In several respects, Oregon law is more generous to employees than federal law. For example, OFLA includes parents-in-law, grandparents and grandchildren in its definition of family members, while FMLA does not. OFLA also includes sick child leave to care for a sick child who does not have a serious health condition. As with all parallel federal and state laws pertaining to employment, employers must follow the law most beneficial to the employee. Differences between federal and state leave law require employers to carefully track employee leave and make sure leave time is appropriately counted against the employee's OFLA and/or FMLA entitlement.

Recent FMLA Rule Changes

On January 16, 2009, the U.S. Department of Labor, which enforces FMLA, implemented amendments to FMLA regulations. The new regulations apply to Oregon employers with 50 or more employees who are required to comply with both FMLA and OFLA. One important change is the provision of additional leave for military members and their families, which is not provided under OFLA. Several other amendments create new inconsistencies between OFLA and FMLA regulations in areas covered by both laws. OFLA regulations require that employers covered by both laws must follow the regulation that is more beneficial to the employee's circumstances. The Oregon Bureau of Labor and Industries (BOLI), which enforces the OFLA, has reviewed the FMLA regulatory changes extensively to identify areas of conflict with OFLA regulations.

Application of OFLA Under New FMLA Regulations

BOLI has concluded that, although many of the new FMLA regulations do not conflict with OFLA regulations, several areas merit further consideration regarding whether the OFLA regulations should be amended to conform to the new FMLA regulations. Commissioner



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Avakian announced his intention to hold informational hearings in February 2009 to gather public comment on potential changes to OFLA regulations to eliminate inconsistencies with the new federal regulations.

The primary issues on which the Commissioner will seek comment are as follows:

- **Serious Health Condition.** Under FMLA and OFLA, employees who have a “serious health condition” qualify for up to 12 weeks of family leave per year. To qualify under the amended FMLA regulations, employees must meet three new requirements: (1) treatment two or more times within 30 days of the first day of incapacity; (2) an in-person visit to a health care provider within seven days of the first day of incapacity; and (3) for “chronic” conditions, at least two visits per year for treatment by a health care provider. In contrast, OFLA regulations require only two or more treatments by a health care provider and “periodic” visits for chronic conditions. Both of these requirements are similar to FMLA’s former regulations. OFLA regulations do not specifically require an in-person visit within any time limit. OFLA regulations require that employers covered by both laws must follow the regulation that is more beneficial to the employee’s circumstances.
 - BOLI will seek public comment on the whether the OFLA regulations should be amended to be consistent with the new FMLA regulations regarding the definitions of serious health condition.
- **Leave Entitlement.** The amended FMLA regulations calculate leave entitlement based on a weekly average of hours scheduled over the 12 months prior to the leave, whereas OFLA relies on a 12 week average. OFLA regulations require that employers covered by both laws must follow the regulation that is more beneficial to the employee’s circumstances.
 - BOLI will seek public comment on the issue of calculation of average work hours for leave entitlement and whether the OFLA regulations should be amended to be consistent with the new FMLA regulations.
- **Attendance Bonuses.** The amended FMLA regulations provide that if a bonus is based on perfect attendance and the employee has not met that goal due to FMLA leave, the bonus may be denied. The OFLA regulation is similar to FMLA’s former regulation and does not allow employers to deny a bonus for perfect attendance due to use of OFLA leave. OFLA regulations require that employers covered by both laws must follow the regulation that is more beneficial to the employee’s circumstances.
 - BOLI will seek public comment on the issue of attendance bonuses and whether the OFLA regulation should be amended to be consistent with the new FMLA regulation.



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- **Employer ability to contact directly an employee's health care provider.** The amended FMLA regulations provide that an employer's health care provider, human relations professional, or management representative who does not supervise the employee may contact an employee's health care provider for purposes of clarification and authentication of the employee's medical certification. This may only be done after the employer has given the employee an opportunity to cure any deficiencies. The OFLA regulation is similar to FMLA's former regulation and only allows the employer's health care provider to contact the employee's health care provider. OFLA regulations require that employers covered by both laws must follow the regulation that is more beneficial to the employee's circumstances.
 - BOLI will seek public comment on the issue of contact with the employee's health care provider and whether the OFLA regulation should be amended to be consistent with the new FMLA regulation.
- **Intermittent leave.** The amended FMLA regulations require that when it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, the entire work period during which the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. An example of this would be a pilot scheduled to fly a 12-4pm flight. If leave is required for only 12-1pm, but requires the pilot to miss the entire flight, the entire shift may be deducted as leave. OFLA regulations have no similar provision. OFLA regulations require that employers covered by both laws must follow the regulation that is more beneficial to the employee's circumstances.
 - BOLI will seek public comment on intermittent leave and whether the OFLA regulation should be amended to be consistent with the new FMLA regulation.
- **Employer Posting.** The amended FMLA regulations allow electronic posting of the required notice of FMLA rights. OFLA regulations require posting of such notices "in each building or worksite."
 - BOLI will seek public comment on the issue of employer posting requirements and whether the OFLA regulation should be amended to be consistent with the new FMLA regulation.
- **Employee Notice to Employer.** The amended FMLA regulations now require employees to specifically reference either the qualifying reason or the need for FMLA leave when the employee seeks leave for a serious health condition for which the employee has previously taken leave. In addition, the employer now need not allow FMLA leave when an employee calls in sick without providing further information. If unusual circumstances are present, an employer may not require an employee to comply with the employer's usual notice requirements. OFLA has no similar provisions. OFLA regulations require



