

**Leaves of Absence <sup>1</sup>**  
**Employment Law Seminar**

*By Stacey Mark*  
*Chair, Labor & Employment Group and*  
*Chair, Sustainable Practice Advisory Group*  
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<sup>1</sup> This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

Oregon employers are required to comply with an ever increasing number of laws protecting employees who take leaves of absence. Moreover, in most cases, it is the employer's obligation -- not the employee's -- to determine whether or not the absence is protected. Punishing an employee for protected leave, even if it is a technical violation, results in employer liability, regardless of the employer's good faith. Consequently, it is critical for employers and supervisors to understand when these laws are triggered, and how they are applied in practice.

The following is an overview of the basic requirements of the federal and Oregon leave laws currently applicable to Oregon employers.

## **I. FAMILY MEDICAL LEAVE**

Employer obligations under the Oregon Family Leave Act (OFLA)<sup>2</sup> and federal Family Medical Leave Act (FMLA)<sup>3</sup> are highly technical and time sensitive. Many of the questions that come up most frequently are addressed by specific regulations. While the full scope of the applicable regulations is too great to cover in this document, what follows are some of the "basics" applicable to OFLA and FMLA.

The extent to which FMLA and OFLA diverge can make administration of family medical leave policies quite complex. Further complicating both types of leave is the newly enacted Oregon Military Family Leave Act,<sup>4</sup> and certain qualifying leaves under Oregon domestic violence leave law,<sup>5</sup> which count against an employee's OFLA entitlement.<sup>6</sup> It is important to recognize that complying with one of these leave laws does not automatically result in compliance with the others. Accordingly, when employees are absent due to their own illness, the illness of a family member, in connection with a family member's military service, or to address issues relating to domestic violence, it is important to conduct a separate review of the leave policies covering each of these subjects to determine what rights and obligations apply.<sup>7</sup>

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<sup>2</sup> ORS 659A.150 to 659A.186; OAR 839-009-0200, *et seq.* Note that Oregon Military Family Leave, enacted in 2009, counts against an employee's annual OFLA entitlement, and may, in some cases, also count against an employee's annual FMLA entitlement.

<sup>3</sup> 29 USC §§ 2601, *et seq.*; 29 CFR Part 825 (revised 2008).

<sup>4</sup> ORS 659A.090-659A.099.

<sup>5</sup> ORS 659A.270 to 659A.285.

<sup>6</sup> OAR 839-009-0335, 839-009-0410. Note that leave provided as a safety accommodation under ORS 659A.290 does not count against OFLA leave. OAR 839-009-0335.

<sup>7</sup> Note that a number of different leave laws may apply to an employee who serves or has a family member serving in the military, including OFLA, FMLA, USERRA, Oregon Military Family Leave, Oregon Uniformed Service Leave, and State Militia Leave, which are covered in Sections 1, 2, 3, 11 and 12 of this memorandum.

➤ **Are you a covered employer?**

You are a covered employer under OFLA if you have 25 or more employees.<sup>8</sup> If you have 50 or more employees, you are also covered under FMLA.<sup>9</sup>

➤ **Is the employee *eligible*?**

Under OFLA:

The employee must be employed in the State of Oregon on the date the leave begins and:

For the purpose of parental leave, the employee must have worked for the employer for 180 calendar days immediately preceding the leave.<sup>10</sup>

For all other OFLA leave, including pregnancy disability leave, the employee must have worked an average of at least 25 hours per week during the 180 calendar days preceding the start of the OFLA leave.<sup>11</sup>

OFLA does not cover breaks in service. An employee who has previously qualified for and taken some portion of OFLA leave must ordinarily re-qualify as an eligible employee each time the employee begins additional leave within the same leave year.<sup>12</sup> However, there are several exceptions to this rule:

(1) An employee on leave for a serious health condition of the employee or family member need not re-qualify if the leave is taken for the same purpose (same individual, same health condition);

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<sup>8</sup> ORS 659A.153. Specifically, the statute provides that OFLA only applies “to employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken.”

<sup>9</sup> 29 USC § 2611(4).

<sup>10</sup> OAR 839-009-0210(6)(a).

<sup>11</sup> OAR 839-009-0210(6)(b). Note that under USERRA, 38 USC § 4301 *et seq*, employees reemployed following a military leave are entitled to be restored to the same benefits they had when their military service began, plus any seniority and seniority-based rights and benefits they would have attained if they had remained continuously employed. 20 CFR 1002.210 (an absence due to military leave is not considered a break in service). Denying OFLA leave based on the failure to meet eligibility requirements that would have been met but for the military service may violate USERRA, but it would not violate OFLA. OAR 839-009-0210(6)(c). An absence due to uniformed service under state law is not considered a break in service under OFLA, either, so if the employee was eligible for OFLA at the time the uniformed service began, the employee returning to work from uniformed retains the same eligibility status under OFLA. OAR 839-009-0210(6)(d).

<sup>12</sup> OAR 839-009-0240(11).

(2) A female employee granted pregnancy disability leave does not need to re-qualify for an additional 12 weeks of OFLA leave for any purpose; and

(3) An employee who has taken the full 12 weeks of parental leave does not need to re-qualify for up to an additional 12 weeks of sick child leave.<sup>13</sup>

Under FMLA:

The employee is employed in the United States and:

The employee has worked for the employer for at least 12 months;

The employee has at least 1,250 hours for the employer in the preceding 12 months; and

At least 50 employees are employed by the employer within 75 miles of the worksite where the employee works.<sup>14</sup>

To meet the 12 months service requirement, the 12 months need not be consecutive, but the break in service ordinarily must not exceed seven years.<sup>15</sup> In addition, employees who are reemployed following military service are entitled to credit toward the eligibility requirements for the period of military service.<sup>16</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

Under both OFLA and FMLA, employees may take family medical leave for their own serious health condition (including disabilities related to pregnancy and childbirth),<sup>17</sup> to care for a

<sup>13</sup> OAR 839-009-0240(11) (a), (b), and (c).

<sup>14</sup> 29 CFR 825.110(a).

<sup>15</sup> 29 CFR 825.110(b). Exceptions exist for employees who are reemployed following military service and where the employer has expressed in a written contract its intent to rehire the employee following a break in service. *Id.*

<sup>16</sup> 29 CFR 825.110(c)(2). There is some question as to whether the requirement that employers count periods of military service toward FMLA eligibility exceeds DoL's authority, as it grants eligibility rights not afforded by the statute. *See* 29 USC § 2611(2) (defining eligibility under FMLA). Under USERRA, an employee returning from military leave who would have met the eligibility requirements but for the military service and is denied FMLA leave may have a claim under USERRA but not under FMLA. 20 CFR 1002.210.

<sup>17</sup> Under OFLA, a "serious health condition" means an illness, injury, impairment or physical or mental condition that requires inpatient care; an illness, disease or condition that in the medical judgment of the treating health care provider poses an imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future, or requires constant care; or any period of disability due to pregnancy, or period of absence for prenatal care. ORS 659A.150(6); OAR 839-009-0210(20). Under FMLA, a "serious health condition" is "an illness, injury, impairment or physical or mental condition that

covered family member with a serious health condition, or for the birth or placement of a child for adoption or foster care. Under OFLA, sick child leave is also available (the child's illness need not qualify as a "serious health condition"). Under FMLA, leave is also available for qualifying exigencies related to a family member's military service and to care for certain family members in the military who sustain a serious injury or illness during covered active duty.

Identifying leave that may qualify as family medical leave is not always easy. While an employee must ordinarily make some reference to circumstances that potentially qualify for family medical leave to invoke protection under the law,<sup>18</sup> the employee does *not* have to request family medical leave by reference to the employer's policy, the law, or by using the words "family medical leave."<sup>19</sup> It is the *employer's* responsibility to determine whether the leave qualifies, designate the leave as qualifying, and notify the employee that the leave will be counted against the employee's annual family medical leave entitlement.<sup>20</sup> Consequently, once you are aware that any potentially qualifying circumstances exist, you should immediately provide the employee with notice of his/her eligibility and rights and responsibilities under your applicable family leave policies.

You should be thinking about family medical leave in any of the following circumstances:

- An employee reports that he/she or the employee's family member has a serious, life threatening, or terminal illness, needs surgery or hospital treatment; calls in sick for more than three consecutive days; or requests time off related to an ongoing medical condition or illness (OFLA/FMLA leave for a "serious health condition");
- An employee is pregnant and needs time off for prenatal care or pregnancy related illness (OFLA/FMLA "pregnancy disability leave");

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involves inpatient care \*\*\* or continuing treatment by a health care provider \*\*\*." 29 CFR 825.113(a), 825.114, 825.115. Both OFLA and FMLA regulations cover periods of incapacity due to chronic and long-term health conditions.

<sup>18</sup> See OAR 839-009-0250(1)(c) (calling in sick without providing more information is not sufficient notice to trigger an employer's obligations under OFLA); 29 CFR 825.302(c) (notice must contain enough information to make the employer aware of the employee's need for FMLA-qualifying leave and the timing and duration of the leave. When the employee has previously taken FMLA leave and requests additional leave due to a FMLA-qualifying reason, the employee must specifically reference the qualifying reason or the need for FMLA leave).

<sup>19</sup> OAR 839-009-0250(1); 29 CFR 825.302(c). Note, however, that under FMLA regulations, an employee who seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA leave must specifically reference the qualifying reason for leave or the need for FMLA leave. 29 CFR 825.302(c).

<sup>20</sup> 29 CFR 825.300(d); OAR 839-009-0250(5).

- An employee has a newborn, newly adopted, or newly placed foster child (or is making arrangements to adopt or provide foster care) (OFLA/FMLA “parental leave”);
- An employee takes time off to care for a sick child (OFLA “sick child leave”);
- An employee takes time off relating to the fact that the employee’s spouse, son, daughter, or parent is on active duty (FMLA “covered active duty leave”);
- An employee takes time off to care for a spouse, son, daughter, parent, or next of kin in the military with a serious injury or illness that was sustained or manifested during active duty (FMLA “service member family leave”).

Note that the definition of “family member” is different under OFLA and FMLA.

OFLA covers spouses, registered domestic partners, custodial parents, non-custodial parents, adoptive parents, foster parents, biological parents, parents-in-law, parents of registered domestic partners, grandparents and grandchildren of the employee, a person with whom the employee is or was in a relationship of *in loco parentis*, and the biological, adopted, foster or stepchild of the employee or the employee’s registered domestic partner.<sup>21</sup>

FMLA covers spouses, parents, persons with whom the employee is or was in a relationship of *in loco parentis*,<sup>22</sup> and biological, adopted, foster- and step-children. Notably, the FMLA does not cover parents-in-law, registered domestic partners and their parents and children, and employees’ grandparents and grandchildren.<sup>23</sup>

## Qualifying Conditions

Changes to FMLA and OFLA over the last two years resulted in some significant differences in the conditions and circumstances that qualify for leave under state and federal law.

- **What is a serious health condition?**

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<sup>21</sup> OAR 839-009-0210(7).

<sup>22</sup> Under both OFLA and FMLA, “in loco parentis” means in the place of a parent, having financial and day-to-day responsibility for the care of a child. No legal or biological relationship is required. OAR 839-009-0210(15); 29 CFR 825.122(c)(3).

<sup>23</sup> 29 CFR 825.112.

Both OFLA and FMLA allow employees to take leave for their own serious health condition that renders them unable to perform one or more essential functions of their job, and for the serious health condition of a family member.<sup>24</sup>

Under OFLA, “serious health condition”<sup>25</sup> means an illness, injury, impairment or physical or mental condition of an employee or family member:

- That involves *inpatient care* in a hospital, hospice or residential medical care facility. When a family member resides in a long-term residential care facility, leave must be granted only for the time spent moving or making arrangements for moving the family member from one facility to another, and providing transportation or other assistance required for the family member to obtain care from a physician, unless other qualifying circumstances apply.
- That poses an *imminent danger of death*, or is terminal in prognosis with a reasonable possibility of death in the near future;
- That requires constant or continuing care, such as home care administered by a health care professional;
- That involves a period of *incapacity*, which is the inability to perform at least one essential job function, or to attend school or perform regular daily activities for *more than three consecutive calendar days* and any subsequent required treatment or recovery period relating to the same condition. This incapacity must involve (1) two or more treatments by a health care provider; or (2) one treatment plus a regimen of continuing care;
- That results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes or epilepsy);
- That involves permanent or long-term incapacity due to a condition for which treatment may not be effective (e.g., Alzheimer’s, 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;
- That involves multiple treatments for restorative surgery or for a condition such as chemotherapy for cancer, physical therapy for arthritis, or dialysis for kidney

<sup>24</sup> OAR 839-09-0230(2); 29 CFR 825.112(a).

