Oregon Paid Family and Medical Leave overview

Program details

On August 9th, Governor Kate Brown signed Oregon's Paid Family and Medical Leave (PFML) law. The Oregon PFML law mandates that all private employers, state agencies and local governmental agencies in the state of Oregon must provide PFML insurance for their employees. Employee and employer premium deductions and contributions begin on January 1, 2022, and the PFML leave and insurance benefits are available to employees beginning January 1, 2023. The Oregon PFML law will be administered by the Director of the Employment Department ("the Director").

In addition to Oregon, eight states (CA, CT, MA, NJ, NY, OR, RI and WA) and the District of Columbia have adopted PFML legislation.

Below is a high-level overview of the PFML bill in anticipation of its becoming law in Oregon.

Leave reasons under Oregon's paid leave bill

Benefits can be used while taking medical, family or safe leave.

Medical leave is available to an employee:

- Due to a serious health condition.

Family leave is available to an employee:

- To bond with a covered individual's child during the first 12 months after the child's birth, or placement of a child under 18 years of age.
- To care for a family member with a serious health condition.

Safe leave is available to an employee:

- To seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's minor child or dependent, including preparing for and participating in protective order proceedings or other civil or criminal legal proceedings related to domestic violence, harassment, sexual assault or stalking.
- To seek medical treatment for, or to recover from, injuries caused by domestic violence, sexual assault, harassment or stalking of the eligible employee or the employee's minor child or dependent.
- To obtain, or to assist a minor child or dependent in obtaining, counseling from a licensed mental health professional that relates to an experience of domestic violence, harassment, sexual assault or stalking.
- To obtain services from a victim services provider for the eligible employee or the employee's minor child or dependent.
- To relocate or take steps to secure an existing home to ensure the health and safety of the eligible employee or the employee's minor child or dependent.

Length of Leave

Each benefit year, eligible employees will be entitled to take the following:

- Up to 12 weeks in any combination of medical leave for their own serious health condition, family leave or safe leave.
- A total of 16 weeks of job protected leave is available in any combination of the paid leave available under Oregon Paid Family and Medical leave Act and of the unpaid leave available under the Oregon Family leave Act.
- If an employee experiences limitations related to pregnancy, childbirth, or related medical condition, including but not limited to lactation, up to two additional weeks of paid benefits are available,

Intermittent leave

The minimum increment of time for which benefits may be claimed is one work day or one work week. Benefit amounts for intermittent leave will be prorated. We expect the regulations to create additional rules and requirements regarding intermittent leave.

Premiums

Premiums to fund benefits will be assessed starting on January 1, 2022. For employers with 25 or more employees employed in the state, the benefits will be funded by premiums paid by both the employer and its employees, with 60% of the premium paid by employees and 40% paid by employers, although employers may elect to pay the employee portion of the premium on the employees' behalf. Employers with fewer than 25 employees are not required to pay the employer portion of the premium, but if they elect to pay the employer portion of the premiums, they will have access to state grant money should they experience a need based on employee leave.

The Director of the Employment Department will establish a method to determine annually the number of employees an employer has. The determination will be based on the average number of people employed by the employer in the 12-month period immediately preceding the date on which the determination is made. A replacement worker who is hired to temporarily replace an eligible employee during a period of family leave, medical leave or safe leave will not be counted as an employee in determining the number of employees working for an employer.

The Director of the Employment Department will set the rate of premium annually. The total rate will not exceed 1% of employee wages, up to a maximum of $132,900 in wages. Notably, the maximum amount is set at the actual dollar amount of $132,900, which is the current Social Security maximum but is not tied to any future increases in the Social Security maximum.

A self-employed individual who has elected coverage must contribute premium at the set rate, not to exceed 1% of the individual's taxable income, for a period of at least three years from the date that the election becomes effective.

A tribal government that elects coverage and employees of the tribal government contribute to the fund in contribution amounts and at the set rate, not to exceed 1% of employee wages, up to a maximum of $132,900 in wages, for a period of at least three years from the date that the election becomes effective

Benefits

If the eligible employee's average weekly wage (AWW) is equal to or less than 65% of the state average weekly wage (SAWW), the employee's weekly benefit amount shall be 100% of the employee's AWW. The intention of the bill is to provide 100% income replacement to low-wage earners in the state.

If the eligible employee's AWW is greater than 65% of the SAWW, the employee's weekly benefit amount is the sum of:

- 65% of the SAWW; and
- 50% of the employee's AWW that is greater than 65% of the SAWW.

