

Employer Next Steps on Recent Changes to Oregon Family Leave Act

Many of us in Oregon are aware of the passage of Senate Bill (SB) 999 in mid-June which mandates significant changes to OFLA in a valiant, if not slightly misguided, attempt to bring alignment between the state's existing unpaid Oregon Family Leave Act (OFLA) and the upcoming Paid Leave Oregon Benefit Program. This memo is a recap of all the changes brought by SB 999 as well as our guidance on next steps related to the amendment's impact on the OFLA 12-month entitlement calculation method. Some of our guidance includes a bit of a 'choose your own adventure' game, but we hope to arm you with the information you need to select the best path forward for your organization. **One important note:** If your adventure includes a change to your OFLA entitlement calculation method effective 9/3/23, as we will discuss below, you are in a bit of a time crunch as this change comes with a requirement to notify your employees no later than 7/5/23!

SB 999: The Basics

This amendment brings the following changes to OFLA and Paid Leave Oregon:

- **Effective immediately:** Adds a new option for determining the OFLA 12-month entitlement calculation period that matches the Paid Leave Oregon's measured forward benefit year definition. The new option is defined as "a period of 52 consecutive weeks beginning on the Sunday immediately preceding the date on which family leave commences." Between now and July 2024, employers may **choose** to use this new option or continue to manage OFLA using their current 12-month entitlement calculation method.
- **Effective July 1, 2024:** All employers are **required** to change their OFLA 12-month entitlement calculation method to the new definition of a period of 52 consecutive weeks beginning on the Sunday immediately preceding an employee's first date of leave.
- **Effective September 3, 2023:** Expands the definition of "family member" under OFLA to mirror the definition of family member under Paid Leave Oregon. The family relationships covered under OFLA will be as follows:
 - The spouse of a covered individual
 - A child of a covered individual or the child's spouse or domestic partner
 - A parent of a covered individual or the parent's spouse or domestic partner
 - A sibling or stepsibling of a covered individual or the sibling's or stepsibling's spouse or domestic partner
 - A grandparent of a covered individual or the grandparent's spouse or domestic partner
 - A grandchild of a covered individual or the grandchild's spouse or domestic partner
 - The domestic partner of a covered individual
 - Any individual related by blood or affinity whose close association with a covered individual is the equivalent of a family relationship.
- When it comes to the additional family relationship of 'any individual related by blood or affinity,' SB 999 also compels the Bureau of Labor and Industries (for OFLA) and the Oregon Employment Department (for Paid Leave Oregon) to establish the criteria for determining whether the threshold of 'related by affinity' is met. This will likely involve the development of an employee attestation.
- Clarifies that when an employee applies for Paid Leave Oregon, OFLA and FMLA will run concurrently if an employee is also eligible and entitled to leave under these laws.
- Clarifies in OFLA and Paid Leave Oregon that upon an employee's return from leave, if an equivalent position is not available at the employee's job site, employers should offer a position

located within 50 miles of the original job site or if positions could be offered at multiple job sites, the employer should choose the one closest to the employee's original job site.

- Amends Paid Leave Oregon to match already-established OFLA regulations permitting employers to deduct benefits contributions from employee's pay who has returned from Paid Leave when the employer advanced these expenses for the employee while on leave so long as the repayment does not exceed 10% of the employee's gross wages per pay period.

Considerations of SB 999's Impact to the OFLA Entitlement Calculation Method

This bill represents the first, but likely not the last, significant legislative attempt to align Paid Leave Oregon and OFLA. The intent behind the mandate for employers to change their OFLA entitlement calculation period to match the Paid Leave Oregon benefit year definition by July 2024 is that the 12-month period used to establish an employee's Paid Leave Oregon benefits year matches the employee's 12-month period used for OFLA. Where this becomes immediately problematic is for any employee who establishes their Paid Leave Oregon benefit year prior to July 2024, since their Paid Leave Oregon year and OFLA year will not be in sync if an employer waits until July 2024 to align OFLA.

Here's where the 'choose your own adventure' part comes in!