<sup>25</sup> OAR 839-009-0210(20).

disease that if not treated would likely result in incapacity of more than three days; or

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

Under FMLA, “serious health condition”<sup>26</sup> means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. “Continuing treatment” means any one or more of the following:

- A period of incapacity of *more than three consecutive, full calendar days*, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
  - (1) Treatment two or more times within 30 days of the first day of incapacity, unless extenuating circumstances exist; or
  - (2) Treatment on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider.<sup>27</sup>

“Treatment by a health care provider” means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity. Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period must be determined by the health care provider. “Extenuating circumstances” are “circumstances beyond the employee’s control that prevent the follow-up visit from occurring as planned by the health care provider.”<sup>28</sup>

- Any period of incapacity or treatment due to a chronic serious health condition.<sup>29</sup> A “chronic serious health” condition is one that:
  - (1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
  - (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

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<sup>26</sup> 29 CFR 825.113(a).

<sup>27</sup> 29 CFR 825.115(a).

<sup>28</sup> 29 CFR 825.115(a)(3).

<sup>29</sup> 29 CFR 825.115(c).

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

- Any period of incapacity due to pregnancy, or for prenatal care.<sup>30</sup>
- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, or the terminal stages of a disease). The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.<sup>31</sup>
- Any period of absence to receive multiple treatments (including any period of recovery from treatment) by a health care provider for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).<sup>32</sup>

The term “incapacity” means the inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment for the health condition, or recovery from the treatment.<sup>33</sup> “Treatment” includes, but is not limited to, examinations to determine if a serious health condition exists and evaluations of the condition. The term does not include routine physical, eye, or dental examinations. A “regimen of continuing treatment” includes, for example, a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that merely requires taking over-the-counter medications, bed rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment under FMLA.<sup>34</sup>

- **What is parental leave?**

Parental leave includes leave taken to care for the employee's newborn, newly-adopted, or newly-placed foster child under 18 years of age, or for a newly-adopted or newly-placed foster

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<sup>30</sup> 29 CFR 825.115(b).

<sup>31</sup> 29 CFR 825.115(d).

<sup>32</sup> 29 CFR 825.115(e).

<sup>33</sup> 29 CFR 825.113(b).

<sup>34</sup> 29 CFR 825.113(c).

child 18 years of age or older who is incapable of self-care because of a physical or mental impairment. It also includes leave time to effectuate the legal process required for placement of a foster child or the adoption of a child.<sup>35</sup>

Parental leave must be taken in one uninterrupted period, unless the employer otherwise agrees. In addition, it must be completed within 12 months of the birth, adoption or placement of the child. An exception must be made to allow parental leave to effectuate adoption or foster placement of the child. Such leave need not be taken in one, uninterrupted period with any additional parental leave.<sup>36</sup>

- **What is family leave?**

Family leave is available to care for a family member with a serious health condition.<sup>37</sup> The term “care for” includes providing physical and psychological care, filling in for others who are caring for the family member, and making arrangements for changes in care (such as transfer to a nursing home).<sup>38</sup> Physical care might be required where the family member is unable to care for his/her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself/herself to the doctor, etc. “Psychological care” includes providing psychological comfort and reassurance deemed beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care. In general, however, care must include the employee’s “participation in ongoing treatment” of the serious health condition.<sup>39</sup>

- **What is sick child leave (OFLA only)?**

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<sup>35</sup> OAR 839-009-0230(1); 29 CFR 825.112(a)(1) and (2); 29 CFR 825.121(a)(1). Under OFLA, the birth, adoption or foster placement of multiple children at one time entitles the employee to take only one 12-week period of parental leave. OAR 839-009-0240(6).

<sup>36</sup> OAR 839-009-0240(5); 29 CFR 825.120(b) and 121(b).

<sup>37</sup> ORS 659A.159(b); 29 USC 2612(a)(1)(C).

<sup>38</sup> OAR 839-009-0210(20)(a); 29 CFR 825.124(a) and (b).

<sup>39</sup> See, e.g., *Marchisheck v. San Mateo Cty.*, 199 F3d 1068, 1076 (9<sup>th</sup> Cir 1999) (employee who took leave to help son with alleged psychological problems could not have participated in son’s treatment because she moved him to place where no treatment was available); *Cianci v. Pettibone Corp.*, 1997 WL 182279 (ND Ill 1997) (“While the ability to visit one’s aging parents, especially when they have a serious health condition, would seem to fall within the FMLA’s overall statutory objectives, it does not appear to be within the coverage provided.”) *aff’d* 152 F3d 273 (7<sup>th</sup> Cir 1998); *Fioto v. Manhattan Woods Golf Enterprises LLC*, 270 F Supp 2d 401 (SDNY 2003) (“a child’s comfort and reassurance to a bedridden parent qualifies as ‘caring for’ the parent”) *aff’d* 123 Fed. Appx. 26 (2<sup>nd</sup> Cir 2005); *Brunelle v. Cytec Plastics, Inc.*, 225 F Supp 2d 67 (D Me 2002) (“care for” requirement satisfied where son kept vigil at father’s bedside and helped doctors make decisions concerning father’s care).

An employee may take sick child leave to care for a child suffering from an illness or injury that requires home care but does not qualify as a serious health condition.<sup>40</sup> Sick child leave need not be provided if another family member, including a non-custodial biological parent, is willing and able to care for the child.<sup>41</sup> An employer is not required to grant leave for a child's routine medical or dental appointments.<sup>42</sup> Sick child leave is only available under OFLA.

- **What is covered active duty leave (FMLA only)?**

Covered active duty leave is an absence due to any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces.<sup>43</sup> "Covered active duty" means (1) for a member of the regular Armed Forces, duty during the deployment to a foreign country; and (2), for a member of the reserve component of the Armed Forces, duty during the deployment to a foreign country under a call or order to active duty under a provision of law referred to 10 USC § 101(a)(13)(B).<sup>44</sup>

A "qualifying exigency"<sup>45</sup> includes any one of the following:

- (1) Short-notice deployment of up to seven days to address any issue that arises from the fact that a covered military member (*i.e.*, the employee's spouse, son, daughter, or parent) is notified of an impending call or order to active duty seven or less calendar days prior to the date of deployment;
- (2) Attendance at military events and related activities or family support or assistance programs and informational briefings;
- (3) Childcare and school activities; to arrange for alternative childcare, enroll in or transfer to a new school or day care facility, or attend meetings with staff at a school or a daycare facility;

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<sup>40</sup> ORS 659A.159(1)(d).

<sup>41</sup> OAR 839-009-0240(7).

<sup>42</sup> OAR 839-009-0230(4).

<sup>43</sup> 29 USC § 2612(a)(1)(E). The Armed Forces include Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, or a retired member of the Regular Armed Forces or Reserve. An employee whose family member is on active duty or call to active duty as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency. 29 CFR 825.126(b)(2)(i). A call to active duty refers to a Federal call to duty. 29 CFR 825.126(b)(2)(ii).

<sup>44</sup> 29 USC § 2611(14).

<sup>45</sup> 29 CFR 825.126(a). A "covered military member" means the employee's spouse, son, daughter, or parent on active duty or call to active duty status. 29 CFR 825.126(b).

(4) To make financial and legal arrangements such as such as preparing/executing financial and healthcare powers of attorney, bank account signature authority, or a will or trust, or obtaining military identification cards;

(5) For counseling;

(6) For rest and recuperation, of up to five days to spend time with a covered military member on short-term, temporary R&R;

(7) Post-deployment activities during the 90 days after termination of active status or to deal with the death that occurred while on active duty;

(8) Other activities, where the employer and employee agree the leave qualifies as an exigency and also to the duration and timing of the leave.

- **What is service member family leave (FMLA only)?**

Service member family leave is available to an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member who seeks leave to care for a covered service member.<sup>46</sup> A “covered service member” is (1) a member of the Armed Forces who is undergoing medical treatment, recuperation, or therapy; or is otherwise in outpatient status or on the temporary disability retired list for a serious injury or illness, or (2) a veteran who was a member of the Armed Forces at any time during the period of five years preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy for a serious injury or illness.<sup>47</sup> “Next of kin” means the nearest blood relative, other than the covered service member’s spouse, parent, son, or daughter.<sup>48</sup>

For the purpose of service member family leave, a “serious injury or illness” is (1) an injury or illness that was incurred or aggravated in the line of duty on active duty by a member of the Armed Forces and that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating; and (2) a qualifying injury or illness that was incurred or aggravated in the line of duty on active duty by a veteran in the Armed Forces that manifested itself before or after the member became a veteran.<sup>49</sup>

- **What notice must the employee provide?**

Employers will typically want employees who wish to take family medical leave to provide as much advance notice as possible and comply with the employer’s regular call-in policies for

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<sup>46</sup> 29 USC §2612(a)(3); 29 CFR 825.127(b).

<sup>47</sup> 29 USC §2611(15).

<sup>48</sup> 29 CFR 825.127(b)(3).

<sup>49</sup> 29 USC § 2611(18).

absences while on leave, particularly when the leave is intermittent. While it is permissible and also desirable to have a policy to this effect, an employer cannot require strict compliance with a call-in policy in circumstances where the employee's need for leave precludes him/her from providing timely notice under the policy.

Under OFLA:

When the need for leave is foreseeable: Employees may be required to provide 30 days' written notice of their need for leave (the employee need not specify that the leave is requested under OFLA).<sup>50</sup> An employee who is able to give advance notice of the need for leave must follow the employer's known, reasonable, and customary procedures for requesting any kind of leave.<sup>51</sup> Calling in sick without providing more information is not sufficient notice to trigger an employer's obligations under OFLA.<sup>52</sup> If the circumstances of the need for leave preclude the employee from complying with the 30-day notice requirement but the employee has advance notice of the need for leave, the employee must provide as much advance notice as practicable.<sup>53</sup>

When the leave is unforeseeable:<sup>54</sup> If the circumstances of the need for leave preclude the employee from complying with the notice requirement, notice of the leave is sufficient if it is provided within 24 hours before or after the start of the leave. The notice may be oral or written and provided by another person on behalf of the employee. The employer may require written notice within three days after the employee returns to work.<sup>55</sup>

If an employee fails to give the required notice, the employer may reduce the employee's unused leave by up to three weeks in that one-year leave period and discipline the employee in accordance with the employer's uniformly applied policy or practice.<sup>56</sup>

Employees on OFLA leave may be required to periodically report their status and intent to return to work in accordance with an established reporting policy.<sup>57</sup> Employees who require more

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<sup>50</sup> OAR 839-009-0250(1).

<sup>51</sup> OAR 839-009-0250(1)(a).

<sup>52</sup> OAR 839-009-0250(1)(c).

<sup>53</sup> OAR 839-009-0250(2).

<sup>54</sup> Leave is considered "unforeseeable" when it is taken as a result of (1) an unexpected serious health condition of an employee or his/her family member; (2) an unexpected illness, injury or condition of a child of the employee that requires home care; or (3) a premature birth or placement for adoption or foster care when the exact date cannot be previously determined with certainty. OAR 839-009-0210(21).

<sup>55</sup> OAR 839-009-0250(3).

<sup>56</sup> OAR 839-009-0250(4). The employer's reduction in the amount of leave entitlement may be no greater than the number of days of leave the employee takes without providing timely notice of the need for leave. *Id.*

<sup>57</sup> OAR 839-009-0270(7).

leave than originally authorized must notify the employer prior to the end of the authorized leave. However, if the employee fails to notify the employer and does not return to work at the end of the leave, an employer having reason to believe the continuing absence may qualify under OFLA must request additional information and may not treat the absence as unauthorized unless the requested information is not provided or the information does not qualify the leave as protected under OFLA.<sup>58</sup>

Under FMLA:

When the need for leave is foreseeable: Employees must provide notice of foreseeable leave 30 days in advance or as soon as practicable.<sup>59</sup> “As soon as practicable” ordinarily means the same day or the next business day.<sup>60</sup> Employees who are required but fail to provide 30 days notice of foreseeable leave must, upon the request of the employer, explain why they could not provide such notice. An employer may delay or deny FMLA leave if the employee fails to comply with the employer’s notice requirements, so long as the employer’s policy does not require notice earlier than 30 days or as soon as practicable.<sup>61</sup>

The employee’s notice must contain enough information to make the employer aware of the employee’s need for FMLA-qualifying leave and the timing and duration of the leave. When employee has previously taken FMLA leave and requests additional leave due to a FMLA-qualifying reason, the employee must specifically reference the qualifying reason or the need for FMLA leave.<sup>62</sup>

When the need for leave is not foreseeable: Employees must provide notice as soon as practicable under the facts and circumstances of the particular case, which is generally within the time prescribed by the employer’s usual and customary notice requirements applicable to such leave. If the employee fails to comply with notice requirements, leave may be delayed or denied.<sup>63</sup>

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<sup>58</sup> OAR 839-009-0250(1)(d). Even if the employee has exhausted family medical leave, it is important to make further inquiry because the employee may qualify for additional leave as a reasonable accommodation.

<sup>59</sup> 29 CFR 825.302(a). Employees may be required to comply with employer’s customary notice and procedural requirements for requesting leave, absent unusual circumstances. 29 CFR 825.302(d).

