

Attachment A
FMLA and OFLA Leave for a Serious Health Condition

This is an attachment to State HR Policy 60.000.15 Family and Medical Leave that specifically addresses FMLA and OFLA leave for a serious health condition. The agency must follow the provisions of the main policy plus this attachment when administering FMLA and OFLA leave for a serious health condition.

- (1) An eligible employee receives up to 12 weeks of FMLA, OFLA or both leaves to tend to the employee's own serious health condition or the serious health condition of an eligible family member.
- (2) Refer to the main policy for procedures for an employee to request FMLA and OFLA leave for a serious health condition and the agency's requirements when responding to a request.
 - (a) If the employee is receiving Paid Leave Oregon benefits to tend to their own serious health condition, or their qualifying family member's serious health condition, or for parental leave; they are eligible for up to 16 weeks of OFLA protected leave.
 - (b) If the employee is receiving Paid Leave Oregon benefits due to their own pregnancy related disability, they are eligible for up to 18 weeks of OFLA protected leave.
- (3) **Definitions:**
 - (a) **Serious Health Condition:** An illness, injury, impairment, or physical or mental condition that involves one or more of the following:
 - (A) Hospital care: Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or as a consequence of inpatient care.
 - (B) Absence plus treatment: A period of incapacity of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves one or both of the following:
 - (i) Treatment received in person, two or more times, by a health care provider, a nurse, or a physician's assistant under direct supervision of a health care provider, or a provider of health care services (e.g., physical therapist) under orders of or referred by a health care provider.
 - (ii) Treatment by a health care provider on at least one occasion resulting in a regimen of continuing treatment under the supervision of the health care provider.
 - (C) Any period of incapacity for pregnancy, pregnancy-related illness, or for prenatal care (pregnancy disability). The following absences related to pregnancy disability qualify:
 - (i) Part-day or full-day absences for severe morning sickness.
 - (ii) Periods of bed rest ordered by the physician of the pregnant employee.
 - (iii) A reduced work schedule because of pregnancy complications.
 - (iv) Routine prenatal visits to the doctor.
 - (v) Pregnancy disability, where the employee is incapacitated due to pregnancy or childbirth. (Pregnancy is a temporary condition and not a covered disability that requires reasonable accommodation under the Americans with Disabilities Act Amendments Act (ADAAA).) Note: An employee may take FMLA and OFLA leave if needed to care for a pregnant family member¹ who is experiencing pregnancy disability.
 - (D) Chronic conditions. A chronic condition is one which:
 - (i) Requires periodic in-person treatments by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider.

¹ See main policy for definitions of qualifying family members for a serious health condition.

