

Employers Covered by OFLA and FMLA

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

Practice Tips:

- As noted in the preceding chart, the federal law has a 50-employee threshold, but state law requires only that the employer employ at least 25 people in Oregon. Employers meeting both coverage standards are subject to both state and federal laws. When “dual coverage” exists, the employer must track both OFLA and FMLA. Whenever the laws differ, the employer must apply the standard most beneficial to the employee.
- Employers with 25 to 49 employees need only comply with OFLA. However, those employers should still have a basic understanding of FMLA, since, to the extent possible, OFLA must be construed consistently with FMLA provisions. ORS 659A.186.
- Employers with fewer than 25 employees are covered by neither law and may determine their own policies as to when and how to grant leave, provided those policies are administered in a nondiscriminatory manner.
- When determining coverage, count full-time and part-time employees on the payroll, employees on paid or unpaid leave, and leased or temporary employees.

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

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

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

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

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

EMPLOYER QUERY: SMALL EMPLOYERS

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

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

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

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

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

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

EMPLOYER QUERY: TEMPORARY EMPLOYEES

TEMPORARY EMPLOYEES ARE COUNTED IN DETERMINING LEAVE LAWS COVERAGE

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

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

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

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

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

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

Employees Eligible for OFLA and FMLA Leave

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

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

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

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

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

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

The OFLA/FMLA Eligibility Gap

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

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

EMPLOYER QUERY: ELIGIBILITY OF TEMPORARY EMPLOYEES

SAME MINIMUM WORK REQUIREMENTS APPLY TO TEMPORARY EMPLOYEES

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

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