Bureau of Labor
and Industries

Family Leave Laws

2010 Edition

Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

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FAMILY LEAVE LAWS

A Handbook for Oregon Employers

2010 Edition
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Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

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To Our Readers:

This book was prepared as a general summary and teaching guide. It is not intended as legal advice. Although we have attempted to summarize and explain the most important regulations in OFLA, FMLA, and Leave for Victims of Domestic Violence, Sexual Assault or Stalking, the sheer volume of statutes and regulations makes it literally impossible to mention and adequately describe all of them. Those seeking legal advice should contact an attorney.

All the statutes and regulations referred to in this handbook can easily be accessed on the internet. Because of the widespread availability of computers in even the smallest communities in Oregon, because the laws are subject to amendment, and to conserve resources, we have chosen not to print the approximately 150 pages that they would otherwise fill. To find laws and administrative rules related to OFLA or the Leave for Victims of Domestic Violence, Sexual Assault or Stalking on the internet, go to BOLI's website at http://www.oregon.gov/BOLI/. To find laws and regulations related to FMLA on the internet, go to U.S. Department of Labor's website at www.dol.gov. You can also download DOL's prototype medical verification forms at that website in the "Forms" section.

Proceeds from the sale of this handbook support the Technical Assistance for Employers Program, a self-supporting program that receives little taxpayer funding.

OREGON BUREAU OF LABOR AND INDUSTRIES

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Technical Assistance For Employers

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OVERVIEW OF LEAVE LAWS

Leave Laws Basics

The Oregon Family Leave Act (OFLA), enacted by the Oregon Legislature in 1995, and the federal Family and Medical Leave Act (FMLA), enacted by Congress in 1993, each requires employers to provide eligible employees up to 12 weeks of protected leave during a leave year in certain qualifying situations.

These laws set guidelines for employers and workers in the granting and taking of leave. Both OFLA and FMLA define various types of qualified absences and provide safeguards for employees who use protected leave.

Employers may not treat OFLA or FMLA leaves as unexcused absences or disciplinary incidents under attendance policies, and employees have reinstatement rights when their protected leave ends.

OFLA is enforced by the Civil Rights Division of the Bureau of Labor and Industries (BOLI). FMLA is regulated by the U.S. Department of Labor, Wage and Hour Division. Each of these agencies has adopted regulations for compliance and enforcement purposes.

This handbook is intended to help Oregon employers comply with both state and federal family leave requirements and avoid potential liability for violations.

History of Family Leave Laws in Oregon

Before 1988, neither Oregon nor federal law required employers to give employees time off for family medical leave. So long as employers had nondiscriminatory policies and followed nondiscriminatory practices, they were free to decide when and if they would grant leave. As a result, workers were treated differently, depending on their employer's policies and practices, and many were terminated.

In 1987, the Oregon Legislature recognized that parents needed the right to develop strong family bonds without fear of job loss or the sacrifice of employment opportunities and enacted the Parental Leave Law (effective January 1, 1988). This law required larger employers to give workers time off to care for a newborn or newly adopted child.

In 1989, the Legislature passed a second leave law that required employers to allow pregnant workers to transfer to less strenuous jobs or to take time off during a pregnancy, if medically necessary. In 1991, the Legislature passed the Family Medical Leave Law that gave workers job-protected leave to care for health conditions of family members.

In 1993, the federal government adopted the Family and Medical Leave Act (FMLA). FMLA adopted many of the components of Oregon's leave laws.

Oregon Leave Laws Streamlined in 1995

In 1995, the Oregon Legislature made statutory changes simplifying the laws to reduce the administrative burden on employers who were covered by all of the separate leave laws. To accomplish this, the Legislature repealed Oregon's parental leave, pregnancy leave and family medical leave laws and adopted the Oregon Family Leave Act (OFLA).

Changes in the Leave Laws in the 21st Century

The 2007 Oregon Legislature further amended the Oregon Family Leave Act (OFLA) that:

- created new provisions relating to the usage of paid sick leave for employees taking family leave;
- redefined Oregon family leave to exclude leave taken by an employee unable to work because of a disabling compensable injury under workers compensation law;
- expanded OFLA's definition of "family member" to include grandparent, grandchild, and two individuals of the same sex who have received a Certificate of Registered Domestic Partnership from the State of Oregon.
- codified BOLI's administrative rule that prohibits discrimination and retaliation against employees using OFLA leave.

In 2007, the Oregon legislature passed the Oregon Victims of Certain Crimes Leave Act ("OVCCLA") which provides employees with protected time off work to deal with real life events arising from acts of domestic violence, sexual assault or stalking. In 2009 additional requirements were added regarding reasonable safety accommodations and the title changed to Leave for Victims of Domestic Violence, Sexual Assault or Stalking.

The National Defense Authorization Act for 2008 (NDAA), Public Law 110-181, was enacted January 28, 2008. Section 585(a) of the NDAA amended the FMLA to give eligible employees working for covered employers important new leave rights related to military service.

On February 11, 2008, the U.S. Department of Labor's Employment Standards Administration/ Wage and Hour Division proposed extensive revisions to its regulations implementing the Family and Medical Leave Act of 1993. Those regulations, as modified based on public comments, went into effect on January 16, 2009.

The 2009 Oregon Legislature added the Oregon Military Family Leave Act (OMFLA).

Federal and State Law Comparisons

Both OFLA and FMLA provide time off for the serious health conditions of employees or their family members, or for the birth, adoption or foster care placement of a child. Both laws provide leave time to pregnant employees for prenatal and postnatal care. Both give eligible employees the right to take up to 12 weeks of family leave per year.

OFLA and FMLA also differ in important ways that are described in detail later in this handbook. A few notable differences include:

- Due to a recent change in federal law, FMLA now permits an eligible employee to take a combined total of 26 workweeks of leave during a single 12-month period to care for a family member who is serving in the military and has a serious injury or illness incurred in the line of duty while on active duty.

- FMLA allows leave for any "qualifying exigency" occurring because an employee's spouse, son, daughter or parent is on active duty in the military or has been notified of an impending call to active duty status in support of a contingency operation.
- OFLA allows a covered employee up to 14 calendar days of leave for the impending call or order to active duty of a spouse or domestic partner.
- OFLA entitles a pregnant employee to 12 weeks of leave for pregnancy-related disabilities and an additional 12 weeks for any OFLA purpose.
- Under OFLA, any employee who takes a full 12 weeks of parental leave (leave to care for and bond with a new child) may also use an additional 12 weeks of "sick child leave" for the child's non-serious health condition requiring home care.

OFLA and FMLA differ in many other ways, including the number of employees required for coverage, the length of employment required for eligibility, the definition of covered family members, the requirement for written designation of leave, and the statute of limitations periods.

Despite these differences, the Oregon Legislature has expressly stated its intent that OFLA be as similar to FMLA as possible. ORS 659A.186 provides that OFLA "shall be construed to the extent possible in a manner that is consistent with any similar provisions" of FMLA. Oregon law also states that OFLA leave must be taken concurrently with any leave taken under FMLA.

Still, the differences between OFLA and FMLA can be complex for employers covered by both laws when tracking family leave. In some cases, depending upon the amount of hours worked and time period employed, an employee may be eligible under one law but not the other. In other cases, the type of leave taken may be covered under one law but not the other. For example, OFLA allows sick child leave, but not leave for "qualifying exigencies" related to family members in the military, whereas FMLA does not provide for sick child leave, but allows leave for such "qualifying exigencies." In those cases, OFLA and FMLA leave runs separately and the employee may be entitled to more than 12 weeks of protected leave in a single year. See the OFLA regulations at OAR 839-009-0220(1), stating that FMLA leave will count as OFLA leave only if the employee is eligible for OFLA leave.

How to Use This Handbook

This handbook is divided into major topics related to family leave. Each section contains charts comparing OFLA and FMLA requirements and includes discussions about the relationship between the two laws.

Each section also contains answers to commonly asked questions in the form of employer and employee queries.

Practice tips are included to aid employers in applying the laws.

Samples of applicable forms also are provided to assist in tracking and administering OFLA and FMLA leave.

Throughout the sections of this handbook, you will find citations to the relevant sections of the Oregon Revised Statutes (ORS), Oregon Administrative Rules (OAR), and Code of Federal Regulations (CFR).

SECTION 1

COVERAGE

Which Employers are Covered by OFLA and FMLA?

Which Employees are Eligible for OFLA and FMLA?

Employers Covered by OFLA and FMLA

EMPLOYERS COVERED BY OFLA	EMPLOYERS COVERED BY FMLA
Employers with 25 or more employees in Oregon during each working day of 20 or more calendar workweeks in the year in which leave will be taken or in the preceding year.	Employers with 50 or more employees in the country for each working day during each of 20 or more workweeks in the current or preceding calendar year.
ORS 659A.153(1), OAR 839-009-0210(3)	29 CFR Sec. 825.104

Practice Tips:

- As noted in the preceding chart, the federal law has a 50-employee threshold, but state law requires only that the employer employ at least 25 people in Oregon. Employers meeting both coverage standards are subject to both state and federal laws. When "dual coverage" exists, the employer must track both OFLA and FMLA. Whenever the laws differ, the employer must apply the standard most beneficial to the employee.

- Employers with 25 to 49 employees need only comply with OFLA. However, those employers should still have a basic understanding of FMLA, since, to the extent possible, OFLA must be construed consistently with FMLA provisions. ORS 659A.186.

- Employers with fewer than 25 employees are covered by neither law and may determine their own policies as to when and how to grant leave, provided those policies are administered in a nondiscriminatory manner.

- When determining coverage, count full-time and part-time employees on the payroll, employees on paid or unpaid leave, and leased or temporary employees.

Example 1: The *Conifer Corporation* has 22 full-time employees, 10 part-time employees, and 3 temporary office assistants, all working in Oregon. *Conifer* also has 5 employees in Washington and 5 employees in California. *Conifer* is covered by OFLA, since it has 35 Oregon employees. *Conifer* is not covered by FMLA, since it has only 45 employees in the country.

Example 2: *Redwoods, Inc.* has 20 full-time, year-round employees in Portland, Oregon and 80 full-time, year-round employees in Portland, Maine. *Redwoods* is not covered by OFLA, since it has fewer than 25 employees within Oregon. *Redwoods* is covered by FMLA since it has at least 50 employees in the country.

Example 3: *Cedar Street Engineering* has 75 employees in Salem, Oregon. Cedar Street is covered by both OFLA and FMLA.

- When two employers share common ownership or management or have interrelated operations, they may meet the "integrated employer" test, in which case employees of both entities should be counted for coverage purposes. 29 CFR §825.104(c)(2).

- When two employers exercise some control over the work of an employee, the businesses may be "joint employers," in which case each employer should count the employee when determining coverage. 29 CFR §825.106.
- Public (government) agencies and private elementary and secondary schools are FMLA-covered employers regardless of the number of employees employed. 29 CFR §825.104(a), §825.108.

EMPLOYER QUERY: SMALL EMPLOYERS

SMALLER FIRM NOT SUBJECT TO LEAVE LAWS MAY DETERMINE ITS OWN POLICY

QUESTION: *My wife is an attorney at a Portland law firm that has 14 employees. One of her colleagues is pregnant and wants to take four weeks of leave when the baby comes, but her request has been denied. Doesn't this employee, who has worked full-time for the firm for several years, have the right to take pregnancy leave?*

ANSWER: Not necessarily. Because your wife's law firm only employs 14 people, it is not a covered employer under the Oregon Family Leave Act (OFLA) or the federal Family and Medical Leave Act (FMLA). This employer's policy, not the leave laws, will determine when employees are entitled to leaves of absence.

A small organization not covered under OFLA or FMLA is free to set its own leave rules, as long as it applies those rules in a non-discriminatory manner. For example, if a firm grants several weeks of leave to a male employee with a broken ankle, it should also grant a similar amount of leave to a woman who is temporarily incapacitated during pregnancy or after childbirth. Otherwise, the firm could be liable for pregnancy or sex discrimination. In addition, if an employee suffered an on-the-job injury or developed a disability covered under the Americans with Disabilities Act (ADA), the employer might have to grant leave under those laws. That will be discussed later in this handbook.

If your wife's employer were subject to OFLA or FMLA, then a long-term employee like the one you describe would be entitled to 12 weeks of job-protected leave for various qualifying events, including pregnancy disability and parental leave (time for bonding with a new child).

In fact, under OFLA, a woman who uses pregnancy disability leave is entitled to 12 additional weeks of OFLA leave in the same leave year, which could be taken for parental leave or another qualifying event, such as the serious health condition of a family member.

EMPLOYER QUERY: TEMPORARY EMPLOYEES

TEMPORARY EMPLOYEES ARE COUNTED IN DETERMINING LEAVE LAWS COVERAGE

QUESTION: *Do we count temporary or leased employees in determining whether our company is covered under OFLA or FMLA?*

ANSWER: FMLA requires employers to count temporary or leased employees along with the employer's regular employees to determine whether the employer is covered. For example, an employer with 35 regular employees and 15 temporary/leased employees is covered because the employer has

a total of 50 employees. Generally, the agency that placed the temporary employee is treated as the primary employer and must provide leave and reinstate the employee.

The secondary employer, generally the employer with which the temporary employee is placed, is required to accept the employee returning from leave if the secondary employer is still contracting with the placement agency. For example, if the primary employer chooses to place the employee returning from leave with the secondary employer, the secondary employer must reinstate the employee. 29 CFR §825.106.

Additionally, the secondary employer is prohibited from discriminating against an employee for exercising rights under the law.

OFLA does not specifically address the issue of temporary or leased workers but states that the Act shall be construed to the extent possible in a manner consistent with any similar provisions of the federal law. In most cases, temporary/leased workers are considered jointly employed by the placement agency and the client employer, and the FMLA requirements apply.

Employees Eligible for OFLA and FMLA Leave

EMPLOYEES ELIGIBLE FOR OFLA	EMPLOYEES ELIGIBLE FOR FMLA
Employee must have worked for a covered employer for a period of **180 calendar days immediately preceding the date leave begins**; *and*	Employee must have **worked** for a covered employer for a total of at least **12 months** (not necessarily consecutive); *and*
Employee must have worked an average of **25 hours per week** during the 180-day period, **unless** the leave is to care for a newborn child or newly placed adoptive or foster child ("parental leave").	Employee must have worked for at least **1,250** hours during the 12 month period immediately preceding the leave; *and*
For OMFLA only, the employee must work for the employer for an average of at least 20 hours per week and there is no 180-day requirement.	Employer must have **50 or more employees within 75 miles** of the employee's worksite.
ORS 659A.156, OAR 839-009-0210(6), OAR 839-009-0380(5)	29 CFR §825.110

Example 1: For the past 5 months, Kent has worked 65 hours per week for Maple Tree Manor, a Portland-based business. Despite working long hours, Kent is ineligible at this time for either OFLA or FMLA leave, since he has been employed there for fewer than 180 days.

Note: The length of service will not apply if the leave is for Oregon Military Family Leave. If the employee works for the employer for an average of at least 20 hours per week, the employee is eligible for OMFLA.

Example 2: Patricia has worked full-time for Maple Tree Manor over the past three years. Maple Tree has 80 employees in Portland and 10 employees in Medford. Patricia works in Medford. Maple Tree is a covered employer under OFLA and FMLA because it employs 90 persons in Oregon. Patricia is eligible for OFLA but ineligible for FMLA, because there are not 50 Maple Tree employees within a 75-mile radius of her worksite.

Example 3: Henry has worked for Maple Tree Manor for the past seven years, but works only 12 hours per week. Henry has just adopted a 6-year-old boy and announces his intention to take 12 weeks of parental leave to bond with the new child. Because of his particular part-time schedule, Henry is not eligible for FMLA leave. Although he would be ineligible for other types of OFLA leave (e.g., serious health condition leave or sick child leave), he is eligible for 12 weeks of OFLA parental leave because OFLA does not require an employee to meet any hourly threshold for parental leave eligibility.

Example 4: Dave has worked for Maple Street Manor as a full-time employee for the past two years. Dave meets the eligibility criteria under both OFLA and FMLA and has a 12-week leave entitlement under both Oregon and federal law.

The OFLA/FMLA Eligibility Gap

An employee who has worked at least 180 days but fewer than 12 months may be OFLA-eligible but is not FMLA-eligible. OFLA leave taken by such an employee in the "eligibility gap" does not reduce the employee's potential FMLA entitlement. If the employee becomes eligible for FMLA later in the same leave year, the employee could be entitled to up to 12 weeks of additional FMLA leave if a qualifying situation arises.

Example: Mark has worked full-time for a restaurant for a total of 8 months. He uses 12 weeks of OFLA leave to care for his wife, who has a serious health condition. Mark then returns to work on a full-time basis. He may take up to 12 weeks of FMLA leave later in the same leave year, provided that (1) he has worked for the restaurant a total of 12 months; (2) he has worked 1,250 hours in the 12-month period preceding the new leave date; and (3) the restaurant employs at least 50 persons within a 75 mile radius of Mark's worksite.

EMPLOYER QUERY: ELIGIBILITY OF TEMPORARY EMPLOYEES

SAME MINIMUM WORK REQUIREMENTS APPLY TO TEMPORARY EMPLOYEES

QUESTION: *Is a temporary employee entitled to take OFLA or FMLA leave?*

ANSWER: Yes, provided the individual meets the normal eligibility standards. Temporary employees must meet the criteria established under OFLA and FMLA for all employees. For instance, a temporary employee working an average of 25 hours per week but employed only 160 days would not be entitled to protected leave under OFLA or FMLA.

EMPLOYER QUERY: BREAK IN SERVICE

EMPLOYMENT PERIOD NEED NOT ALWAYS BE CONTINUOUS FOR ELIGIBILITY

QUESTION: *How should an employer count the 12-month FMLA or 180-day OFLA employment requirement if the employee has had a break in service?*

ANSWER: FMLA states that the 12 months of employment need not be consecutive months. If the employee's name was on the payroll for any part of a week, the week counts as a week of employment, including periods of paid or unpaid leave. A temporary or regular employee with a total of 12 months of employment qualifies for FMLA leave, provided the individual has also worked 1,250 hours during the one-year period immediately preceding the leave. Employment prior to a break in service of 7 years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months. Employment periods preceding a break in service of more than 7 years must be counted in determining whether the employee has been employed by the employer for at least 12 months when the break is due to military service or there is a written agreement, including a collective bargaining agreement. Employers may voluntarily consider employment prior to a continuous break in service of more than 7 years for this purpose.

OFLA requires that an employee be employed for the 180-day calendar period immediately preceding the date on which the leave begins, so a break in service could disqualify certain employees from OFLA eligibility. Employees with fewer than 180 days of employment immediately preceding their leave are ineligible under OFLA.

However, the 180-day rule does not require an employee to have worked on each of the 180 days, but merely requires that the individual be considered an employee during that period. Thus, even if your employee takes two weeks of accrued vacation or leave without pay during the 180 days preceding his OFLA leave, he was still "employed" during that time and will qualify for OFLA leave, as long as his weekly hours still average 25 or more for the period.

EMPLOYER QUERY: PREGNANCY OF NEW EMPLOYEE

LEAVE ELIGIBILITY DEPENDS ON EMPLOYMENT PERIOD AND HOURS WORKED

QUESTION: *A full-time employee who we hired five months ago is requesting leave under the Oregon Family Leave Act and the federal Family and Medical Leave Act based on difficulties with her pregnancy and doctor's orders that she be on bed rest. We know that she is not yet eligible for OFLA or FMLA leave, but we intend to grant her some leave without pay according to our company policy. Once she has been employed for 180 days, are we then required to offer her full eligibility under OFLA and FMLA?*

ANSWER: If you grant the employee's request for leave at this time, she will probably qualify for protection under OFLA once she reaches the 180-day mark in her employment with you, but she won't qualify for protection under FMLA at that point.

Organizations that employ 25 or more employees in Oregon are covered by OFLA, and organizations that employ 50 or more employees in the U.S. are covered by FMLA. Employees become eligible for up to 12 weeks of protected leave — and more, in some cases — based on the length of their employment and the number of hours they work.

Under OFLA, your employee is credited with a 12-week leave entitlement if she has been employed with you for the 180-day calendar period immediately preceding the leave and has worked an average of at least 25 hours per week during the same period. This eligibility rule applies to leave taken for her own serious health condition (or pregnancy disability), for the serious health condition of her family member, or for a sick child with a non-serious health condition requiring home care.

The eligibility rule for OFLA parental leave, time to bond with and care for a new child, is less stringent, requiring only the 180-day period of employment and no minimum number of hours worked.

In order to be eligible under FMLA, an employee must have been employed with you for a total of 12 months and must have worked at least 1,250 hours during the 12-month period immediately preceding the leave.

Since your employee has been with you only five months, she does not currently qualify for leave under either OFLA or FMLA. Thus, your decision to grant her leave will depend upon your own policy and Oregon and federal laws requiring that pregnancy not be treated differently than any other temporary disability.

Since the employee is not yet eligible for either OFLA or FMLA, the leave you grant her now cannot be applied "in advance" towards her eventual OFLA/FMLA entitlement. However, that leave will count towards the employee's period of employment with you. And once she reaches 180 days of employment, she will become eligible for OFLA leave, provided that she has worked an average of 25 hours per week during the period. Since you indicate the employee has already worked full-time for five months she will certainly meet that hourly threshold. If she takes parental leave, she is eligible regardless of whether she meets the 25 hour threshold.

Since she has not been employed with you for 12 months, she does not have FMLA protections, such as the right to continuation of group health insurance during the leave.

Once eligible under OFLA, your employee is entitled to take 12 weeks off for her pregnancy disability and has reinstatement rights to her original job. If she uses the entire 12 weeks of leave for her pregnancy disability, under Oregon law, she is allowed an additional 12 weeks off for parental leave after the birth of her baby, or for any other OFLA related purpose during the same one year period. If she takes the additional 12 weeks off as parental leave within the one year period, she is further entitled to another 12 weeks of "sick child" leave within the same period.

EMPLOYER QUERY: UNIFORMED SERVICES LEAVE

EMPLOYEE'S LEAVE TIME TO SERVE IN THE OREGON AIR NATIONAL GUARD COUNTS TOWARDS OFLA, FMLA ELIGIBILITY

QUESTION: *We have an employee who was called to Oregon Air National Guard duty for five months. He has now returned to work but has a qualifying family leave situation — a father with a serious health condition. We are granting paid sick leave so he can care for his ill father but we are unsure if we should also be tracking this absence as OFLA or FMLA leave. Do we count the time on military leave when determining eligibility for family leave*

ANSWER: Yes. The federal Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted in 1994, gives your employee job security and reemployment rights when he is called up for military training or service. The "uniformed services" include the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard,
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve,
- Army National Guard or Air National Guard,
- Commissioned Corps of the Public Health Service, and
- Any other category of persons designated by the President in time of war or national emergency.

38 U.S.C. Sec. 4303 (13) & (16)

Under the USERRA, employees on military duty are entitled to accrue seniority and certain benefits as if they had remained continuously employed.

Normally, when counting work hours for family leave eligibility, employers are required to use the test for "hours worked" under the Fair Labor Standards Act, which means that you would only count the hours an employee actually performed work for you and not paid sick leave, vacation leave, personal time off or other leaves of absence.

However, the U.S. Department of Labor has taken the position that, when determining eligibility under the federal Family and Medical Leave Act, employers must count the hours an employee would have worked but for serving in the military. The Bureau of Labor and Industries is following the same interpretation with respect to OFLA.

This means that, even though your employee was out for an extended period of time, he could still be eligible for OFLA and FMLA leave upon his return to work, depending on what his work schedule would have been had he not been on military duty. OFLA requires an employee to have worked an average of 25 hours per week in the 180 days immediately preceding the leave, and the federal law requires 1,250 hours of work in the preceding 12-month period.

Even if the employee does not meet these eligibility standards, you might have to allow him to use his paid sick leave to care for his father if he has accrued that benefit and if you allow it for similarly situated employees who take non-military personal leaves of absence. Otherwise, you may face a claim of discrimination based on the employee's military leave.

EMPLOYER QUERY: 75-MILE RADIUS RULE

EMPLOYEES AT SMALL, REMOTE WORKSITES WILL NOT BE FMLA-ELIGIBLE

QUESTION: *FMLA limits eligibility to those employees who work at a site with at least 50 employees within a 75-mile radius. What if the employee has no official fixed worksite? And is there a similar rule under Oregon law?*

ANSWER: For employees with no fixed worksite, such as salespersons, truck drivers and construction workers, the worksite will generally be the site the employee reports to, or from which the work is assigned. For example, a truck driver who lives in Washington, picks up job assignments in Oregon, delivers products to other states and reports back to Oregon for more assignments is home-based in Oregon.

Under FMLA, government agencies, public and private elementary and secondary schools are automatically covered employers, regardless of the number of individuals they employ. 29 CFR §825.104(a), 600(b). This means that the employer must post the required FMLA notice at its worksites and must include basic information about FMLA in any personnel manual or employee handbook. However, individual employees of such organizations will not be FMLA-eligible unless they meet the usual requirements for eligibility, including the 50-employees-within-75-miles test. Therefore, an employee working at a small, remote location will not be entitled to FMLA leave even if the employer is FMLA-covered. 29 CFR §825.110, 600(b).

OFLA requires only that the employer employ a total of 25 employees anywhere in Oregon for coverage, and an employee's eligibility for OFLA leave is based only on the employee's average weekly work hours and period of employment. Therefore, even employees at small, remote locations can become OFLA-eligible if the employer employs at least 25 workers within the state.

