

 STATEWIDE POLICY	NUMBER 60.000.15	SUPERSEDES 60.000.15 01/01/2024
	EFFECTIVE DATE 07/01/2024	PAGE NUMBER Pages 1 of 9
	REVIEWED DATE	
Division Chief Human Resources Office	REFERENCE Federal Family and Medical Leave Act (FMLA), as amended, 29 USC § 2601 <u>et seq</u> ; federal regulations 29 CFR Part 825; the Americans with Disabilities Act (ADA), as amended (including the ADA Amendments Act), 42 USC § 12101 <u>et seq</u> ; the Fair Labor Standards Act (FLSA), as amended, 29 USC § 201 <u>et seq</u> ; and the Uniform Services Employment and Reemployment Rights Act (USERRA), as amended, 38 USC §4301 <u>et seq</u> .	
Policy Owner CHRO Policy Unit		
SUBJECT Federal Family and Medical Leave Act (FMLA)	APPROVED SIGNATURE <i>Signature on file with the Chief Human Resources Office</i>	

POLICY STATEMENT

Oregon state government provides leave to employees according to the Federal Family and Medical Leave Act (FMLA).

APPLICABILITY

All employees, where not in conflict with an applicable collective bargaining agreement.

ATTACHMENTS

- Health Care Provider Certification
- FMLA Military Healthcare Certification (PD 615B)
- Qualifying Exigency Certification (PD 615C)
- Insurance benefits guide
- Additional policy attachments by leave-type
 - A. FMLA Serious Health Condition
 - B. FMLA Parental leave
 - C. FMLA Military Caregiver leave
 - D. FMLA Qualifying Exigency leave

DEFINITIONS

Employee: A person holding a full or part time permanent, limited duration, temporary, seasonal, or academic position in state service.

Agency: includes the appointing authority, the human resource staff, and individuals designated by the appointing authority to administer the agency’s Family and Medical leave program.

Federal Family and Medical Leave Act (FMLA): federal law that protects an employee’s absence from work under certain conditions.

Leave Year: 52 weeks beginning the Sunday immediately preceding the first day of leave. Refer to section 6(d) for FMLA Military Caregiver leave.

Paid Leave Oregon: an insurance program administered by the Oregon Employment Department that provides up to 14 weeks of paid leave for qualifying conditions and protects an eligible employee’s absence from work.

Also refer to State HR Policy 10.000.01, Definitions.

NOTE: Subsequent sections of the policy include other definitions relevant to the FMLA leave type.

POLICY

- (1) An agency is required to notify an employee of their rights under FMLA when requested by the employee or when agency management learns that protected leave may be needed. Federal law prohibits retaliating against an employee with respect to hiring or any other term or condition of employment because the employee asked about, requested or used any type of FMLA leave.

- (2) An agency grants an eligible employee up to 12 weeks (no less than 480 hours for a full-time employee who works 40 hours per week) of protected time off under FMLA for the purposes listed in the chart below. Except for military caregiver leave, an employee’s FMLA leave entitlement is limited to 12 weeks per leave in a leave year, no matter how many different leave-types are used.

Qualifying purposes under FMLA
To tend to the employee’s own serious health condition
To tend to the serious health condition of the employee’s: <ul style="list-style-type: none">• Spouse• Parent: the employee’s biological or adoptive mother or father, or an individual who stood in loco parentis¹ (in place of a parent) when the employee was a child.• Child: The employee’s biological, adopted, foster or stepchild, a legal ward, or a child of an employee standing in loco parentis. The child must be 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) at the time FMLA leave is to commence.
Parental leave: to care for the employee’s newborn, newly adopted child, or newly placed foster child.
Qualifying Exigency leave: to attend to qualifying exigencies when the employee’s spouse, parent, son, or daughter is on active duty or called into active duty in support of a contingency operation for the military.
Military Caregiver leave: [Up to 26 weeks (1040 hours for a full-time employee who works 40 hours per week) in a single 12-month period] to care for the employee’s spouse, parent, son or daughter of any age, or next of kin who is a covered service member with a serious injury or illness incurred in the line of duty on active duty, or a veteran discharged under other than dishonorable conditions within five years of receiving medical treatment, recuperation or therapy for a serious injury or illness. The single 12-month period is applied on the following basis: per covered service member, per injury or illness. This includes (is not in addition to) time used for other FMLA-qualifying purposes during the 12- month period.

