

**Definitions: OFLA**

- (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.104(1)(a), (3), and (4).
- (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 [C]chapter 659A means two individuals of the same sex who have received a Certificate of Registered Domestic Partnership from the State of Oregon in compliance with ORS 432.405(1) and rules adopted by the State Registrar of the Center for Health Statistics.
- (6) "Eligible employee" means an employee employed in the state of Oregon on the date OFLA leave begins. For eligibility of employees reemployed following a period of uniformed service, see subsections (c) and (d) of this section.
  - (a) For the purpose of taking parental leave, an employee must be employed by a covered employer for at least 180 calendar days immediately preceding the date on which OFLA leave begins.
  - (b) For purposes of taking all other types of OFLA leave, including pregnancy disability leave, an employee must have worked for a covered employer for an average of at least 25 hours per week during the 180 calendar days immediately preceding the date OFLA leave begins.
    - (A) In determining that an employee has been employed for the preceding 180 calendar days, the employer must count the number of days an employee is maintained on the payroll, including all time paid or unpaid. If an employee continues to be employed by a successor in interest to the original employer, the number of days worked are counted as continuous employment by a single employer.
    - (B) In determining 25 hours average per week, the employer must count actual hours worked using guidelines set out pursuant to the Fair Labor Standards Act (See 29 CFR [Part]§ 785).
  - (c) The federal Uniformed Services Employment and Reemployment Act, 38 USC §43 (USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had

remained continuously employed. Federal Department of Labor regulation 20 CFR §1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. Under USERRA, a reemployed service member would be eligible for leave under OFLA if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet OFLA's eligibility requirements. In the event that a service member is denied OFLA leave for failing to satisfy the OFLA days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under OFLA.

**NOTE:** USERRA also applies to leave under the federal Family and Medical Leave Act of 1993, 29 USC §2601-2654 (FMLA).

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

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

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

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

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

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

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

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

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

(14) "Health care provider" means:

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

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

*(c) A podiatrist, a dentist, a clinical psychologist, an optometrist, a naturopath, a nurse practitioner, a licensed physician's assistant, a direct entry midwife, a nurse-midwife or a clinical social worker authorized to practice and perform within the scope of a professional license as provided by law; or*

*(d) A Christian Science practitioner listed with the First Church of Christ Scientist in Boston, Mass: or*

*(e) A chiropractor, but only to the extent that a chiropractor provides treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated to exist by X-rays.]*

**(a) A person who is primarily responsible for providing health care to an eligible employee or a family member of an eligible employee, who is performing within the scope of the person's professional license or certificate and who is:**

**(A) A physician licensed to practice medicine under ORS 677.110, including a doctor of osteopathy;**

**(B) A podiatrist licensed under ORS 677.825;**

**(C) A dentist licensed under ORS 679.090;**

**(D) A psychologist licensed under ORS 675.030;**

**(E) An optometrist licensed under ORS 683.070;**

**(F) A naturopath licensed under ORS 685.080;**

**(G) A registered nurse licensed under ORS 678.050;**

**(H) A nurse practitioner certified under ORS 678.375;**

**(I) A direct entry midwife licensed under ORS 687.420;**

**(J) A licensed registered nurse who is certified by the Oregon State Board of Nursing as a nurse midwife nurse practitioner;**

**(K) A regulated social worker authorized to practice regulated social work under ORS 675.510 to 675.600; or**

**(L) A chiropractic physician licensed under ORS 684.054, but only to the extent the chiropractic physician provides treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated to exist by X-rays.**

**(b) A person who is primarily responsible for the treatment of an eligible employee or a family member of an eligible employee solely through spiritual means, including but not limited to a Christian Science practitioner.**

(15) "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.