Reasons for Taking FMLA/OFLA Leave

Eligible employees of covered employers are entitled to take family leave under the following circumstances:

OFLA QUALIFYING CIRCUMSTANCES	FMLA QUALIFYING CIRCUMSTANCES
Employee's own serious health condition, including pregnancy-related conditions	Employee's own serious health condition, including pregnancy-related conditions
Serious health condition of employee's family member, including spouse, parent, biological, adopted or foster child, parent-in-law, same-sex domestic partner, grandparent, and grandchild	Serious health condition of employee's family member, including spouse, parent, biological, adopted or foster child
Newborn, newly adopted or newly placed foster child ("parental leave")	Newborn, newly adopted or newly placed foster child ("parental leave")
Non-serious health condition of a child requiring home care ("sick child leave")	
Leave for spouse or same-sex domestic partner of a service member called to active duty or notified of impending call to active duty, or who is on leave from active duty during a period of military conflict.	Any "qualifying exigency" arising out of the fact that the employee's family member is on active duty in the uniformed services or has been notified of an impending call or order to active duty status, in support of a contingency operation.
	An eligible employee who is the family member or next of kin of a military service member who is recovering from a serious illness or injury sustained in line of duty on active duty in the uniformed services, is entitled to FMLA leave to care for the aforementioned military service member.
ORS 659A.150(4), 659A.159, OAR 839-009-0210(7), OAR 839-009-0230, OAR 839-009-0380	29 CFR 825.12, 29 CFR 825.126, 29 U.S.C. 2612(a)(1)(A)-(E), 29 U.S.C. 2612 (a)(3)

Practice tip:

OFLA allows leave in several circumstances not covered by FMLA, including: (1) serious health condition of a parent-in-law; (2) serious health condition of a same-sex domestic partner; (3) serious health condition of the parent or child of a same-sex domestic partner; (4) serious health condition of a grandparent or grandchild; and (5) non-serious health condition of a child ("sick child leave"). An eligible employee who takes up to 12 weeks of OFLA leave for one of these purposes does not deplete the FMLA 12-week entitlement. If a FMLA-qualifying situation arises during the same leave year the employee may take up to an additional 12 weeks of leave. Two examples follow:

- Cameron, a full-time employee of her company for the past three years, uses 12 weeks of OFLA leave to care for her father-in-law, who is hospitalized due to a serious health condition. Later during the same leave year, Cameron has an emergency appendectomy and suffers complications after surgery. Cameron may use up to 12 weeks of FMLA leave for this purpose, for potentially 24 weeks of leave during the year.
- Bill uses a total of 12 weeks of OFLA leave to stay home with his three children on days when they miss school due to colds and the flu. During the same leave year, Bill's wife sustains serious injuries in a car accident and is under continuing medical care. If Bill is FMLA-eligible, he is entitled to use up to 12 weeks of leave for his wife's serious health condition.

Basis for Taking Family Leave

Eligible employees are entitled to take job-protected leave for a number of "qualifying" reasons or exigencies related to a birth, adoption or an illness of the employee or a family member. These reasons are carefully -- and in some cases narrowly -- defined. Understanding both the OFLA and FMLA definitions of "family member" and "serious health condition" and the differences between those definitions is particularly critical in determining whether or not a request for leave is based on a "qualifying" reason.

Note that OFLA's definition of "family member" is broader than FMLA's.

Parental Leave for Birth, Adoption or Foster Placement

Under OFLA and FMLA, parents may take family leave to bond with their newborns or their newly adopted or newly placed foster children. Employees must take and complete this "parental leave" within one year of the date of birth or placement. While most types of family leave may be taken intermittently when qualifying events arise, OFLA and FMLA both require the employee to take parental leave in one uninterrupted period, unless the employer approves otherwise.
OAR 839-009-0230(1), 839-009-0240(5), 29 CFR §825.120, §825.202(c).

When employees take leave for adoption or placement, the adopted or foster child must be under the age of 18 years, or an adult dependent child incapable of self-care because of some physical or mental impairment. OAR 839-009-0210(2), 29 CFR §825.121.

An employee requesting leave for the placement of a foster child must be a legally recognized foster parent or taking part in the legal process to become a foster parent. OAR 839-009-0210(9).

FMLA defines "foster care" as 24-hour care away from the parents when state action is involved in the removal of the child from parental custody. 29 CFR §825.122(f).

Both mothers and fathers are entitled to leave for birth, adoption or placement of foster children. Each parent has an individual 12-week entitlement, but FMLA limits a husband and wife to the aggregate of 12 weeks of FMLA leave for parental leave when both spouses work for the same covered employer. See the "Length of Leave" section of this handbook for details.
OAR 839-009-0240, 29 CFR §825.121.

Serious Health Condition Leave

OFLA and FMLA both allow employees to take leave time for their own serious health conditions, including pregnancy-related incapacity, as well as for the serious health condition of a covered family member. See the "Serious Health Condition" section of this handbook for details on the types of illnesses and conditions that qualify for leave.

Family members covered under FMLA

FMLA defines family member to include the employee's spouse, parent, son or daughter. "Spouse" means a husband or wife as recognized under state marriage laws where the employee resides. A "parent" is the biological or legal parent or one who is "in loco parentis" (in the place of a parent). FMLA defines "son or daughter" as a biological, adopted or foster child, a legal ward, or a child of a person standing in loco parentis.

An "in loco parentis" relationship exists when one party has been responsible for day-to-day care and financial support of the other. A legal or biological relationship is not necessary.
ORS 659A.150(4), OAR 839-009-0210(14), 29 CFR §825.122(b)(3).

A son or daughter under FMLA must be under 18 years old, unless incapable of self-care because of a mental or physical disability, in which case the son or daughter may be age 18 or older.
29 CFR §825.800.

Under the amended FMLA, an eligible employee who is the next of kin (who may not be a family member as defined above) of a covered member of the Armed Forces is also entitled to Military Family Leave under certain conditions.

Who is the next of kin?

"Next of kin" is defined by the military family leave provisions as the "nearest blood relative other than the spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts, uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA." 29 CFR §825.122(d).

Family members covered under OFLA

OFLA, like FMLA, covers parents, spouses and children. OFLA also includes parents-in-law, OFLA, like FMLA, covers parents, spouses and children. OFLA also includes parents-in-law, same-sex domestic partners, the parent or child of a same-sex domestic partner, grandparents and grandchildren in its definition of "family member." ORS 659A.150(4), OAR 839-009-0210(7).

OFLA and FMLA define "child" the same way for purposes of parental leave — a child under 18, or an adult dependent child substantially limited by a physical or mental impairment. OAR 839-009-0210(2).

However, an OFLA eligible employee may take leave to care for an adult child who has a serious health condition whether or not the adult child is dependent and substantially limited by a physical or mental impairment. OAR 839-009-0210(7).

For the Oregon Military Family Leave Act (OMFLA), only spouses and same-sex domestic partners are eligible family members. OAR 839-009-0370(1)

OFLA Sick Child Leave (Non-Serious Health Condition)

OFLA allows time off to any eligible employee whose child requires home care for an illness or injury that is not a serious health condition; e.g., ear infections, the flu, or pediculosis (lice). This includes required visits with the child to a health care provider.

Employers are not required to allow sick child leave for routine medical or dental appointments for children, because school is not in session, or because the babysitter fails to show up. OAR 839-009-0230(4).

Sick child leave need not be granted to an employee if another family member, including a non-custodial biological parent, is willing and able to care for the child. OAR 839-009-0240(7). For example, an employer can deny leave if the employee states that a stay-at-home spouse is available and willing and able to care for the sick child. If the spouse is also ill and incapable of caring for the child, the employer must grant the employee's leave request.

Sick child leave is only counted as OFLA leave because FMLA does not allow sick child leave for a non-serious health condition. Even if an employee is FMLA-eligible, sick child leave cannot be counted against the employee's FMLA entitlement.

Family Leave and Absences Related to Work-Related Injuries or Illnesses

If an OFLA-eligible employee files a workers' compensation claim after suffering an on-the-job injury, the claim is accepted as a disabling claim, and the OFLA-eligible employee is unable to work because of the work-related injury, the leave is not counted as "OFLA leave" even though the injury may be a "serious health condition" as defined by OFLA. OAR 839-009-0210(17). When this OFLA-eligible injured worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary, the worker automatically commences a period of OFLA leave upon refusing the offer of light duty work. OAR 839-009-0240(8).

A "serious health condition" may result from an on-the-job injury that prevents the injured employee from working. If a FMLA-covered employer designates a FMLA-eligible injured worker's absence as FMLA leave, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. 29CFR §825.207(e)

CASE STUDY: "IN LOCO PARENTIS"

GRANDMOTHER ACTING AS PARENT IS ENTITLED TO FAMILY LEAVE

QUESTION: *I manage a local supermarket that employs 60 persons and is part of a national chain. Leslie is a 55-year-old full-time employee who has been working in our bakery department for the past three years.*

My question relates to Leslie's frequent absences to care for her 6-year-old grandson, Buddy. Buddy's mother (Leslie's daughter) was incarcerated last year and he has been living with Leslie ever since. Leslie has missed 18 days of work in the last few months to take care of Buddy on days when he was home from school due to a cold, flu or sore throat.

Now Leslie is telling us she needs all of next week off because Buddy is scheduled for a tonsillectomy. My understanding was that grandparents are not entitled to family leave. Do we have to grant this time off?

ANSWER: Yes. Based on the information you have provided, it appears Leslie is acting "in loco parentis" (in the place of a parent) for Buddy, and she is therefore entitled to family leave under OFLA and FMLA. Additionally, OFLA has expanded the definition of "family member" to include grandparent and grandchild (for serious health conditions only). Leslie, an eligible employee whose grandchild has a serious health condition, is also entitled to OFLA leave as a grandparent to care for her grandchild.

Based on your company's number of employees, both OFLA and FMLA apply to you. Employers are covered under OFLA if they employ 25 or more employees in Oregon, and covered and under FMLA if they employ 50 or more employees in the country.

Leslie is eligible to take 12 weeks of protected OFLA family leave because she has worked at least 25 hours a week for your company in the 180-day calendar period immediately preceding her leaves. She is also eligible to take 12 weeks of protected FMLA leave because she has worked 12 months for your company and 1,250 hours or more during the 12-month period immediately preceding her leaves.

Generally, you are correct that FMLA does not cover grandparents. FMLA allows an employee leave to care for a family member with a serious health condition but "family member" is defined to include only the employee's parent, spouse or child. Oregon law similarly allows an employee time off to care for a seriously ill family member, and allows an employee up to 12 weeks of "sick child" leave for a child's non-serious health conditions requiring home care.

OFLA's definition of "family member" is considerably broader than FMLA's. Under OFLA, a "family member" includes the employee's parent-in-law, same-sex domestic partner, grandparent and grandchild, as well as the employee's parent, spouse, or child.

Looking at these definitions of "family member," you'll note that the leave laws normally do not apply to an employee's aunts, uncles, cousins, siblings, boyfriends, or girlfriends. However, both OFLA and FMLA allow for leave when there is an "in loco parentis" relationship. If your employee is in the place of a parent to a child, meaning that the employee provides financial support and day-to-day care for the child, the leave laws treat the employee as if she were the parent – even if there is no legal custodial relationship.

Because of her "in loco parentis" relationship with Buddy, Leslie will be entitled to take OFLA "sick child" leave for Buddy's non-serious health conditions, such as the flu or an earache. She is also entitled to take OFLA/FMLA leave for serious health conditions, such as the surgery and inpatient care Buddy will undergo next week. As Buddy's grandparent, she is entitled to take OFLA leave whenever Buddy has a serious health condition.

EMPLOYER QUERY: GRANDMOTHER SEEKS PARENTAL LEAVE

EMPLOYEE WANTS LEAVE FOR GRANDSON DURING DAUGHTER'S NATIONAL GUARD DUTY

QUESTION: *Our employee Sara just provided us notice that her daughter, a member of the Oregon National Guard, is being deployed to Iraq. In her letter, Sara explains that she and her husband will be caring for her 14-month-old grandson while her daughter is on active duty. She also states her belief that she is "legally entitled to 12 weeks off work to care for the child." We are willing to grant her some personal time off, but are we actually obligated to hold her job for 12 weeks?*

ANSWER: As you will see below, your question is more complex than it appears. In general, Sara may be entitled to take protected leave under OFLA and FMLA, depending on the specific reason for which Sara seeks to take leave and if Sara has any legal relationship with her grandson other than as a grandparent.

As a grandparent, Sara is a "family member" under OFLA and has the right to 12 weeks of protected leave to care for a grandson suffering from a "serious health condition." You are obligated to hold her job for the duration of her absence up to 12 weeks. Under FMLA, "family member" is limited to a parent, spouse or child, so Sara would not be entitled to take family leave to care for her grandson's "serious health condition."

Under OFLA, eligible employees are entitled to 12 weeks of parental leave when they have a newborn child, a newly adopted child, or a newly placed foster child. Providing temporary care for a grandchild does not trigger OFLA protection. However, if Sara formally adopted her grandson, she would then become eligible for job-protected OFLA and FMLA leave as a new parent.

Similarly, if the grandson was placed with Sara for foster care, she would be entitled to take up to 12 weeks of parental leave during the first year after the placement under OFLA. FMLA regulations state that, while foster care placement with relatives of the child can qualify for parental leave, state action must be involved in the removal of the child from parental custody. That is apparently not the case with Sara's grandson.

Although Sara will not qualify for parental leave unless she adopts her grandson or she becomes his foster parent, she may qualify for other OFLA or FMLA leave if she has an "in loco parentis" relationship with him. This would happen if Sara is providing her grandson with day-to-day care and financial support and, in effect, standing in place of his parent. In that case, she qualifies for protected leave under OFLA and FMLA if he has a serious health condition, such as a surgery that requires inpatient care overnight in a hospital. Sara would also qualify for OFLA-protected leave if her grandson has a non-serious health condition requiring home care, such as an ear infection or a case of the sniffles.

As of January 28, 2008, FMLA has a new qualifying reason related to military service. Since Sara is a FMLA-eligible employee and your company is a FMLA-covered employer, Sara is entitled to use FMLA leave with respect to her grandson because of "any qualifying exigency" arising out of the fact that her daughter is on active duty status in the National Guard in support of a contingency operation. This includes such circumstances as arranging for alternative childcare, providing childcare on "an urgent, immediate need basis (but not on a routine, regular, or everyday basis)," enrolling or transferring to a new school or day care facility, to attend meetings with staff at a school with a day care facility, or to attend counseling for her grandson. These qualifying exigencies are spelled out in detail in 29 CFR §825.126.

Sara will not be eligible for the Oregon Military Family Leave Act (OMFLA) because she is not the spouse or domestic partner of the service member.

EMPLOYER QUERY: "FAMILY MEMBER" DEFINITION

FAMILY LEAVE PERMITTED FOR EMPLOYEE'S SAME-SEX DOMESTIC PARTNER

QUESTION: *My company employs 30 workers in Oregon. We offer generous insurance benefits, and we also allow employees a good deal of paid personal leave each year. We have been seeing a lot of news stories lately about companies offering benefits for same-gender partners of gay and lesbian workers. Since we have some employees who are gay and lesbian, we are wondering about our legal obligation to extend our benefits to their partners. Are there Oregon laws that apply here?*

ANSWER: As a private employer in Oregon, you are not required by law to provide insurance benefits to your employees or their dependents. However, if your company offers insurance benefits to your employees and their dependents, your company is obligated to extend the same level of coverage to gay and lesbian workers and their same-sex domestic partners. This is the result of the following legal changes:

1. In 1998, the Oregon Court of Appeals ruled in *Tanner v. OHSU, 157 Or App 502, 971 P2d 435*, that public employers must offer gay and lesbian employees the same benefits offered to heterosexual employees. OHSU had offered benefits to married employees but denied benefits to partners of gay employees. Because gay and lesbian couples cannot legally marry in Oregon, the court found that, under the state Constitution and civil rights laws, OHSU's practice discriminated against employees who associate with members of the same sex.

This part of the *Tanner* decision applies only to government employers. Since 1998, Oregon public employers have been providing employment benefits to gay and lesbian employees and their same-sex domestic partners, except when doing so would conflict with federal law.

2. The 2007 Oregon Legislature passed two bills that affect how employers may have to deal with their employees' same-sex domestic partners. House Bill 2007 (chapter 99, Oregon Laws 2007) recognizes and authorizes same-sex domestic partnerships in Oregon. Section 9, chapter 99, Oregon Laws 2007 states the general scope of legal rights and responsibilities related to domestic partnerships. The new law provides that a privilege, immunity, right or benefit granted to an individual by a statute, administrative or court rule, policy, common law or any other law because of the marital relationship is granted on equivalent terms to an individual because the individual is or was in a

domestic partnership or because of a specific relation between the individual and another because of the domestic partnership. In addition, Senate Bill 2 (chapter 100, Oregon Laws 2007) prohibits discrimination in employment and employment benefits based upon sexual orientation.

Since you have 30 employees in Oregon, you are covered by OFLA. OFLA includes "same-gender domestic partner" in its definition of "family member." OFLA entitles eligible employees to take family leave to care for a family member with a serious health condition. Accordingly, you must give any eligible employee up to 12 weeks of family leave if the employee's same-gender domestic partner has a serious health condition.

EMPLOYER QUERIES: SAME-SEX DOMESTIC PARTNER COVERAGE

LEAVE LAW INCLUDES COVERAGE FOR WORKER'S SAME-SEX PARTNER AND FAMILY

QUESTION: *We have an employee who wants to take time off to help care for the terminally ill mother of his same-sex domestic partner. We know we have to allow time off for an employee with a sick parent-in-law under the Oregon Family Leave Act, but is this situation covered too?*

ANSWER: Yes, the OFLA rules at OAR 839-009-0210(7) include same-sex domestic partners and their parents and children as covered family members. Same-sex domestic partners are also included in OFLA's "family member" definition based on *Tanner v. Oregon Health & Science University,* a case decided by the Oregon Court of Appeals in December 1998.

Domestic partner" is defined as an individual who "has joined in a domestic partnership." OAR 839-009-0210(4).

"Domestic partnership," for the purposes of the Oregon Family Leave Act, means "two individuals of the same sex who have received a Certificate of Registered Domestic Partnership from the State of Oregon." OAR 839-009-0210(5)

The Oregon Family Fairness Act (chapter 99, Oregon Laws 2007) creates a same-sex domestic partnership system throughout Oregon. The new law allows same-sex couples (one of whom must be a resident of Oregon) to certify their partnerships in any county within the state and receive a range of civil and legal benefits previously unavailable to them. In Multnomah County, Oregon, for example, a same-sex couple can enter into a domestic partnership by completing and filing in person the Declaration of Domestic Partnership.

The *Tanner* decision was based on the Oregon Constitution and Oregon civil rights law that prohibits discrimination based on an employee's sex or the sex of a person with whom the employee associates. The court held that Article I, Section 20 of the Oregon Constitution prohibits state laws from denying same-sex domestic partners rights that are available to married couples.

Tanner also held that employment discrimination and harassment based on sexual orientation is illegal for all Oregon employers. The court ruled that public employers like OHSU must offer employee benefits to same-sex domestic partners to the same extent that they offer benefits to spouses.

Beginning in 2008, under ORS 659A.030, as amended, (chapter 100, Oregon Laws 2007) the Oregon Legislature codified the Tanner holding by adding sexual orientation as a protected class in Oregon civil rights law and making employment discrimination and harassment based on sexual orientation unlawful employment practices for all employers, not just public employers.

QUESTION: *We have an employee who wants to take time off to help care for the terminally ill mother of his same-sex domestic partner. Our company requires all employees who have family members to produce documentation confirming the family relationship before granting family leave. Is this legal in Oregon?*

ANSWER: No. OFLA has no provision that allows an employer to require documentation of family relationship before an employee is granted family leave. In contrast, in 29 CFR §825.122(j), FMLA provides:

> "For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose."

Although ORS 659A.186(2) provides that the Oregon Family Leave Act "shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Family and Medical Leave Act of 1993," this FMLA provision does not apply to OFLA because OFLA has no similar provision.

QUESTION: *What if an employee, who has a same-sex domestic partner, requests OFLA leave but does not have a Certificate of Declaration of Domestic Partnership?*

ANSWER: Although you may not ask the employee to produce the certificate, if an employee in a same-sex domestic relationship volunteers that he or she does not have a Certificate of Domestic Partnership, you may deny family leave.

QUESTION: *Does that employee have the right to take time off to care for the terminally ill mother of his same-sex domestic partner under the Oregon Family Leave Act?*

ANSWER: An employee in a same-sex relationship who has a Certificate of Domestic Partnership has OFLA rights to family leave to care for the serious health condition of the parent of the employee's same-sex domestic partner.

QUESTION: *Can our male employee take family leave to care for the serious health condition of his female domestic partner, or vice versa?*

ANSWER: No. Opposite-sex domestic partners are not "domestic partners" under the Oregon Family Fairness Act and are not "family members" under OFLA. OAR 839-009-0210(4) and (5).

Practice Tips:

- Does your human resources department require an employee who has a same-sex domestic partner to produce a copy of the Certificate of Declaration of Domestic Partnership before granting OFLA entitlements? If so, does your human resources department require an employee who has a spouse produce a copy of the marriage certificate before granting OFLA entitlements?

- If your human resources department requires the former but not the latter, your company may have inadvertently violated ORS 659A.030 on the basis of sexual orientation, in that your employer requires more documentation from a gay or lesbian employee than a heterosexual employee before granting OFLA entitlements.

EMPLOYER QUERY: CHILD CARE DIFFICULTIES

LEAVE LAWS DO NOT APPLY WHEN EMPLOYEES HAVE ROUTINE BABYSITTING DIFFICULTIES

QUESTION: *Under OFLA and FMLA, do employees have the right to take leave because they are having problems with babysitters and child care availability?*

ANSWER: Not if the problem is related solely to the employee's inability to obtain child care, in which case your company policy determines whether to allow time off when babysitter arrangements fall through. If an eligible employee's child is unable to obtain child care because the child has a serious health condition, a covered employer is required to grant OFLA and FMLA family leave. If your employee tells you that his daycare provider will not take his 4-year-old son because the son has a fever, your employee is entitled to take OFLA sick child leave to stay home with his son.

EMPLOYER QUERY: FAMILY MEMBER DEFINITION

SIBLINGS NOT COVERED UNDER FAMILY LEAVE LAWS

QUESTION: *Am I allowed to take family leave when my sister is seriously ill?*

ANSWER: With one exception, the answer is no. If your employer is covered by OFLA or FMLA, and if you have worked long enough to be eligible for family leave, you can take up to 12 weeks of leave in a year to care for a family member with a serious health condition. However, neither OFLA nor FMLA includes siblings, aunts, uncles or cousins in their definitions of "family member."

Since your sister is not a covered family member, your employer's policy determines whether you can take sick leave or personal leave to care for her. If your employer allows for such leave, it will not be covered under OFLA or FMLA. This means the absence will not reduce your family leave entitlement for the year, but it also will not have the legal protections associated with OFLA or FMLA leave.

There is one situation in which you could take protected family leave to care for your sister. If you are "in loco parentis" to your sister, meaning "in the place of a parent," both OFLA and FMLA would treat her as if she were your child and would permit you leave to care for her. However, you only

qualify as "in loco parentis" if you raised your sister when she was a child, providing financial support and day-to-day care.

EMPLOYER QUERY: COVERED LEAVE EVENTS

OREGON LAW ALLOWS LEAVE FOR EMPLOYEE'S SERIOUSLY ILL ADULT CHILD

QUESTION: *We are covered by the Oregon and federal family leave laws, and we know that an employee who is eligible for family leave has a right to take time off to care for a sick child, but does that include the employee's adult child over the age of 18?*

ANSWER: The answer depends on whether Oregon or federal law applies, whether the adult child is dependent upon the parent and substantially limited by a mental or physical disability, and whether the child's health condition is serious or non-serious.

Both the Oregon Family Leave Act (OFLA) and the federal Family and Medical Leave Act (FMLA) allow eligible employees to take up to 12 weeks off for parental leave or to care for a child with a serious health condition. Additionally, the OFLA allows employees to take "sick child leave" to care for a child who is home from school with a cold or other non-serious health condition.

Under FMLA, employees may take parental leave and leave to care for a child with a serious health condition when the child is under 18 years old or is a dependent child over 18 years old who is substantially limited by a mental or physical disability. Under OFLA, employees also may take parental leave or "sick child leave" to care for a child with a non-serious health condition when the child is under 18 years old or is a dependent child over 18 years old who is substantially limited by a mental or physical disability.

However, under OFLA, your eligible employee may take leave to care for a child of any age with a serious health condition. If your employee has a 22-year-old child who is not a dependent and has no disabilities, who is in the hospital for a week because of a required surgery, your employee is entitled to take time off to care for the adult child. Your employee's absence is protected under OFLA, but not under FMLA. See OFLA regulation OAR 839-009-0210(7) that states, "For the purposes of OFLA, an employee's child * * * may be either a minor or an adult at the time serious health condition leave is taken."

EMPLOYER QUERY: ADULT CHILD

OFLA ALLOWS TIME OFF FOR NON-SERIOUS CONDITION OF DISABLED ADULT CHILD

QUESTION: *We have an employee who has a 20-year-old foster child living with her. The foster child is developmentally disabled. Does caring for this person when he is sick with a cold or flu qualify as protected time off under the Oregon Family Leave Act?*

ANSWER: Yes. Under the Oregon Family Leave Act (OFLA), which applies to employers with 25 or more employees in Oregon, an employee who has worked at least 180 days and averaged 25 hours

per week may take "sick child leave" for the non-serious health condition of a child requiring home care. The OFLA definition of "child" includes stepchildren, adopted children and foster children. For purposes of OFLA "sick child leave," a child is covered if he is under 18, or if he is an adult dependent child substantially limited by a physical or mental disability.