<sup>60</sup> 29 CFR 825.302(b).

<sup>61</sup> 29 CFR 825.302(d).

<sup>62</sup> 29 CFR 825.302(c).

<sup>63</sup> 29 CFR 825.303(c). If the employee fails to provide notice of a leave with no reasonable excuse, the employer may delay FMLA coverage for up to 30 days after the employee provides notice of the leave, depending on the timeliness of the notice. 29 CFR 825.304(b) and (c).

Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member, or other responsible party) if the employee is unable to do so personally.<sup>64</sup> Employees must provide sufficient information for the employer to determine the leave is FMLA-qualifying. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. When an employee seeks FMLA leave for the first time, the employee need not specifically reference the FMLA. However, when an employee seeks leave due to a qualifying reason for which the employer has previously granted FMLA leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave.<sup>65</sup>

Employees on FMLA may be required to follow a non-discriminatory policy for reporting their status and intent to return to work. This requirement must also take into account the relevant facts and circumstances related to the individual employee's leave situation.<sup>66</sup> Although the employer may not require an employee to take more leave than is necessary, the employer may require that the employee provide reasonable notice (*i.e.*, within two business days) of any foreseeable change in circumstances regarding the employee's need for leave (whether more or less than originally anticipated).<sup>67</sup> If an employee gives unequivocal notice of an intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to reinstate the employee cease.<sup>68</sup>

➤ **What documentation may be required to support the employee's leave request?**

Employers may require employees to substantiate their need for leave by providing a medical or other certification, provided you notify the employee in writing of the requirement and the consequences of failing to comply.<sup>69</sup> If the medical certification is complete, you may not request additional medical information.<sup>70</sup> If the certification is incomplete or insufficient, you must notify the employee and specify the deficiencies in writing.<sup>71</sup>

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<sup>64</sup> 29 CFR 825.303(a).

<sup>65</sup> 29 CFR 825.303(b).

<sup>66</sup> 29 CFR 825.311(a).

<sup>67</sup> 29 CFR 825.311(c).

<sup>68</sup> 29 CFR 825.311(b).

<sup>69</sup> See OAR 839-009-0260(1) (request for medical certification must be in writing and state consequences of failure to comply); 29 CFR 825.305(a). Under OFLA, an employer cannot require a medical certification for parental leave. OAR 839-009-0260(1). Verification of a child's illness under OFLA may only be required after the third day of absence for sick child leave. OAR 839-009-0260(13).

<sup>70</sup> See OAR 839-009-0260(5) and (8); 29 CFR 825.307(a).

<sup>71</sup> OAR 839-009-0260(5); 29 CFR 825.305(c).

Under OFLA, employers may *not* contact a health care provider directly for further information after receiving a signed medical certification. However, with written authorization from the employee or the employee's family member, you may have a health care provider contact the employee's or family member's health care provider on your behalf for the purpose of clarifying or authenticating a medical certification.<sup>72</sup> Under FMLA, if an employee fails to cure deficiencies in a medical certification, the employer may, with employee's permission, contact the health care provider directly, so long as the designated representative is not the employee's direct supervisor.<sup>73</sup>

If an employee requests leave because of his/her own serious health condition, the employer may, at its expense, require a second opinion by a health care provider designated by the employer. If the second opinion conflicts with the first, the employer may require the employee to obtain a third and binding opinion.<sup>74</sup> In contrast, for sick child leave under OFLA, you may not require medical verification unless the employee has taken such leave for at least part of three separate days during the leave year. You may not require a second opinion.<sup>75</sup>

An employer may request subsequent medical certifications no more often than every 30 days in connection with an absence. Other limitations also apply.<sup>76</sup>

Under OFLA, you are required to pay the employee's cost of obtaining any required medical certification, to the extent the cost is not covered by insurance.<sup>77</sup> Under FMLA, the employer must only pay the cost of obtaining any second or third opinions.<sup>78</sup> An employee's failure to obtain a required medical certification may prevent the leave from qualifying as family medical leave.<sup>79</sup>

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<sup>72</sup> OAR 839-009-0260(8).

<sup>73</sup> 29 CFR 825.307(a).

<sup>74</sup> OAR 839-009-0260(10) (a second opinion may be required when leave is taken for any OFLA purpose except parental leave); 29 CFR 825.307(b) and (c). Under OFLA, the providers of the first and second opinions designate the health care provider to render the third opinion. OAR 839-009-0260(10). Under FMLA, the employer and the employee designate the health care provider to provide the third opinion. 29 CFR 825.307(c).

<sup>75</sup> OAR 839-009-0260(13).

<sup>76</sup> OAR 839-009-0260(9) (allowing recertification under OFLA when circumstances described in previous certifications have changed significantly or the employer receives information that casts doubt upon the validity of the certification); 29 CFR 825.308 (allowing recertification under FMLA no more often than every six months unless the original certification has expired, circumstances have changed, or the employer has received information that casts doubt upon the validity of the original certification).

<sup>77</sup> OAR 839-009-0260(2).

<sup>78</sup> 29 CFR 825.307(b) and (c).

<sup>79</sup> OAR 839-009-0260(12); 29 CFR 825.305(c) and (d).

If an employee seeks leave for a qualifying exigency, the employer may require the employee to provide a copy of the covered service member's active duty orders or other documentation issued by the military that indicates that the covered service member is on active duty or call to active duty status and the dates of the active duty service.<sup>80</sup> When leave is taken to care for a covered service member with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered service member.<sup>81</sup>

When an employee takes leave for his/her own serious health condition, the employer may require the employee to provide a certification that the employee is able to resume work before reinstating the employee, provided this requirement is part of the employer's uniformly-applied policy.<sup>82</sup> However, in such cases, the employer may not require a second opinion.<sup>83</sup>

➤ **What notice must the employer provide?**

The OFLA regulations impose several notice requirements on employers:

**Posting Requirement.** All covered employers must post a notice of OFLA requirements in every establishment in which employees are employed in Oregon.<sup>84</sup>

**Eligibility/Qualification Notice.** Within five business days after 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 in writing whether the employee is eligible and qualifies for OFLA leave.<sup>85</sup> If the employee is ineligible or does not qualify, the employer must so state and provide at least one reason why the employee is not eligible or the reason does not qualify for leave.<sup>86</sup> If the reason the employee does not qualify is that the employee submitted a medical certification that is incomplete or insufficient, the written notice must specify the additional information required to make the certification complete or sufficient.<sup>87</sup>

**Notice of Paid Leave Exhaustion Requirement.** In addition, unless the employer provides notice that employees must use accrued vacation, sick or other paid leave benefits before the leave starts or within two business days of an unanticipated leave, it may not require employees

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<sup>80</sup> 29 CFR 825.309.

<sup>81</sup> 29 CFR 825.310.

<sup>82</sup> OAR 839-009-0270(7); 29 CFR 825.312.

<sup>83</sup> OAR 839-009-0270(7)(b); 29 CFR 825.312.

<sup>84</sup> ORS 659A.180.

<sup>85</sup> OAR 839-009-0250(5).

<sup>86</sup> OAR 839-009-0250(5)(a).

<sup>87</sup> OAR 839-009-0250(5)(b).

to exhaust paid leave benefits during an OFLA leave.<sup>88</sup> Prompt notice commensurate with that required under FMLA is, therefore, advisable.

Under FMLA, employers have multiple time-sensitive notice requirements:

**FMLA Posting.** Employers must post a notice of employees' FMLA rights, either on a bulletin board or electronically. If you have eligible employees, you must also provide the general notice via an existing employee handbook or by distribution to all new employees, which may be done electronically. This notice must include all of the information contained in the Department of Labor's (DoL's) Rights and Responsibilities poster, including unlawful acts by employers and how employees enforce their rights under FMLA.<sup>89</sup>

**Eligibility Notice.** You must provide employees with an oral or written "eligibility notice" within five business days of a request for leave or absence that you have reason to know may be leave-qualifying. If the employee is not eligible, the notice must provide at least one reason. If the employee subsequently requests leave, you must provide an updated notice within five business days if there has been any change in the employee's eligibility.<sup>90</sup>

**Rights and Responsibilities Notice.** If the employee is eligible, the employer must provide along with the eligibility notice a written "rights and responsibilities notice" advising the employee of his/her obligations while on leave and the consequences of failing to meet those obligations.<sup>91</sup>

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<sup>88</sup> OAR 839-009-0280(3).

<sup>89</sup> 29 CFR 825.300(a)(1).

<sup>90</sup> 29 CFR 825.300(b).

<sup>91</sup> 29 CFR 825.300(c). This notice must include all of the following:

- (1) that any qualifying leave may be designated and counted against the employee's annual 12-month entitlement;
- (2) any requirement that the employee 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;
- (3) the employee's right to substitute paid leave, whether the employer will require substitution of paid leave, conditions relating to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
- (4) any requirement that the employee make premium payments to maintain health benefits, the arrangements for making such payments, and the possible consequences of failing to make such payments on a timely basis;
- (5) 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;
- (6) the employee's rights to maintenance of benefits during leave and reinstatement to the same or an equivalent job upon returning from leave;

**Designation Notice.** Once the employee provides sufficient information to determine whether the leave qualifies for FMLA, the employer must provide a written designation notice within five business days. The designation notice must advise the employee whether the leave will be designated and counted as FMLA leave. If the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination (in which case a simple written statement is sufficient).<sup>92</sup>

The DoL has issued sample forms for each type of notice, which may be used separately or in a combined format.<sup>93</sup>

➤ **How much leave must be granted?**

Under OFLA:

Eligible employees are entitled to take up to 12 weeks in a 12-month period,<sup>94</sup> except:

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(7) the employee's financial exposure for the employer's payment of health insurance premiums during the employee's unpaid leave if the employee fails to return to work after taking leave;

(8) other terms and conditions the employer may wish to impose (e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, call-in requirements, etc).

If there is any change in the information included in the notice (e.g., if the initial leave was paid and the subsequent leave will be unpaid), the employer must, within 5 business days of the employee's notice of need for leave subsequent to any change, provide written notice referencing the prior notice and explaining what terms have changed.

<sup>92</sup> 29 CFR 825.300(d). Employers must include in the designation notice:

(1) any requirement that the employee substitute paid leave for unpaid leave;

(2) if the employer requires a fitness-for-duty certification to return to work, and whether it must address the employee's ability to perform the essential functions of the employee's position (in which case the employer must say so and include a list of the essential functions of the employee's position);

(3) the number of hours, days, or weeks that will be counted against the employee's leave entitlement (if known, otherwise notice of the amount of leave counted against the employee's leave entitlement must be made upon the employee's request, but no more often than once every 30 days and only if leave was taken in that period. Such notice may be oral or written, but if oral, it must be confirmed in writing no later than the following payday unless the payday is less than one week after the oral notice, in which case the notice must not be later than the subsequent payday. Written notice may be in any form, including a notation on the employee's pay stub).

If the information in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), then within five business days of receipt of the employee's first notice of the employee's need for leave subsequent to any change, the employer must provide written notice of the change.

<sup>93</sup> The forms, along with sample FMLA certification forms, are available on the DoL's website at <http://www.dol.gov/whd/forms/index.htm>.

<sup>94</sup> ORS 659A.162(1).

A female employee may take up to 12 weeks of pregnancy disability leave in addition to 12 weeks of OFLA leave for any other qualifying reason.<sup>95</sup>

An employee taking the entire 12 weeks of OFLA leave for parental leave may take an additional 12 weeks of sick child leave within the same leave year.<sup>96</sup> However, if the employee uses less than 12 weeks of parental leave, no additional leave is available except for the balance of the initial 12 weeks, which may be used for any other qualifying purpose.<sup>97</sup>

A female employee may take up to 36 weeks of OFLA leave in one leave year if she takes 12 weeks of pregnancy disability leave; followed by 12 weeks of parental leave; followed by 12 weeks of sick child leave.<sup>98</sup>

Under FMLA:

Eligible employees may take up 12 weeks in a 12-month period,<sup>99</sup> except in the following circumstance:

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member may take a total of 26 workweeks of leave during a 12-month period for covered service member leave. This type of leave is only available one time, during a single 12-month period.<sup>100</sup> The “single 12-month period” begins on the first day the eligible employee takes FMLA leave to care for a covered service member and ends 12 months after that date, regardless of the method used by the employer to determine the employee’s leave year for other FMLA-qualifying reasons. If an eligible employee does not use the entire 26-week entitlement, the unused portion is forfeited.<sup>101</sup>

For all other leave purposes, leave is determined on a fixed 12-month period such as a fiscal year, a calendar year, or a rolling 12-month period (measured forward or backward from the date leave starts). The option selected must be uniformly applied to all employees.<sup>102</sup> In the absence of an employer designation defining the leave year, OFLA

<sup>95</sup> ORS 659A.162(2)(a); OAR 839-009-0240(1)(a).

<sup>96</sup> ORS 659A.162(2)(b); OAR 839-009-0240(1)(b).

