

<b>SUBJECT:</b> Family and Medical Leave	<b>NUMBER:</b> 60.000.15
<b>DIVISION:</b> Chief Human Resources Office	<b>EFFECTIVE DATE:</b> 2/01/2019

**APPROVED: Signature on file with the Chief Human Resources Office**

**POLICY STATEMENT:** Oregon state government provides leave to employees according to the Federal Family and Medical Leave Act (FMLA), the Oregon Family Leave Act (OFLA) and the Oregon Military Family Leave Act (OMFLA).

**AUTHORITY:** Federal Family and Medical Leave Act (FMLA), as amended, 29 USC § 2601 et seq; federal regulations 29 CFR Part 825; Oregon Military Family Leave Act, ORS 659A.090 through 659A.099; Oregon Family Leave Act (OFLA), as amended, ORS 659A.150 through 659A.186; ORS 659A.306; OAR 839-009-0200 through 839-009-0460; OAR 166-300-0010 through 166-300-0045; OAR 101-030-0005 through 101-030-0027; the Americans with Disabilities Act (ADA), as amended (including the ADA Amendments Act), 42 USC § 12101 et seq; the Fair Labor Standards Act (FLSA), as amended, 29 USC § 201 et seq; and the Uniform Services Employment and Reemployment Rights Act (USERRA), as amended, 38 USC §4301 et seq.

**APPLICABILITY:** All employees (including temporary employees) when not in conflict with an applicable collective bargaining agreement.

**ATTACHMENTS:** Required postings  
 Medical or Military Certification  
     Medical Certification (PD 615A)  
     FMLA Military Healthcare Certification (PD 615B)  
     Qualifying Exigency Certification (PD 615C)  
 Insurance benefits guide  
     Public Employees’ Benefit Board FMLA-OFLA Benefit Matrix  
 Additional policy attachments by leave-type  
     A. Leave for a serious health condition  
     B. Parental leave  
     C. OFLA Sick Child leave  
     D. FMLA Military Caregiver leave  
     E. FMLA Qualifying Exigency leave  
     F. OFLA Military Family leave  
     G. OFLA Bereavement leave

**DEFINITIONS:** **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) and Oregon Family and Medical Leave Act (OFLA):** federal and state laws that protect an employee’s absence from work under certain conditions.

**Leave Year:** January 1 through December 31. Refer to section 4(c) for FMLA Military Caregiver leave.

**Oregon Military Family Leave Act:** state law that protects an employee’s absence from work under certain circumstances; referred to as OMFLA Military Family Leave.

Also refer to State HR Policy 10.000.01, Definitions

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

**POLICY:**

- (1) An agency is required to notify an employee of their rights under FMLA and OFLA when requested by the employee or when agency management learns that protected leave may be needed. Federal and state law prohibit 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 or OFLA leave. An agency grants an eligible employee up to 12 weeks (480 hours for a full-time employee who works 40 hours per week) of protected time off under FMLA and OFLA for the purposes listed in the chart below. This policy and its attachments also describe exceptions to the 12-week entitlement; other than these exceptions, an employee’s 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	Qualifying purposes under OFLA
To tend to the employee’s own serious health condition	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"> <li>• Spouse: husband or wife as defined under Oregon state law and a same sex spouse of an employee if they are married in a state that legally recognizes same sex marriage.</li> <li>• Parent: the employee’s biological or adoptive mother or father, or an individual who stood in loco parentis<sup>1</sup> (in place of a parent) when the employee was a child</li> <li>• 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).</li> </ul>	To tend to the serious health condition of the employee’s: <ul style="list-style-type: none"> <li>• Spouse or same-gender domestic partner as defined under Oregon state law</li> <li>• 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, and the parent of the spouse or same-gender domestic partner</li> <li>• Child (of any age): The employee’s biological, adopted, foster or stepchild, a legal ward, or a child of an employee standing in loco parentis, and the child of the same-gender domestic partner</li> <li>• Grandparent or grandchild</li> </ul>

<sup>1</sup> 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.