EMPLOYER QUERY: PARENTAL LEAVE

LEAVE LAWS PROVIDE ONE-YEAR DEADLINE FOR PARENTAL LEAVE

QUESTION: *Does parental leave automatically begin when an employee's baby is born?*

ANSWER: No. Under both OFLA and FMLA, male and female employees are entitled to take up to 12 weeks of parental leave when they have a newborn child, a newly adopted child, or a newly-placed foster child in their home. Under both laws, eligible employees may take this type of family leave any time within one year of the birth, adoption or placement of the child. This means that an employee could choose to begin his or her parental leave months after the birth, adoption or placement of a child, so long as the parental leave is completed by the baby's first birthday or one year from the adoption or placement.

Employees are required to take parental leave in one continuous block of time unless the employer's policy allows otherwise. In contrast, other types of family leave may be taken intermittently. An employee may use up to 12 weeks of leave to bond with a new baby, but is not entitled to take this leave sporadically or on a reduced work schedule unless the employer agrees otherwise.

Both OFLA and FMLA require employees to provide their employer 30 days advance notice when the need for family leave, including parental leave, is anticipated and foreseeable.

OFLA and FMLA both provide an exception that requires employers to grant OFLA or FMLA leave to employees before the actual placement or adoption of a child if the employee's absence from work is required for the placement for adoption or foster care to proceed. For example, an employee may take parental leave if he or she is required to attend counseling sessions, appear in court, or consult with attorneys to arrange for a child's placement or adoption.

Under OFLA, a woman who delivers a baby may choose to designate her post-delivery absence as "pregnancy disability" leave if her doctor tells her not to return to work for a period of time following the birth. Additionally, OFLA permits women who use pregnancy disability leave to take an additional 12 weeks of OFLA leave in the same leave year. As a result, when the pregnancy disability leave ends, a woman may choose to begin 12 weeks of parental leave.

EMPLOYER QUERY: ADOPTIONS

PARENTAL LEAVE INCLUDES ARRANGING FOR PLACEMENT OF CHILD

QUESTION: *My wife and I are in the process of adopting a child. Do I have the right to take time off work to meet with the adoption agency and to attend a court hearing?*

ANSWER: Yes, provided your employer is covered under OFLA or FMLA and you are eligible to take family leave. Absences from work to arrange for an adoption or placement of a foster child are included within the definition of "parental leave."

You are entitled to take this protected leave if you need to attend counseling sessions, appear in court, consult with your attorney or the doctor representing the birth parent, or to submit to a physical examination in connection with the adoption. Also, you are entitled to use the balance of your 12-week parental leave entitlement to care for and bond with the new child within the first year after the adoption or placement.

EMPLOYER QUERY: QUALIFYING LEAVE EVENTS

LAWS PERMIT LEAVE FOR EMOTIONAL SUPPORT OF ILL RELATIVE

QUESTION: *We know that the Oregon Family Leave Act (OFLA) and the federal Family and Medical Leave Act (FMLA) require us to permit an employee to take time off to care for a family member with a serious health condition. But what if the employee is not needed to provide care?*

Our computer specialist, Tom, has taken the last two weeks off work because his elderly mother is in the hospital being treated for kidney problems. We have issued a designation letter to advise Tom that we are counting the time against his OFLA and FMLA 12-week entitlements.

Our question is whether we can require Tom to return to work, since his mother is out of the ICU, her condition has stabilized, and he really is not needed at this time to provide medical care. The doctors and nurses constantly monitor Tom's mother, and he has told us that his three siblings have traveled here to be by her side. Can we terminate Tom's leave and tell him we expect him back Monday morning?

ANSWER: No. We assume that your company is covered by OFLA and FMLA and Tom is eligible for leave under both laws. Under these circumstances you describe, he has the right to use up to 12 weeks of leave to care for his mother. His mother's continued hospitalization counts as a serious health condition. Under OFLA and FMLA, caring for a family member includes physical and psychological care. Tom is entitled to use family leave to provide psychological comfort and reassurance to his mother while she is in the hospital, even though his three siblings are also spending time with their mother.

We note that, as an employer, you are entitled to request and obtain medical certification that Tom's mother has a serious health condition.

EMPLOYER QUERY: OFLA – FMLA DIFFERENCES

OREGON AND FEDERAL LEAVE LAWS FOR EMPLOYEES ARE NOT IDENTICAL

QUESTION: *Our company has 63 employees working in several states, including Oregon. We have been covered by the federal Family and Medical Leave Act (FMLA) for three years now, ever since the number of employees reached 50. However, we have not had to follow the Oregon Family Leave Act (OFLA) because we have had fewer than 25 employees working in Oregon. Recently we have hired several new Oregon employees and we are quickly approaching the 25-employee threshold. Since OFLA as well as FMLA will soon apply to us, what differences should we be aware of?*

ANSWER: OFLA and FMLA are similar, but there are notable differences between them. This answer points out some of the more important differences. You have already pointed out the difference between the number of employees required for employer coverage. OFLA applies to employers with 25 or more employees in Oregon and FMLA applies to employers with 50 or more employees anywhere in the country.

Generally, OFLA and FMLA allow an eligible employee to take up to 12 weeks of protected leave during a 12-month period. Leave may be taken for the employee's serious health condition, the serious health condition of a family member, or parental leave that allows bonding time with a newborn baby, newly-adopted child, or newly-placed foster child. OFLA also includes a provision that allows time off for "sick child leave" when an employee stays home to provide care for a child with a cold or other non-serious health condition.

In 2008, two new qualifying reasons for leave: were added to FMLA: (1) Eligible employees are entitled to up to 12 weeks of leave because of "any qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty of the Armed Forces, or has been notified of an impending call or order to active duty status in support of a contingency operation; (2) An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered military service member who is recovering from a serious illness or injury sustained in the line of duty while on active duty in the Armed Forces is entitled to up to 26 weeks of leave in a single 12-month period to care for the military service member.

In 2009, the Oregon Military Family Leave Act (OMFLA) was added to OFLA. An employee who is a spouse or same-sex domestic partner of a member of the Armed Forces of the United States, the National Guard or the military reserve forces is entitled to a total of 14 calendar days of leave per deployment. This leave must be taken during a period of military conflict once the spouse or domestic partner has been notified of an impending call or order to active duty or may be used after the service member has been notified before deployment or while on leave from deployment.

The OFLA eligibility period for employees is shorter than under federal law. An employee must work 12 months and 1,250 hours to become FMLA-eligible, but can become eligible for OFLA leave after only 180 days of employment and having worked an average of 25 hours per work week. An employee is eligible for OFLA parental leave after 180 days of employment, with no minimum hourly work requirement. An employee is eligible for OMFLA if he or she works an average of 20 hours per week for a covered employer.

A key difference between the laws is found in their respective definitions of "family member." Both laws allow leave for the parent, spouse, or child of an employee, but OFLA also allows leave to care for the serious health condition of a parent-in-law, a same-sex domestic partner, a grandparent or a grandchild with a serious health condition. Under FMLA, for Military Family Leave, the next of kin of a covered military service member has been added as a new category of family member. OMFLA covers only the spouse and same-sex domestic partner of the employee.

OFLA and FMLA leave usually run concurrently. However, when an absence is covered under only one of the laws, employers must track OFLA and FMLA separately and the employee may be eligible for more than 12 weeks of leave.

OFLA and FMLA permit different total amounts of leave. With one exception, FMLA allows 12 weeks of leave per year. The exception is that an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered military service member who is recovering from a serious illness or injury sustained in the line of duty while on active duty in the Armed Forces is entitled to up to 26 weeks of leave in a single 12-month period to care for the military service member. This Military Family Leave is available during "a single 12-month period" during which an eligible employee is entitled to a combined total of 26 weeks of all types of FMLA leave. OFLA also contains some exceptions that allow an employee to take more than 12 weeks of OFLA leave in a year. A female employee who uses any OFLA leave for pregnancy disability may take another 12 weeks of OFLA leave during the same year. A man or woman who uses a full 12 weeks of OFLA parental leave may take up to 12 more weeks for OFLA sick child incidents.

Generally, OFLA and FMLA leaves are unpaid. In Oregon, an eligible employee, while on OFLA leave, is entitled to use any accrued vacation, sick leave or paid time off. Under FMLA, an eligible employee must be permitted to use any accrued vacation during a FMLA leave but may only use accrued sick leave if consistent with the employer's usual sick leave policy.

FMLA permits the employer to reinstate an employee to the same job or to an equivalent job when FMLA leave ends. OFLA is more stringent, requiring the employer to reinstate an employee to the same job the employee held at the time OFLA leave began. When an employee's leave is covered under both laws, Oregon employers must follow the more restrictive OFLA standard for reinstatement.

Frequently, employees using OFLA and FMLA leave for their own serious health condition are also protected under state injured worker laws and state and federal disability laws. Employers must also comply with the requirements of those laws when they apply.

In Oregon, a covered employer may not reduce the amount of OFLA leave available to an eligible injured worker by any period the injured worker is unable to work because of a disabling compensable injury that is also a serious health condition unless the worker refuses a bona fide offer from the employer of light duty or modified duty that is suitable prior to becoming medically stationary.

Under FMLA, an on-the-job injury may also be a serious health condition. If the injured worker is taken off work by the worker's treating physician due to the on-the-job injury, and if the employer designates the leave as FMLA leave, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury also meets the criteria for a serious health condition under FMLA.

SECTION 2

TYPES AND LENGTH OF LEAVE

Length of Leave: How Much Leave Time is Authorized under OFLA and FMLA?

Length of Leave: How much leave time is authorized under OFLA and FMLA?

OFLA HOW MUCH LEAVE?	FMLA
12 weeks per leave year ***Exception #1:*** A female who takes leave for a ***pregnancy-related disability*** (including routine pre-natal care) may take up to an additional 12 weeks for any OFLA-qualifying purpose. ***Exception #2:*** Male or female employees who use ***a full 12 weeks of parental leave*** may use *up to 12 additional weeks* in the same leave year for ***sick child leave***. ORS 659A.162 OAR 839-009-0240	**12 weeks per leave year** ***Exception:*** An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered military service member who is recovering from a serious illness or injury incurred in the line of duty on active duty in the Armed Forces, is entitled to up to **26 weeks** of leave in a single 12-month period to care for the military service member. 29 CFR §825.127(c) 29 U.S.C. 2612(a)(3)

Practice Tips:

- An employee may take a total of 12 weeks of leave in a year for any combination of qualifying purposes. For example, an employee could use 4 weeks of leave for her own serious health condition, 2 weeks of sick child leave, and 6 weeks of leave for the serious health condition of her father.

- OFLA requires that family leave be taken concurrently with any leave taken under FMLA. OAR 839-009-0220(1). When an employee takes 12 weeks of leave for his own serious health condition, the employer may count the leave against the employee's OFLA and FMLA entitlements simultaneously. The employee may not choose to take OFLA and FMLA consecutively (24 weeks of leave) if he is concurrently OFLA and FMLA eligible.

- The OFLA 36 week possibility: Under the OFLA exceptions, a female employee who uses pregnancy disability leave, 12 full weeks of parental leave, and sick child leave could qualify for 36 weeks of OFLA leave during one year. A male employee who utilizes 12 full weeks of parental leave could qualify for up to 24 weeks of OFLA leave in one year.

Example 1: A female employee uses 12 weeks of leave for pregnancy disability. The leave may be counted against both FMLA and OFLA. The employee has depleted her FMLA leave, but still has an additional 12 weeks in the same leave year for other purposes under OFLA.

Example 2: An employee uses 12 weeks for pregnancy disability and 12 full weeks for parental leave after the birth of a newborn. She still has up to 12 weeks in same leave year for OFLA "sick child" occurrences. (FMLA was depleted with the pregnancy disability leave.)

Example 3: Jason takes 5 weeks of parental leave to bond with his newborn son. The employer counts the leave against Jason's OFLA and FMLA entitlements concurrently. Jason returns to work, but his 6-year-old daughter soon comes down with a series of ear infections and colds. Jason is entitled to take up to 7 additional weeks of OFLA sick child leave to care for his daughter at home during these minor illnesses. If Jason uses a full 7 weeks for sick child leave, he will have depleted his OFLA entitlement for the leave year, but will still have 7 weeks of FMLA leave available since FMLA does not cover sick child leave.

Length of Leave is Generally 12 Weeks

FMLA provides 12 weeks of leave in a 12-month period with one exception: An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered member of the Armed Forces who is recovering from serious illness or injury sustained in the line of duty on active duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the ill or wounded military service member. 29 U.S.C. 2612(a)(3). During the single 12-month period, if the eligible employee has other FMLA qualifying events (for example: he or she needs leave to care for his/her own serious health condition,) the eligible employee will be entitled to a combined total of 26 weeks of FMLA leave, no more than 12 weeks of which is for any qualifying reason other than to care for the ill or wounded service member." 29 U.S.C. 2612(a)(4), 29 CFR §825.127(c)(3).

OFLA limits employees to 12 weeks of leave in a 12-month period, except that (1) a woman using pregnancy disability leave may take an additional 12 weeks of OFLA leave during the same leave year, and (2) a man or woman who uses a full 12 weeks of parental leave may also use up to 12 weeks of sick child leave.

OMFLA allows the eligible employee to take up to 14 calendar days per call or order to active duty or notification of a leave from deployment. This time would be counted under the OFLA entitlement.

OFLA Length of Leave Exception #1: Pregnancy Disability

This exception allows a woman to take pregnancy disability leave of up to 12 weeks, as well as an additional 12 weeks of protected OFLA leave during the same year.

OFLA and FMLA both use the word "disability" to refer to this type of leave, and a variety of absences related to pregnancy incapacity may qualify for OFLA and FMLA leave. However, it is important to note that, since pregnancy is a temporary condition, it is not a covered disability that requires reasonable accommodation under the federal Americans with Disabilities Act or the Oregon disability statutes.

Pregnancy disability leave covered under both OFLA and FMLA may include:

- partial day or full-day absences for serious morning sickness;
- periods of bed rest ordered by the pregnant employee's physician;
- a reduced work schedule necessitated by pregnancy complications;
- routine prenatal visits to the doctor; and

- leave following the childbirth, when the employee is still incapacitated (since pregnancy disability is defined to include incapacity due to pregnancy or childbirth).

Under OFLA, an eligible female employee may take up to 12 weeks of pregnancy disability leave for any of these reasons and will still be eligible for up to 12 additional weeks of any type of OFLA leave in the same 12-month leave year. The additional 12 weeks of OFLA leave may be taken before or after the pregnancy leave. The additional 12 weeks of OFLA leave permitted under this exception may be used for any OFLA-qualifying purpose.

Although the employee will often opt to use the additional time for parental leave, she could also use the time for qualifying purposes such as caring for her father-in-law who is having heart surgery, her 6-year-old child who is home from school with the sniffles on Tuesday, her husband who was in a motor vehicle accident, or for her own serious health condition, such as a broken leg. In fact, she could take the additional 12 weeks of leave for another pregnancy-related incapacity or even a continuation of the same pregnancy-related serious health condition.

Under FMLA, a woman who uses 12 weeks for these pregnancy-related forms of serious health condition exhausts her FMLA entitlement for the year.

OFLA Length of Leave Exception #2: Parental Leave

The second exception that allows an employee more than 12 weeks of OFLA leave in a single year applies when either a male or female employee uses a full 12 weeks for parental leave. In such cases, the employee may also use up to 12 weeks of "sick child leave" for the non-serious health conditions of children requiring home care.

This exception is narrow. It only applies when an employee uses the full 12 weeks for parental leave and sick child leave is the only additional type of leave the employee is permitted to take.

The requirement that the employee take a full 12 weeks of parental leave before the employee qualifies for up to 12 additional weeks of sick child occurrences is based on a strict interpretation of ORS 659A.162(2)(b), which states that an employee "who takes 12 weeks of family leave within a one-year period" for parental leave "may take up to an additional 12 weeks of leave within the one-year period" for sick child leave.

If an employee takes less than 12 weeks of OFLA parental leave, he or she is still entitled to use the balance of the 12-week entitlement for any other OFLA qualifying purpose, but will not qualify for an additional 12 weeks of OFLA sick child leave. For example, if a new mother takes only 8 weeks for OFLA parental leave and then chooses to return to work, she will still have 4 weeks of OFLA available that she can use for serious health conditions or sick child leave

EMPLOYER QUERY: PREGNANCY LEAVES

PREGNANT EMPLOYEE MAY HAVE RIGHT TO MORE THAN 12 WEEKS OFF

QUESTION: *We know that the Oregon Family Leave Act applies to our company, since we have recently grown and now have at least 25 employees working in Oregon. What we are still not clear on is how much leave pregnant employees are allowed to take. One of our employees, Megan, is pregnant and about to begin family leave because her doctor says she needs bed rest. Megan says the law gives her the right to 36 weeks of protected time off. Is that right?*

ANSWER: Possibly, but only in rare circumstances. OFLA generally allows eligible employees to take a maximum of 12 weeks off during the year when qualifying situations arise. There are two exceptions in OFLA, each of which allows up to 12 weeks of additional leave. Since a pregnant woman could potentially qualify under both of these exceptions, it is possible she could have the right to 36 weeks of protected time off work.

OFLA allows an employee up to 12 weeks of leave during a 12-month leave year for any combination of the following reasons:

- the employee's own serious health condition (including an incapacity related to pregnancy);
- the serious health condition of a family member;
- "parental leave," which is time off to care for and bond with a newborn baby, newly adopted child, or newly placed foster child; or
- "sick child leave," which is time off to care for a child with a non-serious health condition that requires home care.
- Oregon Military Family Leave which is time off for the spouse or same-sex domestic partner of a service member who has been called to active duty or notified of an impending call or order to active duty, or who is on leave from active duty during a period of military conflict.

Assuming Megan has worked for you long enough to be eligible for OFLA leave, she is entitled to take up to 12 weeks of protected leave for her pregnancy disability. That includes time off when she is physically incapacitated from working – not only during the pregnancy, but also following the delivery when she is recovering from childbirth. The 12 weeks for pregnancy disability may also include intermittent absences due to morning sickness or for routine prenatal doctor visits.

The first exception to the 12-week maximum rule is that a female employee who uses any pregnancy disability leave is entitled to take up to 12 more weeks of leave during the same leave year for any OFLA-qualifying reason. That additional 12 weeks could be used for the serious health condition of a family member, parental leave, sick child leave, Oregon Military Family Leave or even a continuation of the woman's pregnancy disability.

The second exception to the 12-week maximum rule is that both male and female employees who use a full 12 weeks of parental leave may still use up to 12 weeks of sick child leave during the same leave year.

Putting these two exceptions together, if Megan were to take a full 12 weeks of OFLA pregnancy disability leave, followed by a full 12 weeks of parental leave, followed by 12 weeks' worth of non-serious sick child incidents, she could reach the maximum 36-week level. It is possible, but unlikely, as OFLA leave is generally unpaid leave and many employees cannot afford to take 36 weeks off work even when the law permits it.

EMPLOYER QUERY: LENGTH OF LEAVE

EMPLOYEES GET MORE THAN 12 WEEKS OF OFLA LEAVE BUT ONLY IN CERTAIN CASES

QUESTION: *If an employee used only 4 weeks of her pregnancy leave, gave birth to premature twins, and used 12 weeks of her parental leave, would she then be entitled to use 8 weeks of additional OFLA leave for her twins' serious health condition?*

ANSWER: No. Under OFLA, which applies to companies with 25 or more employees in Oregon, an employee who uses pregnancy disability leave may use 12 additional weeks of OFLA leave in the same leave year. In your example, however, the employee has already used up that 12 additional weeks for parental leave and is not legally entitled to extra time for serious health conditions during the same leave year. Of course, in this case, an employer may choose to be more generous than the law requires and grant additional leave without pay.

Following the full 12 weeks of parental leave, the employee is permitted additional time off for "sick child leave," but that type of leave only applies to the non-serious condition of a child requiring home care. Examples include a child with a cold, flu or ear infection.

However, what many employers do not realize is that the time immediately following delivery of the child is not necessarily parental leave. This period may instead be designated as pregnancy disability leave, as the woman is sometimes incapacitated for four, six or even eight weeks, depending on the doctor's determination. The employee may choose to characterize this time as pregnancy disability leave so that she will still be eligible for 12 additional weeks of leave beyond the date she is released for work by the doctor. The additional 12 weeks may be used for any OFLA purpose, including parental or serious health condition leave. In your example, this option would extend the employee's leave time.

EMPLOYER QUERY: LENGTH OF LEAVE

PARENTS WHO WORK FOR SAME EMPLOYER SUBJECT TO SPECIAL RULES — PARENTAL LEAVE

QUESTION: *Is it true that parents who work for the same employer are each entitled to 12 weeks of parental leave when they have a newborn child? I thought that was the case but my colleague heard somewhere that parents who work for the same employer only get a combined total of 12 weeks of leave under those circumstances.*

ANSWER: It depends on whether OFLA or FMLA applies.

Under FMLA, a husband and wife working for the same employer may be limited to the aggregate of 12 weeks in a leave year for parental leave, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. When using parental leave, a husband and wife are limited to a combined total of 12 weeks during the year after their child's birth or within one year of an adoption or foster child placement. For example, the wife could choose to take eight weeks of FMLA parental leave, and the husband who works for the same employer could choose to use the remaining four weeks.

This limitation on the total weeks of leave applies to leave taken for the reasons stated above, so long as a husband and wife are employed by the "same employer." It even applies when the spouses are employed at two different operating divisions of the same company or at two different worksites of the same employer when those worksites are located more than 75 miles from each other. However, if one spouse is ineligible for FMLA leave, the other spouse is entitled to a full 12 weeks of FMLA leave.

When the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the purposes stated above, they will each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for another qualifying reason. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Many state pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods are considered FMLA leave for a serious health condition of the mother and are not subject to the combined limit.

Under OFLA, parents working for the same employer may each take a full 12 weeks of parental leave. Unlike FMLA, OFLA limits parents' rights to take parental leave concurrently (ORS 659A.162(3)). When the leave is covered under OFLA only, an employer may require employees who are family members to stagger their parental leave time. However, when OFLA and FMLA contain similar provisions, employers covered by both OFLA and FMLA must apply the law most beneficial to the employees. In the case of parental leave, FMLA regulations limit the husband and wife to 12 weeks of parental leave in the aggregate, but OFLA entitles each to 12 weeks parental leave. OFLA allows employers to refuse concurrent leave, but FMLA allows concurrent leave. When leave is FMLA covered, the result is that the husband and wife could choose to take concurrent parental leave until they exhaust their aggregate 12 weeks of FMLA leave. After that, OFLA entitles them, should they choose to do so, to take a combined total of 12 weeks additional parental leave separately.

PARENTS OR FAMILY MEMBERS WHO WORK FOR SAME EMPLOYER SUBJECT TO SPECIAL RULES — SERIOUS HEALTH CONDITION LEAVE

QUESTION: *Is it true that family members who work for the same employer may be limited to 12 weeks of family leave for reasons other than parental leave and may be required to take concurrent leave?*

ANSWER: Again, it depends on whether OFLA or FMLA applies.

Under FMLA, a husband and wife working for the same employer may be limited to the aggregate of 12 weeks in a leave year to care for an employee's parent with a serious health condition (29 CFR 825.120(a)(3).

OFLA does not specifically address the rights of a "husband and wife," but does speak to the issue of "two family members" working for the same covered employer. OFLA, unlike FMLA, does not limit the amount of leave such employees may take, but does limit their right to take leave concurrently. In other words, under OFLA, the two family members (or spouses) could each take 12 weeks of leave for covered events, but may be required to take leave at different times. Exceptions to this requirement are:

- When one employee needs to care for the other employee who is suffering from a serious health condition;
- When one employee needs to care for a child who has a serious health condition while the other employee is also suffering a serious health condition;
- When both family members are suffering from a serious health condition; or
- When the employer allows the two family members to take concurrent leave.

EMPLOYER QUERY: COUNTING THE LEAVE ENTITLEMENT

SINGLE HOLIDAY COUNTS TOWARDS 12 WEEKS OF FAMILY LEAVE

QUESTION: *We have an employee who is out on a 12-week FMLA leave because he had surgery related to a serious health condition. Do we count the July 4th holiday as part of his 12-week leave entitlement?*

ANSWER: Yes. FMLA regulations state that for purposes of counting the 12-week entitlement, you count the week as a full week of FMLA leave despite the holiday. The answer changes if your operations cease for a period of one week or more that includes the week in which the July 4 holiday falls. In that case, you do not count the time as FMLA leave. 29 CFR §825.200(h).

EMPLOYER QUERY: PRORATING FOR PART-TIME EMPLOYEES

ELIGIBLE EMPLOYEES ARE ENTITLED TO UP TO 12 WEEKS OF FAMILY AND MEDICAL LEAVE

QUESTION: *Can we prorate an employee's family leave entitlement if he works less than full-time? We have an employee who works four days a week, which amounts to 32 hours or 80 percent of full-time. The employee's wife is due to deliver a baby next week, and he wants to take 12 weeks of parental leave. Is he entitled to a full 12 weeks, or can we prorate the family leave to 9.6 weeks?*

ANSWER: You can prorate the family leave entitlement but not in the way you propose. Assuming this employee has worked for you long enough to be eligible under OFLA or FMLA, he is entitled to take 12 weeks off from his normal work schedule for family leave.

We guess your organization employs 25 or more people in Oregon and 50 or more people in the U.S. so that you are covered by OFLA and FMLA. We also assume that your employee is eligible for both OFLA and FMLA.

The leave entitlements for OFLA and FMLA run concurrently in most cases, and your employee is entitled to 12 weeks of OFLA/FMLA parental leave this year — not 24 weeks — when he has a newborn child. Under both OFLA and FMLA, an employee is required to take parental leave all in one continuous block rather than intermittently, unless your company chooses to allow intermittent parental leave.

Your employee is entitled to 12 calendar weeks off to care for and bond with his new child. If your employee takes a solid block of family leave, you can simply refer to the calendar to determine the amount of leave used.