<sup>97</sup> OAR 839-009-0240(1)(b).

<sup>98</sup> OAR 839-009-0240(2).

<sup>99</sup> 29 USC § 2612; 29 CFR 825.200(a).

<sup>100</sup> 29 USC § 2612(a)(3) and (4).

<sup>101</sup> 29 CFR 825.127(c).

<sup>102</sup> OAR 839-009-0210(19); 29 CFR 825.200(b).

requires the use of a calendar year<sup>103</sup> and FMLA requires the use of whatever method is most beneficial to the employee.<sup>104</sup>

If the employee ordinarily works less than 40 hours or five days per week, the employee receives 12 weeks of family medical leave that duplicates the employee's regular workweek (*e.g.*, an employee who works an average of 25 hours per week receives 12 times 25 hours, or a total of 300 hours).<sup>105</sup> If an employee's hours vary from week to week, the employee is entitled to an average of the weekly hours worked during the 12 months preceding the leave.<sup>106</sup>

Under both OFLA and FMLA, an employee cannot be required to use more leave than is necessary.<sup>107</sup> Consequently, the leave laws provide for intermittent and reduced schedule leave. Intermittent leave is leave that is taken in separate periods of time due to a single qualifying reason. A "reduced leave schedule" is a type of intermittent leave that enables an employee to reduce the usual number of hours worked per day or per week.<sup>108</sup>

An employee may use intermittent leave or a reduced schedule for the employee's serious health condition or that of a family member.<sup>109</sup> Leave for this purpose must be medically necessary and best accommodated through an intermittent or reduced leave schedule.<sup>110</sup> Intermittent leave or a reduced schedule may also be used for a qualifying exigency of a covered service member.<sup>111</sup>

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<sup>103</sup> OAR 839-009-0210(19).

<sup>104</sup> 29 CFR 825.200(e).

<sup>105</sup> OAR 839-009-0240(10); 29 CFR 825.205(b).

<sup>106</sup> OAR 839-009-0240(10)(a); 29 CFR 825.205(b)(8).

<sup>107</sup> OAR 839-009-0245(3) (however, when it is not possible for an employee using intermittent leave or working a reduced schedule to begin or end work midway through a shift, the employer may count all of the time the employee is absent for the OFLA-qualifying purpose); 29 CFR 825.204(e); 29 CFR 825.311; *see also* OAR 839-009-0240(10)(b) and 29 CFR 825.205(a) (only the time actually taken for FMLA leave may be counted toward the 12-week leave entitlement).

<sup>108</sup> OAR 839-009-0210(16); 29 CFR 825.202(a). Under FMLA, employee may use intermittent leave in increments as small as an hour (or less if the employer's payroll system allows this for tracking purposes). 29 CFR 825.205(a).

<sup>109</sup> ORS 659A.162(7) (allowing use of intermittent leave to the extent permitted under federal law); 29 USC 2612(b)(1); *see also* 29 CFR 825.202(b) (allowing use of intermittent leave or a reduced leave schedule leave for a serious health condition of the employee or his/her parent, son, or daughter, including a pregnant employee's prenatal appointments and morning sickness, and for a serious injury or illness of a covered service member).

<sup>110</sup> 29 CFR 825.202(b).

<sup>111</sup> 29 CFR 825.202(d).

An employee who takes parental leave may use it intermittently or on a reduced schedule only if the employer agrees.<sup>112</sup> Although OFLA does not expressly allow intermittent leave for sick child care, it presumably allows intermittent leave to be used for this purpose.<sup>113</sup>

Under FMLA, if an employee requests intermittent leave to accommodate his or her serious health condition or that of a family member, the employer may *require* the employee to transfer temporarily to an available alternate position, provided the position (1) is one for which the employee is qualified; (2) has equivalent pay and benefits; and (3) better accommodates the employee's leave than the employee's regular position.<sup>114</sup> Under OFLA, an employee may be transferred to an alternate position "only when there is no other reasonable option available that would allow the employee to use intermittent leave or reduced work schedule,"<sup>115</sup> and the transfer is temporary, has equivalent pay and benefits, and employee accepts the transfer voluntarily.<sup>116</sup> Under both OFLA and FMLA, a transfer to an alternate position may not be used to discourage an employee from taking leave.<sup>117</sup>

An employer may alter an existing job to accommodate the need for intermittent or reduced leave, and may increase the pay and benefits of an existing position so as to make it equivalent to the employee's regular job.<sup>118</sup> However, employers may not require an employee to take a "light duty" job in lieu of taking family medical leave.<sup>119</sup> An employee may voluntarily accept a light duty assignment if acceptance is not made a condition of employment. However, time spent

<sup>112</sup> OAR 839-009-0240(5) ("An exception must be made to allow parental leave to effectuate adoption or foster placement of the child. Such leave need not be taken in one, uninterrupted period with any additional parental leave."); 29 USC § 2612(b)(1); 29 CFR 825.202(c).

<sup>113</sup> The BOLI regulations mention intermittent leave for a sick child only in passing. *See* OAR 839-009-0240(12)(b). Although the OFLA statute does not expressly allow intermittent leave to be taken for a sick child, *see* ORS 659A.162(7) (authorizing the Commissioner of the Bureau of Labor and Industries to adopt rules for taking intermittent leave in connection with a serious health condition of an employee or a family member of the employee "to the extent permitted by federal law"), prohibiting the use of intermittent leave for a sick child would seem to defeat the purpose of allowing this type of leave.

<sup>114</sup> 29 CFR 825.204(a) and (c).

<sup>115</sup> OAR 839-009-0245(1)(d).

<sup>116</sup> OAR 839-009-0245(1).

<sup>117</sup> OAR 839-009-0245(1)(e); 29 CFR 825.204(d).

<sup>118</sup> 29 CFR 825.204(c).

<sup>119</sup> An employee is entitled to take family medical leave when the employee is disabled from performing any one of his or her essential job functions. *See* 29 CFR § 825.123. This is true even if a health care provider treating the employee for a worker's compensation injury certifies the employee for the light duty position. An employee who declines the position may lose the right to worker's compensation benefits, but is entitled to remain on unpaid family medical leave. 29 CFR 825.207(e).

working in a light duty or other alternative position does not count against the employee's family medical leave entitlement.<sup>120</sup>

A transfer to an alternate position must be temporary. When the employee no longer needs to continue on leave and is able to return to full time work, OFLA requires that the employee be returned to his or her former position unless all of the leave taken in the leave year plus the period of time worked in the alternate position exceed 12 weeks.<sup>121</sup> Under FMLA, the employee may be placed in the same or an equivalent position.<sup>122</sup>

If the employee is on intermittent leave or a reduced work schedule, only the actual time taken as leave may be counted toward the 12 weeks of family medical leave for that year.<sup>123</sup> The amount of family medical leave for an employee on intermittent leave or a reduced work schedule is the difference between the number of hours the employee normally works and the number of hours the employee actually works during the intermittent leave or reduced work schedule.<sup>124</sup> If an employee is on intermittent leave, holidays, and days on which your business is not in operation are not counted as family medical leave.<sup>125</sup>

*NOTE: In most cases, leave taken under OFLA runs concurrently with any leave taken under FMLA,<sup>126</sup> and vice versa. However, OFLA leave cannot be counted toward FMLA leave unless the employee qualifies under both OFLA and FMLA at the time the leave is taken. For example, OFLA provides for leave to care for a sick child that does not have a serious health condition, and leave to care for the employee's parent-in-law, grandchild, grandparent, or registered domestic partner and his/her covered family members, which FMLA does not. Therefore, an employer may not count such OFLA leaves toward the employee's FMLA entitlement.<sup>127</sup> Conversely, FMLA provides for covered active duty and military caregiver leave,<sup>128</sup> which OFLA does not, and an employer may count a qualifying workers compensation leave against an employee's FMLA entitlement, but may not count that time against the employee's OFLA*

<sup>120</sup> OAR 830-009-0245(6); see 29 CFR 825.204(e) (employee may not be required to take more leave than necessary).

<sup>121</sup> OAR 830-009-0245(6).

<sup>122</sup> 29 CFR 825.204(e).

<sup>123</sup> OAR 839-009-0240(10)(b); 29 CFR 825.205(b).

<sup>124</sup> OAR 839-009-0245(3). When it is not possible for an employee using intermittent leave to work only part of a shift (e.g., a flight attendant), the employer may count the entire period of absence against the employee's family medical leave entitlement. *Id.*; 29 CFR 825.205(a)(2).

<sup>125</sup> OAR 839-009-0245(4).

<sup>126</sup> ORS 659A.186(2) (OFLA must be taken concurrently with any period of FMLA leave).

<sup>127</sup> See [http://www.boli.state.or.us/BOLI/TA/T\\_FAQ\\_Taoflaqa.shtml](http://www.boli.state.or.us/BOLI/TA/T_FAQ_Taoflaqa.shtml).

<sup>128</sup> 29 USC § 2612(a)(1)(e) and (3).

entitlement.<sup>129</sup> Accordingly, leave taken under FMLA will count as OFLA leave only if the employee is eligible under both laws.<sup>130</sup>

➤ **What pay and benefits must be provided during the leave?**

Under OFLA:

OFLA leave is unpaid.<sup>131</sup> However, the employee is entitled to use accrued sick leave, personal leave, vacation leave or any other paid leave that is offered in lieu of vacation leave, during the period of OFLA leave.<sup>132</sup>

You may ordinarily reduce an *exempt* employee's pay only for certain full-day absences (*e.g.*, for personal reasons or due to illness).<sup>133</sup> However, if an exempt employee qualifies for family medical leave only under OFLA (*e.g.*, the employer has less than 50 employees, the employee takes leave for a sick child or for the serious health condition of a parent-in-law, registered domestic partner, or grandparent), you may not reduce the employee's salary for a partial-day absence without jeopardizing the employee's exempt status.<sup>134</sup>

Unless the terms of a collective bargaining agreement or other agreement or policy provide otherwise, employees on OFLA leave do not accrue seniority, production bonuses, or other benefits that would accrue while the employee is working.<sup>135</sup> This means that you are not required to continue health or other benefits while an employee is on family medical leave, unless you do so for employees on non-OFLA leave. However, upon returning to work, the employee's benefits must be restored in full, except for accrued benefits used while on OFLA leave, or eliminated or changed for similarly situated employees who were not on family medical

<sup>129</sup> ORS 659A.162(6); OAR 839-009-0240(8). Note, however, that OFLA and FMLA leave may run concurrently with leave under the Oregon's domestic violence leave law, ORS 659A.270-659A.285; OAR 839-009-0335.

<sup>130</sup> OAR 839-009-0220(1).

<sup>131</sup> OAR 839-009-0280(1). If the employee is salaried *non-exempt*, you may convert the salary to an hourly equivalent and reduce the employee's pay for the FMLA taken.

<sup>132</sup> OAR 839-009-0280(2). The employer must provide timely written notice if it will require employees to use available paid leave benefits while on OFLA leave. OAR 839-009-0280(3).

<sup>133</sup> Such deductions may be made only when they comply with state and federal wage and hour laws. *See, e.g.*, 29 CFR 541.602.

<sup>134</sup> OAR 839-009-0240(12)(b). However, provided notice requirements are met, employers are permitted to make deductions from an exempt employee's accrued leave for partial day absences taken under OFLA. OAR 839-009-0280(4).

<sup>135</sup> OAR 839-008-0270(5)(a).

leave.<sup>136</sup> As a practical matter, this may require you to continue to pay for health insurance or other benefits while the employee is on leave.

If you pay any part of the employee's share of health or other insurance premium while an employee is on OFLA leave, you may deduct up to ten percent (10%) of the employee's gross pay each pay period after the employee returns to work until the amount is repaid.<sup>137</sup> If the employee does not return to work following the leave, you may use any legal means to collect the amount you paid for benefits on the employee's behalf (including deduction of the amount owed from the employee's final pay), unless the employee did not return to work due to a serious health condition or other circumstances beyond the employee's control.<sup>138</sup>

Under FMLA:

Exempt and non-exempt employees may take FMLA leave in any increment of time. You must only pay the employee for the hours worked.<sup>139</sup> If the employee is salaried, you may convert the salary to an hourly equivalent and dock the employee's pay for the leave taken.<sup>140</sup> When an exempt employee takes intermittent leave in blocks of less than one day, the employee's salary may be reduced for the part-day absence without jeopardizing the employee's exempt status.<sup>141</sup>

Employees on FMLA may, but are not entitled to, accrue any additional seniority or benefits. If accrued paid leave must be used during FMLA leave, you may make corresponding deductions from accrued leave for the FMLA leave taken.<sup>142</sup>

While employees are on FMLA leave, you must continue any applicable group health coverage on the same terms as applied before the employee took leave (*i.e.*, you must pay your proportionate share of the premiums for health insurance benefits for employees on FMLA leave, but may require employees to pay their corresponding share of the premiums).<sup>143</sup> If the employee fails to pay his/her share of the premiums, you may drop the employee from coverage,

<sup>136</sup> OAR 839-009-0270(6).