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

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

(18) "OFLA leave" means a leave of absence for purposes described in ORS 659A.159, **HB 2950, 77<sup>th</sup> Leg., Reg. Session (Or. 2013)** and OAR 839-009-0230(1) through [(4)] **(5)**. Except that "OFLA leave" does not include leave taken by an eligible employee who is unable to work because of a disabling compensable injury, as defined in ORS 656.005, unless the employee has refused a suitable offer of light duty or modified employment under ORS 659A.043(3)(a)(D) or 659A.046(3)(d). See ORS 659A.162, OAR 839-006-0131(2) and 839-006-0136(4).

(19) "OFLA leave year," for calculating the OFLA leave year entitlement, means a calendar year (January to December), a fixed 12-month period such as a fiscal year, a 12-month period measured forward from the date of the employee's first OFLA leave, or a 12-month period measured backward from the date the employee uses any OFLA leave. The option selected must be applied to all employees. In the absence of an employer policy or collective bargaining agreement defining how an OFLA leave year will be measured, a calendar year will be used.

(20) "Serious health condition" means an illness, injury, impairment or physical or mental condition of an employee or family member:

(a) That requires inpatient care in a medical care facility such as a hospital, hospice or residential facility such as a nursing home. When a family member resides in a long-term residential care facility, leave applies only to:

(A) Transition periods spent moving the family member from one home or facility to another, including time to make arrangements for such transitions;

(B) Transportation or other assistance required for a family member to obtain care from a physician; or

(C) Serious health conditions as described in (b) through (h) of section (20) of this rule.

(b) That the treating health care provider judges to pose an imminent danger of death, or that is terminal in prognosis with a reasonable possibility of death in the near future;

(c) That requires constant or continuing care such as home care administered by a health care professional;

(d) That involves a period of incapacity. Incapacity is the inability to perform at least one essential job function, or to attend school or perform regular daily activities for more than three consecutive calendar days and any subsequent required treatment or recovery period relating to the same condition. This incapacity must involve:

(A) Two or more treatments by a health care provider; or

(B) One treatment plus a regimen of continuing care.

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

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

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

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

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

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

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

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

**(d) The death of a family member.**

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150–659A.186, 659A.043, 659A.046, **H.B. 2950, 77<sup>th</sup> Leg., Reg. Session (Or. 2013)**

### **839-009-0230**

#### **Purposes for Taking OFLA Leave**

Eligible employees may take OFLA leave for the purposes commonly referred to as parental leave, serious health condition leave, pregnancy disability leave, ~~and~~ sick child leave, **and the death of a family member.**

(1) Parental leave is leave taken to care for the employee's newborn, newly adopted or newly placed foster child under 18 years of age or for a newly adopted or newly placed foster child 18 years of age or older who is incapable of self care because of a physical or mental impairment. It includes leave time to effectuate the legal process required for placement of a foster child or the adoption of a child.

(2) Serious health condition leave is leave taken:

(a) To provide care for a family member with a serious health condition as defined in 839-009-0210~~(19)~~**(20)**; or

(b) To recover from or seek treatment for a serious health condition that renders an employee unable to perform at least one essential function of the employee's regular position.

(3) Pregnancy disability leave is leave taken by a female employee for a disability related to pregnancy or childbirth, occurring before or after the birth of the child, or for prenatal care. Pregnancy disability leave is a form of serious health condition leave.

(4) Sick child leave is leave taken to care for an employee's child suffering from an illness or injury that requires home care but is not a serious health condition. An employer is not required to grant leave for routine medical or dental appointments.

**(5) Leave to deal with the death of a family member is leave taken to attend the funeral or alternative to a funeral of the family member, to make arrangements necessitated by the death of the family member, or to grieve the death of the family member.**

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186, H.B. 2950, 77<sup>th</sup> Leg., Reg. Session (Or. 2013)

### **839-009-0240**

#### **Length of Leave and Other Conditions of OFLA Leave**

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

- (a) ~~An eligible~~ **A** female **eligible** 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.