The maximum weekly benefit amount is set at 120% of the SAWW. The minimum weekly benefit amount is set at 5% of the SAWW. The SAWW is set once per year and calculated by the Employment Department.

Eligible employees and covered individuals

Employees are eligible to take leave if they have earned at least $1,000 in wages during the base year. If they have not earned $1,000 in wages during the base year, employees may be eligible if they have earned at least $1,000 in wages during the alternate base year. Wages include those earned for services either performed entirely within Oregon or performed both within and outside of Oregon, but where the service performed outside Oregon is incidental to the employee's service within the state.

Base year means the first four of the last five completed calendar quarters preceding the benefit year. Alternate base year means the last four completed calendar quarters preceding the benefit year.

The bill uses the term "Covered individual" in several places to define the person who qualifies for family and medical leave insurance benefits. A covered individual includes an eligible employee, a self-employed individual or an employee of a tribal government (presumably to capture those working for tribal governments that have opted in to the program).

Average Weekly Wage

An employee's average weekly wage is calculated by the Director of the Employment Department by dividing the total wages earned by an eligible employee during the base year by the number of weeks in the base year.

What family members are covered?

Family member means a child, grandchild, grandparent, parent, sibling, spouse or domestic partner, or any individual who has a familial relationship with the employee.

Family leave can be taken to care for:

- A **child** of the covered individual or the child's spouse or domestic partner. Child includes:
  - a biological, adopted, stepchild or foster child of a covered individual or of the covered individual's spouse or domestic partner;
  - a person who is or was a legal ward of a covered individual or of the covered individual's spouse or domestic partner; or
  - a person who is or was in a relationship in loco parentis with a covered individual or with the covered individual's spouse or domestic partner;
- A **grandchild** of a covered individual or the grandchild's spouse or domestic partner;
- A **grandparent** of a covered individual or the grandparent's spouse or domestic partner;
- A **parent** of the covered individual seeking leave or the parent's spouse or domestic partner. Parent includes:
  - A biological, adoptive, stepparent or foster parent of a covered individual.
    - a covered foster parent includes both a current foster parent and a person who acted as the foster parent to the covered individual when the covered individual was a minor.
  - A person designated as the legal guardian of the individual at the time the covered individual was a minor or a required legal guardian and a person with whom a covered individual was or is in a relationship in loco parentis.
  - A parent of the covered individual's spouse or domestic partner who meets the definition of parent covered under the law and outlined herein is also included.
- A **sibling**, or stepsibling of a covered individual of the sibling's or stepsibling's spouse or domestic partner;
- The covered individual's **spouse or domestic partner**. Domestic partner is a person in a civil partnership entered into in person between two individuals of the same sex who are at least 18 years of age, who are otherwise capable and at least one of whom is a resident of Oregon;
- **Or any individual related by blood or affinity whose close association with a covered individual is the equivalent of a family relationship.**

Serious health condition

A serious health condition, for which an employee may take medical leave themselves, or take leave to care for a family member afflicted by such condition, is an illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice or residential medical care facility; an illness, disease or condition that in the medical judgment of the treating healthcare provider poses an imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future, or requires constant care; or any period of disability due to pregnancy, or period of absence for prenatal care.

Job protection/Benefits continuance/No retaliation

To be eligible for job protection, the employee must have been employed for the employer for at least 90 days before taking leave under OR PFML.

After returning to work from a period of family leave, medical leave or safe leave, an eligible employee is entitled to be restored to the position of employment he or she held when the leave commenced, if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of leave. If the position held by the employee when the leave commenced no longer exists, the employee is entitled to be restored to any available equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.

For employers that employ fewer than 25 employees, if the position held by an eligible employee when the employee's leave commenced no longer exists, an employer may, at the employer's discretion based on business necessity, restore the eligible employee to a different position with similar job duties and with the same employment benefits and pay.

During a period of leave, the employer must maintain any healthcare benefits the employee had prior to taking leave for the duration of the leave, as if the employee had continued in employment continuously during the period of leave.

An eligible employee who has taken leave does not lose any employment benefits, including seniority or pension rights, accrued before the date on which the leave commenced.

Employers cannot interfere with an employee's leave rights or discriminate or retaliate against an employee for taking leave.

What type of notice is due to employees regarding this new law?