<sup>137</sup> OAR 839-009-0270(6)(d). Although OFLA regulations permit employers to make deductions from wages to recover the cost of insurance premiums paid on an employee's behalf, Oregon's wage and hour statutes place limitations on the circumstances under which employers may lawfully make deductions from an employee's pay. Employers should not make deductions to recover the cost of premiums paid without a written authorization from the employee, and should limit deductions from final pay to the amount permitted in ORS 652.610(3)(f)(D).

<sup>138</sup> OAR 830-009-0270(6)(e).

<sup>139</sup> 29 CFR 825.206(a) (leave taken under the FMLA is unpaid).

<sup>140</sup> 29 CFR 825.206(a).

<sup>141</sup> 29 CFR 825.206.

<sup>142</sup> See 29 CFR 825.215(d)(2).

<sup>143</sup> 29 CFR 825.209(a), 29 CFR 825.210(a)

provided you comply with certain notice provisions and dropping coverage does not interfere with your ability to restore the employee's benefits in full upon returning to work (except for benefits used while on leave and those eliminated or changed for similarly situated employees who were not on family medical leave).<sup>144</sup> If you pay any part of the employee's share of health or other insurance premiums while an employee is on FMLA leave, you may use any legal means to collect the amount paid for benefits on the employee's behalf, unless the employee did not return to work due to a serious health condition or other circumstances beyond the employee's control.<sup>145</sup>

➤ **What job protections apply?**

Under OFLA:

An employee on OFLA leave is entitled to be reinstated to the same position the employee held when the leave commenced, even if the employee has been replaced during his or her absence. The former position is the position held by the employee at the time leave began, even if the job has been renamed or reclassified.<sup>146</sup> The employee is not entitled to return to the former position if the employee would have been bumped if OFLA leave had not been taken.<sup>147</sup> If the employee's position has been eliminated, you must return the employee to any available, equivalent position.<sup>148</sup> Unless the terms of a collective bargaining agreement, other agreement or policy provide otherwise, employees on OFLA leave have no greater right to a job or other employment benefits than if the employee had not taken leave, and the employee is subject to layoff the same as similarly situated employees not taking OFLA leave.<sup>149</sup>

If an employee gives unequivocal notice of intent not to return to work from OFLA leave, the employee is entitled to complete the approved leave, provided the original need for it still exists. However, your obligation to hold a position vacant during the OFLA leave and to restore benefits and reinstate the employee at the end of the leave cease.<sup>150</sup>

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<sup>144</sup> 29 CFR 825.209(c) and (e); 29 CFR 825.212(a) and (c)

<sup>145</sup> 29 CFR 825.213(b) and (f).

<sup>146</sup> OAR 839-009-0270(1).

<sup>147</sup> OAR 839-009-0270(3).

<sup>148</sup> OAR 839-009-0270(4). An "available" position is one 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 employee's former job site, you may restore the employee to an equivalent position within 20 miles of the former job site. *Id.*

<sup>149</sup> OAR 839-009-0270(5).

<sup>150</sup> OAR 839-009-0270(8).

Under FMLA:

An employee on FMLA leave is entitled to be reinstated to the same position the employee held when the leave commenced, or to an equivalent position (one with equivalent pay, benefits, and other terms and conditions of employment). This right exists even if the employee has been replaced during the employee's absence.<sup>151</sup> An employee who is unable to perform an essential function of the position because of the continuation of a serious health condition is not entitled to another position under the FMLA, although you may be obligated to transfer the employee to another position under state and/or federal disability laws.<sup>152</sup>

An employee on FMLA leave has no greater right to reinstatement than if he or she had not taken leave. Therefore, if the employee's position is eliminated or the employee would have been laid off had he or she not taken leave, the employee is not entitled to reinstatement.<sup>153</sup> If an employee gives unequivocal notice of intent not to return to work from FMLA leave, all of your obligations under FMLA (including the obligation to pay for health benefits) cease.<sup>154</sup>

Employers may not discriminate or retaliate against employees who request or use family medical leave, nor may the use of such leave be counted against the employee for attendance or any other purpose (such as increases in pay or benefits, or bonus eligibility).<sup>155</sup> Performance (including non-FML attendance issues) and behavior issues addressed for the first time shortly after an employee returns from a qualified FML will likely be viewed as retaliatory.

Under state law, an employee is protected against retaliation for invoking OFLA rights even if he/she was actually not entitled to OFLA-protected leave.<sup>156</sup> In addition to being a violation under OFLA, retaliating against an employee for invoking his or her rights under OFLA gives rise to a common law wrongful discharge claim.<sup>157</sup> However, under federal law, only those employees eligible under FMLA can assert a retaliation claim.<sup>158</sup>

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<sup>151</sup> 29 CFR 825.214; 29 CFR 825.215.

<sup>152</sup> 29 CFR § 825.216(c).

<sup>153</sup> 29 CFR §§ 825.216(a).

<sup>154</sup> 29 CFR § 825.311(b).

<sup>155</sup> 29 USC § 2615; ORS 659A.183(2); OAR 839-009-0320(3) and (4).

<sup>156</sup> *Yeager v. Providence Health Sys. Or.*, 195 Or App 134, 140, 96 P3d 862, 865, *rev. den.* 337 Or 658, 103 P3d 641 (2004). Note that OFLA was amended in 2007 to explicitly provide a right of action for retaliation. ORS 659A.183(2)

<sup>157</sup> *Yeager*, 195 Or App at 142-143.

<sup>158</sup> *Stewart v. Intem, Inc.*, 2000 U.S. Dist. LEXIS 12980; 2000 WL 1140517 (D Or 2000) (unpublished).

## II. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS (USERRA)

USERRA<sup>159</sup> is a federal law that provides job protection to employees who take leave for service in the uniformed services, including duty performed on a voluntary or involuntary basis, in time of peace or war, including National Guard service under Federal authority.<sup>160</sup> USERRA protects employees who take military leaves of absence of up to five years, or longer in some circumstances.<sup>161</sup> USERRA requires that returning service members be restored to their previous employment positions with all the seniority, status, pay, and benefits that they would be entitled to had they not left to serve in the military.

➤ **Are you a covered employer?**

USERRA applies to all employers regardless of size.<sup>162</sup>

➤ **Is the employee *eligible*?**

In general, all employees (including temporary, part-time, probationary, and seasonal<sup>163</sup> and/or employees on leaves of absence<sup>164</sup>) are eligible for protection under USERRA for absences from civilian employment by reason of service in the uniformed services if:

- (1) The employer had advance notice of the employee's service;
- (2) The employee has a break of five years or less for cumulative service in the uniformed services from his or her employment relationship with a particular employer;
- (3) The employee timely returns to work or applies for reemployment; and,
- (4) The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.<sup>165</sup>

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<sup>159</sup> 38 USC §§ 4301-4335; 20 CFR Part 1002.

<sup>160</sup> 38 USC § 4303; 20 CFR 1002.5(1). USERRA does not cover National Guard service performed under State authority. 20 CFR 1002.57. However, state law often protects employees who performed such service. See ORS659A.082(b).

<sup>161</sup> 38 USC § 4312(a)(2); 20 CFR 1002.99.

<sup>162</sup> 38 USC § 4303(4); 20 CFR 1002.34.

<sup>163</sup> An employer is not required to reemploy an employee on a military leave if the position held was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense. 20 CFR 1002.41.

<sup>164</sup> 20 CFR 1002.42.

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

A leave will qualify under USERRA if it is taken for service in the uniformed services.<sup>166</sup>

➤ **What documentation may be required to support the employee's leave request?**

While the employee does not need the employer's permission to take leave under USERRA,<sup>167</sup> the employee must provide advance notice of the leave when possible.<sup>168</sup> The employee or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave employment to perform service in the uniformed services, unless the notice is precluded by military necessity, impossibility, or it is unreasonable under all the circumstances.<sup>169</sup> The employee's notice to the employer may be oral or written, informal, and need not follow any particular format. Although no particular amount of advance notice is required, the Department of Defense recommends that employees provide at least 30 days' notice when possible.<sup>170</sup>

Employees are not required to decide in advance or provide notification to the employer about whether or not the employee will seek reemployment under USERRA at the completion of military service.<sup>171</sup> However, subject to exceptions for illness, injury, unreasonableness, and impossibility,<sup>172</sup> employees must notify the employer of his or her intent to return to employment upon completing service, either by reporting to work or submitting a timely application for reemployment within the following time frames:

(1) If the period of military service was less than 31 days, or the employee was absent from a position for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the employer not later than the beginning of the first full regularly-scheduled work period on the first calendar day following the completion of the period of service, and the expiration of

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<sup>165</sup> 38 USC § 4312; 20 CFR 1002.32.

<sup>166</sup> 38 USC § 4303(13); 20 CFR 1002.6. An employee will not lose reemployment rights if, for example, during the military leave in another state, the employee worked at another job during off-duty hours, or the employee took a reasonable amount of time to put the service member's personal affairs in order before assuming duty that was cancelled, or used some of the time off to travel to the military assignment. 20 CFR 1002.73-1002.74.

<sup>167</sup> 20 CFR 1002.87.

<sup>168</sup> 38 USC § 4312(a)(1); 20 CFR 1002.85.

<sup>169</sup> 38 USC § 4312(a)(1) and (b); 20 CFR 1002.86.

<sup>170</sup> 38 USC § 4312(a)(1); 20 CFR 1002.85; 32 CFR 104.6(a)(2)(i)(B).

<sup>171</sup> 20 CFR 1002.88.

<sup>172</sup> 38 USC § 4312(e); 20 CFR 1002.116-1002.117.

eight hours after a period allowing for safe transportation from the place of that service to the employee's residence.

(2) If the employee's military service was for more than 30 days but less than 181 days, he or she must submit an oral or written application for reemployment with the employer not later than 14 days after completing service. If it is impossible or unreasonable for the employee to apply within 14 days through no fault of his or her own, he or she must submit the application not later than the next full calendar day after it becomes possible to do so.

(3) If the employee's military service services was for more than 180 days, he or she must submit an oral or written application for reemployment not later than 90 days after completing service.<sup>173</sup>

If the service member fails to timely report for or apply for reemployment, he or she does not automatically forfeit USERRA's reemployment and other rights and benefits. Rather, the employee becomes subject to the employer's rules, established policy, and general practices pertaining to an absence from scheduled work.<sup>174</sup>

If the period of military service exceeds 30 days, the employer may request that the service member provide documentation upon a request for reemployment to establish that the reemployment application is timely; the employee has not exceeded the five-year limit on the duration of service; and that the employee's separation or dismissal from service was not disqualifying.<sup>175</sup> You may not, however, delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence for more than 90 days, the employer may require that the employee submit documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.<sup>176</sup>

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<sup>173</sup> 38 USC § 4312(e); 20 CFR 1002.115.

<sup>174</sup> 38 USC § 4312(e)(3); 20 CFR 1002.117.

<sup>175</sup> 38 USC § 4312(f); 20 CFR 1002.121. Examples of documents that satisfy these requirements are listed in 20 CFR 1002.123.

<sup>176</sup> 38 USC § 4312(f)(3) and (4); 20 CFR 1002.122.

➤ **What notice must the employer provide?**

Employers must post a notice of the employees' rights under USERRA.<sup>177</sup>

➤ **How much leave must be granted?**

In general, employers must grant leave for up to a five year period of service,<sup>178</sup> although there are many exceptions that may extend the five-year period.<sup>179</sup> The employee is not required to accommodate the employer's interests or concerns regarding the timing, frequency, or duration of uniformed service, although the employer may properly raise these concerns with the appropriate military authority.<sup>180</sup>

➤ **What pay and benefits must be provided during the leave?**

USERRA leave is unpaid. However, during USERRA leave, the employee is considered to be on furlough or leave of absence from the employer, during which time the employee is entitled to accrue the same non-seniority rights and benefits generally afforded to other employees with similar seniority, status, and pay that are on a comparable furlough or leave of absence.<sup>181</sup>

Employees may elect to continue health care coverage at their own expense for up to 24 months. If the employee is on leave for less than 31 days, the employee cannot be required to pay more than the regular employee share, if any, for coverage. For a longer term of service, the employee may be required to pay no more than 102% of the full premium under the plan.<sup>182</sup> Health benefits must be reinstated upon reemployment with no waiting period or coverage limitations.<sup>183</sup>

The employee may elect, but may not be required to use any accrued vacation, annual, or similar leave with pay during the period of service.<sup>184</sup> The employee is not entitled to use accrued sick leave unless the employer allows employees to use sick leave for any reason, or allows other

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<sup>177</sup> 38 USC § 4334. The text of the required notice applicable to private employers is available at <http://www.dol.gov/vets/regs/fedreg/final/2005023960.htm>.

<sup>178</sup> 38 USC § 4312(c); 20 CFR 1002.99-1002.100.

<sup>179</sup> 38 USC § 4312(c); 20 CFR 1002.103.