Qualifying purposes under FMLA	Qualifying purposes under OFLA
Parental leave: to care for the employee’s newborn, newly adopted child or newly placed foster child	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	Sick Child leave: to care for a child 17 years of age or younger who has a non-serious health condition and requires home care. The age limit does not apply if the child is incapable of self-care because of a mental or physical disability
<p>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.</p> <p>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.</p>	<p>An eligible employee taking any amount of OFLA leave for their own pregnancy-related disability may take up to 12 more weeks of OFLA leave in the same leave year for any OFLA-qualifying purpose.</p> <hr/> <p>– An eligible employee taking a full 12 weeks of Parental leave under OFLA may take up to 12 additional weeks of OFLA leave in the same leave year for Sick Child leave.</p> <hr/> <p>– Military Family leave: Up to 14 working days per deployment related to the deployment of an employee’s spouse or same-gender domestic partner. The 14 days is included in the 12-week OFLA entitlement.</p>
	Bereavement leave: Up to two weeks per family member, in a one year time period [to be taken within 60 days of notification of the death] to deal with the death of a family member by: attending the funeral or alternative to a funeral, making arrangements necessitated by the death, or grieving.

- (a) An agency prorates the FMLA or OFLA leave entitlement for part-time employees. Examples: (1) 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 or OFLA leave ends when the employee’s assignment expires regardless of whether the person has exhausted their leave entitlement.

(2) Required posting: Agencies must display the following posters in the worksite: “Oregon Family Leave

Act, Notice to Employers and Employees” and “Employee Rights under the Family and Medical Leave Act.” These posters are attached to this policy and are available through the US Department of Labor and the Oregon Bureau of Labor and Industries.

- (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.
- (3) An agency follows this policy for all FMLA and OFLA 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) OFLA Sick Child leave
  - (d) FMLA Military Caregiver leave
  - (e) FMLA Qualifying Exigency leave
  - (f) OMFLA Military Family leave
  - (g) OFLA Bereavement leave
- (4) Eligibility for leave: The agency determines eligibility for leave using the chart below. Eligibility is not pro-rated for part-time employees.

<b>Employees Eligible for FMLA</b>	<b>Employees Eligible for OFLA</b>
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) <u>and</u> worked for at least 1250 hours during the 12-month period immediately preceding the leave.	To qualify for leave for serious health condition, Sick Child or Bereavement leave the employee must have worked for Oregon state government for a period of 180 calendar days immediately preceding the date leave begins <u>and</u> worked an average of 25 hours per week.
	To qualify for Parental leave the employee must have worked for Oregon state government for a period of 180 calendar days immediately preceding the date leave begins.
	To qualify for OFLA Military Family leave the employee need only work for Oregon state government an average of 20 hours per week.

- (a) 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, and military

leave-time (per federal USERRA law and State HR Policy 60.000.25 Military Leave), to determine an employee's eligibility for FMLA and OFLA leave. Hours paid to an employee by workers compensation count towards their eligibility for OFLA leave.

- (b) 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. The agency reduces the employee's OFLA entitlement by any OFLA leave used in the current leave year for the employee's own or a family member's serious health condition, Parental leave, Sick Child leave, OMFLA Military Family leave and OFLA Bereavement leave.
  - (c) 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.
- (5) 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 and OFLA 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.
- (6) Dual entitlement: If the reason for the leave qualifies under both FMLA and OFLA, an agency designates both FMLA and OFLA leave to an eligible employee, except in the following circumstance:
- (a) An agency does not designate OFLA if an employee is absent due to a disabling compensable injury (ORS 656.005(7)) or pending a determination of a workers' compensation claim. If the claim is denied or if an employee refuses an offer of transitional work (see State HR Policy 50.020.05 Early Return to Work of Injured Workers), an agency immediately designates OFLA leave if the employee meets eligibility and purpose requirements. If the denial is reversed upon appeal, an agency restores the designated OFLA hours to the employee.
- (7) Entitlement when spouses and family members 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.

