

Federal and Oregon Leave Laws

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The Laws on Your Chart

- Paid Leave Oregon (PLO)/Paid Family and Medical Leave Insurance (PFMLI)
- The federal Family Medical Leave Act (FMLA)
- The Oregon Family Leave Act (OFLA)
- Oregon's Paid Sick Leave Law

*No longer on the chart:

- The Oregon Military Family Leave Act (OMFLA)
- Oregon's Law Providing Leave to Crime Victims to Attend Criminal Proceedings
- Oregon's Law Providing Leave to Victims of Domestic Violence, Sexual Assault, Harassment or Stalking (but this is now included in PFMLI)

PFMLI/PLO - General Information

- HB 2005 in 2019 established the Paid Family and Medical Leave Insurance (PFMLI) program, which is now called “Paid Leave Oregon” (PLO). Benefits started September 2023.
- Statute: ORS 657B.005 *et seq.* Note, there were amendments in 2023, and there may be more to come.
- Oregon Employment Department Rules: OAR 471-070-0010 *et seq.*
- OED Resources: <https://paidleave.oregon.gov>; paidleave@oregon.gov; (833)854-0166

Paid Leave Oregon/PFMLI Payroll Contributions



- OED sets the contribution amount annually, not to exceed 1% of employee wages. The current rate is 1%.
- Contributions began 1/1/23
- Employers with 25 or more employees must contribute at least 40% of the total rate, and the remaining 60% (or less) will be deducted from employees' wages. [Note: SB 913 (2023) removed former \$132,900 cap subject to contributions and aligned with SSA limits. For 2024: \$168,600.]
- Employers may pay part or all of the employee's portion. **BARGAIN IT!**
- Employers with fewer than 25 employees are not required to pay the employer contribution, but if they do, they can get grants to help cover the cost of replacement workers.
- Employers with approved equivalent plans need not pay the employer contributions (see later slide).

Paid Leave Oregon/PFMLI Covered Employer

Covered “employer”

- Any person that employs one or more employees working anywhere in the state
- Political subdivisions of the state or any county, city, district, authority or public corporation
- Does NOT include the federal government or tribal governments

Paid Leave Oregon/PFMLI Eligible Employee

Benefits are available to an employee who has:

- 1) earned at least \$1,000 in wages during the “base year” (first four of the last five completed calendar quarters preceding the benefit year) or during the “alternative base year” (last four completed calendar quarters preceding the benefit year);
- 2) contributed to the PFMLI Fund during the base year or alternative base year; and
- 3) submitted a claim for benefits.

NOTE: DOJ and OED maintain that claimant must be taking leave from current, scheduled work.

Employee Eligibility Under FMLA & OFLA

Employees must meet both of these prongs:

1) Length of employment

- FMLA: 12 months
- OFLA: 180 days (special rules during public health emergency)

2) Hours worked

- FMLA: 1,250 hours in the preceding 12 months
- OFLA: average of 25 hours/week in preceding 180 days (except there is no hours worked requirement for parental leave under OFLA, and requirements relaxed during public health emergency)

Paid Leave Oregon/PFMLI

Reasons for taking PFMLI

- Family leave:
 - To care for and bond with a child during the first year after the child's birth or placement through foster care or adoption; or
 - To care for a family member with a serious health condition.
- Medical Leave: Necessary due to the employee's own serious health condition.
- Safe Leave: For survivors (or parents of children survivors) of sexual assault, domestic violence, harassment, bias crime, or stalking.

Paid Leave Oregon/PFMLI

Definition of “Family Member”



“Family member” now (after 2023 amendments) includes:

- Spouse or domestic partner
- Child or child’s spouse or domestic partner
- Parent or parent’s spouse or domestic partner
- Sibling or stepsibling or their spouse or domestic partner
- Grandparent or grandparent’s spouse or domestic partner
- Grandchild or grandchild’s spouse or domestic partner
- “Any individual related by blood or affinity whose close association with a covered individual is the equivalent of a family relationship.”

Definition of Family Member - “Related by Affinity”

SB 999 (2023) added, “consideration shall be given to whether there exists a significant personal bond attributable to factors . . . that, when examined in total, resemble a family relationship.” Eff. 9/3/23.

Factors in new BOLI and OED rules:

- Shared financial responsibility (e.g. leases, co-ownership of property, joint bills, beneficiary designations)
- Emergency contact designation
- Expectation of or prior providing of care
- Cohabitation and its duration and purpose
- Geographical proximity
- Any other factor that demonstrates the existence of a family-like relationship.

Family Member Definition Comparison

- FMLA: spouse, minor or adult disabled child, or parent (or one standing in the place of a parent or child)
- OFLA: SB 999 (2023) made the definition of “family member” the same as PFMLI (prior slide). Eff. 9/3/23.

Serious Health Condition

Not identical, but similar definitions under FMLA/OFLA/PLO (chart p. 3):

1. Inpatient care (hospital, hospice, residential medical care);
2. Imminent danger of death/terminal;
3. Constant or continuing care;
4. Incapacity for more than three calendar day plus ongoing treatment;
5. Chronic condition requiring periodic visits over extended period with episodic incapacity;
6. Incapacity due to pregnancy/childbirth or absences for prenatal care;
7. Multiple treatments.

Parental Leave: Leave to Care for and Bond with Child



Must be taken during the first year after the child's birth, adoption, or foster care placement. Does not have to be right after birth/placement.