<sup>180</sup> 38 USC § 4312(h); 20 CFR 1002.104.

<sup>181</sup> 38 USC § 4316(b); 20 CFR 1002.149. Pension plans are given specific and detailed treatment under USERRA. *See* 38 USC § 4318; 20 CFR 1002.259-1002.267.

<sup>182</sup> 38 USC § 4317(a)(1) and (2); 20 CFR 1002.164, 20 CFR 1002.166.

<sup>183</sup> 38 USC § 4317(b); 20 CFR 1002.168.

<sup>184</sup> 38 USC § 4316(d); 20 CFR 1002.153.

similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave.<sup>185</sup>

➤ **What job protections apply?**

An employer must promptly<sup>186</sup> reemploy an eligible employee returning from military service. The position to which the employee is entitled depends on the length of the military leave, the employee's qualifications, and the difficulty associated with any training necessary.<sup>187</sup> The employee is entitled to the seniority and seniority-based rights and benefits that the service member had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed.<sup>188</sup> In addition, the employee is entitled to such other rights and benefits not determined by seniority as are generally provided to employees having similar seniority, status, and pay who are on furlough or leave of absence.<sup>189</sup>

Employers must provide refresher training, and any training necessary to update a returning employee's skills in situations where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer.<sup>190</sup>

An employer is not required to provide reemployment if (1) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable; (2) re-employment would impose an undue hardship on the employer; or (3) the employee left employment that was for a brief, non-recurrent period and there was no reasonable expectation that such employment would continue indefinitely or for a significant period.<sup>191</sup>

Once reemployed, an employee may not be discharged without cause for one year after the date of reemployment if the person's period of military service was for more than six months (181 days or more), or for six months after the date of reemployment if the person's period of military service was for 31 to 180 days.<sup>192</sup> Employees on military leave for 30 or fewer days are not

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<sup>185</sup> *Id.*

<sup>186</sup> Absent unusual circumstances, promptly means not more than two weeks. 20 CFR 1002.181.

<sup>187</sup> 38 USC § 4313. An employee is generally entitled to the position he or she would have attained with reasonable certainty if not for the military leave of absence. This is called the "escalator position." 20 CFR 1002.191-1002.198. The escalator principle also applies to compensation. 20 CFR 1002.236.

<sup>188</sup> 38 USC § 4316(a); 20 CFR 1002.210.

<sup>189</sup> 38 USC § 4316(b); 20 CFR 1002.149.

<sup>190</sup> 20 CFR 1002.5(i).

<sup>191</sup> 38 USC § 4312(d); 20 CFR 1002.139.

<sup>192</sup> 38 USC § 4316(c); 20 CFR 1002.247.

protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.<sup>193</sup>

### **III. OREGON MILITARY FAMILY LEAVE<sup>194</sup>**

The Oregon Legislature enacted the Oregon Military Family Leave Act (OFML) in 2009 to enable employees to spend time with family members before deploying or while on leave from active duty.

➤ **Are you a covered employer?**

Only employers with 25 or more employees in Oregon must provide OFML.<sup>195</sup>

➤ **Is the employee *eligible*?**

Employees are eligible to take OMFL leave under any of the following circumstances:

The employee is employed in the state of Oregon on the date leave is to begin;

The employee worked an average of at least 20 hours per week; and

The employee is the spouse or registered domestic partner of a member of the United States Armed Forces, the National Guard, or the United States military reserve, who has been called to active duty or notified of an impending call or order to active duty, or is deployed and on leave from active duty during a period of military conflict.<sup>196</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

During a period of military conflict, an eligible employee is entitled to OMFL to be with a spouse or registered domestic partner who is a member of the United States Armed Forces, the National Guard or the United States military reserve, who has been notified of an impending call or order to active duty, or is deployed and on leave from active duty.<sup>197</sup>

➤ **What notice must the employee provide?**

An employee who intends to take OMFL must provide the employer with notice of the intention to take leave within five business days of receiving official notice of an impending call or order

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<sup>193</sup> 20 CFR 1002.247.

<sup>194</sup> ORS 659A.090-098.

<sup>195</sup> ORS 659A.090(2); OAR 839-009-0380(2)(c).

<sup>196</sup> ORS 659A.090(1); OAR 839-009-0380(5).

<sup>197</sup> ORS 659A.093(1); OAR-839-009-0370(1).

to active duty or of a leave from deployment or, if official notice is provided less than five days from commencement of the leave, as soon as is practicable.<sup>198</sup> The employee's notice must follow the covered employer's known, customary, and uniformly applied procedures for requesting any kind of leave.<sup>199</sup>

➤ **What documentation may be required to support the employee's leave request?**

The employer may require in writing that the eligible employee provide a photocopy of the service member's orders to verify that the leave is for an OMFL purpose. The employee must provide a copy of the service member's orders within a reasonable time after receiving the covered employer's written request.<sup>200</sup> The employer may provisionally designate the leave until a copy of the orders is received.<sup>201</sup>

➤ **What notice must the employer provide?**

No employer notices are required. However, it is advisable to provide notice to the employee of his/her rights and responsibilities with respect to calling in, providing documentation of the need for leave, length of leave, and other terms and conditions of the OMFL.

➤ **How much leave must be granted?**

Eligible employees are entitled to take up to 14 days of leave per deployment.<sup>202</sup> The leave may be taken continuously or on an intermittent basis.<sup>203</sup>

OMFL is counted against the employee's 12-week OFLA entitlement.<sup>204</sup> To the extent the employee's OMFL is also covered by the qualifying exigency entitlements of FMLA, the leave also counts toward the employee's annual FMLA entitlement.<sup>205</sup>

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<sup>198</sup> ORS 659A.093(3); OAR 839-009-0430(1).

<sup>199</sup> OAR 839-009-0430(3).

<sup>200</sup> OAR 839-009-0430(3)(a) and (b).

<sup>201</sup> OAR 839-009-0430(3)(c).

<sup>202</sup> ORS 659A.093(1); OAR 839-009-0390(1).

<sup>203</sup> OAR 839-009-0390(4).

<sup>204</sup> ORS 659A.093(5); OAR 839-009-0410.

<sup>205</sup> OAR 839-009-0420.

➤ **What pay and benefits must be provided during the leave?**

OMFL is unpaid.<sup>206</sup> Employees may elect, but may not be required, to use accrued paid leave during the period of OMFL.<sup>207</sup> When more than one type of paid leave is available, the employee may ordinarily designate the order in which paid leave may be used.<sup>208</sup>

➤ **What job protections apply?**

An employee returning from OMFL is entitled to be restored to the employee's former position and to continuation of benefits consistent with OFLA requirements.<sup>209</sup> If the employee's position is eliminated during the OMFL, the employee must be restored to any available, equivalent position.<sup>210</sup> The employee is not entitled to return to the former position if the employee would have been bumped had he or she not taken OMFL.<sup>211</sup> However, the employee has no greater right to a job or other employment benefits than if the employee had not taken OMFL and is subject to layoff the same as similarly situated employees not taking OMFL.<sup>212</sup>

Employees on OMFL do not accrue seniority, production bonuses or other benefits that would accrue while the employee is working.<sup>213</sup> Except for benefits used on OMFL, the employee is entitled to the same level of benefits as when the leave began.<sup>214</sup>

The employee may be required to pay the same share of health or other insurance premium during the leave that the employee paid prior to the leave. If an employee cannot or will not pay such costs, the employee may be dropped from coverage, so long as benefits are restored in full when the employee returns to work.<sup>215</sup> If the employer pays these costs, it may recover the amount from the employee unless the employee is unable to return to work due to a serious health condition or other circumstances beyond the employee's control.<sup>216</sup> If the employee gives unequivocal notice of intent not to return to work following OMFL, the employee is entitled to complete the approved leave, providing that the original need for it still exists. The employee remains entitled to use vacation, sick leave and health benefits; except the employer's obligation

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<sup>206</sup> ORS 659A.093(1); OAR 839-009-0440(1).

<sup>207</sup> ORS 659A.093(4); OAR 839-009-0440(2).

<sup>208</sup> OAR 839-009-0440(3).

<sup>209</sup> ORS 659A.093(2); ORS 659A.171; OAR 839-009-0450(1).

<sup>210</sup> OAR 839-009-0450(4).

<sup>211</sup> OAR 839-009-0450(3).

<sup>212</sup> OAR 839-009-0450(5)(b) and (c).

<sup>213</sup> OAR 839-009-0450(5)(a).

<sup>214</sup> OAR 839-009-0450(6).

<sup>215</sup> OAR 839-009-0450(6)(a) and (b).

<sup>216</sup> OAR 839-009-0450(6)(d) and (e).

to restore the employee's position and benefits upon the completion of leave cease (except as required under COBRA).<sup>217</sup>

It is unlawful to deny OMFL to a qualifying eligible employee, or to discriminate or retaliate against an individual with respect to hire or tenure or any other term or condition of employment because the individual has inquired about OMFL, submitted a request for OMFL, or invoked any provision of the law.<sup>218</sup>

#### IV. CRIME VICTIM'S LEAVE

This law permits crime victims to take an unpaid leave of absence to attend criminal proceedings.

➤ **Are you a covered employer?**

The law applies to employers with six or more employees in the State of Oregon.<sup>219</sup>

➤ **Is the employee *eligible*?**

An employee is eligible for crime victim's leave if:

The employee worked an average of at least 25 hours per week for the 180 days immediately preceding the date on which the leave commences, and

The employee or the employee's immediate family member is a victim of certain person felonies.<sup>220</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

The employee will qualify for leave if he or she suffered financial, social, psychological or physical harm as a result of a person felony and is seeking leave to attend a criminal proceeding.<sup>221</sup>

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<sup>217</sup> OAR 839-009-0450(8).

<sup>218</sup> ORS 659A.096; OAR 839-009-0460.

<sup>219</sup> ORS 659A.190(1).

<sup>220</sup> ORS 659A.190(4). A "crime victim" for the purpose of Crime Victim's Leave is someone who suffered financial, social, psychological, or physical harm as the result of a person felony. ORS 659A.190(2). "Immediately family" includes the employee's spouse, domestic partner, parent, sibling, child, stepchild, and grandparent. ORS 659A.190(5).

<sup>221</sup> ORS 659A.190(2); ORS 659A.192(2).

➤ **What notice must the employee provide?**

An employee must provide reasonable notice of the employee's intent to take leave to attend a criminal proceeding.<sup>222</sup>

➤ **What documentation may be required to support the employee's leave request?**

The employee must provide copies of any notices of scheduled criminal proceedings that the employee receives from a law enforcement agency.<sup>223</sup>

➤ **What notice must the employer provide?**

No notice is required.

➤ **How much leave must be granted?**

The amount of leave available is unlimited, except that an employer may limit the amount of leave taken to attend a criminal proceeding if the leave creates an undue hardship to the employer's business.<sup>224</sup>

➤ **What pay and benefits must be provided during the leave?**

Crime victim's leave is unpaid.<sup>225</sup> The employee may elect, but the employer may not require the employee to use any accrued vacation or other paid leave in lieu of vacation during the period of leave.<sup>226</sup> However, the employer may determine the order in which accrued leave is to be used when more than one type of accrued leave is available.<sup>227</sup>

➤ **What job protections apply?**

An employer is prohibited from denying protected leave, and from discharging or threatening to discharge a worker who takes Crime Victim's Leave.<sup>228</sup>

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<sup>222</sup> ORS 659A.196(1)(a).

<sup>223</sup> ORS 659A.196(1)(b).

<sup>224</sup> ORS 659A.192(3).

<sup>225</sup> ORS 659A.198(1).

<sup>226</sup> ORS 659A.198(2).

<sup>227</sup> ORS 659A.198(3).

<sup>228</sup> ORS 659A.194(1).

**V. DOMESTIC VIOLENCE LEAVE<sup>229</sup>**

This law provides protected leave to employees who are victims, or the parents or guardians of children who are victims, of domestic violence, sexual assault, or stalking. A separate section of the law requires employers to provide reasonable workplace safety accommodations, which may include a leave of absence.<sup>230</sup>

➤ **Are you a covered employer?**

The leave section of this law applies to employers with six or more Oregon employees.<sup>231</sup> The safety accommodation section applies to all employers.<sup>232</sup>

➤ **Is the employee *eligible*?**

An employee is eligible for domestic violence leave (DVL) under the leave section of this law if:

The employee 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; and

The employee is a victim of domestic violence, sexual assault, or stalking, or is the parent or guardian of a minor child or dependent who is a victim of domestic violence, sexual assault or stalking.<sup>233</sup>

A “victim” for the purpose of the domestic violence law is a person against whom the specified crime of domestic violence, sexual assault, or stalking has been threatened or committed, as well as any other person who has suffered financial, social, psychological or physical harm as a result

<sup>229</sup> ORS 659A.270-290.