**(c) An eligible employee taking leave under HB 2950, 77<sup>th</sup> Leg., Reg. Session (Or 2013) and OAR 839-009-0230(5) to deal with the death of a family member is entitled to a total of two weeks of OFLA leave. An eligible employee is entitled to the this period of leave upon the death of each family member of the employee within any one-year period, except that the leave taken under 839-009-0230(5) may not exceed the total in subsection (1) of this section. A covered employer may not require an eligible employee to multiple leave periods concurrently if more than one family member of the employee dies during the one year period. All leave taken under 839-009-0230(5) shall be counted toward the total period of OFLA leave authorized subsection (1) of this section. 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.**

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

(3) An eligible employee may take up to 24 weeks of OFLA leave in one leave year under the following circumstances:

- (a) The employee takes 12 weeks of parental leave, followed by:
- (b) Twelve weeks of sick child leave.
- (4) When two **or more** eligible family members work for the same covered employer, **two or more** employees may take OFLA leave at the same time only under the following circumstances:

- (a) One employee needs to care for ~~the other~~ **another** employee **who is a family member and who is** 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~~ **another** employee **who is a family member** is also suffering from a serious health condition; or
- (c) **All** family members are suffering from a serious health condition; or
- (d) The employer allows concurrent leave; ~~or~~ **or**

**(e) The employees are taking leave described in HB 2950, 77<sup>th</sup> Leg., Reg. Session (Or. 2013) and OAR 839-009-0230 (5).**

- (5) Unless the employer approves otherwise, parental leave must be taken in one uninterrupted period, and must be completed within 12 months of the birth, adoption or placement of the child. An exception must be made to allow parental leave to effectuate adoption or foster placement of the child. Such leave need not be taken in one, uninterrupted period with any additional parental leave.
- (6) The birth, adoption or foster placement of multiple children at one time entitles the employee to take only one 12-week period of parental leave.
- (7) Sick child leave need not be provided to an eligible employee by a covered employer if another family member **of the child**, including a non-custodial biological parent, is willing and able to care for the child.
- (8) A covered employer may not reduce the amount of OFLA leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005.
- (a) If an employee uses OFLA leave for a workplace injury pending acceptance of a workers' compensation claim, upon acceptance of the claim any OFLA leave used for the workplace injury must be restored to the employee. If the claim is denied, OFLA leave will be deducted from the employee's entitlement.
- (A) If the employer uses a rolling forward leave year, a fixed leave year or a calendar leave year, and a worker's compensation claim is first denied and then accepted, the employer must restore any OFLA leave taken in the leave year in which the worker's compensation claim is accepted.
- (b) An employee must be eligible under OAR 839-009-0210(6) in order to use OFLA leave following a period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005.
- (9) Notwithstanding section (8) of this rule, the employer may reduce the amount of OFLA leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005 after the employee has refused a suitable offer of light duty or modified employment under ORS 659A.043(3)(a)(D) or 659A.046(3)(d). See ORS 659A.043(4), 659A.046(5), 659A.162, OAR 839-006-0131(2) and 839-006-0136(4).
- (10) For the purpose of intermittent leave, OFLA leave entitlement is calculated for an employee by multiplying the number of hours the employee normally works per week by 12. (For example, an employee normally employed to work 30 hours per week is entitled to 12 times 30 hours, or a total of 360 hours OFLA leave.)
- (a) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 months worked prior to the beginning of the leave period must be used for calculating the employee's normal work week. (For example, an employee working an average of 25 hours per week is entitled to 12 times 25 hours, or a total of 300 hours OFLA leave.)
- (b) If an employee takes intermittent or reduced work schedule OFLA leave, only the actual number of hours of leave taken may be counted toward the 12 weeks of OFLA leave to which the employee is entitled.
- (11) An employee who has previously qualified for and taken some portion of OFLA leave must requalify as an "eligible employee" as defined in OAR 839-009-0210(6) each time the employee begins additional OFLA leave within the same leave year. Exceptions:

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

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

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

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

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

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

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150–659A.186, 659A.043, 659A.046, **H.B. 2950, 77<sup>th</sup> Leg., Reg. Session (Or. 2013)**

**839-009-0250**

**OFLA Leave: Notice by Employee; Designation by Employer; Notice by Employer Regarding Eligibility or Qualification**

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

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

(b) An employer may request additional information to determine that a requested leave qualifies for designation as OFLA leave, except in cases of parental leave.

