

COULDN'T THE STORK ALSO DELIVER PARENTAL LEAVE INSTRUCTIONS?

QUESTION: We have two employees, Katie and Andrew, who are about to have a baby. Since we have 64 employees, we know we are subject to both federal and state family leave law, but we we're not sure how that would work in this situation. For example, do we have to allow each of them to take a whole 12 weeks of parental leave? If so, may we require them to take their leave separately, or can they insist on taking it at the same time? There are three of us in the Human Resources Department, and we are unable to come to a consensus about how FMLA and OFLA apply in this situation. Will you please help us unravel how the leave laws apply here?

ANSWER: Many employers struggle with the issue of properly allocating parental leave to employees who are also new parents. Here's a summary of how it works, and how it would likely apply in Katie and Andrew's situation:

Both the federal Family Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA) require employers to provide up to 12 weeks of unpaid leave to employees having a baby or adopting (including foster child adoption). When an employer is covered under both FMLA and OFLA (as you are), you can count that 12 weeks under both laws at the same time. Thus, when the 12 weeks have run out, so has the OFLA/FMLA leave.

But there are two critical differences in OFLA/FMLA when we're talking about parent/employees working for the same employer:

The first difference is that while OFLA allows each parent to take a separate 12 weeks of leave, FMLA allows an employer to require that two new parents working for the same employer **share** the 12 weeks. For example, if Katie takes 6 weeks, only 6 weeks of FMLA leave would remain available for Andrew. And if Katie took the whole 12 weeks, there would be no FMLA leave left for Andrew.

The second major difference is that unlike FMLA (which is silent on the issue) OFLA allows an employer to require the employees to take leave **separately**. In other words, the employer can require one employee to stay at work while the other employee goes on parental leave, and then they can switch.

So how would this play out in Katie and Andrew's case? If they decided that they wanted to take the first six weeks of parental leave together, the employer would have to allow them to do that, because FMLA is involved. When that six weeks was over, both parents would have collectively used their 12 weeks, and their FMLA leave is depleted for the year.

But as mentioned above, OFLA allows each parent/employee to take a separate 12 weeks. Thus, Katie and Andrew each have 6 more weeks of OFLA leave. And since an employer can require employees on OFLA to take leave at different times, the employer is now free to do just that with Katie and Andrew.

For example, the employer could tell them that although they are free to use up their leave, one of them will have to stay at work while the other finishes out their six weeks. Then they can switch. The employer could allow Katie and Andrew to take parental leave on an intermittent basis, but the employer is not required to do so.

Keep in mind that this analysis applies only to parental leave and not to other types of events that qualify for family leave (for example serious health conditions of the employee or a family member)

For more information on this and other important issues affecting Oregon employers, including seminars conducted by BOLI's Technical Assistance Unit, please visit our website at www.oregon.gov/boli/ta. You can also call us at 971-673-0824.