If your employee takes intermittent leave, possibly for his own serious health condition or that of a family member, you would be required to break his leave entitlement up into hours. In that case, you would have to prorate his hours.

An employee who normally works 40 hours per week starts off the leave year with 480 hours (40 hours x 12) in his leave bank. An employee like yours who works 32 hours per week has a balance of 384 hours (32 hours x 12) at the start of the leave year. Intermittent family leave is tracked on an hourly basis, based on the time the employee is absent from his regular work schedule. For example, if your employee were being treated for cancer and had to leave work 4 hours early on a Monday for a chemotherapy treatment, you would count that as 4 hours of OFLA and FMLA leave for that day and reduce his leave entitlement by 4 hours.

EMPLOYER QUERY: EXHAUSTION OF LEAVE

APPLY NORMAL ATTENDANCE POLICIES AFTER LEAVE ENDS

QUESTION: *What happens when family leave is exhausted and the employee still can't return to work?*

ANSWER: You should apply your normal absenteeism or leave policies to determine if you will allow extra time off. Once the 12 weeks of OFLA and FMLA leave have been exhausted, further absences may be treated as disciplinary incidents.

After the conclusion of family leave, you can begin applying your attendance rules, so long as the absences counted as OFLA and FMLA leave are in no way counted against the employee or used as a basis for disciplining the employee. An employee who has taken OFLA and FMLA leave should be in no worse position because of taking leave.

Note that other laws, such as injured worker reinstatement statutes and the Americans with Disabilities Act, may provide additional protected time off beyond the 12 weeks of family leave, so it is important to consider whether the employee is covered under such laws before taking any disciplinary measures.

Finally, the federal Pregnancy Discrimination Act requires that employees absent for pregnancy-related disabilities be treated at least as favorably as the employees absent for other short-term disabilities. Oregon's sex discrimination laws that cover pregnancy disability also prohibit the different treatment of employees in such situations.

EMPLOYER QUERY: LEAVE TRACKING RECORDS

FEDERAL LEAVE LAW SETS RECORDKEEPING AND RETENTION REQUIREMENTS

QUESTION: *Are employers required to keep records of family leave taken by employees?*

ANSWER: Yes. Under FMLA, employers must maintain records indicating the dates that FMLA leave is taken by each employee and must retain all family leave tracking records and related medical certification for a minimum of three years.

FMLA also requires employers to designate family leave by providing written notice of rights and responsibilities each time an employee takes leave. Employers should retain copies of each notice as part of their FMLA recordkeeping. The written notice advises the employee of eligibility status and whether the employer is counting the leave against the 12-week FMLA entitlement. See the section of this handbook entitled, "What Notification Must Employers Give?" for more information.

The formal notification and tracking is not specifically required under OFLA, although a prudent employer will have some tracking system in place to ensure OFLA compliance. Since OFLA and FMLA do not always run concurrently and sometimes afford eligible employees more than 12 weeks of protected leave, tracking OFLA and FMLA can be quite complex. A tracking form that employers may wish to use for OFLA and FMLA is provided at the end of this section of the handbook. handbook.

Practice Tips for Tracking Leave:

- Full-time employees who work 40 hours per week are entitled to 480 hours of leave in a year (12 weeks at 40 hours per week). Leave may be taken in increments as small as the employer uses to track employees' absences, provided they are not greater than one hour. 29 CFR §825.205(a). For example, an employee could use one hour of family leave for a doctor's visit required due to a serious health condition.

- Part-time employees who meet the eligibility requirements for family leave are entitled to 12 workweeks of leave during the year. The workweek for part-time employees is based on the normal weekly hours. For example, an employee who normally works 30 hours per week is entitled to 360 hours of leave within one year. If that employee works only 20 hours a week under a reduced leave schedule, the 10 hours of leave used constitute one-third of a week for tracking purposes. 29 CFR §825.205.

- If an employee's schedule varies from week to week, the normal workweek for that employee is calculated based on the weekly average of hours worked over the 12 months preceding the leave for FMLA. 29 CFR §825.205(c). Under OFLA, it is calculated based on the weekly average of hours worked over the 12 weeks preceding the leave.

- Track leave in increments as small as you use to pay employees. For example, if you track employees by the quarter hour for payroll purposes, you should also track family leave absences down to the quarter hour. 29 CFR §825.205(a).

- Effective January 1, 2008, an Oregon employer subject to OFLA requirements may not reduce the amount of OFLA leave available to an OFLA eligible employee by any period the employee is unable to work because of a disabling compensable injury. OAR 839-009-0240(8).

- A serious health condition may result from an on-the-job injury. If an employer who is subject to FMLA designates the leave following a FMLA-eligible employee's on-the-job injury as FMLA leave, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. 29 CFR Sec. 825.207(e).

- 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. OAR 839-009-0240(8)(a).

- If the employer uses a rolling forward leave year, a fixed leave year or a calendar year, and a workers' compensation claim is first denied and then accepted, the employer must restore any OFLA leave taken in the leave year in which the workers' compensation claim is accepted. OAR 839-009-0240(8)(a)(A).

- An Oregon employer subject to OFLA may reduce the amount of OFLA leave available to an OFLA-eligible employee by any period that the employee is unable to work because of a disabling compensable injury after the employee has refused a suitable offer of light duty or modified employment prior to becoming medically stationary. OAR 839-009-0240(9).

BOLI

FAMILY LEAVE TRACKING FORM

OREGON FAMILY LEAVE ACT

Employee Name:

Hire Date:

Employer's Leave Year Method:

OFLA Eligibility:

Employee must be employed for 180 calendar days immediately preceeding the first day of leave.
____yes ____no (not eligible)

Employee must have worked an average of 25 hours per week during the 180 day period, unless the employee is taking leave for the birth, adoption or foster care of a child. (All employees who meet the 180 calendar days of employment are entitled to take OFLA parental leave.)
____yes ____no (not eligible)

FEDERAL FAMILY AND MEDICAL LEAVE

FMLA Eligibility:

Employee must be employed for at least 12 months prior to Using Leave (employment need not be consecutive months.)
____yes ____no (not eligible)

Employee must have worked at least 1250 hours during the 12 Months immediately preceeding the first day of the leave.
____yes ____no (not eligible)

Date:	Serious Health Condition of the Employee	Pregnancy Disabilities	Serious Health Condition of the Spouse, Parent or Child	*Serious Health Condition of the Parent-in-Law, Same-gender Domestic Partner, Parent or Child of Same-gender Domestic Partner	*Serious Health Condition of the Grandparent or Grandchild	Birth, Adoption, Foster Care	*Non-serious illness of a Child	Oregon Military Family Leave (14 days)

Date:	Serious Health Condition of the Employee	Serious Health Condition of the Spouse, Parent or Child	Birth, Adoption, Foster Care	Qualifying Exigency	Serious Injury or-Illness of a Service-member/ Veteran

* These leave categories qualify as OFLA leave only.

INTERMITTENT FAMILY LEAVE

Introduction

OFLA and FMLA both allow leave for a serious health condition to be taken intermittently. OFLA defines intermittent leave as "leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule." OAR 839-009-0210(15). FMLA defines intermittent leave as "leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time." 29 CFR §825.800.

The chart below summarizes the intermittent leave provisions of OFLA and FMLA.

TYPE OF LEAVE	OFLA INTERMITTENT LEAVE?	FMLA INTERMITTENT LEAVE?
Parental Leave	An employee must take parental leave in one continuous block, unless the employer chooses to permit intermittent leave or a reduced work schedule.	Same as OFLA
Serious Health Condition of Employee or Family Member	Intermittent leave or reduced schedules for serious health conditions must be permitted when medically necessary.	Same as OFLA
Pregnancy Disability or Prenatal Care	Intermittent leave or reduced schedules must be permitted as necessary for pregnancy disability or prenatal care.	Same as OFLA
Sick Child Leave (Non-Serious Health Condition)	By its nature, sick child leave requires time as needed rather than a continuous block of time.	FMLA does not provide for sick child leave.
Qualifying Exigency*	To the extent the need for OMFLA leave is also covered by the "qualifying exigencies" entitlement of FMLA.	FMLA does. See 29 CFR §825.126 for a list of "qualifying exigencies."
Servicemember Family Leave	OMFLA may be taken intermittently.	FMLA does. See 29 CFR §825.127 for leave available to an eligible employee to care for a covered servicemember who suffers a serious injury or illness in the line of duty on active duty.
	OAR 839-009-0210(15), OAR 839-009-0240(5).	29 CFR §825.203, 29 U.S.C. 2612(b)(1).

Practice Tips:

- Employers are not required to grant intermittent parental leave, but may choose to approve an altered or reduced work schedule for that purpose. For example, Enrique takes parental leave for a new child, but decides to come back to work after three weeks. Although he still has nine weeks of leave remaining, he is not entitled to use additional time for parental leave unless his employer chooses to allow parental leave intermittently. Employers should be aware that approving an intermittent schedule for one employee and not others could lead to possible discrimination claims.

- Intermittent leave must be given when it is medically necessary to care for family members with serious health conditions, the employee's own serious health condition, or for a sick child requiring home care (OFLA only).

- Employees may not be required to take more leave than the condition requires.

- Only the actual amount of leave taken may be counted as family leave. For example, if an employee normally works 40 hours per week and takes 20 hours of leave, only 1/2 of one week has been used. 29 CFR §825.205(b).

- If the need for intermittent leave is foreseeable, FMLA allows an employer to temporarily transfer an employee to an available alternative position which better accommodates recurring periods of leave. The employee must receive the same pay and benefits as the regular position provides. 29 CFR §825.204. OFLA rules allow for such a transfer, but only when the employee accepts the transfer voluntarily and without coercion. If the intermittent leave is OFLA-covered, the employer should not require a job transfer without the employee's clear consent. OAR 839-009-0245.

EMPLOYER QUERY: INTERMITTENT LEAVE — IMPOSSIBILITY OF WORKING A FULL SHIFT

EMPLOYER MAY COUNT ENTIRE DAY FOR PARTIAL DAY'S ABSENCE UNDER FMLA UNDER CERTAIN CIRCUMSTANCES

QUESTION: *We are an airline and OFLA/FMLA covered employer. It is physically impossible for our flight attendants or pilots to take a partial day off work for intermittent leave because their scheduled flight will already be in the air after they finish their partial day family or medical leave. How do we designate their OFLA/FMLA leave?*

ANSWER: Both OFLA and FMLA employers may designate the entire period their employee is forced to be absent, due to the physical impossibility of completing their shift, as OFLA/FMLA leave. This would also apply to employees such as railroad conductors or laboratory employees who are unable to enter or leave a sealed "clean room" during a certain period of time. 29 CFR 825.205(a)(2), OAR 839-009-0245(3).

EMPLOYER QUERY: SHIFT CHANGES, INTERMITTENT LEAVE

EMPLOYER MAY PROCEED WITH NON-RETALIATORY SCHEDULE CHANGE

QUESTION: *We have over 100 employees in Oregon. One of them, Alice, has been on intermittent family medical leave for a few months due to back problems. Alice has worked full-time for several years on a 7:00 a.m. to 4:00 p.m. shift. Her supervisor is planning on rearranging the work schedules in her department and wants to have Alice work from 8:30 a.m. to 5:30 p.m. Alice is not aware that this change is coming. She recently told the supervisor that she plans to attend a 5:00 p.m. water therapy class, although we do not have a doctor's note for this. Can the supervisor change Alice's schedule? If so, are we legally obligated to let her leave early on the days she has the class?*

ANSWER: In general, the supervisor can proceed with the schedule change as long as it is not retaliatory and that action was going to be taken regardless of the employee's use of family leave. If Alice still has some of her annual family leave entitlement remaining, she does have the right to miss work to attend therapy sessions, provided her doctor advises it is medically necessary due to her serious health condition. You have the right to request medical certification, at your own expense, to confirm that determination. These issues are discussed in more detail below.

Alice's condition is a qualifying "serious health condition" if it falls into one of six categories defined under OFLA and FMLA. Those categories include inpatient care, "absence plus treatment," pregnancy disability, chronic conditions, continuing treatment and multiple treatments. Her back problems could qualify under several of these categories, and her water therapy sessions would qualify under the "multiple treatments" definition if they are administered on referral by her doctor who indicates that the absence of such treatments would likely result in an incapacity of more than three consecutive calendar days.

Full-time employees like Alice start the 12-month leave year with 480 hours of available leave. Since Alice has taken OFLA and FMLA intermittently, you need to track the work time she has missed on an hourly basis to determine how much of her annual entitlement remains.

OFLA and FMLA both require employees to make reasonable attempts to arrange treatments so as not to unduly disrupt the employer's operations. OAR 839-009-0260(14), 29 CFR §825.203. Once your new work schedules take effect, you could ask Alice if it would be possible for her to register for a later evening water therapy session, if there were one approved by her doctor. Be careful in this discussion with Alice to avoid misunderstandings that could lead her to file a retaliation claim.

OFLA and FMLA provide job reinstatement rights for employees, but both state that an employee on leave is not entitled to greater rights than she otherwise would have. ORS 659A.171(3)(b), 29 CFR §825.216. That is why you can still proceed with non-discriminatory employment actions like schedule changes — or even layoffs — that would have occurred regardless of the employee taking leave. Of course, when an employee is on family leave or in any other civil rights protected category, you should document your legitimate business reasons for making any job changes.

EMPLOYER QUERY: EXEMPT WORKERS, INTERMITTENT LEAVE

DOCKING EXEMPT EMPLOYEE'S SALARY PERMITTED WHEN FMLA INVOLVED

QUESTION: *How do we deal with an exempt employee who is using intermittent family leave?*

ANSWER: Under Oregon and federal wage and hour laws, employers generally may not deduct from an exempt employee's salary for partial-day absences, because to do so would cause the employee to lose the exemption. FMLA addresses this by simply carving out an exception from federal wage and hour law for partial-day absences occasioned by FMLA leave. Under FMLA, deductions for part-day FMLA absences are permitted with respect to an exempt employee's pay. 29 CFR §825.206.

Oregon's wage and hour law also permits the exception for FMLA absences by exempt employees. Docking an exempt employee's salary is permitted, even hour by hour, when the intermittent leave is FMLA-covered.

However, the result is different when the leave is only OFLA-covered because there is no exception in state or federal wage laws for OFLA partial-day absences. When an exempt employee misses part of a day due to intermittent leave covered by OFLA only, the employer should pay the employee's full salary for the day so as not to jeopardize the employee's exempt status. OAR 839-009-0240(12).

"SERIOUS HEALTH CONDITION"

Introduction

OFLA and FMLA have similar definitions for "serious health condition." They define "serious health condition" as an illness, injury, impairment, or physical or mental condition that falls into one or more categories based primarily on the severity of the serious health condition and the type of medical treatment involved. Among the categories are inpatient care, terminal illnesses, constant or continuing treatment, pregnancy-related conditions, chronic conditions, and conditions requiring multiple treatments. However, within those categories, there are some important differences, noted below. ORS 659A.150(6), OAR 839-009-0210(20), 29 CFR §825.113 - .115, §825.120, §825.800.

The chart below compares the definitions and qualifying conditions necessary for an employee to meet the definitions of "serious health condition" in OFLA and FMLA.

OFLA "SERIOUS HEALTH CONDITION"	FMLA "SERIOUS HEALTH CONDITION"
1. An illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice, or residential medical care facility. ORS 659A.150(6)(a), OAR 839-009-0210(20)(a)	1. An illness, injury, impairment or physical or mental condition that requires an overnight stay in a hospital, hospice, or residential medical facility, including any period of incapacity, or any subsequent treatment in connection with such inpatient care. 29 CFR §825.114
2. An illness, injury, impairment or physical or mental condition that: ■ requires "constant" or "continuing" care such as home care administered by a health care provider; or ■ involves a period of incapacity for more than three consecutive calendar days and two or more treatments by a health care provider or one treatment plus a regimen of continuing care; or ■ involves permanent or long-term incapacity 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. OAR 839-009-0210(20)(c)(d)(f)	2. An illness, injury, impairment or physical or mental condition involving continuing treatment, a period of incapacity for more than three consecutive, full calendar days, and: ■ in-person treatment two or more times within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, with the first visit within seven days of the first day of incapacity; or ■ in-person treatment by a health care provider on at least one occasion that results in a period of continuing treatment under the health care provider's supervision, with the first visit within seven days of the first day of incapacity. 29 CFR §825.115(a)

3. An illness, injury, impairment or physical or mental condition that results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for that 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. OAR 839-009-0210(20)(e)	3. A chronic condition that requires at least two visits a year for treatment by a health care provider, continues over an extended period of time, and may cause episodic instead of a continuing period of incapacity. 29 CFR §825.115(c)
4a. An illness, disease or condition diagnosed as terminal with a reasonable possibility of death in the near future. 4b. An illness, disease or condition diagnosed as posing an imminent danger of death. ORS 659A.150(6)(b), OAR 839-009-0210(20)(b)	4. Permanent or long-term conditions for which treatment may not be effective, e.g. Alzheimer's disease, stroke, terminal stages of a disease. 29 CFR §825.115(d)
5. An illness, injury, impairment or physical or mental condition that involves multiple treatments for restorative surgery or for a condition such as chemotherapy for cancer that, if not treated, would likely result in incapacity of more than three days. OAR 839-009-0210(20)(g)	5. Conditions that require multiple treatments for restorative surgery or would likely result in a period of incapacity for more than three calendar days without medical treatment, e.g. cancer chemotherapy, severe arthritis (physical therapy). 29 CFR §825.115(e)
6. Any period of disability due to pregnancy or period of absence for prenatal care. ORS 659A.150(6)(c), OAR 839-009-0210(20)(h)	6. Pregnancy, including prenatal and postnatal care. 29 CFR §825.115(b)
"Covered servicemember" leave is not covered by OFLA.	An injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember unfit to perform the duties of the member's office, grace, rank, or rating. 29 CFR §825.127

chart continues

A "health care provider" is 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 physician, including a doctor of osteopathy, ■ a podiatrist, dentist, psychologist, optometrist, naturopath, registered nurse, nurse practitioner, direct entry midwife, licensed registered nurse who is certified as a nurse midwife nurse practitioner; clinical social worker, or chiropractor; ■ 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. ORS 659A.150(5), OAR 839-009-0210(14)	A "health care provider" is: ■ a licensed doctor of medicine or osteopathy; ■ a licensed podiatrist, dentist, clinical psychologist, optometrist, or chiropractor performing within the scope of their practice; ■ a licensed nurse practitioner, nurse-midwife, clinical social worker, or physician assistant performing within the scope of their practice; ■ a Christian Science Practitioner; ■ any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and ■ a health care provider listed above who practices in another country who is authorized to practice in that country and is performing within the scope of their practice. 29 CFR §825.125

Practice Tips:

- OFLA/FMLA covered employers must apply the regulation that is more beneficial to an individual employee's circumstances. OAR 839-009-0220.
- To determine if the employee or the employee's family member has a "serious health condition" under the "continuing treatment" or "chronic serious health condition" definitions, an OFLA/FMLA covered employer must use the OFLA definition.
- Unlike FMLA, OFLA does not require that an employee or the employee's family member taking leave for serious health condition under the "continuing treatment" definition to have an in-person visit to a health care provider within seven days of the first day of incapacity or two or more treatments within 30 days of the first day of incapacity.
- Similarly, OFLA does not require two visits per year for treatment by a health care provider to meet the "chronic serious health condition" definition.
- Examples of conditions that generally do not qualify as "serious health conditions" under OFLA or FMLA include the common cold, flu, ear aches, upset stomach, routine headaches, minor ulcers, sore throat, routine medical or dental visits, and conditions for which cosmetic treatments are administered, unless inpatient hospital care is required or unless complications arise. ORS 659A.186(2), 29 CFR §825.113(c) and (d), §825.800.

- Many employers incorrectly assess whether employees qualify for leave because they do not realize the complexity of the "serious health condition" definition. It is a gross oversimplification of the law to say that "when an employee misses three days of work, that's FMLA" or "when an employee hasn't missed three days, it's not FMLA." Neither of these statements is necessarily correct. There are a variety of qualifying absences that may involve less than three days off work, and some longer absences will not qualify — for example, when the employee does not see a health care provider.

EMPLOYER QUERY: SERIOUS HEALTH CONDITION

FOUR-DAY ABSENCE DOES NOT ALWAYS TRIGGER FAMILY LEAVE

QUESTION: *An employee who missed four days of work because of the flu says we are wrong to count the time as family leave. She only wants to use sick leave and says we cannot dock her OFLA or FMLA entitlements because the flu is not a "serious health condition." Isn't it true that an absence of more than three days is considered OFLA and FMLA?*

ANSWER: Not necessarily. Your employee's absence might or might not qualify as family leave, but you cannot automatically count the time against her OFLA and FMLA leave banks. You need to apply the legal definition of "serious health condition" to make the proper determination.

OFLA and FMLA have similar criteria for qualifying absences. One of the many definitions of serious health condition includes a three-day rule, but it is more involved than just counting the days of an absence. There must be an "absence plus treatment."

Under both OFLA and FMLA, the employee must be incapacitated for more than three consecutive calendar days to qualify under the "three-day rule." The absence must be accompanied by two or more treatments by a health care provider, or one treatment followed by a regimen of continuing treatment — for example, prescription medication. Under FMLA, the employee must meet two additional tests: (1) under the "two or more treatments" criterion, the first visit to a health care provider must be in-person and take place within seven days of the first day of incapacity and the employee must make a second in-person visit to the health care provider within 30 days of the first day of incapacity; and (2) under the "one treatment" criterion, the employee must visit a health care provider in-person within seven days of the first day of incapacity and that visit must result in a period of treatment under the health care provider's supervision.

Applying this test, you will see that the flu generally will not qualify as a serious health condition — even when an employee is out all week. If the absence involves only one doctor visit, with instructions to "rest and drink plenty of fluids," that does not count as a regimen of continuing treatment, and the absence does not count as family leave. In fact, FMLA regulations explicitly state that "[o]rdinarily, unless complications arise, * * * the flu * * * [does] not meet the definition of a serious health condition * * *." 29 CFR 825.113(c), (d), 825.800

Likewise, routine colds, headaches, stomachaches and sore throats generally do not qualify as serious health conditions. Absences for routine medical and dental visits also do not meet the definition of serious health condition and should not be counted as family leave.

Note, however, that there are many other types of "serious health conditions" that cause absences that should be counted as family leave under OFLA and FMLA, and it is not always required that the absences last more than three days. For example, OFLA and FMLA's definitions of "serious health condition" include absences for inpatient care; critical or terminal illnesses; constant or continuing care in a residential facility; and permanent or long term incapacity due to conditions such as Alzheimer's disease or stroke. Also included are absences for multiple treatments for conditions that, if not treated would likely result in incapacity of more than three days. This category could include intermittent absences for chemotherapy or kidney dialysis.

Pregnancy-related disability is another type of qualifying serious health condition that includes medically necessary absences during the pregnancy and after delivery, when recuperating from childbirth. This category also includes absences for morning sickness and routine prenatal care.

OFLA and FMLA also allow time off for chronic conditions. For instance, an employee diagnosed with a chronic migraine condition could take intermittent family leave on individual days when that employee suffers incapacitating migraines. If the employee works a regular full-time schedule and misses a single day of work due to a qualifying serious health condition, the employer can count the absence as eight hours of family leave.

EMPLOYER QUERY: POST-PARTUM DEPRESSION

WIFE'S CONDITION MAY ENTITLE EMPLOYEE TO INTERMITTENT LEAVE

QUESTION: *My company has several hundred employees in the U.S., so we are covered by the family leave laws. I have a full-time employee who has a terrible attendance record and who has received several warnings related to his absenteeism. He and his wife just had a baby, and although he is not planning to take time off for parental leave, he is advised us that he may need to miss work intermittently because his wife is having bouts of post-partum depression. Is this kind of absence protected?*

ANSWER: Yes. Both the OFLA and FMLA cover "pregnancy disability" as a form of serious health condition. If your employee has worked for you long enough to be eligible, he may take up to 12 weeks of family leave when his wife has a qualifying condition, and this type of leave may be taken intermittently.

The leave laws define pregnancy disability as incapacity related to pregnancy or childbirth, and a diagnosis of post-partum depression could certainly qualify. Both OFLA and FMLA also cover a pregnant employee's absences for serious morning sickness and even routine pre-natal doctor visits.

Under OFLA and FMLA, you do have the right to require your employee to provide you with medical certification from his wife's doctor to verify that she has a qualifying serious health condition. Assuming she does, you would be prohibited from disciplining your employee for leave taken to care for her, even though he already has a poor attendance record. Of course, if the employee has additional absences that are unrelated to his wife's condition and not otherwise protected, you could continue from where you left off in your disciplinary process for unexcused absences.

Note that, under OFLA and FMLA, if your employee were taking time off for the purpose of parental leave (time off to care for and bond with a new child), you would not be obligated to grant

the leave intermittently. Although eligible employees may take up to 12 weeks of parental leave during the first year after their baby's birth, the law requires them to do so in one continuous block of time, unless the employer agrees to grant such leave intermittently.

EMPLOYER QUERY: ABSENCE FOR ALCOHOL TREATMENT

ALCOHOLIC EMPLOYEE'S WORK ABSENCES MAY HAVE LEGAL PROTECTION

QUESTION: *We have 62 employees in Oregon, so our company must follow both OFLA and FMLA. Lila, a full-time employee who has been with us for several years, has just told us she needs to leave work early two or three times per week to attend an alcohol treatment program. Lila works on a clean-up crew comprised of just three employees, and when she is out that frequently, it creates a real hardship on the crew. She insists, however, that she has a right to medical leave. Would this be a protected absence under OFLA and FMLA? Can we deny the leave if it is unduly disruptive to our operations?*

ANSWER: Based on the information you have given, it is likely that you are required to grant Lila's request for intermittent leave for alcohol treatment. In addition, this issue may involve not only OFLA and FMLA, but the Americans with Disabilities Act.