(c) The employer may provisionally designate an absence as OFLA leave until sufficient information is received to make a determination. An employee who calls in sick without

providing further information will not be considered to have provided sufficient notice to trigger an employer's obligations under OFLA.

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

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

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

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

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

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

**(c) A reduction of OFLA leave under this subsection may not limit leave under HB 2950, 77<sup>th</sup> Leg., Reg. Session (Or. 2013) and OAR 839-009-0230(5) for the death of a family member.**

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

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

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

(6) An employer may not request medical verification of the need for sick child leave until after an employee's third occurrence of sick child leave in the same OFLA leave year.

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

(8) 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.

(9) 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).

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

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

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

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150–659A.186, 659A.043, 659A.046, **H.B. 2950, 77<sup>th</sup> Leg., Reg. Session (Or. 2013)**

## **Leave for Victims of Domestic Violence, Har[r]assment, Sexual Assault or Stalking**

### **839-009-0325**

#### **Purpose and Scope of Rules for ORS 659A.270-.285**

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

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

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 - 659A.285[, *OL 2011 c. 687*]

### **839-009-0330**

#### **Prohibited Discrimination under ORS 659A.270-.285; Employer Obligations**

**(1) It is an unlawful employment practice for a covered employer to deny leave under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking to an eligible employee or to discharge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment because the employee inquires about, applies for, or takes leave as provided under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking.**

**(2) Every covered employer shall keep summaries of ORS 659A.270 to 659A.285 and summaries of all rules promulgated for the enforcement of these statutes posted in a conspicuous and accessible place in or about the premises where the employees of the covered employer are employed. Employers may obtain the summaries from the website of the Bureau of Labor and Industries or upon request from the bureau, the first copy of which shall be furnished without charge. In addition, upon request, the bureau shall furnish the complete text of all rules promulgated pursuant to ORS 659A.270 to 659A.285 to any employer without charge.**

**(3) If a public employer has knowledge, or reasonably should have knowledge, that an employee is a victim of domestic violence, harassment, or stalking and that any direct or indirect communication to the eligible employee related to the victimization of the employee is made or attempted to be made in the workplace, the public employer shall immediately inform the employee and offer to report the communication to law enforcement.**

**(4) A public employer shall annually inform all employees of the provisions of 659A.290, regarding reasonable safety accommodations.**

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 – 659A.285[, *OL 2011 c. 687*], **H.B. 3263, 77<sup>th</sup> Leg., Reg. Session (Or. 2013)**

### **839-009-0340**

#### **Definitions: Leave under ORS 659A.270-.285**

(1) "Covered employer" means an employer who employs 6 or more individuals in the state of Oregon for each working day during each of 20 or more calendar workweeks in the [*calendar*] year in which an eligible employee takes leave under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking or in the [*calendar*] year immediately preceding the year in which an eligible employee takes the leave.

(2) "Eligible employee" means an employee who is employed in the state of Oregon on the date leave **begins** under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking [*begins*]; and

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

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

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

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

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

~~(i) The federal Uniformed Services Employment and Reemployment Act, 38 USC 43 (USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. Federal Department of Labor regulation 20 CFR 1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. Under USERRA, a reemployed service member would be eligible for leave under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet the eligibility requirements of these rules. In the event that a service member is denied leave under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking for failing to satisfy the days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under these statutes.~~

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

~~victims of domestic violence, harassment, sexual assault or stalking prior to the date uniformed service began, the leave eligibility requirements are considered met.]~~

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

(3) "Dependent" [means] **includes** an adult dependent child substantially limited by a physical or mental impairment as defined by ORS 659A.104(1)(a), (3), and (4) or any adult of whom the employee has guardianship.