- (3) An agency prorates the FMLA leave entitlement for part-time employees. Examples:

1 The Wage and Hour Division of the US Department of Labor issued an Administrator’s Interpretation No. 2010-3 on June 22, 2010, to clarify the definition of “son or daughter” under Section 101(12) of the FMLA as it applies to an employee standing “in loco parentis” to a child.

- (a) The entitlement for a part-time employee who works 30 hours a week is up to 12 weeks of leave at 30 hours a week or 360 hours of intermittent or reduced-schedule leave in a leave year for their own serious health condition; (2) An employee who uses FMLA Military Caregiver leave and works 30 hours a week is entitled to up to 26 weeks of leave at 30 hours a week or 780 hours of intermittent or reduced-schedule leave in a leave year.
 - (b) An eligible limited duration or temporary employee's FMLA leave ends when the employee's assignment expires regardless of whether the person has exhausted their leave entitlement.
- (4) Required posting: Agencies must display the following poster in the worksite: "Employee Rights under the Family and Medical Leave Act." The poster is attached to this policy and is available through the US Department of Labor.
- (a) Federal law requires that an agency provide FMLA information to applicants and employees upon hire. To satisfy the first requirement for all agencies, DAS maintains a link to FMLA information on the state Jobs website. An agency can satisfy the second requirement by giving a newly hired employee a copy of the FMLA poster or by using another method of informing new hires.
- (5) An agency follows this policy for all FMLA leave-types. Additional requirements for specific leave-types are contained in the following policy attachments:
- (a) Leave for a Serious Health Condition
 - (b) Parental leave
 - (c) FMLA Military Caregiver leave
 - (d) FMLA Qualifying Exigency leave
- (6) Eligibility for leave: The agency determines eligibility for leave as follows. Eligibility is not pro-rated for part-time employees.
- (a) Employees Eligible for FMLA: to qualify for all FMLA leave types the employee must have worked for Oregon state government for a total of at least 12 months (if months are non-consecutive there can be no more than a seven-year break in service) and worked for at least 1250 hours during the 12-month period immediately preceding the leave.
 - (b) The agency counts only the hours the employee actually worked (not hours while on paid or unpaid leave), the hours worked in another state agency, hours worked as a temporary employee (state or Qualified Rehabilitation Facility temp) for a state agency, military leave- time (per federal USERRA law and State HR Policy 60.000.25 Military Leave), and hours spent performing union business to determine an employee's eligibility for FMLA leave.
 - (c) The agency reduces the employee's FMLA entitlement by any FMLA leave used in the current leave year for the employee's own or a family member's serious health condition, Parental leave, FMLA Military Caregiver leave or FMLA Qualifying Exigency leave.
 - (d) To determine the amount of an employee's entitlement to FMLA Military Caregiver leave, the agency uses a "rolling forward" leave year. This means the leave year for Military Caregiver leave starts on the first day of the first occurrence of Military Caregiver leave. The employee has one year from the first day of the leave to use the 26-week leave entitlement. If the employee exhausts the leave before the year is over, the employee is not eligible for additional FMLA Military Caregiver leave during that year. The agency does not reduce the employee's entitlement to FMLA Military Caregiver leave by the amount of FMLA leave used prior to the start of the Military Caregiver leave.

(7) Types of leave schedules:

- (a) Continuous leave: Leave taken in a block of time. For example, an employee takes six weeks of leave due to illness.
- (b) Intermittent leave: Leave taken sporadically. For example, an employee misses five days of work a month due to a serious health condition. Conditions for use of intermittent leave are outlined in the policy attachments for each specific leave-type, where applicable.
- (c) Reduced-schedule leave: Leave taken where the employee is scheduled to work less than the employee's normal hours in a day or week. For example, an employee scheduled to work eight hours a day, works six hours and takes the remaining two hours as FMLA due to a serious health condition. Conditions for use of reduced-schedule leave are outlined in the policy attachments for each specific leave-type, where applicable.

(8) FMLA will run concurrently with the Oregon Family Leave Act (OFLA) and/or Paid Leave Oregon, when applicable.