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that employers covered by both laws must follow the regulation that is more beneficial to the employee's circumstances.

- **Medical Certification.** Newly amended FMLA regulations clarify or change employer and employee medical certification requirements in a number of areas. Some of the more significant changes to FMLA include:
 - Employers should request certification within five business days after an employee requests leave, or within five business days after unforeseen leave commences. An employee must provide certification within 15 calendar days.
 - Employers must advise employees whenever the employer finds a certification "incomplete or insufficient" and give the employee seven calendar days to cure the deficiency. If the employee does not, FMLA leave may be denied.
 - Employers may require an employee to provide a new medical certification in each subsequent leave year when the serious health condition lasts beyond a single leave year.
 - If an employee fails to provide the employer with the authorization to clarify the certification with the health care provider after the employer has given the employee an opportunity to cure any deficiencies and the employee does not otherwise clarify the certification, the employer may deny the taking of FMLA leave.
 - Upon request by an employee, an employer must provide the employee copies of second and third medical opinions within five business days.
 - When making a recertification request, an employer may provide the employee's health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition is consistent with such a pattern.
 - When a serious health condition is expected to last more than 30 days, an employer may request a recertification every six months.

OFLA has "medical verification" rules that are similar in some respects but differ considerably, or are silent, in others. OFLA regulations require that employers covered by both laws must follow the regulation that is more beneficial to the employee's circumstances.

- BOLI will seek public comment on the issue of medical certification and whether the OFLA regulation should be amended to be consistent with the new FMLA regulation.
- **Employee Notice to Employer and Medical Certification.** The newly amended FMLA regulations make several changes in the requirements for notice by an employee to an employer that the employee will take family leave and for the medical certification of an employee's or a family member's serious health condition. OFLA regulations do not



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include these requirements. BOLI realizes these are important areas for employers and employees which warrant more extensive review.

- BOLI will seek public comment on the issues of employee notice and medical certification and whether the OFLA regulations should be amended to be consistent with the new FMLA regulations.
- **Forms.** Newly amended FMLA regulations include a number of new forms for employers and employees. Prior to the amendments to FMLA regulations, BOLI advised employers that FMLA medical certification forms could be used for OFLA as well as FMLA leave. BOLI is continuing this policy in regard to two FMLA forms, one for obtaining medical certification for the employee's serious health condition (WH-380-E November 2008) and the other for a family member's serious health condition (WH-380-F November 2008). Additional new FMLA forms are not consistent with OFLA, such as those that apply to leave for military members and their families.

Providing Comment on Rulemaking

BOLI will hold informational hearings in February to take public comment on the issues identified above. After taking public comment at informational hearings in February 2009, BOLI will determine if changes to Oregon leave law regulations are necessary. If changes are necessary, BOLI will begin the formal rulemaking process. Rulemaking notice and other updates on this subject will be posted on BOLI's website at <http://www.oregon.gov/BOLI/>. To be added to the BOLI rules notice list please send an email to marcia.l.ohlemiller@state.or.us.

Complying with Both OFLA and FMLA

Employers and employees covered by both laws have expressed understandable concern to BOLI about implementing OFLA and the amended FMLA regulations together. Until and unless OFLA regulations are amended to conform with new FMLA regulations, OFLA regulations require that employers covered by both laws must follow the regulation that is more beneficial to the employee's circumstances.

BOLI Technical Assistance for Employers

Employers with specific questions regarding compliance with the new FMLA regulations and OFLA are encouraged to call the Bureau's Technical Assistance for Employers Program through the Hotline (971-673-0824) or via email at BOLI.MAIL@state.or.us.