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

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

(6) "Immediate family" means spouse, domestic partner, father, mother, sibling, child, stepchild, grandparent, or any person who had the same primary residence as the victim at the time of the domestic violence, harassment, sexual assault or stalking.

(7) "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.

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

(9) "Law enforcement officer" means all police, corrections, and parole and probation officers who are included in the Public Safety Standards and Training Act as described in ORS 181.610 and 181.651.

(10) "Minor child," means a biological, adopted, foster or stepchild, or a child with whom the employee is or was in a relationship of in loco parentis. It also includes the biological, adopted, foster or stepchild of an employee's registered domestic partner. The minor child must be under the age of 18.

(11) "Parent or guardian" means a custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent or an employee who is or was in relationship of in loco parentis with a minor child or a dependent with whom the employee is or was in a relationship of in loco parentis.

(12) "Protective order" means an order authorized by ORS 30.866, 107.095(1)(c), 107.700 to 107.735, 124.005 to 124.040 or 163.730 to 163.750 or any other order that restrains an individual from contact with an eligible employee or the employee's minor child or dependent.

~~(12)~~ **(13) "Public employer" means the State of Oregon.**

~~(13)~~ **(14)** "Reasonable leave" means any amount of leave that does not cause an undue hardship on a covered employer's business.

~~(14)~~ **(15)** "Victim of domestic violence" means:

(a) An individual who has been threatened with abuse or who is a victim of abuse, as defined in ORS 107.705; or

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

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

~~(15)~~ **(16)** "Victim of harassment" means: [*an individual against whom harassment has been committed as described in Oregon's criminal code at ORS 166.065.*]

**(a) An individual against whom harassment has been committed as described in Oregon's criminal code at ORS 166.065; or**

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

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

~~(16)~~ **(17)** "Victim[s] services provider" means a prosecutor-based victim assistance program or a nonprofit program offering safety planning, counseling, support or advocacy related to domestic violence, harassment, sexual assault or stalking.

~~(17)~~ **(18)** "Victim of sexual assault" means:

(a) An individual against whom a sexual offense has been threatened or committed as described in ORS 163.305 to 163.467 or 163.525; or

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

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

~~(18)~~ **(19)** "Victim of stalking" means:

(a) An individual against whom stalking has been threatened or committed as described in ORS 163.732; or

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

(c) An individual who has obtained a court's stalking protective order or a temporary court's stalking protective order under ORS 30.866.

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 - 659A.285, [*OL 2011 c. 687,*] **H.B. 3263 77<sup>th</sup> Leg., Reg. Session (Or. 2013)**

### **839-009-0345**

#### **Purposes for Taking Leave**

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

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

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

- (3) To obtain, or to assist the eligible employee's minor child or dependent in obtaining counseling from a licensed mental health professional related to an experience of domestic violence, harassment, sexual assault or stalking.
- (4) To obtain services from a victim services provider for the eligible employee or the eligible employee's minor child or dependent.
- (5) To relocate or take steps to secure an existing home to ensure the health and safety of the eligible employee or the eligible employee's minor child or dependent. Relocate includes:
  - (a) Transition periods spent moving the eligible employee or the eligible employee's minor child or dependent from one home or facility to another, including but not limited to time to pack and make security or other arrangements for such transitions related to domestic violence, harassment, sexual assault or stalking;
  - (b) Transportation or other assistance required for an eligible employee or the eligible employee's minor child or dependent related to the domestic violence, harassment, sexual assault or stalking.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 - 659A.285[, *OL 2011 c. 687*]