First, you are correct that your company is covered by both OFLA and FMLA, since you meet the state threshold of having 25 or more employees in Oregon and the federal threshold of having 50 or more employees in the U.S. Also, Lila has worked for you full-time for several years, and that means that she more than meets the Oregon and federal requirements for leave eligibility. Therefore, Lila can take up to 12 weeks of protected leave if she has a qualifying illness or event.

Alcoholism qualifies as a "serious health condition" under FMLA and OFLA, as long as the absence is for treatment of her alcoholism and not for absences relating to the actual use of alcohol, such as being "hung over" on Monday morning.

Both OFLA and FMLA provide that employees needing intermittent leave must make a reasonable effort to schedule their leave to minimize disruptions to the employer's operations. You could ask Lila to attend a later counseling session, if one were available or, with Lila's consent, your company could temporarily place her in an alternative position that is equivalent in pay and benefits until her intermittent leave is completed.

As for your concern about Lila's absence and the resulting hardship on her crew, undue hardship is not a defense under OFLA or FMLA as it is under the Americans with Disabilities Act (ADA), and leave cannot be denied on that basis. However, because alcoholism is considered a disability under the ADA, that defense might be available if this absence was not also covered under OFLA/FMLA.

EMPLOYER QUERY: CHRONIC CONDITIONS

EMPLOYEE'S MIGRAINE HEADACHES MAY CONSTITUTE "SERIOUS HEALTH CONDITION"

QUESTION: *When an employee has a migraine headache and misses just one day of work at a time, is this considered a serious health condition under family leave laws?*

ANSWER: It may be. Migraine headaches often fall into the "chronic condition" category under OFLA and FMLA. Companies covered by these laws must allow eligible employees leave for migraines that require periodic visits for treatment by a health care provider and occur over an extended period of time.

Under the leave laws, the definition of "serious health condition" includes absences for inpatient care, terminal illnesses and illnesses that result in an incapacity of more than three calendar days and require continuing treatment by a health care provider. However, chronic conditions such as migraines are also considered a serious health condition, even though they are typically episodic in nature and do not require continuous blocks of leave from work.

You should track qualifying intermittent absences according to the number of hours your employee misses from work. When a full-time employee with a chronic migraine condition is out for just one day of work, you can designate the absence as eight hours of family leave. Full-time employees who work 40 hours per week are entitled to 480 hours (or 12 weeks) of OFLA and FMLA leave in qualifying situations.

Your company has the right to require medical certification to verify that your employee's condition qualifies as a serious health condition.

Asthma, diabetes, and epilepsy are examples of other conditions that may qualify as chronic serious health conditions.

EMPLOYER QUERY: MISCARRIAGE

ANY PERIOD OF INCAPACITY RELATED TO PREGNANCY QUALIFIES FOR LEAVE

QUESTION: *We have a female employee who suffered a miscarriage and missed two days of work. Since she was not incapacitated for more than three days, is her absence covered under family leave laws?*

ANSWER: Yes. Assuming that your organization is covered under OFLA and FMLA and that your employee has worked for you long enough and for enough hours to be eligible, she may take protected leave for any period of incapacity related to pregnancy or childbirth. This would include an absence due to a miscarriage.

Neither OFLA nor FMLA require that pregnancy-related leave last more than three days to qualify. Pregnant employees may take leave intermittently in various circumstances, including absences for routine prenatal care visits and periods when bed rest or a reduced work schedule is needed because of pregnancy complications.

EMPLOYER QUERY: FERTILITY TREATMENTS

LEAVE REQUEST FOR FERTILITY TREATMENT MAY BE COVERED UNDER FMLA/OFLA

QUESTION: *We have a male employee asking for intermittent medical leave because he and his wife are seeing doctors in an effort to conceive a child. Do employees have the right to take time off work to be treated for infertility?*

ANSWER: Yes, in some cases, but it depends on the size of your business and the specific health conditions and treatments involved.

The laws that may entitle your employee to time off for fertility treatments include the federal Family and Medical Leave Act (FMLA), the Oregon Family Leave Act (OFLA), the Americans with Disabilities Act (ADA), and Oregon disability accommodation laws.

If you have 50 or more employees in the U.S., you are covered by FMLA, and if you have 25 or more employees in Oregon, you are covered by OFLA. The ADA applies if you have 15 or more employees, and the Oregon disability statutes apply if you have 6 or more employees.

Assuming that you are covered under all of these laws, you will need to determine whether your employee or his spouse have a qualifying "serious health condition" entitling the employee to as much as 12 weeks of family medical leave, or whether your employee has a "disability" that may entitle him to protected time off as a reasonable accommodation.

Infertility and its various treatments may qualify as a "serious health condition" under the leave laws, if the condition or treatments fit into one of categories included in the OFLA/FMLA definitions of "serious health condition." When OFLA- and FMLA-qualifying conditions exist, the laws permit intermittent leave as medically necessary.

Determining whether particular conditions qualify for OFLA or FMLA leave requires a case-by-case analysis, and you may choose to require medical certification from your employee and his spouse to help make the determination.

Simple insemination procedures will generally not fall under the "serious health condition" definition, except when there are complications resulting in inpatient care or a prolonged incapacity. Although infertility itself does not usually incapacitate an employee from performing work functions and is not usually a life-threatening problem, the conditions that cause infertility and some of the treatments may qualify as serious health conditions.

For example, surgery may be required to treat an underlying medical condition such as endometriosis, to assist sperm flow, to remove a tumor or cyst, or to repair damaged reproductive organs. Absences for such treatments qualify under OFLA and FMLA when they involve an overnight stay in a hospital or incapacitate your employee or his spouse for more than three consecutive calendar days and involve two or more treatments with a doctor.

Even after a successful conception, your employee may qualify for OFLA and FMLA leave if his wife requires bed rest or time off work because of a threatened pregnancy loss or history of miscarriage.

A number of federal courts have also held that infertility meets the ADA definition of "disability" because it is a physical impairment that substantially limits one or more major life activities. These decisions are based largely on the U.S. Supreme Court's determination in 1998 that reproduction is a major life activity. This means that allowing an employee time off to pursue infertility treatment may, in some cases, be a reasonable accommodation that employers must make.

EMPLOYER QUERY: BEREAVEMENT

COMPANY POLICY DETERMINES EMPLOYEE'S RIGHT TO BEREAVEMENT LEAVE

QUESTION: *One of our employees left for Chicago three weeks ago to care for her father, who has been in the terminal stages of cancer. We granted this time off and designated the absence as family leave because our company is covered by OFLA and FMLA and because Karen has been with us full-time for several years. Karen just notified us that her father passed away this week. She says that she wants to take an additional three weeks off to recover from the emotional strain she has been under, to comfort other grieving family members, and to deal with her father's estate.*

We would like to help Karen through this difficult time, but we do need her back as soon as possible . What are our legal obligations? Does she have the right to bereavement leave, and would this count as family leave?

ANSWER: : Family leave laws usually do not apply after the death of an employee's relative and it is your company policy that determines the employee's right to additional time off.

Eligible employees may take up to 12 weeks of family leave per year in qualifying situations, including caring for a family member with a serious health condition. Under both state and federal leave laws, the "serious health condition" definition includes the terminal stages of a disease. Since you have employed Karen full-time for over a year, she is eligible to take up to 12 weeks off during her father's terminal illness under OFLA and FMLA.

However, neither OFLA nor FMLA covers bereavement leave. As strange as it may sound, death is not a "serious health condition" covered by these laws. This means that, although the first three weeks of Karen's absence were covered, family leave and its legal protections ceased when her father died because a qualifying condition no longer existed.

It is up to your company to decide whether you will offer bereavement leave, how much you will allow, and whether the time will be paid. Bereavement leave, like sick or vacation leave, is a fringe benefit and your company policy sets the rule. Some employers, for instance, allow employees to access sick leave for two or three days of bereavement.

OFLA and FMLA do not cover the time Karen spends settling her father's affairs, but you are free to allow such time off under your policy.

Family leave laws do sometimes come into play in bereavement scenarios, but not simply by virtue of a family member's death. For example, Karen herself may qualify if, after her father's death, she is diagnosed with clinical depression that incapacitates her. She would then have the right to use some or all of her remaining nine weeks of family leave for her own serious health condition. Or, if Karen's mother had a similar diagnosis after her husband's death, Karen could take leave to care for her.

HOW IS THE "LEAVE YEAR" DETERMINED?

Under both OFLA and FMLA, an employer must designate its 12-month "leave-year" and may choose one of the four options outlined in the chart below:

The Four "Leave Year" Options

Calendar Year	Employers using the calendar year must allow workers up to 12 weeks of qualifying leave between January 1st and December 31st.
Fixed Year	Employers may select any fixed, recurring 12-month leave year, e.g. a fiscal year, a year starting on an employee's anniversary date, or another fixed year, such as June 23rd to June 23rd.
"Rolling Forward" Year	Employers apply a rolling forward year by measuring forward from the particular employee's first family leave. After the first 12-month leave year, a new rolling forward year is determined by the date the employee next uses family leave.
"Rolling Backward" Year	Employers using a rolling backward year measure back 12 months to determine if additional leave is available to an employee. An employee is entitled to use any balance of the 12 weeks which has not been used during the preceding 12 months.
	OAR 839-009-0210(19), 29 CFR §825.200(b).

Practice Tips:

- The employer must use the same leave year option for all employees and for all types of family leave.
- If an employer fails to designate a leave year, the OFLA leave year automatically becomes the calendar year and the FMLA leave year automatically becomes whichever option provides the most beneficial outcome for the employee.
- When employees take parental leave, employers should use their regular 12-month period for calculating the leave entitlement, keeping in mind that parental leave must be completed within 12 months following the birth or adoption/placement of a foster child.
- The benefit to an employer of using a rolling year is that it reduces the ability of an employee to "stack" periods of leave. The downside of using a rolling year method is that it is more time-consuming to administer.

Case Example: Dan's employer uses the calendar year as its family leave year. Dan has a serious health condition and takes 12 weeks of leave from October 8, 2009 through December 31, 2009. Dan's serious health condition continues, and he wants to take an additional 12 weeks of leave in the new calendar year, from January 1 through March 25, 2010. If the employer uses a rolling back or rolling forward year, Dan will not have any family leave available on January 1, 2010, and in fact will have to wait until October 8, 2010 before more protected leave will be available to him. However, if Dan's condition is covered under the Americans with Disabilities Act, the employer might still be required to give time off as a reasonable accommodation if it does not pose an undue hardship.

EMPLOYER QUERY: THE "LEAVE YEAR"

EMPLOYER SHOULD DESIGNATE ITS 12-MONTH LEAVE YEAR

QUESTION: *: We have an employee, Eric, who has used 12 weeks of family medical leave over the past year because his wife has been very sick. We want to be as generous as possible in granting time off, but this employee is in a management position and it is fairly difficult for us to accommodate his frequent absences. In addition, Eric insists that he has yet another 12 weeks of leave available starting this month because he began taking his family leave on an intermittent basis exactly one year ago.*

Since we have 54 employees in Oregon, we know that we have to follow the family and medical leave laws. We also know that an eligible employee can take up to 12 weeks of family leave in a year. But how do we measure that year? What 12-month period are we required to use for purposes of tracking an employee's leave?

ANSWER: It depends on your company policy. It is the employer's responsibility to select and designate a 12-month leave year for family leave purposes. OFLA and FMLA provide four options.

The first leave year option that an employer may select is to simply use the calendar year. This means that Eric would be able to use 12 weeks of protected leave for the serious health condition of his wife during any January 1 to December 31 period. Then, if he has worked enough hours during that year, he will have a new 12 weeks of leave available in his "leave account" as of January 1 of the next year. The second option is for the employer to use a different fixed year such as your company's fiscal year.

Unlike the first two options, the last two are not fixed 12-month periods. Under the third option, the employer may use a "rolling forward" year that begins on the first day the employee uses leave, and continues for a year from that date. Finally, the employer may choose to use a "rolling back" year in which the employer looks back over the last 12 months to determine how much leave has been used and whether any time is still available to the employee.

Whether Eric has more leave available as of this month depends on which leave year method you have selected. However, be aware that if you have not designated a leave year, both OFLA and FMLA will choose one for you! Under OFLA, the "default" year is the calendar year. Under FMLA, the, employer must use whichever of the four leave year options provides the best results for the employee. That is why it is certainly in your best interest to decide for yourself how you want to designate the leave year, and to advise employees of your selection in your written policies.

EMPLOYER QUERY: LEAVE YEAR AND PARENTAL LEAVE

PARENTAL LEAVE FOR ADOPTIONS PERMITTED UNDER OFLA, FMLA

QUESTION: *We have an employee who adopted a child last year and took parental leave for 12 weeks — from May 9 to August 1, 2009. We use a "rolling back" leave year, and this same employee just adopted a second child on January 31, 2010. Is she eligible for another 12 weeks of parental leave at this point?*

ANSWER: No. You could choose to grant the additional time off under your company policy, but because of the rolling leave year method your company uses, the earliest time at which this employee could be eligible for another 12 weeks of legally protected parental leave would be May 9, 2010.

Under OFLA and FMLA, an employee who has worked for you long enough becomes eligible to take 12 weeks of protected family leave during each 12-month leave year. Under OFLA and FMLA, employees may take time off work for a variety of covered absences, including parental leave to care for and bond with a newborn child, a newly placed foster child, or a newly adopted child.

An eligible employee may use up to 12 weeks of parental leave during the first year after the birth, placement, or adoption of a new child. Parental leave must generally be taken in one continuous block of time, unless the employer chooses to allow it intermittently.

Employers must select a "leave year" method for family leave tracking purposes. There are four options: calendar year, different fixed year, rolling forward year, or rolling back year. If your company used the calendar year method, it's likely this employee would have been eligible for another 12 weeks of family leave as of January 1, 2010.

However, under the rolling back method your company uses, when you roll back one year from January 31, 2010, the date your employee apparently wants to begin a new leave, you learn that the employee has already used up her 12 weeks of protected leave during the last 12 months. That is why she will not have any more protected leave available until May 9. After that time, she can begin using up to 12 weeks of parental leave for the second adopted child. She would need to complete that parental leave by January 31, 2011, one year after the date of adoption.

SECTION 3

NOTICE, BENEFITS AND MEDICAL VERIFICATION

Employee Notice Requirements

Under both OFLA and FMLA, employees are required to notify employers that they need to take family leave and to provide some information about the condition for which they are taking or propose to take leave, depending on whether the leave is foreseeable or unforeseeable. The chart below describes the employee notification requirements in OFLA and FMLA

How Much Notice Must Employees Give Before Taking Leave?

NATURE OF LEAVE	OFLA NOTICE REQUIRED BY EMPLOYEE	FMLA NOTICE REQUIRED BY EMPLOYEE
Foreseeable Leave	Employers may require up to 30 days advance written notice. Employee must follow employer's policy.	An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember.
Foreseeable Leave Less than 30 Days in Advance	If 30 days notice is not possible, employees must give as much notice as is practicable. Any written notice requirements should be flexible.	The employee must give notice as soon as practicable considering circumstances - within one or two business days of when the need for leave is known. The determination of when is practicable must take into account individual facts and circumstances.
Unforeseeable or Emergency Situations	Employees are required to give oral or written notice within 24 hours before or after starting leave. Employer may require written notice within three days after the employee's return to work.	It should generally be practicable for the employee to provide notice of unforeseeable leave within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.

chart continues

Consequence for Failure to Give Timely Notice of Foreseeable Leave	Employers may reduce employee leave by up to three weeks or take disciplinary action consistent with the employer's policy	Employers may delay coverage until up to 30 days after notice was received.
	OAR 839-009-0250.	29 CFR §825.302 - .304.

Practice Tips:

- In emergencies, notice may be provided by the employee or any other person providing information on the employee's behalf, such as a family member.
- No "magic words" are required under OFLA or FMLA. The employee need only describe the situation that exists. It is then the employer's obligation to inquire further to obtain enough information to determine whether a qualifying situation exists.
- It is prudent to provide at least some minimal training to employees so that they understand their obligation to provide notice and understand why the employer is required to inquire about the reasons for their absences.
- In emergency situations where leave is unanticipated, OFLA states that employers may require employees to provide written notice within three days after returning to work.
- As part of their leave tracking efforts, employers may choose to require employees to complete a leave request form before taking OFLA or FMLA leave. Note that this type of form is not required, but it may aid front-line supervisors in communicating key information to the human resources staff that often track and designate family medical leave.
- An employer may waive employees' FMLA notice requirements.

EMPLOYER QUERY: EMPLOYEE NOTICE REQUIREMENT FOR FORESEEABLE LEAVE

QUESTION: *We are an OFLA/FMLA covered employer. How much information do our employees have to give us when requesting foreseeable leave?*

ANSWER: FMLA requires employees seeking foreseeable leave to provide, at a minimum, at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. When applying for FMLA the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under FMLA or even mention FMLA. When an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. 29 CFR §825.302(c).

Under FMLA, if an employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee must explain the reason why such notice was not practicable if the employer requests an explanation. 29 CFR §825.302(a).

Under OFLA, a covered employer may require an employee requesting foreseeable leave to include an explanation of the need for leave. The employee is not required to specify that the request is for OFLA leave. OAR 839-009-0250(1).

Under both OFLA and FMLA, an employer may require the employee to provide medical verification of the need for foreseeable leave, except for parental leave. OAR 839-009-0260(1)(9), 29 CFR 825.305(a).

Under OFLA, an employer may only require verification for sick child leave after the third occurrence or third day during a leave year. OAR 839-009-0260(13) The employer must pay the cost of the verification not covered by insurance or another benefit plan.

As with all other similar regulations, OFLA/FMLA covered employers must apply the regulation most beneficial to the employee's circumstances when leave is under both OFLA and FMLA.

EMPLOYER QUERY: EMPLOYEE NOTICE REQUIREMENT FOR UNFORESEEABLE LEAVE

QUESTION: *We are an OFLA/FMLA covered employer. How much information do our employees have to give us when requesting unforeseeable leave?*

ANSWER: FMLA requires employees requesting unforeseeable leave to provide sufficient information for an employer to reasonably determine whether FMLA applies to the leave request. An employee is not required to expressly assert rights under FMLA or even mention FMLA. Calling in "sick" without providing more information is not considered sufficient notice to trigger an employer's FMLA obligations. 29 CFR §825.303(b).

OFLA requires employees requesting unforeseeable leave to describe the situation that exists that has created the need for the leave.

As with all "similar" regulations, OFLA/FMLA covered employers must apply the regulation most beneficial to the employee's circumstances when leave is under both OFLA and FMLA.

EMPLOYER QUERY: INJURED WORKER NOTICE REQUIREMENTS

QUESTION: *We are an OFLA covered employer. How much notice must an injured worker give before taking OFLA leave?*

ANSWER: Effective January 1, 2008, an OFLA-eligible employee who files a workers' compensation claim for a work-related injury or illness which is accepted as a disabling claim need not give additional written or oral notice to the employer that he or she is commencing a period of OFLA leave when the employee refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary. OAR 839-009-0250(10)

EMPLOYER QUERY: EMPLOYEE NOTICE REQUIREMENT FOR EXTENDING OFLA LEAVE

QUESTION: *How much notice must an employee give before taking more OFLA leave than originally authorized?*

ANSWER: 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. OAR 839-009-0250(1)(d).

EMPLOYER QUERY: EMPLOYEE NOTICE – PARENTAL LEAVE

EMPLOYER IS ENTITLED TO NOTICE WELL AHEAD OF FAMILY LEAVE

QUESTION: *We have an employee who has just told us he plans to take nine days of parental leave, beginning this week, to be with his newborn daughter. This is our busiest time of the year, and the employee gave us absolutely no warning that he would be missing work. We have a policy requiring 30 days written notice of an employee's intent to take family leave. Since he knew the baby was coming, wasn't he supposed to provide us advance notice? What are our options as an employer?*

ANSWER: OFLA provides that an employer may require employees to give the employer at least 30 days written notice before commencing family leave. FMLA requires employees to provide at least 30 days advance notice when the need for family leave is foreseeable based on an expected birth, foster placement or adoption. The same rules apply if your employee or his family member has a planned medical treatment for a serious health condition. When 30 days' advance notice is not possible and family leave is foreseeable, OFLA "encourages" employees to give as much advance notice as possible, whereas FMLA generally requires notice within two business days of when the need for leave is known.

In cases where there is a premature birth, unexpected adoption or foster placement, or medical emergency, the notice requirements are more lenient. OFLA requires the employee, or another person on his behalf, to provide oral notice to the employer within 24 hours of the commencement of the leave. In contrast, FMLA provides that "an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." If the leave is covered under both laws, you must follow the standard most generous to the employee.

Assuming that your employee's parental leave was foreseeable and that he failed to give you 30 days notice, the leave laws allow you several options. If you are only covered by OFLA, you can reduce the employee's leave entitlement by three weeks as a penalty. This means that you could limit your employee to nine weeks of protected OFLA leave rather than the 12 weeks eligible employees are otherwise entitled to take.

That penalty will not have much of an effect in your particular scenario, since your employee is only planning to take nine days of leave. If you are an OFLA/FMLA-covered employer, you are not allowed to reduce the leave entitlement. However, FMLA permits you to delay the start of the employee's leave by 30 days from the date on which he provided notice. Another option you may choose is simply to apply your company's disciplinary measures as you would with any employee who fails to follow your reporting rules. Given the confusion between the different OFLA and FMLA penalties, this may be the most manageable choice for you.

If you are an employer covered by OFLA and FMLA, you must conspicuously display required state and federal leave posters in your workplace. These posters inform employees of their rights and obligations under the leave laws, including the requirement to provide notice to employers. If you do not have the required posters in your workplace, not only can you be subject to fines, but you are also prohibited from penalizing an employee who fails to provide you notice of taking leave. Under certain circumstances, FMLA posting may be done electronically instead of by using posters. When posted electronically, all employees and applicants must have access to the information. 29 CFR §825.300(a)(1). FMLA-covered employers must also include FMLA's general notice in an existing employee handbook or other written materials concerning leave rights. 29 CFR §825.300(a)(3).

Keep in mind that the leave laws do not require employees to formally apply for family leave or to give notice by using a particular form. No magic words are required, so your employee need not mention "OFLA" or "FMLA" or even say "family leave." Instead, it is sufficient if an employee reports to management the reason that he will be missing work. When an employee calls in to say, "I won't be in today because my daughter is home from school with a sore throat," or "I'm going to need the rest of the week off because my wife is in the hospital with appendicitis," it is then up to management to recognize that the absence is OFLA or FMLA qualifying and to designate and track the leave accordingly.

You may require the employee to complete leave paperwork under your company policy, but the only form that is mandatory under the leave laws is the FMLA designation notice that you provide to an employee each time a FMLA leave begins. 29 CFR §825.300(d)(1). OFLA has no similar provision.

EMPLOYER QUERY: RECOURSE FOR EMPLOYEE'S FAILURE TO PROVIDE PROPER NOTICE

EMPLOYER MAY IMPOSE SANCTIONS IF EMPLOYEE FAILS TO GIVE PROPER NOTICE OF FORESEEABLE LEAVE

QUESTION: *What if an employee fails to provide advance notice of a family medical leave absence when it was anticipated and foreseeable?*

ANSWER: Both OFLA and FMLA allow the employer to impose penalties or take disciplinary actions in this situation. Under OFLA, an employer may take these actions only if the employer has posted the required BOLI Family Leave Act notice or the employer can otherwise establish that the employee had actual knowledge of the notice requirement. Under FMLA, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or employee distribution.

Under FMLA, when the leave was clearly foreseeable to the employee 30 days in advance of the leave, employers may require up to 30 days advance notice for foreseeable leave and may delay FMLA leave until 30 days after notice was received. 29 CFR §825.304. Under OFLA, employers may reduce the total leave entitlement by up to 3 weeks or may take disciplinary action consistent with employer's policy when an employee fails to give proper notice of foreseeable leave. OAR 839-009-0250(4)(a)(b).

How does an employer resolve this conflict? When the leave qualifies under OFLA only, the employer may follow the OFLA rule and reduce the leave entitlement by three weeks. When the leave qualifies under FMLA only, the employer may follow the FMLA rule and delay the taking of leave. However, when the leave qualifies under both OFLA and FMLA, the OFLA regulations indicate that the employer may either delay the start of the leave or apply normal discipline rules, depending on which of these options is "most beneficial to the employee's individual circumstances." OAR 839-009-0250(9).

Another option provided in the OFLA regulations is for the employer to simply follow its normal disciplinary policies that apply when employees violate the employer's reporting rules. This type of discipline must be consistent with the employer's policy for similar violations of comparable rules. OAR 839-009-0250(4)(b).