<sup>230</sup> ORS 659A.272. Eligible employees are also entitled to workplace safety accommodations, which may include unpaid leave, as well as a transfer, reassignment, modified schedule, changed work telephone number, changed work station, installed lock, implemented safety procedure or any other adjustment to a job structure, workplace facility or work requirement in response to actual or threatened domestic violence, sexual assault, or stalking. ORS 659A.290(a).

<sup>231</sup> ORS 659A.270(1) (defining covered employers as those with six or more employees for the purpose of ORS 659A.270 to 659A.285; OAR 839-009-0340(1).

<sup>232</sup> The safety accommodation, ORS 659A.290, is not covered by the definition of “employer” applicable to the domestic violence leave section. All employers must provide leave when it is required as a safety accommodation. ORS 659A.001(4). The rules implementing and interpreting ORS 659A.290 are found at OAR 839-005-0160 and 839-005-0170. See OAR 839-009-0325(2).

<sup>233</sup> ORS 659A.270(2); OAR 839-009-0340(2).

of the crime committed against the victim, including a member of the victim's immediate family.<sup>234</sup>

Any employee, regardless of tenure, who is a victim of domestic violence, sexual assault or stalking is eligible for leave as a safety accommodation.<sup>235</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

The employee is entitled to DVL:

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

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

(3) To obtain, or to assist a minor child or dependent in obtaining, counseling from a licensed mental health professional related to an experience of domestic violence, sexual assault or stalking.

(4) To obtain services from a victim services provider for the eligible employee or the 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 employee's minor child or dependent.<sup>236</sup>

An employee who needs leave as a reasonable workplace safety accommodation will qualify under the safety accommodation section.<sup>237</sup>

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<sup>234</sup> OAR 839-009-0340(14). "Immediate family" for the purpose of Domestic Violence Leave includes the employee's spouse, domestic partner, parent, sibling, child, stepchild, grandparent, or any person who had the same primary residence as the victim at the time of the domestic violence, sexual assault, or stalking. OAR 839-009-0340(6).

<sup>235</sup> ORS 659A.290(2)(c); OAR 839-009-0340(14).

<sup>236</sup> ORS 659A.272; OAR 839-009-0345.

<sup>237</sup> ORS 659A.290(2)(c).

➤ **What notice must the employee provide?**

Employees must provide “reasonable advance notice” of the employee’s intention to take DVL, unless giving the advance notice is not feasible.<sup>238</sup> When it is possible to provide advance notice of the need for DVL, the employee must follow the employer’s known, reasonable and customary procedures for requesting any kind of leave.<sup>239</sup> When the need for leave is unanticipated or an emergency, the 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.<sup>240</sup>

While on DVL, the employee must follow the covered employer’s known, reasonable, and customary procedures regarding periodic reporting of the employee’s current status.<sup>241</sup>

➤ **What documentation may be required to support the employee’s leave request?**

An employer may require certification within a reasonable time that the employee or the employee’s minor child or dependent is a victim of domestic violence, sexual assault or stalking; and that the leave taken is for one of the specified purposes.<sup>242</sup> Certification is sufficient if the employee provides any of the following:

- (1) A copy of a police report indicating that the eligible employee or the employee’s minor child or dependent was a victim of domestic violence, sexual assault or stalking.
- (2) A copy of a protective order or other evidence from a court or attorney that the eligible employee appeared in or was preparing for a civil or criminal proceeding related to domestic violence, sexual assault or stalking.
- (3) Documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the eligible employee or the employee’s minor child or dependent was undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, sexual assault or stalking.<sup>243</sup>

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<sup>238</sup> ORS 659A.280(1); OAR 839-009-0362(1).

<sup>239</sup> OAR 839-009-0362(3).

<sup>240</sup> OAR 839-009-0362(2).

<sup>241</sup> OAR 839-009-0350(2).

<sup>242</sup> ORS 659A.280(2); OAR 839-009-0362(4).

<sup>243</sup> ORS 659A.280(4); OAR 839-009-0362(5).

➤ **What notice must the employer provide?**

The statute imposes no notice requirements on the employer. However, it is advisable to provide employees with notice of their rights and responsibilities under the law, particularly if the circumstances of the leave also qualify for OFLA or FMLA.

➤ **How much leave must be granted?**

The statute does not limit the amount of leave that may be taken under the leave or safety accommodation sections. However, an employer may limit the amount of leave taken if it creates an undue hardship on the employer's business.<sup>244</sup> In addition, to the extent a DVL that is not provided as a safety accommodation also qualifies under OFLA, the leaves will run concurrently and count against the employee's OFLA entitlement.<sup>245</sup>

Leave may be taken in a continuous block of time, intermittently, or as an altered or reduced work schedule. The employee may be transferred to another position that better accommodates the leave if the employee transfers voluntarily; the transfer is temporary, lasts, no longer than necessary, and has equivalent pay and benefits; there is no other reasonable option available that would allow the employee to use intermittent leave or reduced work schedule; and the transfer is not used to discourage the employee from taking leave on an intermittent or reduced work basis or to create a hardship for the employee.<sup>246</sup>

➤ **What pay and benefits must be provided during the leave?**

Leave is unpaid.<sup>247</sup> Employees may elect, but may not be required to use any accrued vacation or other paid leave offered in lieu of vacation leave during the period of leave. When more than

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<sup>244</sup> ORS 659A.275(2); 659A.290(2)(c). Leave imposes an undue hardship on the operation of the business of the employer if the accommodation requires significant difficulty or expense, giving consideration to the size of the employer's business and the employer's critical need for the employee. ORS 659A.121; 659A.275(1). Other factors affecting undue hardship may include the cost; the overall financial resources of the covered employer's facility or facilities; the number of persons employed at the facility; the effect of the leave on expenses and resources or other impacts on the operation of the facility; the overall financial resources of the employer; the overall size of the employer's business with respect to the number of its employees and the number, type and location of the covered employer's facilities; and the type of operations conducted by the employer, including the composition, structure and functions of the covered employer's workforce. OAR 839-009-0355.

<sup>245</sup> OAR 839-009-0335.

<sup>246</sup> OAR 839-009-0360.

<sup>247</sup> ORS 659A.285(1); OAR 839-009-0363.

one type of paid leave is provided, the employer may designate the order in which paid leave may be used.<sup>248</sup>

➤ **What job protections apply?**

An employer may not deny DVL or safety accommodation leave to an eligible employee, except in cases of undue hardship.<sup>249</sup> An employer may not discriminate or retaliate against an employee because he or she has taken DVL.<sup>250</sup> Nor may an employer refuse to hire, discriminate, or retaliate against an employee because the employee is a victim of domestic violence, sexual assault, or stalking.<sup>251</sup>

**VI. OREGON WORKPLACE RELIGIOUS FREEDOM ACT<sup>252</sup>**

This law requires employers to allow employees to use vacation or other unrestricted available leave for the purpose of allowing the employee to engage in the religious observance or practices of the employee (*i.e.*, taking a day off to observe a holy day), unless the leave would result in an undue hardship.<sup>253</sup>

➤ **Are you a covered employer?**

The law applies to employers with one or more employees in the State of Oregon.<sup>254</sup>

➤ **Is the employee *eligible*?**

All employees are eligible regardless of tenure.

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

The employee qualifies for leave if the employee seeks to use the paid leave for his or her own religious observance.<sup>255</sup>

➤ **What notice must the employee provide?**

The statute imposes no specific notice requirements on employees.

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<sup>248</sup> ORS 659A.285(2); ORS 659A.285(3).

<sup>249</sup> ORS 659A.277; ORS 659A.290(2)(c).

<sup>250</sup> ORS 659A.277.

<sup>251</sup> ORS 659A.277; ORS 659A.290(2)(c).

<sup>252</sup> ORS 659A.033; OAR 839-005-0140 *et seq.*

<sup>253</sup> ORS 659A.033(a).

<sup>254</sup> ORS 659A.001(4).

<sup>255</sup> ORS 659A.033(a); OAR 839-005-0140(1).

➤ **What documentation may be required to support the employee’s leave request?**

Nothing in the statute imposes an obligation on employees to provide documentation of the need for leave for religious observance.<sup>256</sup> However, when an employee seeks time off as a religious accommodation, an employer may request that an employee provide a note from his or her priest, minister, rabbi or other similar source to verify the employee’s religion and clarify whether it is a tenet of that religion that the employee may not work on particular days.<sup>257</sup>

➤ **What notice must the employer provide?**

The statute imposes no specific notice requirements on employers.

➤ **How much leave must be granted?**

No specific amount of leave is specified, but the leave is limited to the amount of unrestricted accrued paid leave the employee has available.

➤ **What pay and benefits must be provided during the leave?**

The employer may not discriminate based on religion, so the same leave and benefits must be provided as during a use of vacation or other unrestricted leave for any other purpose.<sup>258</sup>

➤ **What job protections apply?**

None are specified, but discrimination based on use of vacation for religious observance would violate the prohibition on religious discrimination.<sup>259</sup>

**VII. FIREFIGHTERS LEAVE**

This law provides protected leave to volunteer firefighters performing firefighting services.<sup>260</sup>

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<sup>256</sup> Note, however, that an employer may seek limited verification when an employee makes a special request based on religion. “[Y]our first step as an employer should be to engage in an interactive process to discuss the employee’s religious needs and consider the potential options for accommodation. See BOLI Technical Assistance FAQ on Religious Accommodation at [http://www.boli.state.or.us/BOLI/TA/T\\_FAQ\\_Religious.shtml](http://www.boli.state.or.us/BOLI/TA/T_FAQ_Religious.shtml).

<sup>257</sup> *Id.*

<sup>258</sup> ORS 659A.030(1)(b).

<sup>259</sup> *Id.*

<sup>260</sup> ORS 476.574(1).

➤ **Are you a covered employer?**

The law applies to employers of one or more employees in the state of Oregon.<sup>261</sup>

➤ **Is the employee *eligible*?**

All employees are eligible regardless of tenure.<sup>262</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

An employee qualifies for leave if the employee is a volunteer firefighter of a rural fire protection district or a firefighter employed by a city or a private firefighting service to perform firefighting services under the Oregon Emergency Conflagration Act.<sup>263</sup>

➤ **What notice must the employee provide?**

No specific notice is required.

➤ **What documentation may be required to support the employee's leave request?**

No documentation is required.

➤ **What notice must the employer provide?**

The employer must provide written notice that the leave is granted.<sup>264</sup>

➤ **How much leave must be granted?**

The leave is granted until release from qualifying firefighting service permits the employee to resume the duties of employment.<sup>265</sup>

➤ **What pay and benefits must be provided during the leave?**

Firefighter's leave is unpaid.<sup>266</sup>

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<sup>261</sup> ORS 476.574(5)(b).

<sup>262</sup> ORS 476.574(5)(a).

<sup>263</sup> ORS 476.574(1); ORS 476.510 to 476.610.

<sup>264</sup> ORS 476.574(1).

<sup>265</sup> *Id.*

<sup>266</sup> ORS 476.574(4).

➤ **What job protections apply?**

Employees must be restored to the employee's former position or an equivalent position without loss of seniority, vacation credits, sick leave credits, service credits under a pension plan or any other employee benefit or right that had been earned at the time of the leave of absence.<sup>267</sup> Employers may not remove or discharge an employer from his or her former position as a consequence of the leave of absence.<sup>268</sup>

### VIII. JURY DUTY LEAVE

Both state and federal law provide job protection to employees summoned for jury service. The laws prohibit employers from discharging, threatening, intimidating, or coercing an employee because the employee has been summoned for or serves on jury service.<sup>269</sup>

➤ **Are you a covered employer?**

This law applies to all Oregon employers.<sup>270</sup>

➤ **Is the employee *eligible*?**

All employees are eligible for jury service leave, provided they otherwise meet the criteria for jury service.<sup>271</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

An employee qualifies for leave if the employee is summoned for service or scheduled service as a juror on a grand jury, trial, or jury of inquest in state court, or on any federal jury.<sup>272</sup>

➤ **What notice must the employee provide?**

No notice is required by statute. However, many employers have policies outlining what notice is required upon an employee's receipt of a jury duty summons.<sup>273</sup>

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<sup>267</sup> ORS 476.574(3).

<sup>268</sup> ORS 476.574(2).

<sup>269</sup> ORS 10.090; 28 USC §1875.

<sup>270</sup> See ORS 10.090(1); 28 USC §1875(a).

<sup>271</sup> See ORS 10.090(1); 28 USC §1875(a). To be eligible to sit on an Oregon jury, the employee must be a citizen of the United States, live in the county in which the employee was summoned for jury service, be at least 18 years old, and be free of criminal convictions for a period that depends on the nature of the jury service. In addition, the employee in most cases must not have served on a state or federal jury in the last 24 months. ORS 10.030.

<sup>272</sup> ORS 10.090(1); 28 USC §1875(a).

- **What documentation may be required to support the employee's leave request?**

The statutes do not impose an obligation on employees to provide documentation. However, the court clerk can generally provide the employee with evidence of jury service and/or employers can request that employees provide a copy of the summons.

- **What notice must the employer provide?**

No particular notice is required.