(9) Entitlement when spouses work for Oregon state government:

- (a) Spouses who are both employed by Oregon state government share the FMLA entitlement for Parental leave, leave to care for a parent with a serious health condition, and FMLA Military Caregiver leave. An agency (or agencies) may choose to lift the requirement that spouses share the entitlement when the absence of both employees does not cause a hardship for the agency.

(10) Employee requirements to request FMLA: An employee makes a request to the agency 30 calendar days in advance for a planned or foreseeable absence². The employee is not required to use the word FMLA, but they must give enough information that the agency can determine if the reason for the leave might qualify as FMLA. If the employee does not give enough information, the agency may ask questions as to the nature of the leave. Exceptions:

- (a) For medical emergencies, other unforeseeable events or short-notice situations, an employee, or their family member if the employee is medically unable, must notify the agency as soon as possible.

(11) Agency's initial response to a request for FMLA leave and eligibility determination³: Under most circumstances an agency provides an initial written response to the employee within five business days telling the employee whether they are eligible for FMLA leave, that the leave may count as FMLA, and:

- (a) If the employee is not eligible for leave, the agency provides at least one reason for the determination. For example, the employee has not worked enough hours to qualify.
- (b) If the employee is eligible for leave, the agency may provisionally designate the leave until the employee provides further information. Additionally, the agency notifies the employee of their rights and responsibilities listed in Section 13, and whether the employee must provide medical or military certification or military orders (in order for the agency to determine if the employee's reason for the leave qualifies as FMLA). If the agency requires medical or military certification or military orders, the agency must also notify the employee of the consequence for failing to provide the information.

² The penalty for failure to give a 30-day notice is located in 29 CFR § 825.302 for an employee using exclusively FMLA.

³ An agency may designate or deny FMLA leave in the initial written response if the agency has enough information to make the determination if the employee is eligible and the employee's need for leave qualifies. The agency's response must include (where applicable) the provisions in Sections (10)(a), (11) and (12).

(12) Agency's determination if leave qualifies as FMLA: Within five business days of receiving information such as a medical or military certification, or military orders, the agency provides the employee with a written response that states whether the reason for the employee's leave qualifies as FMLA and:

- (a) If the employee's reason or purpose for the leave does not qualify for FMLA, the agency provides at least one reason for the determination. For example, the leave did not qualify as a serious health condition.
- (b) If the employee's reason or purpose for leave qualifies as FMLA, the agency designates the leave as such and notifies the employee of:
 - i. Their rights and responsibilities listed in Section 13.
 - ii. The number of weeks, days or hours of leave that will count against the employee's FMLA entitlements if the leave is taken in a block of time or as a predictable reduced schedule.
 - iii. If the FMLA leave is intermittent or it is not possible to provide the specific amount of time that counts against the employee's FMLA entitlement, the employee may request the agency provide a notice of the amount counted against FMLA. The request can be no more than every 30 days and only when the employee has FMLA during those 30 days.

(13) Employee's rights and responsibilities under FMLA:

- (a) Employees are responsible for providing sufficient information for the agency to determine if the leave qualifies.
- (b) Employees must use paid leave according to this policy or a collective bargaining agreement.
- (c) Employees are entitled to insurance premium information.
- (d) An employee who requests leave for their own serious health condition is entitled to know whether the agency will require a fitness-for-duty certification before returning to work. The fitness-for-duty certificate must verify whether the employee is able to return to work, whether the employee has any job-related restrictions, and the duration of any restrictions. The agency must communicate this requirement when it initially responds to the employee's request for leave.

(14) Core PEBB Insurance: During months when an employee uses FMLA the agency pays its share of health care contributions for a benefit eligible employee's enrolled core benefit (medical, dental, and vision and basic employee-only life insurance).

- (a) An employee must pay their share of the premium payment and any surcharges related to their core benefits. An employee in leave without pay status is required to make arrangements with the agency to pay for their share of the premium payments and surcharges associated with the employee's core benefits. A family member may make arrangements to make premium payments if the employee is incapacitated.
 - i. An employee may submit monthly payments to the agency for the employee portion of core benefits.