Employer Notification & Designation Requirements

Under both OFLA and FMLA, employers are subject to notice and designation requirements when an employee requests family leave, or the employee begins an unforeseeable leave. Those requirements are summarized below:

OFLA	FMLA	LEAVE IS CONCURRENT OFLA AND FMLA
When an employee requests OFLA leave, or when the employer acquires knowledge that an employee's leave may be for an OFLA-qualifying reason, the employer must notify the employee within five business days whether the employee is eligible and qualifies to take OFLA leave, absent extenuating circumstances. All OFLA absences for the same qualifying reason are considered a single leave event and employee qualification as to that reason for leave does not change during the applicable 12-month period unless the reason is no longer qualifying. OAR 839-009-0250(5)	When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for a FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days of the request, absent extenuating circumstances. All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period. 29 CFR §825.300(b)(1)	Follow FMLA
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. The notice 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. The written notice 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. OAR 839-009-0250(5)(a)(b)	If the eligibility notice states that the employee is not eligible for FMLA leave, the notice must state "at least one reason why the employee is not eligible." 29 CFR §825.300(b)(2)	OFLA/FMLA covered employers follow FMLA regulation.

chart continues

OFLA contains no similar provisions other than to post information on OFLA rights.	Each time a FMLA eligibility notice is given to an employee, the employer must provide a written "Rights and Responsibilities" notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet those obligations. 29 CFR §825.300(c)	OFLA/FMLA covered employers follow FMLA regulation.
When an employee requests OFLA leave, or when the employer acquires knowledge that employee's leave may be for an OFLA-qualifying reason, the employer must notify the employee within five business days whether the employee is eligible and qualifies to take OFLA leave absent extenuating circumstances. 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. OAR 839-009-0250	When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason, the employer must give the employee a written notice stating whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. If the employer determines that the leave will not be designated as FMLA-qualifying, the employer must notify the employee of that determination. 29 CFR §825.300(d)	OFLA/FMLA covered employers follow FMLA regulation.
OFLA has no similar requirement	If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice, unless the employer's handbook or other written policies clearly state that requirement. The employer must still provide oral notice no later than the time the designation notice is given. 29 CFR 825.300(d)(3)	OFLA/FMLA covered employers follow FMLA regulation.

chart continues

An employer may request additional information to determine that a requested leave qualifies for designation as OFLA leave, except in cases of parental leave or sick child leave (no medical verification may be required until after three occurrences). OAR 839-009-0250(1)(b).	An employer's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson. If an employer does not have sufficient information about the reason for the employee's use of leave, the employer should ask the employee for more information to ascertain if the leave is potentially FMLA-qualifying. Once the employer acquires knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must provide a designation notice as provided in 29 CFR §825.300(d). 29 CFR §825.301(a).	OFLA/FMLA covered employers follow FMLA regulation.
	An employer may retroactively designate leave as FMLA leave with appropriate notice to the employee provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. An employer and employee may mutually agree that leave qualifying for FMLA leave be retroactively designated as FMLA leave. 29 CFR §825.301(d).	
OFLA has no similar requirement.	If, when an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. 29 CFR §825.300(b)(3)	Follow FMLA as to leave that would be covered under FMLA.

Practice Tips:

- In all circumstances, it is the employer's obligation to obtain enough information from the employee or the employee's spokesperson to determine if leave does qualify under OFLA or FMLA, to designate leave that does qualify, and to notify the employee of the leave designation and whether the leave is paid or unpaid.
- Employees are not required to specifically state that they intend to use leave under OFLA or FMLA and may not always spontaneously provide enough information for the employer to determine if the leave qualifies under these laws.
- An employee who calls in sick without providing further information will not be considered to have provided sufficient notice to trigger an employer's obligation under OFLA.
- Upon the employer's request, the employee must provide enough explanation for the employer to make the appropriate designation.
- Leave may be denied if the employee fails to explain the reasons. If there is any dispute about leave designation or the use of paid leave, it should be resolved through discussions between the employer and employee. Such discussion and the decision must be documented. 29 CFR §825.301(c)

Contents of FMLA "Rights and Responsibilities Notice"

Each time a FMLA eligibility notice is given to an employee, the "Rights and Responsibilities" notice must be given as well. The "Rights and Responsibilities" notice must be translated if a significant portion of the employer's workforce is not literate in English. 29 CFR 825.300(a)(4) That notice must include the following information:

- The leave may be designated and counted against the employee's annual FMLA leave entitlement, if qualifying; and the notice must also specify the applicable 12-month period for FMLA entitlement;
- The leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying and the applicable 12-month period for FMLA entitlement;
- Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so;
- The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
- Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments;
- The employee's status as a "key" employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;

- The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave. 29 CFR §825.300(c)

Provisional Leave Designations

In some cases, the employer may know the reason for leave but may not have enough information to confirm that the absence qualifies under OFLA or FMLA. Additionally, medical certification may have been requested but not received. In such cases, an OFLA employer may provisionally designate an absence as OFLA leave until sufficient information is received to make a determination. OAR 839-009-0250(1)(c). Prior to 2009, FMLA also allowed provisional designation. That provision has been eliminated.

When Employer Learns of Qualifying Reasons After Leave Has Begun

In some cases, an absence is taken for reasons that do not qualify as FMLA leave, but circumstances later change. For example, an employee may suffer injuries while on vacation leave, or an employee who takes sick leave for a cold may end up with a serious health condition such as bronchial pneumonia.

In the first example, any leave used from the date of the accident may be designated as FMLA leave. In the second example, when an existing condition becomes a serious health condition while the employee is absent, the entire absence may be counted as FMLA leave. In both examples, the employee must be notified as soon as the employer learns of the FMLA-qualifying reason for the absence.

Employers May Use Department of Labor Prototype Notice to Employee

The U.S. Department of Labor has developed a form (WH-381) that employers may use to meet the notice requirements of FMLA. That form is available for download in the "Forms" section of the Department's website at: www.dol.gov.

EMPLOYER QUERY: FMLA NOTICE TO EMPLOYEE

EMPLOYERS STILL MUST PROVIDE FMLA NOTICE DESPITE SUPREME COURT DECISION

QUESTION: *I read that the U.S. Supreme Court issued a decision on the Family and Medical Leave Act about an employer's failure to designate leave. What does the case mean for employers?*

ANSWER: The case you are referring to is *Ragsdale v. Wolverine World Wide, Inc.*, decided by the U.S. Supreme Court on March 19, 2002. This case marked the first time that the Supreme Court

has weighed in on the federal Family and Medical Leave Act of 1993 (FMLA), and the Court was sharply divided (5–4).

At issue in *Ragsdale* was a particular regulation issued by the U.S. Department of Labor (DOL) that set a penalty for an employer's failure to timely designate an employee's FMLA leave. The Court determined that the DOL had exceeded its authority in enacting this particular regulation (29 CFR 825.700(a)) and declared the regulation invalid.

FMLA applies to employers who have 50 or more employees working anywhere in the United States and allows protected time off for eligible employees who have a serious health condition, have a family member with a serious health condition, or have a newborn, newly-adopted, or newly-placed foster child. When an employee gives notice of a qualifying family leave event, the employer normally has two business days - absent extenuating circumstances - to provide a written designation notice to the employee.

The written notice must advise the employee of various rights and responsibilities in connection with FMLA, including whether the employee is eligible for leave, whether the leave will count against the 12-week FMLA entitlement, whether the employee must provide medical certification, whether the employee must use paid sick or vacation time during the FMLA period, how often the employee must check in with the employer, and whether the employer will require a fitness for duty certificate upon the employee's return.

The FMLA rule in question provided that employers who failed to designate the leave as FMLA could not retroactively count the leave against the employee's 12-week entitlement. The result was that an employee would be fully protected during the leave, but would still have an untouched 12 weeks of leave available to her. The FMLA leave could continue indefinitely until the employer "started the clock" by issuing the proper designation notice.

It is that penalty — the automatic continuation of FMLA leave — that the Supreme Court declared invalid. Essentially, the Court determined that as long as the employee's absence is otherwise FMLA-compliant, the employer should be able to count the time as FMLA leave, and the employee is not entitled to more than 12 weeks of protected leave in a single 12-month period.

It is important to note that *Ragsdale* does not eliminate the employer's obligation to promptly designate FMLA leave in writing. The difference is that the penalty may not be quite as steep for employers who inadvertently fail to issue a designation. Courts will now assess on a case-by-case basis whether the employee was actually harmed by the failure to issue the notice. For instance, did the employee still have his or her group health insurance continued as required under FMLA? Was the employee improperly disciplined for the FMLA-qualifying absence? Did the employee still have job protection and reinstatement rights as required by the law?

Oregon employers with 25 or more employees in the state must also follow the Oregon Family Leave Act (OFLA). OFLA now requires a similar type of formal written eligibility and qualification notice as FMLA. OFLA covered employers must now advise eligible employees whether their leave will be counted against the OFLA 12-week entitlement. OAR 839-009-0250(5).

Medical Certification for Serious Health Condition Leave

Under OFLA and FMLA, employers can require employees to provide medical verification or certification of the serious health condition for which the employee requests family leave. These provisions contain detailed requirements and a number of changes were made to FMLA in the most recent amended regulations. The chart below summarizes and compares some of the more important provisions of each law.

OFLA	FMLA
An employer may require medical verification from a health care provider of an employee's need for leave if the leave is to care for a family member with a serious health condition, to recover from or seek treatment for the employee's serious health condition, or for sick child leave (only after the employee has taken more than three days of leave). ORS 659A.168. The employer may require the employee, in the case of foreseeable leave, to provide medical verification of the need for OFLA leave before the leave starts. OAR 839-009-0260(1)	An employer may require that an employee's leave to care for an employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. 29 CFR §825.305(a)
An employer must provide the employee with written notice of any requirement to provide medical verification of the need for leave and the consequences for failure to do so. OAR 839-009-0260(3)	Employers should request certification when the employee gives notice of the need for leave or within five business days afterwards. Employers may request certification at a later date if the employer has reason to question the appropriateness of the leave or its duration. 29 CFR §825.305(b)
OAR 839-009-0260(4) requires the employee to provide medical verification "within 15 days of the employer's request for verification" if the employee cannot give 30 days notice.	Employees must provide "complete and sufficient" certification to the employer within 15 calendar days of the request. 29 CFR §825.305(c). The medical facts must be sufficient to support the need for leave and may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation for treatment, or any other regimen of continuing treatment. 29 CFR §825.306(a)(3)
If an employer determines the employee is not eligible for OFLA because the medical verification is incomplete or insufficient, the written notice of ineligibility must state what additional information is required to make the verification complete or sufficient. OAR 839-009-0250(4)(b).	If a requested certification is incomplete or insufficient, the employer must give the employee seven days to cure the deficiencies. If the employee fails to cure the deficiencies, the employer may deny the taking of FMLA leave. 29 CFR §825.305(c)

chart continues

OFLA has no similar provision and is silent on serious health conditions that last beyond a single leave year	An employer may require the employee to provide a new medical certification in each subsequent leave year when the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year. 29 CFR §825.305(e)
OFLA employers may require the employee to provide "medical verification of the need for leave." OFLA employers can use DOL's medical verification forms.	FMLA regulations specify the content of the medical certification an employer can require an employee to provide and DOL has created two optional forms for use in obtaining medical certification, including second and third opinions. In all cases, the information on the form must relate only to the serious health condition for which the current need for leave exists. 29 CFR §825.306. The U.S. Department of Labor has provided prototype medical verifications (Forms WH-380E and WH-380F) that you can use for this purpose, and you can download those documents in the "Forms" section at www.dol.gov.
OFLA has no similar provision and is silent on this issue.	If an employee is on FMLA/ worker's compensation benefits or FMLA/disability paid leave, the employer may ask for medical information it is entitled to under worker's compensation and disability provisions and can use that information to determine the employee's entitlement to FMLA leave. 29 CFR §825.306(c)
OFLA has no similar provision and is silent on this issue.	If an employee's serious health condition may also be a disability under the ADA, FMLA does not prevent the employer from following the procedures for requesting information under the ADA and any information received may be used in determining the employee's entitlement to FMLA-protected leave. 29 CFR §825.306(d)
OFLA has no similar provision because OAR 839-009-0260(8) allows the employer's health care provider, but not the employer, to contact the employee's health care provider.	An employee is not required to provide the employer with an authorization to allow the employer to directly communicate with the health care provider, but in all instances in which certification is requested, it is the employee's responsibility to provide complete and sufficient certification and failure to do so may result in the denial of FMLA leave. 29 CFR §825.306(e)

chart continues

OFLA only allows the employer, with the employee's permission, to have its own health care provider contact the employee's health care provider in order to clarify or authenticate an OFLA certification. OAR 839-009-0260(8).	An employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification if the medical certification submitted by the employee is not complete and sufficient, after the employer has given the employee an opportunity to cure any deficiencies. The employer must use a health care provider, a human resources professional, a leave administrator, or a management official, but cannot use the employee's direct supervisor. "Authentication" is defined as requesting verification that the information on the medical certification was completed by the health care provider. "Clarification" is defined as contacting the health care provider "to understand the handwriting on the medical certification or to understand the meaning of a response." DOL's commentary to this regulations states that this limits employers to asking the health care provider to read the handwriting on the certification or asking the meaning of a response. HIPAA applies when a health care provider shares medical information with the employer. If an employee fails to provide the employer with the authorization to clarify the certification with the health care provider and does not otherwise clarify the certification, the employer may deny the taking of FMLA if the certification is unclear. The authorization must be valid under the HIPAA Privacy Rule. 29 CFR §825.307(a)
OFLA allows for second and third opinions, but has no similar provision for a consequence to an employee who does not cooperate in authorizing the release of medical information related to the serious health condition to be used by the health care provider who is providing a second or third opinion for the purpose of medical verification. The employer is required to provide the employee with a copy of any second or third opinions within five business days of the employee's request.	An employer who has reason to doubt the validity of a medical certification may, at the employer's expense, require a second opinion or third opinion if the first and second opinions differ. If the employee fails to authorize his or her health care provider to release all relevant information pertaining to the serious health condition at issue, if requested by the health care providers designated to provide the second or third opinions, the employer may deny leave. 29 CFR §825.307(b)

chart continues

When the employee or a family member needs to obtain medical verification in a foreign country, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. When a medical verification by a health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request. OAR 839-009-0265	When the employee or a family member develops a serious health condition in another country, the employer must accept medical certification, and second and third opinions, from a health care provider who practices in that country. When a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation upon request. 29 CFR §825.307(f)

Practice Tips:

- Under OFLA, an employer may require the employee to provide medical verification for: (1) the employee's own serious health condition; (2) a family member's serious health condition; or (3) sick child leave for the non-serious health condition of a child requiring home care.

- An employer may not request verification for sick child leave for the first three occurrences during the 12-month leave year, but may do so according to its policy beginning with the fourth day or occurrence of sick child leave and every subsequent occurrence during the year. Second opinions may not be required in these instances.

- Medical verification may be required before leave begins when 30 days notice has been provided. The request for medical verification must be in writing.

- Medical verification may not be required for parental leave.

- Employers who choose to require OFLA or FMLA medical verification must pay for its cost to the extent it is not covered by insurance or other benefit plan.

- The employer must pay any "out of pocket" expenses for medical verification required as a condition of continuing employment. ORS 659A.306. The Bureau of Labor and Industries interprets the statute to include medical verification for family leave.

- Under OFLA and FMLA, if the employee has not provided at least 30 days notice, the employer must allow the employee at least 15 days to provide medical verification.

- It is advisable for employers to draft a policy that addresses how medical verification requests, forms, and responses will be handled.

- Employers must keep all medical information confidential and store it separately from personnel records.

EMPLOYER QUERY: MEDICAL VERIFICATION

EMPLOYER ENTITLED TO INQUIRE ABOUT LEAVE TO DETERMINE PROPER DESIGNATION

QUESTION: *: My doctor took me off work for two weeks because of stress and depression. I brought my supervisor a note releasing me from work and asked to use paid leave for the two-week period, since I have over 300 hours of accrued sick leave. My employer is demanding more specific information from the doctor and saying they will probably charge my absence as "family leave." I feel it's an invasion of my privacy to require more medical information when I've already provided a doctor's note. Can my employer legally count this time against me for family leave even though I only requested sick leave?*

ANSWER: Your employer doesn't have the right to invade your privacy when it comes to medical issues, but it does have the right to make medical inquiries whenever they are "job-related and consistent with business necessity." An employer covered by OFLA and FMLA is entitled to require sufficient medical verification to determine if your absence is for a qualifying family leave reason.

An absence related to stress and depression may or may not qualify as a "serious health condition" leave under OFLA and FMLA, depending upon whether you are incapacitated for more than three days, whether you must see a doctor two or more times, or whether the condition qualifies under another category such as a "chronic" condition.

If you do have a qualifying serious health condition, your employer is entitled to designate your absence as family leave and count the time towards your 12-week entitlement, even though you haven't specifically requested OFLA or FMLA leave. Although the family leave designation may seem like a punishment to you, it actually benefits and protects you in a number of ways.

When you are on a family leave, the employer may not count the absence against you or discipline you for excessive absenteeism. That is not necessarily the case when you are just taking sick leave, as employees can be disciplined or terminated for excessive sick absences or "abuse of sick leave." You also have reinstatement rights to your job at the end of family leave, and under FMLA you have the right to have your group health insurance coverage continued throughout the leave. Even though family leave is an unpaid leave, generally, you can use available paid leave concurrently with an OFLA or FMLA absence. In addition, as of January 1, 2008, employers are required to allow employees on OFLA to use any accrued sick leave for that purpose, even if they might not otherwise be eligible for sick leave under the employer's policy.

The U.S. Department of Labor has created a four-page medical verification form that employers may use to help determine whether an employee's medical condition qualifies as a serious health condition under FMLA. The doctor answers a series of questions on the form and indicates whether the individual's condition qualifies under any one of six categories. The employer is entitled to seek the information outlined on this form, but could be violating the Americans with Disabilities Act and invading your privacy if it asks questions that are not job-related and that go beyond the information necessary for medical verification.

Since the "serious health condition" definitions under OFLA and FMLA are very similar, employers can use the Department of Labor form for verification purposes for both laws.

EMPLOYER QUERY: MEDICAL VERIFICATION FORM

EMPLOYER MAY DEVELOP ITS OWN VERIFICATION FORM

QUESTION: *Are employers required to use the federal medical verification form?*

ANSWER: No. The Department of Labor's Forms WH-380E and Form WH-380F, as revised, are optional medical verification forms that include the pertinent medical information necessary to verify a serious health condition. Under FMLA, this is the only information that may be required. 29 CFR §825.306(b).

Employers may develop their own form, provided the information on the form relates only to the serious health condition for which the leave is requested.

Using the DOL forms is recommended, since asking questions beyond those listed on the form could constitute a violation of the Americans with Disabilities Act and Oregon's disability statutes, which only permit employers to make job-related inquiries consistent with business necessity. Those forms (Forms WH-380E and WH-380F) can be downloaded from DOL's website in the "Forms" section at www.dol.gov.

Of course, it is job-related and consistent with business necessity for an employer to determine whether to track and designate an absence as OFLA or FMLA qualifying. However, specific questions about the employee's symptoms, treatments and medications are usually not necessary to determine whether an event qualifies.

OFLA/FMLA covered employers and OFLA-only employers may use DOL's forms. Employers may develop their own company form using the DOL forms as a template.

EMPLOYER QUERY: TROUBLE OBTAINING VERIFICATION

LAWS PROVIDE CONSEQUENCES FOR EMPLOYEE'S FAILURE TO PROVIDE VERIFICATION

QUESTION: *Our business is covered under both OFLA and FMLA. In administering OFLA and FMLA, we have a recurring problem with employees who refuse to provide us medical verification when they take leave. How can we legally address this? Does the law permit us to discipline employees who refuse to provide proof that they have a serious health condition?*

ANSWER: Under both OFLA and FMLA, an eligible employee may generally take up to 12 weeks of protected leave during a 12-month leave year for various qualifying reasons. Once an employee gives you notice of the need for leave, OFLA and FMLA permit you to require medical verification.

Your request for medical verification must be made in writing. 29 CFR §825.300(c), 29 CFR §825.305(a), OAR 839-009-0260(1). Once you make your written request, the employee has 15 calendar days to return the completed medical verification, signed by the employee's health care provider or the family member's health care provider, if the leave is for a family member's medical condition. 29 CFR §825.305(b), ORS 659A.168(1). The 15 day requirement does not apply if "it is

not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification." 29 CFR §825.305(b). The U.S. Department of Labor has provided prototype medical verifications (Forms WH-380E and WH-380F) that you can use for this purpose, and you can download those documents in the "Forms" section at www.dol.gov.

Under FMLA, if an employee fails to provide certification in a timely manner in the case of foreseeable leave, an employer may deny FMLA coverage until the required certification is provided. 29 CFR §825.313(a). In the case of unforeseeable leave, if an employee fails to provide certification within 15 days of the request for certification, absent extenuating circumstances the employer can deny FMLA protections for the leave after the 15-day time period until a sufficient certification is provided; if the employee never produces the certification, the leave is not FMLA leave. 29 CFR §825.313(b).

Under FMLA, you are required to advise the employee of the consequences for failure to provide adequate verification at the time you make your written request for the verification. If the employee refuses to comply and never provides the verification, the leave will not be protected, and you may treat the absence as unexcused under your attendance rules and deny the leave. 29 CFR §825.305(d)

Under OFLA, you are also required to advise the employee of the consequences for failure to provide adequate verification at the time you make your written request for the verification. OAR 839-009-0260(1).

EMPLOYER QUERY: RECERTIFICATION OF SERIOUS HEALTH CONDITION

EMPLOYERS CAN REQUEST RECERTIFICATION OF SERIOUS HEALTH CONDITION

QUESTION: *We are an OFLA/FMLA covered employer. One of our long-term employees has been taking intermittent leave for eight months now for migraine headaches. We requested and were given medical certification of the employee's need for leave when she started getting these headaches and are concerned that she is now taking leave for recreational purposes instead of migraine headaches. Can we request another doctor's note verifying that she has these headaches?*

ANSWER: Yes. Both OFLA and FMLA allow the employer to request recertification under specified conditions.

OFLA allows an employer to request subsequent medical verification, but no more often than every 30 days and only in connection with an absence by the employee except as provided in FMLA's regulations. Examples include when circumstances described by the previous medical verification have changed significantly or when the employer receives information that casts doubt upon the employee's stated reason for the absence. OAR 839-009-0260(8).

FMLA's regulations on this subject are considerably more detailed. 29 CFR §825.308. Like OFLA, FMLA provides that an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, with the following exceptions:

- The employee requests an extension of leave (29 CFR §825.308(c)(1);
- Circumstances described by the previous certification have changed significantly. For example, if the original medical certification stated that an employee would need leave for one to two days for migraines and the employee's absences for migraines have increased to four days (29 CFR §825.308(c)(2);
- The employer receives information that casts doubt on the employee's stated reason for the absence or the continued validity of the certification (29 CFR §825.308(c)(3);
- The medical certification states that the minimum duration of the serious health condition is more than 30 days, in which case the employer must wait until that minimum duration expires before requesting recertification unless the three exceptions stated above apply. 29 CFR §825.308(b)

Under FMLA, the employee must provide the requested recertification within 15 days of the employer's request unless not practicable under the employee's particular circumstances. The employer may ask for the same information as permitted for the original certification. The 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 and need for leave is consistent with such a pattern. 29 CFR §825.308(d)(e)

Under FMLA, if the employer requests recertification pursuant to a uniformly applied policy for similarly-situated employees when the employee seeks reinstatement for a serious health condition, the employer may delay restoration until the certification is provided. The employee may be terminated when the FMLA leave is concluded if the employee has not provided the requested certification by that time. 29 CFR §825.313(d)

Under FMLA, the employee must pay for the recertification unless the employer provides otherwise. The employer may not ask for a second or third opinion on recertification. (29 CFR §825.308(f)

EMPLOYER QUERY: CERTIFICATION FOR "QUALIFYING EXIGENCY"

EMPLOYERS CAN REQUEST CERTIFICATION FOR "QUALIFYING EXIGENCY"

QUESTION: *We are a FMLA covered employer. Our employee who has been employed fulltime for two years has asked for leave because his spouse, who is in the National Guard, has been called to active duty in Afghanistan. They have two children, ages 6 and 8. He wants to take a week's leave to attend a family support program sponsored by the American Red Cross for families that have a member being called into active duty in the Middle East. We want to support him, but wonder if this program really exists. Can we ask him to provide proof that the Red Cross is really putting on this program?*

ANSWER: Yes. To begin, we note that your employee's spouse is a "covered military member." 29 CFR §825.126(b). Under FMLA, the family support program you describe is a qualifying exigency that entitles your eligible employee to take FMLA leave. 29 CFR §825.126(a)(2)(ii). FMLA provides

that the first time an employee requests leave because of a qualifying exigency, an employer may require the employee to document the active duty orders by providing:

- A copy of the covered military member's active duty orders; and
- The dates of the covered servicemember's active duty service.

The employee only needs to provide this information once.

The employer may also require that the employee provide certification of the qualifying exigency that includes:

- Appropriate facts for which FMLA leave is requested that are sufficient to support the need for leave;
- The approximate date on which the qualifying exigency commenced or will commence;
- The beginning and end dates of the leave if the leave is continuous;
- If the leave is intermittent or on a reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency;
- If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting, and a brief description of the meeting.

An employer may contact a party with whom an employee is meeting to verify the meeting and nature of the meeting. An employer may also contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or call to active duty status. The employee's permission is not required for either of these contacts, but no additional information may be requested by the employer. 29 CFR §825.309.