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- (ii) Continues over an extended period of time, including recurring episodes of a single underlying condition.
 - (iii) May cause episodic rather than a continuing period of incapacity; for example, asthma, diabetes, epilepsy.
- (E) Permanent or long-term conditions requiring supervision: A period of incapacity that is permanent or long-term due to a condition for which treatment is potentially ineffective. The employee or family member is under supervision of a health care provider, not necessarily receiving active treatment. Examples are Alzheimer's disease, a severe stroke, the terminal stages of a disease.
- (F) Multiple treatments (non-chronic conditions): Any period of absence to receive multiple treatments (including any period of recovery) by a health care provider or by a provider of health care services under orders of, or on referral by a health care provider for one or both of the following reasons:
- (i) Restorative surgery after an accident or other injury.
 - (ii) A condition that in the absence of treatment or medical intervention will likely result in a period of incapacity of more than three consecutive calendar days. For example: chemotherapy or radiation for cancer, physical therapy for severe arthritis, dialysis for kidney disease.
- (G) Other definitions relevant to whether a condition qualifies as a serious health condition:
- (i) Incapacity: The inability to work, attend school or perform other regular daily activities due to a serious health condition or treatment for or recovery from a serious health condition.
 - (ii) Treatment: Includes examinations to determine if a serious health condition exists and for evaluations of the condition. The definition does not include routine physical examinations, eye examinations or dental examinations.
 - (iii) Regimen of Continuing Treatment: Includes a course of prescription medication such as an antibiotic or physical therapy requiring special equipment to resolve or alleviate the health condition. A regimen of continuing treatment does not include taking over-the-counter medications such as aspirin, antihistamines or salves, bed-rest, drinking fluids, exercise, and other similar activities that could be initiated without a visit to a health care provider.
- (b) Definition of Family Member Under FMLA:**
- (A) Parent: The employee's biological or adoptive mother or father, or an individual who stood in loco parentis (in place of a parent) when the employee was a child.
- (B) Son or Daughter (Child): A biological, adopted, foster or stepchild, a legal ward, or a child of an employee standing in loco parentis who is 17 years of age or younger. The age limit does not apply if the child is incapable of self-care because of a mental or physical disability under the ADA as interpreted by the EEOC per 29 C.F.R. § 825.122(d)(2). The child:
- (i) Has a disability as defined by the ADA
 - (ii) Is incapable of self-care due to that disability
 - (iii) Has a serious health condition and is in need of care due to that health condition
- It is only when the above requirements are met that an eligible employee is entitled to FMLA protected leave to care for their child who is over 17 years of age.

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The Department of Labor clarified that age of a son or daughter at the onset of their disability is not relevant to determining a parent's entitlement to FMLA leave.

- (C) Spouse: A husband or wife as defined under Oregon state law. Under FMLA, a spouse can be a same sex spouse if the employee and their same sex spouse are legally married in a state that recognizes same sex marriage.

(c) Definition of Family Member Under OFLA:

- (A) "Family member" means: an individual related to an eligible employee by affinity or an individual who is an eligible employee's:
- (i) Spouse or domestic partner
 - (ii) Child or the child's spouse or domestic partner (includes biological, adopted, stepchild, foster child, or spouse/domestic partner's child)
 - (iii) Parent or the parent's spouse/domestic partner (includes biological, adoptive, stepparent, foster parent, or legal guardian, or the parent of your spouse/domestic partner, or in loco parentis)
 - (iv) Sibling or step sibling or the sibling's or step sibling's spouse or domestic partner
 - (v) Grandparent or the grandparent's spouse or domestic partner
 - (vi) Grandchild or the grandchild's spouse or domestic partner
- (B) "Affinity" means a relationship for which there is a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship.
- (i) The bond may be demonstrated by, but is not limited to the following factors, with no single factor being determinative:
 - (1) Shared personal financial responsibility, including shared leases, common ownership of real or personal property, joint liability for bills or beneficiary designations;
 - (2) Emergency contact designation of the employee by the other individual in the relationship or the emergency contact designation of the other individual in the relationship by the employee;
 - (3) The expectation to provide care because of the relationship or the prior provision of care;
 - (4) Cohabitation duration and purpose;
 - (5) Geographic proximity; and
 - (6) Any other factor that demonstrates the existence of a family-like relationship.

- (d) **Definition of Health Care Provider:** A person performing within the scope of their professional license or certification with primary responsibility to provide health care to an eligible employee or family member.

- (A) Health Care Provider includes: a doctor of medicine or osteopathy authorized to practice medicine or surgery, podiatrists, clinical social workers, optometrists, chiropractors (limited to manual manipulation of the spine to correct subluxation shown to exist by x-ray,) nurse practitioners, nurse midwives and Christian Science practitioners.