Since employers subject to OFLA are ultimately being required to make this change, how can we get the biggest bang for our buck? How can Oregon employers get the most amount of Paid Leave Oregon and OFLA alignment possible? Since SB 999 makes the new entitlement definition under OFLA available to us now, the closest alignment can be gained with a change to OFLA effective 9/3/23, when Paid Leave Oregon goes live. That way any employee who files for Paid Leave Oregon benefits on or after 9/3/23 will have a matching OFLA entitlement calculation period definition when the reason for leave also qualifies under OFLA. Another reason to consider making the switch on 9/3/23 is that for any of us currently using the ol' tried and true rolling backward entitlement calculation method under OFLA, a switch to the new measured forward definition will effectively grant employees a clean slate of OFLA leave entitlement. This is because when making a change in entitlement calculation methods, we must provide impacted employees with the leave calculation method that is the most generous. Knowing employees' OFLA entitlement will reset, it might make sense to give them this gift of time when they're already receiving a new bank of leave under Paid Leave Oregon.

Next Steps

Once you've determined your timing for taking the leap on the new OFLA entitlement calculation method, here are some things you should be thinking about and planning for:

1. Employers are required to provide 60 days' notice to employees of a change to their OFLA leave entitlement calculation period. For those of you considering a change effective 9/3/23, that means you have until **July 5, 2023**, to post a notice of this change.
 - a. Attached is a sample notice template that you can use to communicate this change to your employees. This notice has yellow highlighted sections to indicate where you need to customize or make a selection from multiple options. This sample also assumes you are adjusting both OFLA and FMLA. Select accordingly if you decide not to adjust FMLA.

- b. The regulations are not specific on what constitutes adequate notice. The important thing is to ensure all impacted employees see the notice. Therefore, we recommend the following:
 - i. Email the notification to employees or consider regular mail if you have a subset of employees that do not have work email.
 - ii. In addition to email, post the notice via any other electronic means that you typically use to communicate with your employees such as posting on your intranet or including in a newsletter.
 - iii. Consider posting this notice in languages other than English if there is a significant portion of the workforce that does not use English as a primary language.
 - c. *But what happens if Paid Leave Oregon is delayed?** Glad you asked! We've included some language that makes it clear that the intent is to change OFLA to coordinate with Paid Leave Oregon go-live. In the unlikely event that the solvency test conducted in early August results in a delay of Paid Leave Oregon go-live, this language supports a decision to also delay a change to your OFLA entitlement calculation method.
2. Make sure your systems and processes can support this change. If you partner with a technology vendor or a third-party administrator to manage leave entitlements, notify them of your intent to make this change and be sure you know your vendor's timeline for when their systems will be ready to measure entitlement by the new measured forward '52 weeks from the preceding Sunday' definition.
3. FMLA Considerations
- a. Determine whether you will also make a change to your FMLA entitlement calculation method so that if an employee qualifies for leave under Paid Leave Oregon, OFLA, and FMLA, you have the best shot at getting alignment of these 3 distinct entitlements.
 - b. For employers with employees in multiple states, consider whether you will adjust your FMLA entitlement method just for Oregon employees, or make a uniform change to your FMLA entitlement calculation method for all employees. Generally, the FMLA mandates that we measure entitlement under one calculation method uniformly across all employees. However, in this instance where Oregon is only giving us one option under their state leave laws, the FMLA permits employers to run FMLA using an alternate method just in that impacted state.
 - c. If you decide to change your FMLA 12-month entitlement measurement period, you are limited to the calculation methods available under the FMLA. This means that the closest you can get is the FMLA's measured forward definition: "The 12-month period measured forward from the date any employee's first FMLA leave begins." While this gets us close to alignment with the new OFLA definition, it will not align perfectly with FMLA.
 - d. For those employers with a high volume of employees in alternate work states and who are also using the FMLA's rolling backward entitlement measurement period, it may be in your best interest to limit your FMLA change to just Oregon employees. The FMLA's rolling backward method is the only measurement option under FMLA that prevents the ability for leave stacking. Since the measured forward method under FMLA permits leave stacking, employers may want to limit the utilization of that method to just their

Oregon workforce. However, this will mean managing multiple FMLA entitlement calculation methods depending on an employee's work-state which can create extra administrative challenges for employers.