EMPLOYER QUERY: CERTIFICATION FOR OREGON MILITARY FAMILY LEAVE

EMPLOYERS CAN REQUEST CERTIFICATION FOR OMFLA LEAVE

QUESTION: *We are an OFLA covered employer. Our receptionist has requested a week off to spend time with her husband who has been notified that his National Guard unit will be deployed to Iraq in two weeks. Can we require our employee to provide some proof of this deployment?*

ANSWER: Yes. Your employee must provide you with notice of her intention to take leave within five business days of receiving the official notice of an impending call or order to active duty. You may advise her in writing that she must provide a photocopy of the service member's orders to verify that the leave is for this purpose. OAR 839-009-0430

EMPLOYER QUERY: CERTIFICATION FOR "COVERED SERVICEMEMBER"

EMPLOYERS CAN REQUEST CERTIFICATION FOR "COVERED SERVICEMEMBER"

QUESTION: *We are a FMLA covered employer. Our millwright's son, a Marine on active duty in Iraq, recently suffered a traumatic head injury when a bomb exploded near the truck he was driving. We have been told that he is being treated at Walter Reed Hospital in Washington, D.C. Our employee wants to take 12 weeks of leave to care for his son. We understand that our employee has the right to take leave, but can we request medical certification of our employee's need for that much leave, and if so, what information can we request?*

ANSWER: Yes. When leave is taken to care for a covered servicemember with a serious injury, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. The employer may request the following information:

- Name of the servicemember for whom the employee is requesting leave to care;
- Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the member's branch, rank, and current unit assignment;
- Whether the health care provider is a Department of Defense ("DOD") health care provider, a Veterans Affairs health care provider, a DOD TRICARE network authorized health care provider, or a DOD non-network TRICARE network authorized health care provider;
- Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty;
- The approximate date on which the serious injury or illness commenced, and its probable duration;
- A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested;
- Information sufficient to establish that the covered servicemember is in need of care, and the length of time needed for care;
- If an employee requests intermittent or reduced schedule leave, whether there is a medical necessity for the covered servicemember to have such periodic care, and an estimate of the frequency and duration of the care;
- Whether there is a medical necessity for the covered servicemember to have unplanned medical care for circumstances such as episodic flare-ups of a medical condition and an estimate of the frequency and duration of the care;
- Whether the covered servicemember is assigned to a military medical facility as an outpatient, and the name of the medical treatment facility or unit;
- Whether the covered servicemember is on the temporary disability retired list; and

- A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

29 CFR §825.310.

DOL has developed an optional form (WH-385) that employees can use to obtain certification. Second and third opinions are not permitted.

Employee Reporting While on Leave and Intent to Return to Work

Under FMLA, an employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA) and to restore the employee cease. An employer's obligations continue if an employee indicates they may be unable to return to work but expresses a continuing desire to do so. If an employee finds that he or she needs to take more or less leave than originally anticipated, the employer may require that the employee give the employer notice within two business days of the changed circumstances where foreseeable. An employee may not be required to take more leave than necessary. 29 CFR §825.311.

Under OFLA, 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. ORS 659A.171(4), OAR 839-009-0270(7). If an employee gives unequivocal notice of intent not to return from OFLA leave, the employee is entitled to complete the approved leave, providing the original need for leave still exists. The employee is also entitled to maintain vacation, sick leave and health benefits. When the leave ends, the employer's OFLA obligations to restore the employee's position and restore benefits cease (subject to COBRA), and the employer is not required to hold a position vacant or available for the employee. OAR 839-009-0270(8).

Fitness for Duty/Return to Work Certification

OFLA and FMLA differ considerably in this area.

Under OFLA, an employer may require an employee who has been on leave for the employee's own serious health condition to present certification from the employee's health care provider that the employee is able to resume work. Certification may only be required pursuant to a uniformly applied practice or policy of the employer. The employer may not seek a second opinion. The employer must pay any out-of-pocket costs for the certification. ORS 659A.171(4)(a), OAR 839-009-0270(7).

FMLA contains the same basic requirements, but is much more detailed and has some major differences. Its key provisions are summarized below.

- The employer may have a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. 29 CFR §825.312(a).

- The employee has the same obligations to participate and cooperate in the fitness-for-duty certification as in the initial certification process. 29 CFR §825.312(a).

- The employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job if the employer provided a list of the essential functions of the employee's job with its initial designation notice and indicated in that notice that the employee's fitness-for-duty certification would have to address such ability. 29 CFR §825.312(b).

- No second or third opinions on a fitness-for-duty certification may be required. 29 CFR §825.312(b).

- The employee must pay for the cost of certification. 29 CFR §825.312(c).

- The original designation notice must tell the employee if the employer will require a fitness-for-duty certification to return to work. 29 CFR §825.312(d).

- If the employer provides the required notice, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under FMLA. 29 CFR §825.312(e).

- An employer is entitled to a certification of fitness to return to duty for intermittent absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took leave. 29 CFR §825.312(f).

Practice Tips:

- Require all employees on leave to provide periodic reports on their medical status and intent to return.

- The ADA requires such verification to be consistent with business necessity and limited to the employee's ability to perform the essential functions of the job.

Employee Benefits During Leave?

If employers offer paid leave benefits, employees may be entitled to use paid leave balances and benefits during a family leave. Otherwise, OFLA and FMLA leaves are unpaid unless otherwise provided by the terms of an agreement between the eligible employee and covered employer, a collective bargaining agreement, or an employer policy. Employers may require employees to use particular accrued leave balances and dictate the usage. The following chart summarizes the paid leave and other benefits that employees are entitled to during their OFLA and FMLA leaves.

TYPE OF BENEFIT	OFLA	FMLA
Vacation Leave	Employee must be permitted to use any accrued vacation (or any other paid leave that is offered in lieu of vacation) during an OFLA leave.	Employee must be permitted to use any accrued vacation during a FMLA leave.
Sick Leave	Employee must be permitted to use any accrued sick leave during an OFLA leave.	Employee may use accrued sick leave during FMLA leave if consistent with the employer's usual sick leave policy.
Accrual of benefits, seniority, and bonuses	Accrual of paid leave, benefits, seniority, and bonuses during OFLA leave is subject to employer's policy or collective bargaining agreement.	Accrual of paid leave, benefits, seniority, and bonuses during FMLA leave is subject to employer's policy.
Insurance benefits	Employer is not required to maintain employee's insurance benefits during leave. Employer must continue to pay its share of premiums during family leave. Employee may be required to continue paying his/her share of premiums. If employer pays any share of employee's premiums during the leave, employer may deduct 10% of employee's gross from each paycheck after the employee returns to work, until the amount is recovered. These amounts are not recoverable if employee fails to return to work because of circumstances beyond employee's control or for reasons that would ordinarily qualify as family medical leave. Upon reinstatement, employee must be guaranteed same level of coverage and benefits enjoyed prior to leave.	Group health plan coverage must be maintained during family leave, subject to any changes that affect other employees similarly situated. Employer must continue to pay its share of premiums during family leave. Employee may be required to continue paying his/her share of premiums. Upon reinstatement, employee must be guaranteed same level of coverage and benefits enjoyed prior to leave.
	OAR 839-009-0270, 839-009-0280.	29 CFR §§825.207 - 825.213.

Practice Tip:

Under both OFLA and FMLA, the employer may require the use of available paid vacation or sick leave and may determine the order in which paid leave is used. An example of this principle follows:

- Lauren, an employee of a local newspaper, takes 12 weeks of leave to care for her husband who acquired a serious health condition after consuming some salmonella-tainted vegetables. Lauren has six weeks of accrued vacation leave and two weeks of accrued sick leave. The newspaper's policy would normally allow Lauren to use sick leave for her spouse's illness. The newspaper company may require Lauren to use her six weeks of vacation pay before using her two weeks of sick leave. Lauren may take the remaining four weeks of family leave as leave without pay.

OAR 839-009-0280(3), 29 CFR §825.207

EMPLOYER QUERY: DESIGNATING LEAVES

EMPLOYEE'S FAMILY LEAVE AND PAID SICK LEAVE OFTEN OVERLAP

QUESTION: *Our employee Martha claims we are violating the law by forcing her to use family leave. Martha's mother is undergoing major surgery and the doctors say she will be confined to bed and recuperating for at least 12 weeks. Martha told us she intends to take the entire 12 weeks off to care for her mother.*

Our store is part of a national office supply chain and Martha has been with the company full-time for more than seven years. We know that means she has the right to take 12 weeks of leave. So we approved Martha's request for time off and told her we would count it as family leave.

That is where the dispute began. Our generous sick leave plan allows employees to use sick leave to care for family members, and Martha has over 500 hours of accrued paid leave. She insists she has the right to use the paid sick leave instead of family leave. What does the law say? Who decides when family leave is taken or whether it is paid leave?

ANSWER: As an employer, you are entitled to designate an absence as family leave as soon as there is a qualifying event. OFLA and FMLA only provide for unpaid leave, but when an employer offers paid leave benefits, the employees are entitled to use any accrued leave time for family leave purposes. Family leave often runs concurrently with various types of paid leave. Whether an employee can use paid leave during the family leave depends on the kind of leave and, to some extent, your company policies.

Martha has given you notice of a qualifying leave event — the serious health condition of her mother. She has the right to use 12 weeks of family leave for that purpose, and you have the right to designate this 12-week absence concurrently as OFLA and FMLA leave. OFLA and FMLA guarantee Martha protected time off to care for her mother, meaning that she cannot be disciplined for the absence and must be reinstated at the end of the leave.

Although family leave is not a paid leave, OFLA and FMLA permit an employee to use accrued paid leave during family leave. If Martha has accrued paid vacation leave or any other paid leave you offer in lieu of vacation leave, she is entitled to use that leave during her family leave. Additionally, Martha

is entitled to use her paid sick leave during her OFLA leave, regardless of your policy. Since your policy allows Martha to use sick leave for ill family members, you must allow her to use her paid sick leave during that type of family leave as well. Under FMLA, she may use her accrued paid sick leave as long as it is consistent with your regular sick leave policy. Your policy may require her to exhaust the paid leave.

It is not Martha's choice to save her family leave for some future date. Rather, it is your responsibility as an employer to track and designate family leave. Martha seems to think you are punishing her by counting this time as family leave. It may help if you explain to her that the family leave designation actually benefits her. Her absence will be legally protected, she will have reinstatement rights, and she will have the right under FMLA to continuation of her group health insurance for the entire leave period — guarantees which sick leave policies alone often do not provide.

EMPLOYER QUERY: EARNING BONUSES

EMPLOYER CANNOT USE FMLA LEAVE AS BASIS FOR DENYING ATTENDANCE BONUS

QUESTION: *Our company offers a bonus to employees with a perfect attendance record during the calendar year. If our receptionist, James, misses two weeks of work because of a family leave situation, do we still have to pay him this bonus?*

ANSWER: Yes, if your company is covered by OFLA or OFLA/FMLA covered. No, if your company is only covered by FMLA.

OFLA specifically provides that it is an unlawful practice for an employer to count OFLA leave against an employee in determining the employee's compliance with attendance policies or to count OFLA leave against an employee when determining eligibility for bonuses based on attendance. An employee is entitled to continue eligibility for a bonus based on attendance upon return from OFLA leave and may not be disqualified from an attendance bonus as a result of taking OFLA leave. OAR 839-009-0320(4).

In contrast, FMLA's amended regulations now 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, unless otherwise paid to employees on an equivalent leave status that does not qualify as FMLA leave. 29 CFR §825.215(c)(2).

FMLA also addresses bonuses paid on the achievement of a specified goal such as hours worked or products sold. If the employee has not met the goal due to FMLA leave, payment may be denied unless otherwise paid to employees on an equivalent leave status that does not qualify as FMLA leave. 29 CFR §825.215(c)(2).

SECTION 4

REINSTATEMENT

Employee Reinstatement Rights

Under OFLA and FMLA, employees who have taken family leave for any qualifying reason have reinstatement rights when their leave ends, with one major difference. The chart below explains those rights under each law.

OFLA	FMLA
An employee returning from OFLA leave, including intermittent and alternative duty leave, must be restored to position held when the leave commenced, even if it has been filled with a replacement worker. ORS 659A.171(1), OAR 839-009-0270(1)(2)	An employee returning from FMLA leave is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment, even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. 29 CFR §825.214
If the employee's former position has been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position. ORS 659A.171(1), OAR 839-009-0270(4). ■ An available position is a position that is vacant or not permanently filled. ■ An equivalent position is one that is the same as the former position in as many aspects as possible. ■ If an equivalent position is not available at the job site of the employee's former position, the employee may be offered an equivalent position within 20 miles of the job site of the employee's former position.	An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. 29 CFR §825.215. ■ The employee must be reinstated to the same or a geographically proximate worksite. If the employee's original worksite is closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. ■ The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule. ■ An employee cannot be induced by the employer to accept a different position against the employee's wishes. ■ The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

chart continues

The employee is not entitled to return to the former position if the employee would have been bumped even if OFLA leave had not been taken. ORS 659A.171(3)(b), OAR 839-009-0270(3). An employee on OFLA leave is subject to layoff the same as similarly situated employees not taking OFLA leave. OAR 839-009-0270(5)(c)	An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. 29 CFR §825.216(a)

Practice Tips:

- Anytime an employee's job has been eliminated while the employee was on OFLA family leave, the employer should be prepared to show that the job was eliminated for a legitimate business reason and not in retaliation for the employee having taken leave. Some examples of legitimate business reasons might be that a job is eliminated as part of a general downsizing program, or that the functions of the position have become unnecessary or superfluous.
- Upon return from OFLA leave, the employee is entitled to be reinstated to the former position, defined as the position held by the employee when the leave began, regardless of whether the job has been renamed, reclassified or filled during the employee's leave.
- Under OFLA, the returning employee has "bumping" rights to the original job, even if a replacement worker has taken the employee's position.
- Under FMLA, the employer has the option of placing an employee returning from FMLA leave to either the same position held when leave began or to an equivalent position.
- FMLA rules provide that an employer may deny reinstatement to "key employees" if such denial is "necessary to prevent substantial and grievous economic injury to the operations of the employer." A key employee is defined as a salaried employee who is among the highest paid 10 percent of all those employed by the employer within 75 miles of the employee's worksite. To determine which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). 29 CFR §825.217, §825.218.
- An employee who fraudulently obtains FMLA leave is not protected by FMLA's job restoration or maintenance of health benefits provision. 29 CFR §825.216(e).

When OFLA and FMLA Both Apply

FMLA allows an employee to be reinstated to either the same position or to an equivalent position, but OFLA does not allow an employer a choice in reinstatement opportunities for the employee. When OFLA and FMLA both apply, the employer must follow the stricter state standard and return the employee to the same position previously held, as long as that position still exists.

Additionally, the definition of "equivalent" is different under OFLA and FMLA. A position that does not meet the definition of "equivalent" under FMLA may nevertheless be considered equivalent under OFLA if it is the available position that most closely matches the employee's former job. For example, while a teacher is on family leave, the district eliminates his job due to a budget shortfall (legitimate business reason). The only available job is assistant director of student activities, for which the teacher is qualified but that has a much lower salary and fewer benefits. Under OFLA, the employee is entitled to be reinstated to an available, equivalent position, and the assistant director position will

qualify if it is the most similar to the teacher's former job. Under FMLA, there is no duty to reinstate the employee if the employee's job has been eliminated for a legitimate business reason. The employer must follow the more generous OFLA provision and reinstate the employee to the assistant director position.

OFLA also has no "key employee" concept, so employers covered under OFLA may not refuse to reinstate an employee on this basis, even in the rare situation when the individual qualifies as a "key employee" under FMLA. Although OFLA must be construed consistently with FMLA when the laws contain similar terms, OFLA is completely silent on the topic of "key employees." Therefore, employers may utilize this provision only for FMLA leaves that are not also covered by OFLA.

EMPLOYER QUERY: REINSTATEMENT RIGHTS

EMPLOYEE MAY LOSE REINSTATEMENT RIGHTS ON LIMITED-DURATION

QUESTION: *What if an employee was hired only for a specific project and that project terminates while the employee is off work on family leave?*

ANSWER: Under both OFLA and FMLA, if the project is completed in the employee's absence, the employer is under no obligation to reinstate the employee since the assignment would have ended regardless of the employee taking leave. ORS 659A.171(3)(b); 29 CFR §825.216(a).

EMPLOYER QUERY: LAYOFF AFTER REINSTATEMENT

RETALIATORY LAYOFF PROHIBITED

QUESTION: *Do I still have to reinstate an employee who, but for taking family leave, would otherwise be terminated or laid off?*

ANSWER: As long as the employer is not acting in retaliation for the employee having taken the leave, the reinstated employee may be held to the same standards as other employees, and may also be subject to the same layoff system or termination.

Of course, it is always somewhat risky to lay off or terminate an employee soon after the employee has engaged in any legally protected activity such as invoking family leave, since the timing of events may appear retaliatory to the employee, and, in the worse case scenario, to third parties such as administrative agency investigators or jury members. Therefore, it is prudent for an employer to seek legal advice in such situations.

The employer should also maintain good documentation of the nondiscriminatory criteria used to select employees for layoff, which could include seniority level, production level, job category, work shift, and a variety of other job-related factors.

EMPLOYER QUERY: NO-FAULT ATTENDANCE POLICIES

FAMILY LEAVE ABSENCES MAY NOT BE COUNTED AS DISCIPLINARY INCIDENTS

QUESTION: *Is it legal to have a "no-fault" attendance policy under which we terminate employees who reach a certain number of absences during the year?*

ANSWER: Generally, yes. However, if an employee's absence is a reasonable accommodation for a disability covered under the Americans with Disabilities Act or Oregon's disability laws , you should make an exception to your no-fault policy when granting the time off would be a reasonable accommodation. Similarly, when your employee misses time for conditions covered under OFLA or FMLA, you may not count these protected absences as a "point" or an "occurrence" that could lead to discipline. OAR 839-009-0320(4).

EMPLOYER QUERY: JOB ABANDONMENT

REINSTATEMENT OBLIGATIONS CEASE WHEN EMPLOYEE CLEARLY QUITS

QUESTION: *What if an employee on family leave gives notice that he or she does not plan to return to work?*

ANSWER: If an employee has given unequivocal notice of the intent not to return, the employer's obligation to reinstate the employee ceases. 29 CFR §825.311(b), OAR 839-009-0270(8).

Under FMLA, the employment relationship generally ends after the employee clearly abandons future employment. Under OFLA, the employee is entitled to complete the previously-approved OFLA leave, provided that the original need for OFLA leave still exists. The employee remains entitled to all the rights and protections under OFLA for the balance of the 12 weeks, including the right to use paid vacation or sick leave.

Practice Tip:

- Develop a reporting policy that requires employees to periodically report in during all types of leave, including family leave. This reduces the possibility of miscommunication as to what will happen when leave is over.

SECTION 5

COMPLIANCE AND ENFORCEMENT

Employer Posting Requirements

OFLA	FMLA
■ Covered employers must post a notice of OFLA requirements. Failure to post is an unlawful employment practice. ■ An OFLA poster must be displayed in every establishment of the employer in which employees are employed in an area that is accessible to and regularly frequented by employees. ■ An employer may not reduce an employee's available OFLA leave or take disciplinary action based on the employee's failure to follow the employer's or OFLA's notice requirements unless the employer has posted BOLI's required Family Leave Act notice or the employer can otherwise establish that the employee had actual knowledge of the notice requirement. ORS 659A.180, OAR 839-009-0250(7), OAR 839-009-0300.	■ FMLA poster must be displayed prominently where it can be readily seen by employees and applicants and at all locations where employees are employed, even if there are no eligible employees. ■ A civil penalty of $100 may be assessed for failure to post. ■ Electronic posting is sufficient if it otherwise meets all the posting requirements. ■ When the employer has eligible employees, the notice on the FMLA poster must also be in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, is such written materials exist, or by distributing a copy to each new employee upon hiring. This distribution may be accomplished electronically. ■ No disciplinary action may be taken against an employee, including delaying leave for failing to furnish advance notice, if the employer has failed to post. 29 CFR §825.300(a), 29 CFR §825.304(a).

Practice Tips:

- Employers with multiple worksites should post the required notices at each worksite, so that they are readily accessible to employees.
- When a significant portion of an employer's workforce is not literate in English, the employer must post the notice in a language in which the employees are literate. 29 CFR §825.300(a)(4).

OFLA/FMLA Unlawful Employer Practices

The chart below summarizes employer practices made unlawful by OFLA and FMLA

OFLA	FMLA
■ Failure to post BOLI's Family Leave Act notice. ■ Denying family leave to an eligible employee. ■ Retaliating or in any way discriminating against any person with respect to hire, tenure, or any other term or conditions of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave, or invoked any other provision of OFLA. ■ Counting OFLA leave against an employee in determining the employee's compliance with attendance policies. ■ Counting OFLA leave against an employee in determining eligibility for bonuses based on attendance. ■ Discharging, expelling, or otherwise discriminating against any person because the person has filed a complaint, testified or assisted in any proceeding in connection with the OFLA. ■ For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts in violation of the OFLA or to attempt to do so. ORS 659A.183, OAR 839-009-0300, OAR 839-009-0320	■ Failure to post a notice explaining FMLA's provisions. ■ Interfering with, restraining, or denying the exercise of or the attempt to exercise, any right provided by FMLA. ■ Discharging or in any other manner discriminating against any individual for opposing any practice made unlawful by FMLA. ■ Discharging or in any other manner discriminating against any individual because the individual: 1. has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to FMLA; 2. has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under FMLA; or 3. has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under FMLA. 29 U.S.C. 2615, 29 CFR §825.300

Who Enforces OFLA & FMLA?

OFLA	FMLA
OFLA is enforced by the Civil Rights Division of the Oregon Bureau of Labor and Industries, (971) 673-0761. Complaints must be filed within one year of the alleged violation. Aggrieved employees may also file a private lawsuit. Employees may file separate complaints with BOLI-CRD and USDOL. Technical Assistance for Employers is available at (971) 673-0824 or on the internet at http://www.oregon.gov/BOLI/ ORS 659A.870, OAR 839-009-0320(2)	FMLA is enforced by the Wage and Hour Division of the U.S. Department of Labor, (503) 326-3057. Complaints must be filed within two years, or three years if the alleged violation was willful. Aggrieved employees may also file a private lawsuit within two years after the last action which the employee contends was in violation of FMLA, or three years if the violation was willful. Employees may file separate complaints with BOLI-CRD and USDOL. 29 CFR §825.400, 29 CFR §825.401

How Do OFLA And FMLA Relate To Other Laws?

Injured Workers / Workers' Comp.	ADA / Disability Laws	OFLA / FMLA
ORS 659A.040 Covers employers of 6 or more employees. Prohibits discrimination or retaliation because a worker has used workers' comp. provisions. **ORS 659A.043** Covers employers of 21 or more employees: [On-the-job injury] + [compensable workers' comp. claim] + [full duty work release] = Reinstatement rights to original job (if it still exists). **ORS 659A.046** Covers employers of 6 or more employees: [On-the-job injury] + [compensable workers' comp. claim] + [partial/light duty work release] = Re-employment rights to an available, suitable job (if one exists).	The ADA covers employers of 15 or more employees. State disability law covers employers of 6 or more employees. Disability = a physical or mental impairment that substantially limits one or more major life activities. Qualified individual with a disability = a person who can perform the essential functions of the job with or without reasonable accommodation. Employer must make reasonable accommodations for a qualified individual with a disability, unless employer can show: undue hardship; or the employee is not qualified because she poses a "direct threat" to herself or others.	OFLA covers employers of 25 or more employees in Oregon; FMLA covers employers of 50 or more employees in the country. Eligible employees are entitled to 12 weeks of protected leave (in most cases) in any leave year for qualifying situations: employee's own serious health condition (including pregnancy disability); serious health condition of family member; parental leave; non-serious condition of child (OFLA only) Leave for spouse or domestic partner of a service member who has been called to active duty or on leave from active duty (OFLA only) Servicemember leave (FMLA only)

Practice Tips:

- OFLA/FMLA serious health condition leaves are often related to workers' compensation absences and disability leaves. When on-the-job injuries or disabilities meet the "serious health condition" criteria, leaves for such conditions may run concurrently with the 12 weeks of family leave -- except that OFLA leave does not include a period of absence occasioned by an OFLA-eligible employee who is unable to work because of a disabling compensable injury unless the OFLA-eligible

employee has refused a suitable offer of light duty or modified employment prior to becoming medically stationary. During the period of absence occasioned by a FMLA-eligible employee who is unable to work because of a disabling compensable injury, the FMLA-covered employer may designate the leave as FMLA leave when the injury is one that meets the criteria for a serious health condition.

- The ADA and Oregon disability statutes require reasonable accommodation of an employee's disability that may include leave without pay that extends beyond the 12 weeks provided by family leave laws.

- An employee who loses reinstatement rights under injured worker rules may still have OFLA/FMLA reinstatement rights at the conclusion of 12 weeks. Conversely, an employee who exhausts family leave while on a workers' compensation absence may still have reinstatement rights for up to three years under ORS 659A.043 or 659A.046.

EMPLOYER QUERY: EXHAUSTION OF FMLA

EMPLOYEE WHO DEPLETES FAMILY LEAVE ENTITLEMENT MAY HAVE OTHER RIGHTS

QUESTION: *We have an employee who is out on FMLA leave due to a knee replacement. His 12 weeks of protected leave will be up at the end of this month. However, according to the employee, his doctor says he will never be able to return to his job in our foundry because we melt steel at very high temperatures and the employee's knee will make it impossible to work in that environment. What is our obligation to this employee?*

ANSWER: The FMLA requires you to grant 12 weeks of protected leave when an eligible employee has a serious health condition, but it does not require you to change your employee's job duties or create a brand new job for him. If he is permanently unable to return to his job at the end of the FMLA leave, your reinstatement obligations under that law cease.

However, you do have to determine whether this employee has protection under other laws. For example, if his knee condition qualifies as a long-term or permanent disability under Oregon's disability statutes and the federal Americans with Disabilities Act (ADA), you are required to make a reasonable accommodation if the employee can perform the essential functions of his job without creating an undue hardship for the company.

In this case, the doctor may be saying your employee is permanently restricted from his job and cannot perform his duties even with accommodation. If so, the 9th Circuit Court of Appeals and BOLI have determined that an employer has a duty to enter into an interactive process with a disabled employee to determine if there is a reasonable accommodation that will enable the employee to perform the job duties. You may require that the employee provide you more formal medical verification from the doctor as to whether such an accommodation might be possible.

If it is clear that the employee cannot return to his job, even with accommodation, the ADA still requires you to see if you have another vacant job that the employee can perform with or without accommodation.

