

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

839-009-0325

Purpose and Scope

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

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

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

Stat. Auth.: ORS 659A.805

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

839-009-0330

Prohibited Discrimination

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.270 – 659A.285, OL 2011 c. 687

839-009-0340

Definitions

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

the calendar year immediately preceding the year in which an eligible employee takes the leave.

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

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

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

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

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

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

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

uniformed service, the service member may have a cause of action under USERRA but not under these statutes.

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

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

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

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

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

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

(7) "In loco parentis" means in the place of a parent, having financial or day-to-day responsibility for the care of a child. A legal or biological relationship is not required.

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

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

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

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

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

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

(14) "Victim of domestic violence" means:

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

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

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

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

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

(17) [(16)] "Victim of sexual assault" means:

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

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

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

(18) [(17)] "Victim of stalking" means:

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

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

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

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

Stat. Auth.: ORS 659A.805

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

839-009-0345

Purposes for Taking Leave

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

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

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

(c) To obtain, or to assist the eligible employee's minor child or dependent in obtaining counseling from a licensed mental health professional related to an experience of domestic violence, **harassment**, sexual assault or stalking.

(d) To obtain services from a victim services provider for the eligible employee or the eligible employee's minor child or dependent.

(e) To relocate or take steps to secure an existing home to ensure the health and safety of the eligible employee or the eligible employee's minor child or dependent. Relocate includes:

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

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

Stat. Auth.: ORS 659A.805

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

839-009-0355

Undue Hardship

(1) Undue Hardship means a significant difficulty and expense to a covered employer's business and includes consideration of the size of the covered employer's business and the covered employer's critical need for the eligible employee. Other factors to consider in determining whether granting leave under ORS 659A.270 to 659A.285 for **victims of domestic violence, harassment, sexual assault or stalking** [*Victims of Domestic Violence, Sexual Assault or Stalking*] will cause an undue hardship on a covered employer's business include, but are not limited to:

(a) The length of leave under ORS 659A.270 to 659A.285 for **victims of domestic violence, harassment, sexual assault or stalking** [*Victims of Domestic Violence, Sexual Assault or Stalking*] requested and the relative cost to a covered employer's business;

(b) The overall financial resources of the covered employer's facility or facilities, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility if the leave under ORS 659A.270 to 659A.285 for **victims of domestic violence, harassment, sexual assault or stalking** [*Victims of Domestic Violence, Sexual Assault or Stalking*] were granted;

(c) The overall financial resources of the covered employer, the overall size of the business of the covered employer with respect to the number of its employees and the number, type and location of the covered employer's facilities;

(d) The type of operations conducted by the covered employer, including the composition, structure and functions of the covered employer's workforce.

Stat. Auth.: ORS 659A.805

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

839-009-0360

Intermittent Leave and Alternate Duty

(1) An eligible employee may take leave under ORS 659A.270 to 659A.285 for **victims of domestic violence, harassment, sexual assault or stalking** [*Victims of Domestic Violence, Sexual Assault or Stalking*] in multiple blocks of time and/or requiring an altered or reduced work schedule.

(2) A covered employer may transfer an employee on intermittent leave or a reduced work schedule into an alternate position with the same or different duties to accommodate the leave, provided the following exist:

(a) The eligible employee accepts the transfer position voluntarily and without coercion;

(b) The transfer is temporary, lasts no longer than necessary to accommodate the leave and has equivalent pay and benefits;

(c) Transfer to an alternate position is used only when there is no other reasonable option available that would allow the eligible employee to use intermittent leave or reduced work schedule; and

(d) The transfer is not used to discourage the eligible employee from taking intermittent or reduced work schedule leave, or to create a hardship for the eligible employee.

(3) An eligible employee transferred to an alternate position for the purpose of a reduced work schedule under section (2)(a) through (d) of this rule must be returned to the eligible employee's former position when the eligible employee notifies the employer that the eligible employee is ready to return to the former position.