- ii. An employee may choose to have the employee portion of core benefit premiums paid by the agency on their behalf during months an employee uses FMLA. Payments made by the agency are recoverable upon the first available paycheck(s) after the employee returns to work, not to exceed 10% of their gross pay of each pay period.
- (b) An employee may be required to reimburse an agency for the employer's portion and any agency paid employee's portion of insurance premiums paid on the employee's behalf if the employee fails to return to work, unless the reason for the employee's failure to return is a continuation, recurrence, or onset of a serious health condition of the employee or employee's family member, a continuation, recurrence, or onset of a serious illness or injury of a covered service member or other circumstances beyond the employee's control.
- (c) Refer to the CHRO Paid Leave Oregon policy 60-000-04 for continuation of insurance benefits when FMLA is used concurrently with Paid Leave Oregon.

(15) Optional PEBB insurances:

- (a) If an employee works an insufficient number of hours in a month to cover their optional insurances while on FMLA or is in leave without pay status, the employee must pay premiums for the optional PEBB insurances that may be continued.
 - i. An employee may submit monthly payments to the agency for the continued optional insurance benefits.

(16) PEBB Insurances after exhaustion of FMLA:

- (a) When leave does not qualify under FMLA, all insurance coverage terminates when the employee, who is not in a current Affordable Care Act (ACA) Stability Period, does not work enough hours in the month, uses insufficient paid leave, or fails to make a premium payment. Should the employee wish insurance to continue, they may self-pay some insurance premiums under COBRA. The employee receives information about self-paying insurance through a third-party administrator.

- (17) Use of paid leave: FMLA is unpaid leave entitlement. However, this policy requires an employee to use available paid leave during FMLA leave prior to using leave without pay with some exceptions listed in the chart below. The agency counts all paid and unpaid leave used during FMLA leave toward the employee's FMLA entitlement. An employee chooses whether to use compensatory time (unless required by a collective bargaining agreement).

Leave Situation	Represented Employees <i>(The column below is the employee's requirement to use or reserve leave in the leave situation listed in the left-hand column)</i>	Management Service, Unclassified Executive Service or Unrepresented Employees <i>(The column below is the employee's requirement to use or reserve leave in the situation listed in the far left- hand column)</i>
Employee is on any FMLA leave-types in a block of time is not on workers' compensation or receiving payments from a disability provider.	Employee must use paid leave but may be able to reserve leave according to an applicable collective bargaining agreement. Employee may not reserve accrued paid leave when on intermittent or reduced-schedule leave.	Employee must use paid leave but may reserve 60 hours of sick or vacation leave or a combination of both for use upon return to work. Employee may not reserve accrued paid leave when on intermittent or reduced-schedule leave.
Employee receives payments from a disability provider while they are on FMLA.	Employee chooses if they will use paid leave. If the employee chooses to use paid leave, paid leave must be used until exhausted prior to entering into leave without pay. If the employee chooses to use leave without pay, leave without pay shall end when disability payments end. Employee resumes use of accrued paid leave when disability payments end.	Employee chooses if they will use paid leave. If the employee chooses to use paid leave, paid leave must be used until exhausted prior to entering into leave without pay. If the employee chooses to use leave without pay, leave without pay shall end when disability payments end. Employee resumes use of accrued paid leave when disability payments end.
Employee receives payments from a disability provider and/or receive Paid Leave Oregon while they are on FMLA	Refer to the applicable collective bargaining agreement.	Employees may choose to use sick, vacation, personal business, compensatory time, straight time leave or leave without pay in any increment, up to their normally scheduled hours, while receiving Paid Leave Oregon.
Employee exhausts FMLA and continues to receive payments from a disability provider.	Employee chooses if they will use paid leave. If the employee chooses to use paid leave, paid leave must be used until exhausted prior to entering into leave without pay. If the employee chooses to use leave without pay, leave without pay shall end when disability payments end. Employee resumes use of accrued paid leave when disability payments end.	Employee chooses if they will use paid leave. If the employee chooses to use paid leave, paid leave must be used until exhausted prior to entering into leave without pay. If the employee chooses to use leave without pay, leave without pay shall end when disability payments end. Employee resumes use of accrued paid leave when disability payments end.