Also, if your employee's knee problems resulted from a compensable on-the-job injury, and he is released for full duty or modified work, Oregon civil rights laws afford him certain reemployment rights for up to three years from the date of injury.

EMPLOYER QUERY: OVERLAP OF LEAVE LAWS

EMPLOYEE'S ASTHMA-RELATED ABSENCE COULD BE COVERED UNDER SEVERAL LAWS

QUESTION: *I manage a jewelry store in a mall that is undergoing renovation. One of our employees is having asthma attacks and allergy problems because of the construction and dust in the building. She is completely unable to work, even though no one else at the store has been affected. The construction is scheduled to continue for several months. How long are we required to hold her job while she is out?*

ANSWER: It depends on which laws apply to your business and whether this employee qualifies for protection under any of them.

It is possible that your employee's condition is a permanent or long-term disability covered under the Americans with Disabilities Act (ADA) and Oregon's disability laws. Your business is covered under the ADA if you have 15 or more employees and under Oregon law if you have 6 or more employees.

If these laws apply, your obligation is to make a reasonable accommodation that may include granting a leave of absence and reinstating the employee to her original job. The length of such a leave is determined by what is reasonable for your business, when considering all the circumstances. This type of leave may be denied if you show the leave poses an undue hardship on the business. If there is an accommodation possible that does not involve leave and does not pose an undue hardship (such as providing special equipment or allowing her to work in another building), you must offer that to the employee.

It is also possible that this employee qualifies for protection under OFLA and FMLA. Your company is covered by OFLA if you have 25 or more employees in Oregon and by FMLA if you have 50 or more employees in the country. If the employee has worked long enough to become eligible for protected leave, and if her condition qualifies as a "serious health condition," she is entitled to take up to 12 weeks of protected leave. OFLA and FMLA both give her reinstatement rights at the conclusion of the leave.

Another possibility is that the employee's condition is an occupational illness. If she files a workers' compensation claim that is accepted, she may have rights to return to work. If she is medically released to perform her original job, she is entitled to be reinstated in that job if you have 20 or more employees. If she is disabled from performing the duties of her original job, she is still entitled to be reemployed to another position that is available and suitable if you have six or more employees. These rights may last for up to three years from the date of injury or onset of illness. It is important to remember that an employer is prohibited from counting leave taken for an accepted workers' compensation claim towards an employee's OFLA leave. OAR 839-009-0240(8)

Under all of these laws, you are entitled to request medical verification to help you determine the employee's rights. If none of these laws apply, then it will be up to your company leave policies to determine how long the employee's job remains open, so long as you apply those policies in a non-discriminatory manner.

SECTION 6

OREGON MILITARY FAMILY LEAVE ACT

Introduction

In 2009, the Oregon legislature passed the Oregon Military Family Leave Act (OMFLA). The purpose of the Act was to provide employees with protected time off from work to spend time with a spouse or domestic partner who has been called to active duty or notified of an impending call or order to active duty or who is on leave from active duty during a period of military conflict. This leave is counted as leave taken under the Oregon Family Leave Act (OFLA).

Who Is A Covered Employer?

OMFLA covers all public and private employers who employ 25 or more individuals in the State of Oregon for each working day during each of 20 or more calendar workweeks in the calendar year in which an eligible employee takes OMFLA leave, or in the calendar year immediately preceding the year in which an eligible employee takes OMFLA leave. OAR 839-009-0380(2).

Who Is An Eligible Employee?

An eligible employee is "an employee employed in the State of Oregon on the date OMFLA begins" and who:

- Work for an employer an average of at least 20 hours per week;
- Is the spouse or same-sex domestic partner of a member of the Armed Forces of the United States, the National Guard, or the military reserve forces of the United States. who has been:
  - Called to active duty, or
  - Notified of an impending call or order to active duty, or
  - Is on leave from active duty during a period of military conflict.

OAR 839-009-0370, OAR 839-009-0380(5)

Practice Tips:

- OFLA requires an eligible employee to work an average of 25 or more hours a week for at least 180 calendar days immediately preceding the date the leave begins, while OMFLA requires an employee to work at least 20 hours per week. Work need not occur solely in Oregon.
- There is no minimum number of days the employee must have worked for the employer to be eligible for the leave.
- If a service member is denied OMFLA leave for failing to satisfy the hours requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA, but not under OMFLA. OAR 839-009-0380(5)(c).

Purposes for Which Employees May Take OMFLA Leave

Covered employers are required to allow up to 14 calendar days of leave per order to active duty or notification of a leave from deployment. An eligible employee is the spouse or same-sex domestic partner of a member of the Armed Forces of the United States, the National Guard, or the military reserve forces of the United States who has been:

- Called to active duty, or
- Notified of an impending call or order to active duty, or
- Is on leave from active duty during a period of military conflict.

Length of OMFLA Leave

OMFLA leave is not required to be taken in one uninterrupted period, but may be taken intermittently. Some or all OMFLA leave may be taken before deployment after notification of an impending call or order to active duty, and some or all may be taken during leave from deployment. The 14 day entitlement is per deployment. If multiple deployments occur in an employee's OFLA leave year, the employee is entitled to use all OFMLA leave until the leave entitlement is exhausted.

The 14 days of unpaid leave are individual days which the employee would work if on the normal schedule.

Leave taken for OMFLA is counted against the employee's OFLA leave entitlement.

OMFLA Notice Requirements

An employee seeking OMFLA leave is required to give the employer 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 in situations where official notice is provided less than five days from commencement of the leave.

The employee must follow the covered employer's "known, reasonable and customary procedures for requesting any kind of leave."

The employer may require in writing that the employee provide a photocopy of the service member's orders. The employee must provide the required photocopy of the orders within a reasonable time after receiving the employer's written request. The leave may be provisionally designated as OMFLA leave pending receipt of the photocopy.

OAR 839-009-0430.

SECTION 7

LEAVE FOR VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSUALT OR STALKING

Introduction

In 2007, the Oregon legislature passed the Oregon Victims of Certain Crimes Leave Act, which has been codified as ORS 659A.270 to 659A.285. In 2009, the legislature changed the act to Leave for Victims of Domestic Violence, Sexual Assault or Stalking. The purpose of the Act is to provide employees with protected time off from work to deal with real life events arising from acts of domestic violence, sexual assault and stalking, and thereby prevent employees from having to make a choice between their employment and the very real need to protect themselves and their family members from physical and/or emotional harm. Leave for Victims of Domestic Violence, Sexual Assault or Stalking entitles eligible employees to take reasonable leave to address these circumstances and covers a substantial number of public and private employers in Oregon. In 2009 additional requirements were added regarding reasonable safety accommodation.

Who Is A Covered Employer?

Leave for Victims of Domestic Violence, Sexual Assault or Stalking covers all public and private employers who employ six 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 for Victims of Domestic Violence, Sexual Assault or Stalking, or in the calendar year immediately preceding the year in which an eligible employee takes Leave for Victims of Domestic Violence, Sexual Assault or Stalking. ORS 659A.270(1), OAR 839-009-0340(1).

A covered employer's obligations under Leave for Victims of Domestic Violence, Sexual Assault or Stalking extend to "successor employers" as defined in FMLA in 29 CFR §825.107. OAR 839-009-0365(2) Factors considered in determining if an employer is a successor in interest include:

1. Substantial continuity of the same business operations;
2. Use of the same plant;
3. Continuity of the work force;
4. Similarity of jobs and working conditions;
5. Similarity of supervisory personnel;
6. Similarity in machinery, equipment, and production methods;
7. Similarity of products or services; and
8. The ability of the predecessor to provide relief.

A determination of whether an employer is a "successor in interest" is not determined by the application of any single criterion listed above; rather, the entire set of circumstances is viewed in its totality.

Practice Tip:

The coverage definition is the same as for the Oregon Family Leave Act (OFLA) except OFLA requires an employer to employ 25 or more employees for coverage purposes.

Who Is An Eligible Employee?

An eligible employee is "an employee employed in the State of Oregon on the date Leave for Victims of Domestic Violence, Sexual Assault or Stalking begins" and who:

- has worked an average of more than 25 hours per week for at least 180 calendar days immediately preceding the date the employee takes Leave for Victims of Domestic Violence, Sexual Assault or Stalking; and
- is a victim of domestic violence, sexual assault or stalking, or is the parent or guardian of a minor child or dependent who is the victim of domestic violence, sexual assault or stalking.

ORS 659A.270(2), OAR 839-009-0340(2).

A "minor child" is a child who is under 18 and is a biological, adopted, foster, stepchild or a child with whom the employee is or was in an in loco parentis relationship and also includes the minor child of the employee's same sex domestic partner. OAR 839-009-0340(10).

A "dependent" is an adult dependent child substantially limited by a physical or mental impairment, or any adult over whom the employee has guardianship. OAR 839-009-0340(3).

When determining the number of days an employee has been employed, count number of days on the payroll and include all paid or unpaid time. Successor-in-interest situations count as continuous employment.

When determining the average number of hours an employee has worked, count actual hours worked following guidelines in the Fair Labor Standards Act, which sets out the federal wage and hour criteria on what types of activities are considered work time (see 29 CFR Part 785).

EMPLOYER QUERY: REEMPLOYED SERVICEMEMBERS/USERRA

EMPLOYERS MUST COUNT PERIOD OF UNIFORMED SERVICE IN DETERMINING EMPLOYEE ELIGIBILITY FOR LEAVE FOR VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT OR STALKING

QUESTION: *Our company operates a regional warehouse and has employed 40-65 persons in Oregon over the last three years. One of our fulltime forklift operators only worked for three weeks before he was recalled into active service as an Air Force mechanic in Iraq. Five months later, he was injured and received an honorable discharge. Immediately after his discharge, he returned to work for us and has been working continuously for four months. Now he wants to take leave to seek counseling for his 14-year-old daughter, who was recently the unfortunate victim of a sexual assault at school. We want to accommodate him, but what does the law require in this situation?*

ANSWER: The Leave for Victims of Domestic Violence, Sexual Assault or Stalking requires that "covered employers" in Oregon allow "eligible employees" to take reasonable leave to deal with circumstances arising from acts of domestic violence, sexual assault and stalking. You are a covered

employer because you have employed six or more persons in Oregon during the year in which need for leave arose or in the preceding year. He is an eligible employee because he is a fulltime employee whose daughter was a victim of sexual assault, and because he is requesting leave to seek counseling for her. We note that Leave for Victims of Domestic Violence, Sexual Assault or Stalking requires that an eligible employee must have "worked an average of more than 25 hours per week for a covered employer for at least 180 days immediately before the date the employee takes leave," which would seem to make your employee ineligible for Leave for Victims of Domestic Violence, Sexual Assault or Stalking. ORS 659A.270(2), OAR 839-009-0340(2). However, based on the federal Uniformed Services Employment and Reemployment Act ("USERRA"), Leave for Victims of Domestic Violence, Sexual Assault or Stalking provides an exception for employees following a period of uniformed service. OAR 839-009-0340(2)(a)(D). Under USERRA and Leave for Victims of Domestic Violence, Sexual Assault or Stalking, employers must count the days and hours the employee worked for them, as well as the days and hours the employee would have been employed by them had they not been engaged in military service, when determining employee eligibility for Leave for Victims of Domestic Violence, Sexual Assault or Stalking purposes.

Under Leave for Victims of Domestic Violence, Sexual Assault or Stalking, you must allow your employee "reasonable leave" and may only limit the amount of leave he takes if his leave creates an "undue hardship" on the company's business. ORS 659A.275, OAR 839-009-0350. You may require him to provide certification that his daughter was a victim of a sexual assault and he must follow your company's "known, reasonable, and customary procedures regarding periodic reporting" of his current status. ORS 659A.280, OAR 839-009-0350.

Practice Tips:

- OFLA requires an eligible employee to have worked an average of 25 or more hours a week for at least 180 calendar days immediately preceding the date leave begins, while Leave for Victims of Domestic Violence, Sexual Assault or Stalking requires an employee to have worked an average of more than 25 hours per week. Work need not have occurred solely in Oregon.
- If a service member is denied Leave for Victims of Domestic Violence, Sexual Assault or Stalking for failing to satisfy the days and hours requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA, but not under Leave for Victims of Domestic Violence, Sexual Assault or Stalking. OAR 839-009-0340(2)(a)(D).

Who Is A Victim Of Domestic Violence, Sexual Assault Or Stalking?

Domestic Violence	Sexual Assault	Stalking
A victim of domestic violence is: ■ A victim of abuse as defined at ORS 107.705; or ■ Any other person who has suffered financial, social, psychological or physical harm as a result of domestic violence committed against the victim, including a member of the victim's immediate family. ORS 659A.270(4), OAR 839-009-0340(14)(a)(b).	A victim of sexual assault is: ■ An individual against whom a sexual offense has been committed as described at ORS 163.305 to ORS 163.467 or 163.525; or ■ Any other person who has suffered financial, social, psychological or physical harm as a result of a sexual assault committed against the victim, including a member of the victim's immediate family. ORS 659A.270(5), OAR 839-009-0340(16)(a), (b).	A victim of stalking is: ■ An individual against whom stalking has been committed as described at ORS 163.732; or ■ Any other person who has suffered financial, social, psychological or physical harm as a result of stalking committed against the victim, including a member of the victim's immediate family. ORS 659A.270(6), OAR 839-009-0340(17)(a), (b)
In no event will alleged perpetrators of domestic violence, sexual assault or stalking be considered "victims" for purposes of Leave for Victims of Domestic Violence, Sexual Assault or Stalking		

A victim's "immediate family" includes spouses, domestic partners, parents, siblings, children (regardless of age), stepchildren (regardless of age), grandparents, or any person who had the same primary residence as the victim at the time of the domestic violence, sexual assault or stalking.

Practice Tips:

- Domestic Violence (ORS 107.705) Sexual Assault (ORS 163.305) and Stalking (ORS 163.732) are legally defined under the Family Abuse Prevention Act and/or in the Oregon Criminal Code.
- Incidents involving domestic violence, sexual assault and/or stalking are not time-barred for purposes of the need for the leave. In other words regardless of the date of the event, any qualifying employee is still eligible to take the leave when requested.

Purposes for Which Employees May Take Leave for Victims of Domestic Violence, Sexual Assault or Stalking:

Covered employers are required to allow eligible employees to take "reasonable leave" for any of the following purposes, all of which are related to incidents of domestic violence, sexual assault or stalking:

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, sexual assault or stalking.

2) To seek medical treatment for or to recover from injuries caused by domestic violence, sexual assault or stalking against 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, 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. Relocation includes:

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

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

ORS 659A.272, OAR 839-009-0345.

Practice Tip:

The types of services included on this list are general and broad. For example, types of services that might be included in the "legal" category include things like name and social security number changes, working with agencies who have removed children from an inappropriate environment because of domestic violence, sexual assault or stalking, etc. When in doubt, contact the Bureau for assistance.

Length of Leave for Victims of Domestic Violence, Sexual Assault or Stalking

Unlike OFLA and FMLA leave, an employee's entitlement to Leave for Victims of Domestic Violence, Sexual Assault or Stalking is not fixed at any specific period of time. Instead, employers are required to grant "reasonable" leave" to an eligible employee who seeks to take Leave for Victims of Domestic Violence, Sexual Assault or Stalking for a qualifying purpose. ORS 659A.272, OAR 839-009-0350.

OAR 839-009-0340(13) defines "reasonable leave" as any amount of leave that does not cause an "undue hardship" on the employer's business. "Undue hardship" is "a significant difficulty and expense to a business and includes consideration of the size of the business and the employer's critical need for the employee." ORS 659A.275(1), OAR 839-009-0350(1). A covered employer may limit the amount of Leave for Victims of Domestic Violence, Sexual Assault or Stalking an employee takes if it creates an undue hardship on the employer's business. ORS 659A.275(2), OAR 839-009-0355.

An employer may consider a number of factors in determining whether Leave for Victims of Domestic Violence, Sexual Assault or Stalking will cause an undue hardship to the employer's business. They include, but are not limited to:

- Length of the leave and relative cost to the business.
- Overall financial resources of the facility, number of employees, and the effect on expenses and resources or other impacts on the operation of the facility if the leave were granted.
- Overall financial resources of the employer, overall size of the business with respect to the number of its employees, and the number, type and locations of the employer's facilities,
- The type of operations conducted by the employer; including composition, structure and functions of the employer's workforce.

Practice Tip:

To determine what amount of leave is "reasonable," employers should focus on the purpose of the request, the length of time requested, and whether the length is sufficient to accomplish the intended purpose. Each request should be considered on a case-by-case basis according to the particular circumstances, the severity of domestic violence, sexual assault or stalking, and type of service needed.

Intermittent and Alternate Duty Leave

Leave for Victims of Domestic Violence, Sexual Assault or Stalking allows eligible employees to take leave in multiple blocks of time (intermittent leave) or on an altered or reduced work schedule. OAR 839-009-0360(1). It also allows employers to transfer an employee on intermittent leave or a reduced work schedule to an alternate position with the same or different duties, in order to accommodate the leave. OAR 839-009-0360(2). Such transfers are allowed when all of the following conditions exist:

- The employee voluntarily accepts the transfer without coercion;
- The transfer is temporary and lasts no longer than necessary;
- The position to which transferred must have equivalent pay and benefits;
- The transfer may be made only when there is no other reasonable option which allows the employee to access leave; and
- The transfer does not cause a chilling effect, does not discourage, or create an undue hardship for the employee using the leave.

An eligible employee transferred to an alternate position for the purpose of a reduced work schedule must be returned to the employee's former position when the employee notifies the employer that he or she is ready to return to that position.

Practice Tips:

- Limiting leave without being able to support an undue hardship claim could pose an increased liability risk for the employer and may, in the end, prove to be unlawful.

- Except for a circumstance in which an employee transfers to an alternate position for the purpose of a reduced work schedule, Leave for Victims of Domestic Violence, Sexual Assault or Stalking, unlike OFLA, includes no explicit statutory requirement that employers reinstate employees taking Leave for Victims of Domestic Violence, Sexual Assault or Stalking leave to their former position when the employee notifies the employer that the employee is ready to return to work. However, the language prohibiting discrimination under Leave for Victims of Domestic Violence, Sexual Assault or Stalking is more explicit than the nondiscrimination language in OFLA. Leave for Victims of Domestic Violence, Sexual Assault or Stalking provides, at ORS 659A.277: "It is an unlawful employment practice for a covered employer to deny leave 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 takes leave as provided in ORS 659A.272." Consequently, employers should carefully consider any plan to return the employee to any position other than the one from which the employee took Leave of Victims of Domestic Violence, Sexual Assault or Stalking, and make certain that their actions would withstand scrutiny under ORS 659A.277. In addition, employers should keep in mind that discrimination theory includes an analysis of whether an employee is treated differently than similarly-situated employees who take leave not covered under Leave for Victims of Domestic Violence, Sexual Assault or Stalking.

Leave for Victims of Domestic Violence, Sexual Assault or Stalking Notice Requirements

An employee seeking Leave for Victims of Domestic Violence, Sexual Assault or Stalking is required to give the employer reasonable advance notice of the employee's intention to take leave unless giving the advanced notice is not feasible. ORS 659A.280(1), OAR 839-009-0362(1).

When an employee is able to give advance notice, the employee must follow the covered employer's "known, reasonable and customary procedures for requesting any kind of leave." OAR 839-009-0362(3).

When taking leave in an unanticipated or emergency situation, an employee must give oral or written notice "as soon as is practicable." This notice may be given by any other person on behalf of the employee. OAR 839-009-0362(2).

Leave for Victims of Domestic Violence, Sexual Assault or Stalking Certification Requirements

Employers may require an employee seeking Leave for Victims of Domestic Violence, Sexual Assault or Stalking to provide certification that:
(1) the employee or the employee's minor child or dependent is a victim of domestic violence, sexual assault or stalking; and (2) that the leave is for a qualifying purpose set out in ORS 659A.272. ORS 659A.280(2), OAR 839-009-0362(4). The employee must provide the certification "within a reasonable time after receiving the covered employer's request." ORS 659A.280(3), OAR 839-009-0362(7). The employee is not required to provide certification unless the employer's request is

in writing. OAR 839-009-0362(7). While waiting for certification, the employee may provisionally designate the leave as covered under Leave for Victims of Domestic Violence, Sexual Assault or Stalking. OAR 839-009-0362(8).

Any of the following meets Leave for Victims of Domestic Violence, Sexual Assault or Stalking's certification requirement:

- A copy of a police report indicating the employee or employee's minor child or dependent was a victim of domestic violence, sexual assault or stalking. ORS 659A.280(4)(a), OAR 839-009-0362(5)(a).
- A copy of a protective order or other evidence from a court or attorney that the employee appeared in or was preparing for a civil or criminal proceeding related to domestic violence, sexual assault or stalking. ORS 659A.280(4)(b), OAR 839-009-0362(5)(b).
- Documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the eligible employee or the eligible employee's minor child or dependent is undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, sexual assault or stalking. ORS 659A.280(4)(c), OAR 839-009-0362(5)(c).

Practice Tip:

The employer must pay the cost of medical verification not covered by insurance or other benefit plan. ORS 659A.306

Extension of Leave

An employee on Leave for Victims of Domestic Violence, Sexual Assault or Stalking 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. When an authorized leave ends and an employee does not return to work, an employer having reason to believe the continuing absence may qualify as Leave for Victims of Domestic Violence, Sexual Assault or Stalking may request additional information. If the covered employer requests additional information, the eligible employee will provide the requested information as soon as is practicable. The covered employer may not treat a continuing absence as unauthorized unless requested information is not provided or does not support leave qualification. OAR 839-009-0362(9).

Confidentiality Requirements

All records and information kept by a covered employer regarding an eligible employee's leave under Leave for Victims of Domestic Violence, Sexual Assault or Stalking, including the fact that the eligible employee has requested or obtained leave under Leave for Victims of Domestic Violence, Sexual Assault or Stalking, are confidential and may not be released without the express permission of the eligible employee, unless otherwise required by law. ORS 659A.280(5), OAR 839-009-0362(10).

Practice Tip:

Before allowing anyone access to the employee's leave documents, the employer should be sure to obtain a release from the employee.

Reasonable Safety Accommodation

It is an unlawful employment practice to refuse to make a reasonable safety accommodation requested by an individual who is a victim of domestic violence, sexual assault or stalking, unless the employer can demonstrate the accommodation would cause an undue hardship on business operations. Employers must work with an employee who requests a safety accommodation. These accommodations could include a transfer, reassignment, modified work schedule, unpaid leave, changed work telephone number, changed work station, installed lock, implemented safety procedure or any other adjustment to the job structure, workplace facility or work requirement in response to actual or threatened domestic violence, sexual assault or stalking. Prior to making an accommodation, an employer may require the individual to provide certification that the individual is a victim.

Leave for Victims of Domestic Violence, Sexual Assault or Stalking – Paid or Unpaid?

Leave for Victims of Domestic Violence, Sexual Assault or Stalking is designed to be a leave without pay. However, factors that determine when the employer must grant the leave with pay include provisions outlined under collective bargaining agreements, or other employment contracts, agreements or policies that allow paid leave.

Eligible employees subject to the above mentioned agreements may use any paid accrued vacation leave or any leave offered in lieu of vacation during any Leave for Victims of Domestic Violence, Sexual Assault or Stalking qualifying leave. Generally the employer gets to choose the order in which the paid leave is taken unless specifically barred by collective bargaining agreement, policy, contract or other employment agreement entered into by the employer and employee.

Compliance and Enforcement

Under Leave for Victims of Domestic Violence, Sexual Assault or Stalking, it is an unlawful employment practice for an employer to:

- Refuse to hire an otherwise qualified individual because the individual is a victim of domestic violence, sexual assault, or stalking.

- 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 individual is a victim of domestic violence, sexual assault, or stalking.
- Count Leave for Victims of Domestic Violence, Sexual Assault or Stalking against an employee in determining the employee's compliance with attendance policies.
- Count Leave for Victims of Domestic Violence, Sexual Assault or Stalking against an employee when determining eligibility for bonuses based on attendance.
- Discharge, expel or otherwise discriminate against any person because the person has filed a complaint, testified or assisted in any proceeding in connection with Leave for Victims of Domestic Violence, Sexual Assault or Stalking.
- Aid, abet, incite, compel or coerce the doing of any of the acts in violation of Leave for Victims of Domestic Violence, Sexual Assault or Stalking or attempt to do so.

ORS 659A.277, OAR 839-009-0365.

Employees who believe they have been a victim of one of the unlawful employment practices listed above may file complaints alleging violations of Leave for Victims of Domestic Violence, Sexual Assault or Stalking with BOLI's Civil Rights Division. Complaints must be filed no later than one year from the date of the alleged harm. ORS 659A.820, OAR 839-009-0365.

Leave for Victims of Domestic Violence, Sexual Assault or Stalking's Relationship to Other Types of Leave

The purposes for which employees access Leave for Victims of Domestic Violence, Sexual Assault or Stalking may overlap with other statutorily required leaves or protected areas of the law. For example, an employee's need for Leave for Victims of Domestic Violence, Sexual Assault or Stalking may also be considered a serious health condition under both OFLA and FMLA. In those situations the employer may count the absences concurrently.

It is also possible that the need for Leave for Victims of Domestic Violence, Sexual Assault or Stalking may qualify for protection under the ADA, Oregon's disability discrimination laws, or Oregon's injured worker discrimination laws. For example, an employee of a covered employer who is a victim of a sexual assault and now suffers from post-traumatic stress disorder would qualify for Leave for Victims of Domestic Violence, Sexual Assault or Stalking and may also have a disability. If that assault occurred at work, the employee may also be an injured worker.

Practice Tip:

Employers should carefully examine these situations and look at the overall circumstances creating the need for leave to determine if the employee is entitled to protection or leave under any laws other than Leave for Victims of Domestic Violence, Sexual Assault or Stalking.

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