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- (4) **New Medical Certification:** An agency has the option to require an employee to provide medical certification from a health care provider that verifies the need for leave for a serious health condition for the employee or the employee's family member. A new medical certification is obtained at the first occurrence of each family and medical leave condition and on the one year anniversary for each at the time the employee takes leave for each condition. If the agency requires medical certification, the agency gives the Health Care Provider Certification PD 615A to the employee. The Health Care Provider Certification PD615A can be accessed electronically in the "Attachments" section on Page 1 of the policy. (An agency may not require medical certification for parental leave for the birth of a newborn, newly adopted or newly placed foster child.
- (A) An employee must provide a required medical certification prior to taking leave or within 15 days after the agency requests the medical certification, whichever is later. In some extenuating circumstances, the agency may allow more than 15 days, when despite the employee's diligent efforts they are unable to provide the certification in 15 days.
 - (B) An employee may preliminarily designate FMLA and OFLA leave pending the submission of a completed Health Care Provider Certification form.
 - (i) If an employee refuses to or does not provide a required medical certification per FMLA and OFLA statutes and applicable collective bargaining agreement, the agency may deny the FMLA or OFLA leave. Denied FMLA and OFLA leave is not protected under the FMLA and OFLA statutes.
 - (ii) An agency may recoup from the employee insurance payments made on the employee's behalf where the employee is not entitled to insurance.
 - (C) If the medical certification is incomplete or insufficient, an agency advises an employee in writing of the additional information needed to make the certification complete and sufficient. An agency allows the employee up to seven calendar days to obtain a complete and sufficient certification from the employee's health care provider.
 - (D) Under FMLA only, if the agency has followed Section (4)(B) above, and still needs to authenticate or clarify a medical certification, an agency designee who is not the employee's supervisor may, at the agency's option, contact the employee's health care provider to authenticate or clarify the medical certification (subject to any applicable provisions of the Health Insurance Portability and Accountability Act (HIPAA).) If an employee refuses to provide necessary HIPAA authorization so that their health care provider can communicate with the agency designee, and the employee does not otherwise clarify the certification (if needed), the agency may deny FMLA leave.
 - (E) If an employee needs OFLA or both OFLA and FMLA, and the agency needs to authenticate or clarify a medical certification a health care provider representing the agency may contact the employee's health care provider, with the employee's permission, for purposes of clarifying or authenticating the medical certificate. If an employee refuses to provide the necessary HIPAA authorization to their health care provider to communicate with the agency designee and does not otherwise clarify the certification (if needed), the agency may deny FMLA and OFLA leave.
 - (F) If an agency has reason to doubt the validity of a medical certification for an employee's serious health condition, an agency has the option to require a second opinion under FMLA and OFLA statutes. If the second opinion conflicts, an agency has the option to require a third opinion, which is binding.
 - (G) An agency pays uninsured expenses related to required medical certifications to determine if an employee's reason for leave qualifies for OFLA only or OFLA and FMLA together. FMLA and OFLA require that an agency pay the uninsured expenses of required medical certifications for second and third opinions. The employee submits receipts for uninsured expenses according to the agency's policy on reimbursements.
 - (H) An agency has the option to require a new medical certification when the employee requests leave for a new serious health condition for the employee or their family member, and at the beginning of each leave year for each qualifying condition (if the employee continues to have need for leave).

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- (b) **Medical Recertification:** An agency may require updated medical information only when the circumstances of the original medical certification changed, such as:
- (A) The original medical certification had an end date of less than one year and an employee requests an extension of leave.
 - (B) The circumstances (including the duration or frequency of absences) described in the previous certification change significantly.
 - (C) The agency receives information casting doubt on the employee's stated reason for the absence.
 - (D) To determine if the employee must reimburse the agency for health care contributions paid on the employee's behalf (if the employee does not return to work following FMLA or OFLA leave).
 - (E) Every six months for an ongoing condition in connection with an absence.
 - (F) No more than every 30 days (unless the initially requested leave period had an end date that was greater than 30 days), if none of the above circumstances apply.
- (c) **Affinity Attestation:** When an employee uses OFLA to care for a family member who is related by affinity, the employer may require the employee to attest in writing that the employee and the person cared for have a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship.

In this case the employee is required to submit an affinity attestation form in addition to any other required forms and certifications.