An employer must provide written notice to all employees of their duties and rights. The notice must explain, at a minimum, the following:

- The right of an eligible employee to claim and receive benefits;
- The procedure for filing a claim for benefits;
- That the employee must provide notice to an employer before the employee commences leave, and the notice must describe the penalties for not complying with notice requirements;
- The right of an eligible employee to job protection and benefits continuation;
- The right of an eligible employee to appeal a claim decision;
- The anti-discrimination and anti-retaliation rights included;
- The right to bring a civil action or file a complaint; and
- The privacy protection afforded to any health information related to the leave

The notice must be provided to an employee in the language the employer typically uses to communicate with the employee. The director will make model notices available.

What type of notice is required from employees to take leave?

For foreseeable leave, an employer may require an employee to provide written notice of the need for leave at least 30 days before the start of family, medical or safe leave.

For unforeseeable leave, the employee may begin leave without 30 days' advance notice. Unforeseeable leave needs may include an unexpected serious health condition of the employee or family member, a premature birth, unexpected adoption or foster-care placement or safe leave.

If the employee begins leave without prior notice to the employer, the employee must give oral notice to the employer within 24 hours of the start of the leave and must provide written notice within three days of the start of the leave. The oral notice can be given by another person on behalf of the employee. Written notice may be given by the employee, the employee's emergency contact, or any other person designated by the employee.

Failure to give notice can result in the first weekly benefit amount being reduced by up to 25%. Employers are obligated to notify the Director if an employee fails to provide required notice.

For safe leave, the employee is obligated to give reasonable advance notice that he or she intends to take safe leave, unless giving advance notice is not feasible.

How does the employee apply for benefits?

The Director will establish a family and medical leave insurance program to provide family and medical leave insurance benefits. Rules necessary to establish the program will be adopted by September 1, 2021.

Interaction with other laws, paid sick leave, vacation leave, other paid leave earned

Any family leave or medical leave taken under OR PFML must be taken concurrently with any leave taken by an eligible employee that is available under existing state leave law or under the federal Family and Medical Leave Act of 1993 when available under both laws for the same purposes. However, as noted above, an employee may take up to 12 weeks of paid leave (or 14 weeks, depending on pregnancy complications) under the PFML, plus another four weeks of unpaid leave under the Oregon unpaid FMLA.

The employer may permit the employee to receive paid sick time, paid vacation leave, or any other paid leave earned by the employee in addition to PFML benefits, up to a maximum of 100% of the eligible employee's average weekly wage.

In addition, an employee may take up to an additional four weeks per year of unpaid leave under Oregon 659A.159 (the Oregon unpaid FMLA law).

The bill makes clear that time under the PFML law is in addition to paid sick time under ORS 653.606, vacation leave or other paid leave earned by the employee.

Are there any exclusions from coverage?

In any week in which an employee is eligible to receive workers' compensation or unemployment benefits, the employee is disqualified from receiving family and medical leave insurance benefits. The Director will prevent payments of benefits in excess of 100% of the eligible employee's average weekly wage if the eligible employee is simultaneously covered under more than one employer's plan. When an employee is covered under two plans, the benefits will be prorated under each respective plan. There are likely to be more exclusions and restrictions as rules are finalized.

Equivalent plans

An employer may apply to the Director of the Employment Department for approval of an employer-offered benefit plan that provides family and medical leave insurance benefits to the employer's employees. An employer seeking approval will be required to submit an application to the Director accompanied by an application fee to be set, but not to exceed $250. The

Director will review the submission and approve an application for a plan if the Director finds that:

- The plan is made available to all employees who have been continuously employed by an employer for 30 days.
- The benefits afforded to employees covered under the plan are equal to or greater than the weekly benefits and the duration of leave that an eligible employee would qualify for under the state plan.

If approved, the employer will not be required to remit employer or employee contributions to the state plan. The employer may deduct employee contributions to fund an equivalent plan, provided the contributions do not exceed the amount the employee would remit under the state plan. Any contributions taken by the employer to fund an equivalent plan must be used for plan expenses and are not considered employer assets.

Employers approved for an equivalent plan are subject to the rule that paid sick leave mandated under Oregon law is required to be paid in addition to the benefits available under the PFML plan.

Equivalent plans must remain in effect for a minimum of one year. Employers offering equivalent plans are required to meet reporting, notice, records, job protection and benefits continuation requirements. Employers will be required to reapply once per year for three years following the initial approval of an equivalent plan. Thereafter, reapproval is required only for plan changes.

Sun Life services

Sun Life is in the process of evaluating this bill. We look forward to providing more updates and resources on the passage of this bill.

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