- **How much leave must be granted?**

The statutes impose no limit on the leave required for jury service.

- **What pay and benefits must be provided during the leave?**

The statutes impose no obligation on employers to pay employee during a jury duty leave, except that no deductions may be made from the salary of exempt employees for absences due for jury service. The employer may offset any amounts received by an employee as jury fees for a particular week against the employee's salary for that week.<sup>274</sup> In addition, the employees are entitled to benefits consistent with other employees who are on a leave of absence.<sup>275</sup>

- **What job protections apply?**

An employer may not discharge, threaten, intimidate, or coerce an employee because of the employee's service or scheduled service as a juror.<sup>276</sup> Employees may be entitled to pursue a common law wrongful discharge claim if terminated for service as a juror.<sup>277</sup> The federal statute provides a separate right of action for employees who sit on federal juries.<sup>278</sup>

## **IX. WORKERS' COMPENSATION LEAVE**

Workers compensation statutes afford job protection to injured workers following a leave of absence for compensable injuries.

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<sup>273</sup> See BOLI's Duty to Serve, [http://www.oregon.gov/BOLI/TA/TA\\_COL\\_060606\\_Jury\\_Duty.pdf](http://www.oregon.gov/BOLI/TA/TA_COL_060606_Jury_Duty.pdf).

<sup>274</sup> 29 CFR 541.602(b)(3).

<sup>275</sup> 28 USC §1875(c).

<sup>276</sup> ORS 10.090(1); 28 USC §1875(a).

<sup>277</sup> See, e.g., *Alexander v. Hamilton Hallmark, Inc.*, 125 F3d 857, 1997 WL 604125 (9<sup>th</sup> Cir 1997) (unpublished); *Halbasch v. Med-Data, Inc.*, 192 F.R.D. 641 (D Or 2000).

<sup>278</sup> 28 USC §1875(b).

➤ **Are you a covered employer?**

Employers of 21 or more employees are obligated to provide reinstatement to an injured worker returning from workers compensation leave.<sup>279</sup> Employers of six or more employees are required to provide reemployment to an injured worker following a workers compensation leave.<sup>280</sup>

➤ **Is the employee *eligible*?**

Any worker who sustains an injury compensable under the Oregon worker's compensation system while working for a covered employer is eligible. However, eligibility may terminate under certain circumstances.<sup>281</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

The employee qualifies for leave if the employee sustains a compensable injury or illness and is eligible for time loss benefits, or the absences are medically certifiable by the attending physician in connection with the compensable injury.<sup>282</sup>

➤ **What notice must the employee provide?**

No notice is required to support the leave request. However, a certificate of the attending physician may be required to establish that the employee is medically stationary or released for duty.<sup>283</sup>

➤ **What documentation may be required to support the employee's leave request?**

No documentation is required. However, as a practical matter, the employer will be notified by the carrier if the employee's injury is compensable or the absences are medically certifiable by the attending physician.

➤ **What notice must the employer provide?**

No notice is required.

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<sup>279</sup> ORS 659A.043(3)(b)(D).

<sup>280</sup> ORS 659A.046(7).

<sup>281</sup> ORS 659A.043(3); ORS 659A.046(3).

<sup>282</sup> OAR 839-006-0117(3).

<sup>283</sup> ORS 659A.049; ORS 659A.043(1), 659A.046(2).

➤ **How much leave must be granted?**

Leave is protected for a period of up to three years from the date of injury.<sup>284</sup>

➤ **What pay and benefits must be provided during the leave?**

Pay and benefits, if any, are determined and paid by the workers compensation carrier.

➤ **What job protections apply?**

Employers cannot discipline workers for absences due to a compensable injury, so long as the time off work is covered by time loss compensation or the absences are medically certifiable by the attending physician in connection with the compensable injury.<sup>285</sup>

Employers with 21 or more employees must, upon demand by the employee, provide reinstatement to the employee's former position if the employee is not disabled from performing the duties of the position.<sup>286</sup> If the employee is disabled from performing the duties of the former position, employers with six or more employees must, upon demand by the employee, provide reemployment to a position that is available and suitable.<sup>287</sup> Reinstatement and reemployment rights continue for up to three years.<sup>288</sup>

**X. LEAVE TO DONATE BONE MARROW**

➤ **Are you a covered employer?**

The law applies to employers with one or more employees in the State of Oregon.<sup>289</sup>

➤ **Is the employee *eligible*?**

An employee who works an average of at least 20 hours per week is eligible for leave.<sup>290</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

An employee qualifies for leave if he she seeks to use accrued paid leave to donate bone marrow.<sup>291</sup>

<sup>284</sup> ORS 659A.043, 659A.046; OAR 839-006-0131, 839-006-0135.

<sup>285</sup> OAR 839-006-0117(3).

<sup>286</sup> ORS 659A.043(3)(b)(D); ORS 659A.043(1).

<sup>287</sup> ORS 659A.046(1) and (7).

<sup>288</sup> ORS 659A.043, 659A.046; OAR 839-006-0131, 839-006-0135.

<sup>289</sup> ORS 659A.001(4).

<sup>290</sup> ORS 659A.312(5).

➤ **What notice must the employee provide?**

No specific notice is required.

➤ **What documentation may be required to support the employee's leave request?**

The employer may require medical verification of the purpose and length of the leave.<sup>292</sup>

➤ **What notice must the employer provide?**

No specific notice is required.

➤ **How much leave must be granted?**

The employee may take leave up to the lesser of the employee's accrued paid leave or 40 work hours, unless the employer agrees to a longer period.<sup>293</sup>

➤ **What pay and benefits must be provided during the leave?**

The employee is entitled to use accrued paid leave.<sup>294</sup>

➤ **What job protections apply?**

An employer may not retaliate against an employee who requests or uses accrued paid leave to donate bone marrow.<sup>295</sup>

## **XI. OREGON UNIFORMED SERVICE LEAVE**

➤ **Are you a covered employer?**

The law applies to employers with one or more employees in the State of Oregon.<sup>296</sup>

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<sup>291</sup> ORS 659A.312(1).

<sup>292</sup> ORS 659A.312(2).

<sup>293</sup> ORS 659A.312(1).

<sup>294</sup> ORS 659A.312(1).

<sup>295</sup> ORS 659A.312(3).

<sup>296</sup> ORS 659A.001(4).

➤ **Is the employee *eligible*?**

An employee is eligible for Uniformed Service Leave if he or she is a member of the Uniformed Service (Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard or military reserve forces).<sup>297</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

The employee will qualify for leave if he or she takes leave to perform duty on a voluntary or involuntary basis in a uniformed service, which may involve active duty, active duty for training, initial active duty for training, inactive duty for training, full-time duty in the National Guard, funeral honors duty or an examination to determine fitness for service in a uniformed service.<sup>298</sup>

➤ **What notice must the employee provide?**

No specific notice is required.

➤ **What documentation may be required to support the employee's leave request?**

No specific documentation is required.

➤ **What notice must the employer provide?**

No specific notice is required.

➤ **How much leave must be granted?**

There is no specified amount of leave that may be taken. However, the law is to be construed consistently with the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), where possible.<sup>299</sup>

➤ **What pay and benefits must be provided during the leave?**

No pay and benefits are specified. However, employers may not discriminate with respect to compensation for employees who take leave for uniformed service.<sup>300</sup>

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<sup>297</sup> ORS 659A.082(1)(b); OAR 839-006-0480(1)(b).

<sup>298</sup> ORS 659A.082(1)(a).

<sup>299</sup> ORS 659A.082(4).

<sup>300</sup> OAR 839-006-0480(2)(c)(E)

➤ **What job protections apply?**

An employer may not deny reemployment following a leave taken for service in a Uniformed Service.<sup>301</sup>

**XII. STATE MILITIA LEAVE**

State Militia Leave protects employees who take leave to serve in a state militia.

➤ **Are you a covered employer?**

The law applies to employers with one or more employees in the State of Oregon.<sup>302</sup>

➤ **Is the employee *eligible*?**

An employee is eligible for state militia leave he or she is a member of the organized militia of this state or another state.<sup>303</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

The leave will qualify if:

The employee is called into active service of the state under ORS 399.065 (1) or active state duty under ORS 399.075.

The employee is a member of the organized militia of another state and is called into active state service by the Governor of the respective state.

➤ **What notice must the employee provide?**

No notice of the need for leave is specified.

➤ **What documentation may be required to support the employee's leave request?**

No specific documentation is required.

➤ **What notice must the employer provide?**

No notice of the need for leave is specified.

<sup>301</sup> ORS 659A.082(2)(b)(B); OAR 839-006-0480(2)(c)(B).

<sup>302</sup> ORS 659A.086(8)(c).

<sup>303</sup> ORS 659A.086(1); 659A.086(8)(a).

➤ **How much leave must be granted?**

The employer must allow the employee to take leave until release from active state service permits the employee to resume the duties of employment.<sup>304</sup>

➤ **What pay and benefits must be provided during the leave?**

State Militia Leave is unpaid.<sup>305</sup> An employer may elect to provide group health coverage to the employee and eligible dependents during the leave.<sup>306</sup>

➤ **What job protections apply?**

An employee returning from State Militia Leave is not subject to removal or discharge from the employee's position as a consequence of the leave of absence.<sup>307</sup> Once released from duty, the employee must return to work within seven calendar days.<sup>308</sup> The employer must restore the employee to the employee's former position or an equivalent position without loss of seniority, vacation credits, sick leave credits, service credits under a pension plan or any other employee benefit or right that had been earned at the time of the leave of absence.<sup>309</sup>

### **XIII. LEAVE FOR STATE LEGISLATIVE SERVICE**

This law allows any member of the Legislative Assembly whose employment is "interrupted by reason of attendance upon regular or special sessions of the Legislative Assembly or the performance of official duties as a member of the Legislative Assembly" to take an unpaid, job-protected leave of absence.<sup>310</sup>

➤ **Are you a covered employer?**

The law applies to Oregon employers with ten or more employees.<sup>311</sup>

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<sup>304</sup> ORS 659A.086(2).

<sup>305</sup> ORS 659A.086(4).

<sup>306</sup> ORS 659A.086(5)(b).

<sup>307</sup> ORS 659A.086(2).

<sup>308</sup> ORS 659A.086(3)(a).

<sup>309</sup> ORS 659A.086(3)(b).

<sup>310</sup> ORS 171.120(1).

<sup>311</sup> ORS 171.122(5)(f).

➤ **Is the employee *eligible*?**

Any member or prospective member of the Legislative Assembly is eligible if he or she has worked for the employer at least 90 days prior to the first day of the leave and is not employed on a temporary basis.<sup>312</sup>

➤ **Does the employee's reason for the leave *qualify* as protected leave?**

An employee who leaves regular employment to attend any regular or special session of the Legislative Assembly or to perform official duties as a member or prospective member of the Legislative Assembly for which the member or prospective member may receive a per diem under ORS 171.072 or may receive reimbursements for out-of-state travel is eligible for leave.<sup>313</sup>

➤ **What notice must the employee provide?**

An employee must provide notice of the intent to take leave at least 30 days before a regular session or as soon as it is reasonably apparent that a special or emergency session is to be called.<sup>314</sup>

➤ **What documentation may be required to support the employee's leave request?**

No specific documentation is required.

➤ **What notice must the employer provide?**

No specific notice is required.

➤ **How much leave must be granted?**

An employer must provide leave for the period of time reasonably necessary to permit the employee's attendance at the legislative session or performance of official duties.<sup>315</sup>

➤ **What pay and benefits must be provided during the leave?**

Leave for State Legislative service is unpaid. Employees continue to accrue seniority, the right to participate in insurance or other employment benefits during the leave.<sup>316</sup>

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<sup>312</sup> ORS 171.122(5)(a) and (e).

<sup>313</sup> ORS 171.122(1).

<sup>314</sup> ORS 171.122(2)

<sup>315</sup> ORS 171.122(1).

➤ **What job protections apply?**

The employee must be reinstated to the former position or, if the position no longer exists, a similar position, with the seniority and benefits that would have been afforded if there had been no break in service.<sup>317</sup> The job and benefit restoration requirements are inapplicable if:

- (1) The circumstances of the employer have so changed during the leave of absence of the member or prospective member as to make restoration of the member or prospective member to employment impossible or unreasonable.
- (2) The member or prospective member fails to apply for restoration to employment within fifteen days after adjournment sine die of the Legislative Assembly following a regular session; or if the leave was for a lesser period for another legislative assignment, five days after the assignment is completed.
- (3) The employee's former position or the character, terms, conditions or activities of that position are incompatible under the Constitution and laws of this state with the office of member of the Legislative Assembly.<sup>318</sup>

Employees who take leave are protected from discrimination, harassment, discipline, discharge, intimidation, and coercion based on their legislative service.<sup>319</sup>

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<sup>316</sup> ORS 171.122(4).

<sup>317</sup> *Id.*

<sup>318</sup> ORS 171.122(5).

<sup>319</sup> ORS 177.120(2) and (3).