### **839-009-0362**

#### **Notice by Employee: Leave under ORS 659A.270-.285**

- (1) An eligible employee seeking leave under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking will give the covered employer reasonable advance notice of the employee's intention to take leave unless giving the advance notice is not feasible.
- (2) When taking leave in an unanticipated or emergency situation, an eligible employee must give oral or written notice as soon as is practicable. This notice may be given by any other person on behalf of an eligible employee taking unanticipated leave.
- (3) An eligible employee able to give advance notice of the need to take leave must follow the covered employer's known, reasonable and customary procedures for requesting any kind of leave;
- (4) The covered employer may require the eligible employee to provide certification that:
  - (a) The eligible employee or the eligible employee's minor child or dependent is a victim of domestic violence, harassment, sexual assault or stalking as defined in OAR 839-009-0340(14), (15), (16) and (17); and
  - (b) The leave taken is for one of the purposes identified in OAR 839-009-0345.
- (5) Any of the following constitutes sufficient certification:
  - (a) A copy of a police report indicating that the eligible employee or the eligible employee's minor child or dependent was a victim or alleged victim of domestic violence, harassment, sexual assault or stalking as defined in OAR 839-009-0340(14), (15), (16) and (17); or
  - (b) A copy of a protective order or other evidence from a court or attorney that the eligible employee appeared in or is preparing for a civil or criminal proceeding related to domestic violence, harassment, sexual assault or stalking as defined in OAR 839-009-0340(14), (15), (16) and (17); or

(c) Documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the eligible employee or the eligible employee's minor child or dependent is undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, harassment, sexual assault or stalking as defined in OAR 839-009-0340(14), (15), (16) and (17).

(6) Consistent with ORS 659A.306, the covered employer must pay the cost of any medical verification related to OAR 839-009-0345(1)(b) and (c) not covered by insurance or other benefit plan.

(7) The eligible employee will provide the certification within a reasonable time after receiving the covered employer's written request for the certification.

(8) The covered employer may provisionally designate an absence as leave under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking until sufficient certification is received, if requested, to make a determination.

(9) An eligible employee on leave who needs to take more leave than originally authorized should give the covered employer notice as soon as is practicable prior to the end of the authorized leave, following the covered employer's known, reasonable and customary procedures for requesting any kind of leave. However, when an authorized period of leave has ended and an eligible employee does not return to work, a covered employer having reason to believe the continuing absence may qualify as leave under ORS 659A.270 to 659A.285 for victims of domestic violence, harassment, sexual assault or stalking may request additional information. If the covered employer requests additional information the eligible employee will provide the requested information as soon as is practicable. The covered employer may not treat a continuing absence as unauthorized unless requested information is not provided or does not support leave qualification.

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 - 659A.285[, *OL 2011 c. 687,*]

### **839-009-0363**

#### **Use of Paid Leave: ORS 659A.270-.285**

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

(a) A collective bargaining agreement;

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

(c) A covered employer's policy.

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

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

**(4) An eligible employee of a public employer shall be granted leave with pay for the purposes in ORS 659A.272 and OAR 839-009-0345. Leave with pay taken under this section is in addition to any vacation, sick, personal business, or other forms of paid or unpaid leave available to the eligible employee. The eligible employee must exhaust all other forms of paid leave before the employee may use the paid leave under this section.**

**(a) An eligible employee may take up to 160 hours of leave with pay authorized by this section in each calendar year.**

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 - 659A.285, **H.B. 3263, 77<sup>th</sup> Leg., Reg. Session (Or. 2013)**

### **839-009-0430**

#### **Notice by Employer: Oregon Military Family Leave Act (OMFLA)**

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

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

(3) An eligible employee's notice of intention to take OMFLA leave must follow the covered employer's known, customary, and uniformly applied procedures for requesting any kind of leave. **A covered employer may provide an OMFLA leave request form. An example is found at Appendix A of this rule.**

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

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

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

**ED. NOTE: [Appendices referenced are not included in rule text.]** [Click here for PDF copy of appendices.](#)

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

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