- (b) Family members who are employed by Oregon state government may not take OFLA leave at the same time unless:
  - (A) One employee needs to care for the other employee who is suffering from a serious health condition.
  - (B) One employee needs to take care of a child with a serious health condition while the other employee is suffering from a serious health condition.
  - (C) Both employees have a serious health condition.
  - (D) The employees are taking OFLA Bereavement leave.
  - (E) An agency (or agencies) chooses to grant permission to use leave at the same time when the absence of the family members does not cause a hardship for the agency.
- (8) Employee requirements to request FMLA or OFLA leave: An employee makes a request to the agency at least 30 calendar days in advance for a planned or foreseeable absence<sup>2</sup>. The employee is not required to use the words FMLA or OFLA, but they must give enough information that the agency can determine if the reason for the leave might qualify as FMLA, OFLA or both. 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.
  - (b) For unplanned absences of OFLA Sick Child leave or pre-approved intermittent leave, an employee follows agency call-in procedures and states the leave is to care for their sick child or for pre-approved FMLA or OFLA leave.
  - (c) For OMFLA Military Family leave, an employee notifies the agency within five business days of the employee's spouse or same-gender domestic partner receiving official notice of an impending call or order to active duty or of a leave from deployment, or as soon as possible in situations where official notice is provided less than five days from commencement of the leave.
- (9) Agency's response to a request for OFLA Sick Child leave: When initially designating OFLA Sick Child leave, the agency sends written notification to the employee stating whether the employee is eligible for OFLA Sick Child leave, the employee's rights and responsibilities under OFLA including how to code time appropriately, and any requirement to provide medical certification after the third occurrence of OFLA Sick Child leave in a leave year.

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<sup>2</sup> The penalty for failure to give a 30 day notice is located in 29 CFR § 825.302 for an employee using exclusively FMLA and in ORS 659A.165 for an employee using exclusively OFLA.

- (10) Agency's initial response to a request for FMLA or OFLA leave and eligibility determination<sup>3</sup>: 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 or OFLA leave, that the leave may count as FMLA, OFLA or both, and:
- (a) If the employee is not eligible for one or both leaves, 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 one or both leaves, the agency may provisionally designate the leave until the employee provides further information. Additionally, the agency notifies the employee of his or her rights and responsibilities listed in Section (12), 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, OFLA or both). 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.
- (11) Agency's determination if leave qualifies as FMLA, OFLA or both: 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, OFLA or both, and:
- (a) If the employee's reason or purpose for the leave does not qualify for FMLA, OFLA or both, 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, OFLA or both, the agency designates the leave as such and notifies the employee of:
    - (A) Their and responsibilities listed in Section (12)
    - (B) The amount of weeks, days or hours of leave that will count against the employee's FMLA and OFLA entitlements if the leave is taken in a block of time or as a predictable reduced schedule.
    - (C) If the FMLA or OFLA leave is intermittent or it is not possible to provide the specific amount of time that counts against the employee's FMLA or OFLA entitlement, the employee may request the agency provide a notice of the amount counted against FMLA or OFLA. The request can be no more than every 30 days and only when the employee has FMLA or OFLA during those 30 days.
- (12) Employee's rights and responsibilities under FMLA and OFLA:
- (a) Employees are responsible for providing sufficient information for the agency to determine if the leave qualifies.

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<sup>3</sup> An agency may designate or deny FMLA or OFLA 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).



- (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.
- (13) Core PEBB Insurance: During months when an employee uses FMLA or OFLA, the agency pays its share of health care contributions for a benefit eligible employee's enrolled core benefits (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 or OFLA. 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.
- (14) Optional PEBB insurances:
- (a) If an employee works an insufficient number of hours in a month to cover their optional insurances while on FMLA and OFLA 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.
- (15) PEBB Insurances after exhaustion of FMLA and OFLA:
- (a) When leave does not qualify under FMLA or OFLA, 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.

(b) Refer to the attached “Public Employees’ Benefit Board FMLA-OFLA Benefit Matrix” for the effect on an employee’s insurance when returning from FMLA or OFLA leave.

