

Navigating the “Eligibility Gap” Between Paid Leave Oregon, OFLA & FMLA

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As of September 3, 2023, eligible individuals may apply for, take leave, and receive benefits for a qualifying reason under Paid Leave Oregon. As a result, employers must ensure their leave tracking systems properly account for an employee’s leave taken under each (or any combination) of the potentially applicable laws, including Paid Leave Oregon, the Oregon Family Leave Act (OFLA), and the federal Family and Medical Leave Act (FMLA). Adding to the complexity, each of these three leave laws differ in multiple respects, including the definition of a “covered” employer, employee eligibility requirements, and methods of defining the “benefit” or “leave” year.

To assist employers navigating these eligibility gaps, below are tips for administering leave in Oregon:

1. Determine Whether You Are a “Covered” Employer.

By now, we presume employers are well aware as to whether they are “covered” by Paid Leave Oregon, OFLA, or FMLA. This first step is important, particularly when determining how much protected leave employees may be eligible for.

As a reminder, in general, employers with one or more employees working anywhere in Oregon are covered under Paid Leave Oregon. Employers with 25 or more employees in Oregon are generally OFLA-covered, and employers with 50 or more employees are generally FMLA-covered.

Under Paid Leave Oregon, employees are generally eligible to take up to 18 weeks of total leave. Those weeks break down as follows: 12 weeks of paid leave for any qualifying reason under Paid Leave Oregon; 2 weeks of possible additional paid leave for limitations related to pregnancy, childbirth, or a related medical condition; and a possible additional 4 weeks of unpaid leave for which the individual is eligible under OFLA. However, if the employer is not OFLA-covered, then



those possible additional 4 weeks of unpaid leave are not accessible to employees. In other words, for employers with fewer than 25 employees, the maximum amount of protected leave available to their employees under Paid Leave Oregon is 14 weeks.

2. Evaluate Whether the Employee is “Eligible.”

Even if their employer is covered under Paid Leave Oregon, OFLA, and/or FMLA, to take protected leave under any of these laws, employees must still meet the respective eligibility requirements. The differing eligibility requirements and waiting periods under each of these leave laws contributes to the “eligibility gap.” As a result, an employee of an OFLA-covered employer may be eligible for Paid Leave Oregon, but may not yet meet the OFLA eligibility requirements. (Meaning, the employee may not be eligible to take those additional 4 weeks of unpaid leave referenced above.) Similarly, an employee of an employer covered by Paid Leave Oregon, OFLA, and FMLA may be eligible for Paid Leave Oregon and OFLA at the start of their leave and may subsequently become eligible for additional protected leave under FMLA.

Another key consideration in determining an employee’s eligibility is whether the employee experiences a qualifying event as defined under each leave law. For example, while each law contemplates leave to care for a “family member,” the accompanying definitions differ such that a qualifying reason for leave under Paid Leave Oregon may not qualify under FMLA’s definition of “family member.”

3. Understand How Your “Benefit” or “Leave” Year is Defined.

Paid Leave Oregon’s benefit year is forward-looking and begins the Sunday immediately preceding the day the leave commences. An OFLA leave year may be defined to align with Paid Leave Oregon. Alternatively, an OFLA leave year (similar to a FMLA leave year) may

be defined as any consecutive 12-month period, such as a calendar year, a fiscal year, a forward-looking leave year that begins on the date the employee begins their OFLA leave, or a backward-looking leave year that ends on the date the employee begins their OFLA leave.

In light of these differing definitions, it is critical that employers understand how their benefit and leave years are defined under each law so that leave may be properly tracked. In general, the closer employers can align their benefit and leave years, the easier it will be to track and administer protected leave.

4. Clarify the Order in Which the Employee Takes Their Leave.

The final, and perhaps most important, component is understanding that employees have a choice to either (1) apply for and take leave under Paid Leave Oregon, or (2) opt to take leave under OFLA and/or FMLA before applying for Paid Leave Oregon. This distinction is key, because once an employee’s Paid Leave Oregon benefit year begins, the employee is capped at the above mentioned 18 weeks of leave under Paid Leave Oregon and OFLA. Conversely, leave taken under OFLA or FMLA prior to a Paid Leave Oregon benefit year has no impact on the employee’s entitlement to leave under Paid Leave Oregon. As a result, this decision will likely have a significant impact on the amount of potential protected leave available to an eligible employee.

It is important to note that protections may also be triggered by other laws, including but not limited to those relating to disability or pregnancy accommodation. Accordingly, employers need to evaluate an employee’s reason for leave holistically to ensure compliance with all potentially applicable laws.

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