Leave Situation	Represented Employees <i>(The column below is the employee's requirement to use or reserve leave in the leave situation listed in the left-hand column)</i>	Management Service, Unclassified Executive Service or Unrepresented Employees <i>(The column below is the employee's requirement to use or reserve leave in the situation listed in the far left- hand column)</i>
Employee is on time loss through workers' compensation while on FMLA leave.	Employee chooses whether they will supplement the workers' compensation payment with accrued paid leave to equal the difference between the workers' compensation payment and their normal salary. (A collective bargaining agreement may have further requirements or different provisions.)	Employee chooses whether they will supplement the workers' compensation payment with accrued paid leave to equal the difference between the workers' compensation payment and their normal salary.

(18) Returning from leave:

- (a) If an agency has exercised the option to require an employee who returns from leave for their own serious health condition to provide a fitness for duty statement from a health care provider, the agency can require that statement for the employee's return. The statement must certify the employee is able to return to work, whether the employee has any job-related restrictions, and the duration of any restrictions.

(19) Reinstatement rights:

- (a) An agency restores an employee who returns from FMLA to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. The following exceptions apply:
 - i. If an equivalent position is not available, the employer shall offer the employee an equivalent job at a geographically proximate worksite (i.e. one that does not involve a significant increase in commuting time or distance), if such a position is available. If equivalent positions are available at multiple job sites, the employer shall first offer the employee the position at the job site that is nearest to the job site of the employee's former position.
 - ii. If an agency eliminates the employee's position through layoff, the agency treats the employee as if the employee was not on FMLA, in the same manner as similarly situated employees, according to the agency's policy or applicable collective bargaining agreement.
 - iii. An agency restores an unclassified, temporary, or limited duration employee to the extent the employee's placement, appointment or position still exists.
 - iv. If an employee does not return from leave or is unable to perform an essential function of the position the employee held prior to the commencement of FMLA, with or without reasonable accommodation, the employee may be subject to termination under applicable law, rule, policy, or collective bargaining agreement.

(b) An agency has no obligation under FMLA to continue to employ an employee who has exhausted their FMLA leave if the employee cannot return to the position they held prior to FMLA, or cannot perform an essential function of the position, with or without reasonable accommodation⁴. The following exceptions apply:

- i. An employee who cannot return to work after exhausting their FMLA leave entitlement, who is not receiving disability payments, and who still has sick leave, must notify the agency of the need to continue their absence using accrued sick leave according to State HR Policy 60.000.01 Sick Leave with Pay, an applicable agency policy, or an applicable collective bargaining agreement.
- ii. Where an employee's own serious health condition prevents them from returning to work after exhausting their FMLA leave entitlement, an agency has the option to grant an employee's request to extend an absence when continuing the leave does not impose an undue hardship on the agency and it complies with law, policy, applicable collective bargaining agreement, and reasonable accommodation provisions of the Americans with Disabilities Act Amendments Act (ADAAA). An agency may request the employee provide medical certification verifying the need for continued leave.

(20) Effect on seniority, salary increases and recognized service date: Use of FMLA does not affect an employee's seniority, eligibility for salary increases or the employee's recognized service date. The agency treats an employee using FMLA leave as if the employee is not on leave, up to the point where the employee's FMLA entitlement ends. Unpaid leave affects an employee's PERS retirement benefits.

(21) FMLA recordkeeping: An agency maintains records of the FMLA leave taken by its employees according to the recordkeeping requirements and purging schedules of OAR 166- 300-0035(3)(5)(6). An agency keeps FMLA medical records in a secured location in the Oregon state Human Resources Information System separate from an employee's personnel file. These records will be available to the appropriate personnel in any agency in which the employee is currently employed.

(22) An agency may send all eligibility and designation letters to the employee's work email before and after the time the employee is on FMLA leave. The agency may send eligibility and designation letters to the employee's personal email if the employee wants to provide their personal email address during the time the employee is on FMLA leave.

Otherwise, eligibility and designation letters are delivered in person or sent through US mail. An agency may not send an employee's completed medical certification through unsecure email. However, the agency is not prohibited from receiving medical documentation via email if the employee chooses to provide it in this manner.

(23) Refer to the appropriate federal and state laws for situations regarding family and medical leave not covered in the policy.

⁴ An employee has reinstatement rights under FMLA as long as the employee returns immediately (the next business day for an employee on full-day leave) after the employee's leave entitlement ends and can perform all essential functions of the position. An agency may still have an obligation to employ the person, but it is no longer under FMLA.