(16) Use of paid leave: FMLA and OFLA are unpaid leave entitlements. However, this policy requires an employee to use available paid 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 and OFLA leave toward the employee’s FMLA and OFLA 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>
<p><b>Employee is on any FMLA, OFLA or both leaves-types in a block of time, <u>and</u>, employee is not on OMFLA Military Family leave, workers' compensation or receiving payments from a disability provider.</b></p>	<p>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.</p>	<p>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.</p>
<p><b>Employee receives payments from a disability provider while they are on FMLA, OFLA or both.</b></p>	<p>Employee chooses if they will use paid leave.</p> <p>If the employee chooses to use paid leave, paid leave must be used until exhausted prior to entering into leave without pay.</p> <p>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.</p>	<p>Employee chooses if they will use paid leave.</p> <p>If the employee chooses to use paid leave, paid leave must be used until exhausted prior to entering into leave without pay.</p> <p>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.</p>
<p><b>Employee exhausts FMLA, OFLA or both and continues to receive payments from a disability provider.</b></p>	<p>Employee chooses if they will use paid leave.</p> <p>If the employee chooses to use paid leave, paid leave must be used until exhausted prior to entering into leave without pay.</p> <p>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.</p>	<p>Employee chooses if they will use paid leave.</p> <p>If the employee chooses to use paid leave, paid leave must be used until exhausted prior to entering into leave without pay.</p> <p>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.</p>

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>
<b>Employee is on OMFLA Military Family leave.</b>	Employee chooses if they will use paid leave. If the employee chooses to use accrued paid leave, the employee chooses the order in which to use the leave.	Employee chooses if they will use paid leave. If the employee chooses to use accrued paid leave, the employee chooses the order in which to use the leave.
<b>Employee is on time loss through workers' compensation while on FMLA leave.</b>	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.
<b>Employee is on OFLA Bereavement leave</b>	The first few days are paid by the employer, if the employee is eligible per the relevant collective bargaining agreement. Employee uses their own accrued paid leave for time that is not employer paid. Employee may request donated hardship leave if addressed in a collective bargaining agreement.	Eligible employees are paid for the first three days (24 hours), prorated for part time employees, by the employer per occurrence under State HR Policy 60.000.10 Special Leaves with Pay. The employee is required to use their own accrued paid leave for the remainder of the period. The employee may request donated hardship leave if the employee will be in leave without pay during bereavement leave. The employee may receive up to 40 hours of donated leave per occurrence.

(17) **Returning from leave:**

- (a) An agency has 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 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. (The agency must communicate this requirement when it initially responds to the employee's request for leave.)
- (b) **Reinstatement rights:**

- (A) An agency restores an employee who returns from OFLA only, or OFLA and FMLA used at the same time to the position of employment held by the employee when the leave began. If the position no longer exists, or the employee returns from FMLA only, an agency returns the employee to an equivalent position with equivalent pay, benefits and other terms and conditions of employment. The following exceptions apply:
- (i) If an agency eliminates the employee's position through layoff, the agency treats the employee as if the employee was not on FMLA, OFLA or both, in the same manner as similarly situated employees, according to the agency's policy or applicable collective bargaining agreement.
  - (ii) An agency restores an unclassified, temporary or limited duration employee to the extent the employee's placement, appointment or position still exists.
  - (iii) 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, OFLA or both, 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 to continue to employ an employee who has exhausted their FMLA and OFLA leave if the employee cannot return to the position they held prior to FMLA and OFLA, or cannot perform an essential function of the position, with or without reasonable accommodation.<sup>4</sup> The following exceptions apply:
- (i) An employee who cannot return to work after exhausting their FMLA and OFLA 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) 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.

- (18) **Effect on seniority, salary increases and recognized service date:** Use of FMLA and OFLA 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 or OFLA leave as if the employee is not on leave, up to the point where the employee's FMLA and OFLA entitlement ends. Unpaid leave affects an employee's PERS retirement benefits.

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<sup>4</sup> An employee has reinstatement rights under FMLA and OFLA 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 and OFLA.

- (19) **FMLA and OFLA recordkeeping:** An agency maintains records of the FMLA and OFLA 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 and OFLA 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.
- (20) 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 or OFLA 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 or OFLA 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.
- (21) Refer to the appropriate federal and state laws for situations regarding family and medical leave not covered in the policy.