- e. If you decide to make a change to your FMLA entitlement calculation method to measured forward, ensure that your systems and applicable vendor partners are informed and prepared to help you manage this administrative change.
 - f. The 60-day notice requirement applies to OFLA and FMLA, so if you are making a change to both, be sure it is clear in your notice.
4. Despite lawmakers' and employers' best efforts to adjust OFLA and FMLA to measured forward entitlement calculation methods to reach alignment with Paid Leave Oregon, be aware that we still face many instances where leave plans will not align. We are entering into a more complex leave administration space than ever, so you want to ensure you have the mechanisms, support, and tools in place to ensure employee leaves are managed correctly. The following are many instances where we will not have alignment of 12-month periods and where we will not be able to run our statutory leave plans concurrently. Pro tip: if you read this in your head with your best Jeff Foxworthy voice, only instead of 'you might be a redneck' you repeat the mantra, 'you won't have alignment' working through this list will be *much* more entertaining for you!
- a. If an employer does not adjust their FMLA entitlement calculation method to measured forward, they will be running FMLA on potentially a very different entitlement calculation method than OFLA and FMLA. *In this situation, you won't have alignment.*
 - b. If an employer waits until July 2024 to adjust their OFLA entitlement to Paid Leave Oregon's measured forward definition, some employees who establish their benefit year under Paid Leave Oregon prior to July 2024 will only establish a different 12-month period under OFLA/FMLA upon their first utilization of OFLA following July 2024. *In this situation, you won't have alignment.*
 - c. If an employee's first utilization of Paid Leave Oregon is for a reason that does not qualify under OFLA/FMLA (think Safe Leave), they will establish their benefit year under Paid Leave Oregon, but they will not have established their 12-month period under OFLA/FMLA. *In this situation, you won't have alignment.*
 - d. If an employee's first utilization of OFLA is for a reason that does not qualify under PLO/FMLA (think, Sick Child Leave or Bereavement), they will establish their 12-month period under OFLA, but they will not have established their benefit year under Paid Leave Oregon. *In this situation, you won't have alignment.*
 - e. Because the eligibility threshold for Paid Leave Oregon is lower than that for OFLA and FMLA, you will have situations where an employee will qualify for Paid Leave Oregon leave, establishing their benefit year, but will not qualify for OFLA and FMLA. *In these situations, you won't have alignment.*
 - f. If an employee uses OFLA/FMLA leave intermittently in increments of less than one workday, this absence will not qualify for Paid Leave Oregon. *In this situation, you won't have alignment.*
 - g. If an employee's leave qualifies for Paid Leave Oregon, OFLA, and FMLA but they choose to *not* apply for Paid Leave Oregon, *you won't have alignment.* Although OFLA has been amended to make it clear that leave taken under Paid Leave Oregon will run concurrent

with OFLA and FMLA where applicable, we still cannot force an employee to apply for Paid Leave Oregon.

- h. If an employee works for you and another employer and takes Paid Leave Oregon from their other employer, they will establish their Paid Leave Oregon benefit year, but not their OFLA/FMLA 12-month period under your plans. *In this, slightly more rare but still absolutely feasible situation, you won't have alignment.*
 - i. And finally, where an employer adjusts FMLA to measured forward and where OFLA, FMLA, and Paid Leave Oregon all run concurrently in a perfect-case scenario, but an employees' leave does not actually begin on a Sunday, your 12-month period under FMLA will still be off by 1-6 days due to the slight variation in 12-month period definitions. *Even in this almost-best-case-scenario situation, you won't have alignment.*
5. Update your leave policies to reflect the multiple changes brought by SB 999.
- a. OFLA policies should be revised with the new family member definitions.
 - b. OFLA and FMLA policies should contain language clarifying that any leave taken under Paid Leave Oregon will run concurrent with FMLA and OFLA where applicable.
 - c. Update your OFLA/FMLA policies to reflect any updated entitlement calculation method(s). Remember to provide notice to your employees at least 60 days prior to this change!

This content has been brought to you by the TPG Total Absence Management team. While our team is comprised of leave enthusiasts and compliance nerds, we are not attorneys. We are not giving you legal advice and we highly recommend you seek legal counsel for their interpretation of SB 999 and your organization's response and next steps.

* See [SB 31](#) which creates the ability for a delay in Paid Leave Oregon go-live if the Program's fund is determined to be insolvent.