Stat. Auth.: ORS 659A.805

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

839-009-0362

Notice by Employee

(1) An eligible employee seeking leave under ORS 659A.270 to 659A.285 for **victims of domestic violence, harassment, sexual assault or stalking** [*Victims of Domestic Violence, Sexual Assault or Stalking*] will give the covered employer reasonable advance notice of the employee's intention to take leave unless giving the advance notice is not feasible.

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

- (3) An eligible employee able to give advance notice of the need to take leave must follow the covered employer's known, reasonable and customary procedures for requesting any kind of leave;
- (4) The covered employer may require the eligible employee to provide certification that:
- (a) The eligible employee or the eligible employee's minor child or dependent is a victim of domestic violence, **harassment**, sexual assault or stalking as defined in OAR 839-009-0340(14), **(15)**, (16) and (17); and
- (b) The leave taken is for one of the purposes identified in OAR 839-009-0345.
- (5) Any of the following constitutes sufficient certification:
- (a) A copy of a police report indicating that the eligible employee or the eligible employee's minor child or dependent was a victim or alleged victim of domestic violence, **harassment**, sexual assault or stalking as defined in OAR 839-009-0340(14), **(15)**, (16) and (17); or
- (b) A copy of a protective order or other evidence from a court or attorney that the eligible employee appeared in or is preparing for a civil or criminal proceeding related to domestic violence, **harassment**, sexual assault or stalking as defined in OAR 839-009-0340(14), **(15)**, (16) and (17); or
- (c) Documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the eligible employee or the eligible employee's minor child or dependent is undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, **harassment**, sexual assault or stalking as defined in OAR 839-009-0340(14), **(15)**, (16) and (17).
- (6) Consistent with ORS 659A.306, the covered employer must pay the cost of any medical verification related to OAR 839-009-0345(1)(b) and (c) not covered by insurance or other benefit plan.
- (7) The eligible employee will provide the certification within a reasonable time after receiving the covered employer's written request for the certification.
- (8) The covered employer may provisionally designate an absence as leave under ORS 659A.270 to 659A.285 for **victims of domestic violence, harassment, sexual assault or stalking** [*Victims of Domestic Violence, Sexual Assault or Stalking*] until sufficient certification is received, if requested, to make a determination.
- (9) An eligible employee on leave who needs to take more leave than originally authorized should give the covered employer notice as soon as is practicable prior to the end of the authorized leave, following the covered employer's known, reasonable and

customary procedures for requesting any kind of leave. However, when an authorized period of leave has ended and an eligible employee does not return to work, a covered employer having reason to believe the continuing absence may qualify as leave under ORS 659A.270 to 659A.285 for **victims of domestic violence, harassment, sexual assault or stalking** [*Victims of Domestic Violence, Sexual Assault or Stalking*] may request additional information. If the covered employer requests additional information the eligible employee will provide the requested information as soon as is practicable. The covered employer may not treat a continuing absence as unauthorized unless requested information is not provided or does not support leave qualification.

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

Stat. Auth.: ORS 659A.805

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

839-009-0365

Enforcement and Denial of leave under ORS 659A.270 to 659A.285 for Victims of Domestic Violence, Harassment, Sexual Assault or Stalking

(1) A covered employer's duties and obligations under ORS 659A.270 to 659A.285 extend to a successor employer as defined in 29 CFR 825.107.

(2) It is an unlawful employment practice for a covered employer to count leave under ORS 659A.270 to 659A.285 against an employee in determining the employee's compliance with attendance policies or to count such leave against an employee when determining eligibility for bonuses based on attendance. An employee is entitled to continue eligibility for a bonus based on attendance upon return from leave under ORS 659A.270 to 659A.285 and may not be disqualified from the bonus as a result of taking leave.

(3) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts in violation of ORS 659A.270 to 659A.285 or to attempt to do so.

Stat. Auth.: ORS 659A.805

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