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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

BLI 15-2023

CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

FILED

09/06/2023 9:15 AM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Amends rule related to the Oregon Family Leave Act.

EFFECTIVE DATE: 09/06/2023 THROUGH 02/29/2024

AGENCY APPROVED DATE: 09/05/2023

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NEED FOR THE RULE(S):

This rule is necessary to implement recently enacted legislation. Updating this rule shortly after the legislation becomes operative is likely to eliminate confusion for employees and employers.

JUSTIFICATION OF TEMPORARY FILING:

The Bureau of Labor and Industries finds that the failure to act promptly will result in serious prejudice to the public interest and the interests of employees and employers. A new definition of "family member," that includes individuals related by affinity, became operative on September 3, 2023. These amendments clarify the scope of an attestation requirement that applies to leave taken involving family members related by affinity. If the rules are not updated, employees and employers across the state may be misled regarding the state of the law. Conversely, updating the rule will provide employees and employers with clarity regarding the state of the law.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

No documents were relied upon.

AMEND: 839-009-0240

SUSPEND: Temporary 839-009-0240 from BLI 14-2023

RULE SUMMARY: Amends rule to clarify circumstances under which employer may require employee to attest to family relationship.

CHANGES TO RULE:

839-009-0240

OFLA: Length of Leave and Other Conditions of OFLA Leave ¶

Except as otherwise provided in ORS Chapter 657B:¶

(1) An eligible employee is entitled to up to a total of 12 weeks of OFLA leave in any one-year period.¶

(2) In addition to the 12 weeks of leave authorized by ORS 659A.162 (1), a female¶ eligible employee may take a

total of 12 weeks of leave within the same leave year for an illness, injury or condition related to pregnancy or childbirth that disables the employee from performing any available job duties offered by the employer. The employee may use all or part of the 12 weeks of leave authorized by 659A.162(1) and all or part of the 12 weeks of pregnancy disability leave in any order. The employee need not exhaust either type of leave in order to use the other.¶

(3) An eligible employee taking the entire 12 weeks of OFLA leave authorized by ORS 659A.162 (1) for parental leave may take an additional 12 weeks of sick child leave within the same leave year. If the employee uses less than 12 weeks of parental leave, however, no additional sick child leave is available, except that the balance of the 12 weeks of OFLA leave authorized by ORS 659A.162 may be used for sick child leave or for any OFLA leave purpose.¶

(4) A female eligible employee may take up to 36 weeks of OFLA leave in one leave year that includes up to 12 weeks of pregnancy disability leave, 12 weeks of parental leave, and up to 12 weeks of sick child leave.¶

(5) An eligible employee may take up to 24 weeks of OFLA leave in one leave year under the following circumstances:¶

(a) The employee takes 12 weeks of parental leave, followed by:¶

(b) Up to 12 weeks of sick child leave.¶

(6) An eligible employee taking leave under ORS 659A.159(1)(e) and OAR 839-009-0230(5) to deal with the death of a family member is entitled to take up to a total of two weeks of OFLA leave for that purpose.¶

(a) An eligible employee is entitled to take up to two weeks of OFLA leave upon the death of each family member of the employee within any one-year period, except that the leave taken to deal with the deaths of family members may not exceed the total in ORS 659A.159(1) and subsection (1) of this rule.¶

(b) A covered employer may not require an eligible employee to take multiple leave periods concurrently if more than one family member of the employee dies during the one-year period. If multiple family members of an eligible employee die concurrently, an eligible employee may take up to two weeks of leave for the death of each family member.¶

(c) All leave taken under ORS 659A.159 (1)(e) and OAR 839-009-0230(5) shall be counted toward the total period of OFLA leave authorized in ORS 659A.159(1) and subsection (1) of this rule.¶

(d) All leave taken for the death of a family member must be completed within 60 days of the date on which the eligible employee receives notice of the death of the family member. Notice of the death of a family member may be by any means and from any source.¶

(7) Two or more eligible employees who are family members of each other as defined in OAR 839-009-0210(7), working for the same covered employer, may take OFLA leave at the same time with that covered employer only under the following circumstances:¶

(a) One eligible family member needs to care for another eligible family member who is suffering from a serious health condition;¶

(b) One eligible family member needs to care for a child suffering from a serious or non-serious health condition while another eligible family member is suffering from a serious health condition;¶

(c) Two or more eligible family members are suffering from one or more serious health conditions;¶

(d) The employer allows family members to take concurrent leave; or¶

(e) The eligible family members are taking leave for the death of a family member pursuant to ORS 659A.159(1)(e) and OAR 839-009-0230(5).¶

(8) Unless the covered employer approves otherwise, parental leave shall be taken in one uninterrupted period, and shall be completed within 12 months of the birth, adoption or placement of the child. Exceptions shall be made:¶

(a) To allow intermittent parental leave to effectuate adoption or foster placement of a child. Parental leave taken to effectuate adoption or foster placement of a child is part of the total amount of parental leave available to the employee, but need not be taken in one, uninterrupted period with any remaining parental leave taken after the actual placement of the child.¶

(b) To allow parental leave to attend the birth of or give birth to the employee's child. Such leave need not be taken in one, uninterrupted period with any remaining parental leave taken after the birth of the child.¶

(9) 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.¶

(10) A covered employer need not grant sick child leave to an eligible employee if another family member of the child is willing and able to care for the child.¶

(11) A covered employer may not reduce the amount of OFLA leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005.¶

(a) If an employee uses OFLA leave for a workplace injury pending acceptance of a workers' compensation claim, upon acceptance of the claim any OFLA leave used for the workplace injury must be restored to the employee. If

the claim is denied, OFLA leave will be deducted from the employee's entitlement.¶¶

(b) If a worker's compensation claim is first denied and then accepted, the employer must restore any OFLA leave taken for the condition covered by worker's compensation in the leave year in which the worker's compensation claim is accepted.¶¶

(c) Notwithstanding this rule, the employer may reduce the amount of OFLA leave available to an eligible employee under this section by any period the employee is unable to work because of a disabling compensable injury as defined in ORS 656.005 after the employee has refused a suitable offer of light duty or modified employment under ORS 659A.043 (3) (a) (D) or 659A.046(3)(d). See ORS 659A.043(4), 659A.046(5), 659A.162, OAR 839-006-0131(2) and 839-006-0136(4).¶¶

(d) An employee unable to work for an employer because of a disabling compensable injury arising out of and in the course of employment for that employer, but who is also employed by and able to work for another employer, may be eligible and qualify to use OFLA leave under the other employer.¶¶

(12) For the purpose of intermittent leave, OFLA leave entitlement is calculated for an employee by multiplying the number of hours the employee normally works per week by 12. (For example, an employee normally employed to work 30 hours per week is entitled to 12 times 30 hours, or a total of 360 hours OFLA intermittent leave; an employee normally employed to work 50 hours per week is entitled to 12 times 50 hours, or a total of 600 hours OFLA intermittent leave.)¶¶

(a) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 months worked prior to the beginning of the leave period must be used for calculating the employee's normal work week. (For example, an employee working an average of 25 hours per week is entitled to 12 times 25 hours, or a total of 300 hours OFLA leave.)¶¶

(b) If an employee takes intermittent or reduced work schedule OFLA leave, only the actual number of hours of leave taken may be counted toward the 12 weeks of OFLA leave to which the employee is entitled.¶¶

(13) An employee who has previously qualified for and taken some portion of OFLA leave must requalify as an "eligible employee" as defined in OAR 839-009-0210~~(6)~~ each time the employee begins additional OFLA leave within the same leave year. Exceptions:¶¶

(a) An employee who has been granted OFLA leave for a qualifying serious health condition of the employee or family member need not requalify under OAR 839-009-0210~~(6)~~ each time the employee takes leave for the same individual and the same serious health condition during the same leave year.¶¶

(b) A female eligible employee taking, in any order, some or all of 12 weeks of OFLA pregnancy disability leave and some or all of 12 weeks of OFLA leave for any other purpose, need not requalify under OAR 839-009-0210~~(6)~~ each time she takes OFLA leave within the same leave year.¶¶

(c) An employee who has taken 12 weeks of OFLA parental leave, need not requalify under OAR 839-009-0210~~(6)~~ for up to an additional 12 weeks of leave within the same leave year when used for the purposes of OFLA sick child leave.¶¶

(d) An employee unable to work because of a disabling compensable injury as defined in ORS 656.005 need not requalify under OAR 839-009-0210~~(6)~~ in order to use OFLA leave following a period the employee is off work due to the compensable injury.¶¶

(e) An employee who has taken serious health condition leave to care for a family member who dies during the employee's serious health condition leave, need not requalify under OAR 839-009-0210~~(6)~~ to take leave for the death of that family member.¶¶

(14) An exempt employee is a salaried executive, administrative or professional employee under the federal Fair Labor Standards Act (see 29 CFR § 541 through 541.315) or the state minimum wage and overtime laws (ORS chapters 652 and 653).¶¶

(a) When OFLA leave is also covered by FMLA and the employee takes intermittent leave in blocks of less than one day, if done in accordance with 29 CFR § 825.206, the employer may reduce the employee's salary for the part-day absence without the loss of the employee's exempt status in accordance with OAR 839-020-0004(30)(a).¶¶

(b) When OFLA leave is not covered by FMLA (e.g., the employer has 25 to 49 employees, the leave is taken for a sick child¶¶

, for the serious health condition of a parent-in-law, for the serious health condition of a registered domestic partner or for the serious health condition of a registered domestic partner's parents or for the death of a family member), and the employee takes intermittent leave in blocks of less than one day, an employer will jeopardize the employee's exempt status if the employer reduces the employee's salary for the part-day absence.¶¶

(15) The requirements of OFLA do not apply to any employer offering eligible employees a nondiscriminatory cafeteria plan, as defined by section 125 of the Internal Revenue Code of 1986, that provides as one of its options employee leave at least as generous as the leave required by OFLA.¶¶

(16) ORS 659A.150 to 659A.186 and these rules do not limit any right of an employee to any leave that is similar to the leave described in 695A.159(1) and OAR 839-009-0230 and to which the employee may be entitled under

any agreement between the employer and the employee, collective bargaining agreement or employer policy.¶
(17) When an eligible employee takes leave under ORS 659A.150 to 659A.186 to care for, or to deal with the death of, a family member who is related by affinity, the employer may require the employee to attest in writing that the employee and the other person have a significant personal bond that, when examined under the totality of the circumstances, is like a family relationship.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 659A.150 - 659A.186, ORS 659A.043, ORS 659A.046