Intermittent/Reduced Schedule or Continuous:

- FMLA/OFLA: Gives employers the discretion to permit parental leave intermittently or on reduced schedule (except must allow to effectuate adoption or foster placement and to attend or birth).
- PLO: The ability to take leave in one-day or one-week increments applies to all reasons for taking PLO, including family leave.

Safe Leave

Leave for victims of domestic violence, harassment, sexual assault, bias crime*, or stalking or for parents or guardians of a minor child or dependent who is a victim of domestic violence, harassment, sexual assault, bias crime or stalking.

To seek legal or law enforcement assistance, medical treatment or recovery from injuries, mental health counseling, victim services, relocation.

*Effective 1/1/24, HB 3443 (2023) added “bias crime,” which includes certain property, physical, and threat crimes because of the person’s perception of the other person’s race, color, religion, gender identity, sexual orientation, disability or national origin.

Reasons for Leave Comparison

PFMLI/PLO	FMLA	OFLA
Bonding after birth, adoption, foster placement	Bonding after birth, adoption, foster placement	Bonding after birth, adoption, foster placement
Care for family member with serious health condition	Care for family member with serious health condition	Care for family member with serious health condition
Employee's own serious health condition	Employee's own serious health condition	Employee's own serious health condition
Safe Leave (DV, sexual assault, harassment, bias crime, stalking)	Military-Qualifying Exigencies	Sick child leave or school/care closed due to public health emergency
	Military Caregiver	Bereavement

Paid Leave Oregon/PFMLI

Interaction with Other Laws

- PFMLI is in addition to contractual or other statutory paid sick leave, PTO, or paid vacation. Employers cannot require employees to use contractual paid leave before getting PLO benefits.
- Employees cannot take PLO leave during weeks they are eligible to receive workers' compensation or unemployment benefits.
- PLO leave must be taken concurrently with FMLA and OFLA leave if it qualifies, but not all PFMLI leave qualifies under those laws, and not all leave under FMLA or OFLA qualifies under PFMLI. Also, employees may take PFMLI leave before they are eligible under FMLA/OFLA.

Duration of Leave (chart p. 1)



FMLA

12 work weeks in a leave year for most reasons

26 weeks during a single 12-month period for Military Caregiver Leave

OFLA

12 weeks in a “leave year” PLUS additional 12 weeks for:

- (1) birth- or pregnancy-related disability (includes routine prenatal care).
- (2) care for sick child requiring home care if took full 12 weeks for parental leave.
- (Potential total of up to 36 weeks for females and 24 for males).
- (3) Bereavement leave: up to two weeks per death of family member up to 12-week maximum in leave year.

PMFLI/PLO

12 weeks per benefit year

But up to 16 weeks per benefit year by combining up to 12 weeks of PFMLI plus up to 4 weeks of unpaid OFLA

Plus 2 additional weeks for pregnancy/childbirth related reasons (for total of up to 14 weeks of PFMLI plus 4 weeks of unpaid OFLA)

PLO Benefit Year

Benefit year: 52-week period beginning on the Sunday immediately preceding the day leave commences.

SB 999 (2023) amended OFLA so that “one-year period” aligns with PLO definition. Employers can update OFLA year to align (with 60-day notice) now, and must do so by 7/1/24. BARGAIN IT!

Leave Year - FMLA/OFLA

There are four ways to determine the leave year:

1. Calendar Year
2. Another Fixed Year (e.g. fiscal year)
3. Measuring Forward (12 months forward from date first leave begins; does not re-set until first time use leave again after the 12-month period)
4. Rolling Backward (12 months backward from date seek to use leave)

Paid Leave Oregon/PFMLI Benefit Amount

The weekly benefit amount is capped at 120% of the state average weekly wage (SAWW)* and has a floor of 5% of the SAWW.

- SAWW for 7/1/23 through 6/30/24 is \$1,269.69.
- 2023-2024 minimum weekly benefit amount is \$63.48 and maximum is \$1,523.63.

Employees who earn less than 65% of the SAWW will receive 100% of their average weekly wage.

- An employee's AWW is the total wages earned by the employee during the base year divided by the number of weeks in the base year.

Employees who earn more than 65% of the SAWW will receive 65% of the state average weekly wage plus 50% of the amount by which the employee's average weekly wage exceeds the SAWW.

PLO Benefit Amount (cont.)

Paid Leave Oregon Benefits Estimate Calculator:

<https://paidleave.oregon.gov/employees/benefits-calculator.html>

Taxability

- PLO benefits are taxable and must be reported on personal income tax returns. OED will issue a Form 1099 by the end of January.
- Claimants can request tax withholding when they file their benefit applications.
- PLO contributions are deducted from after-tax pay.
- If the employer pays some or all of the employee payroll contribution, that counts as taxable income to the employee.

Supplementing PLO Benefits with Paid Leave

SB 913 (2023), eff. 9/24/23:

“An employer may permit an employee to use *all or a portion of* paid sick time, vacation leave or any other paid leave earned by the employee in addition to receiving paid family and medical leave insurance benefits [*to replace an employee’s wages up to 100 percent of the eligible employee’s average weekly wage*] during a period of leave taken for family leave, medical leave or safe leave.”

REMOVED the language capping at 100% wage replacement.

Employers may permit but cannot require employees to use paid time off while taking PLO.

BARGAIN IT!

Paid Leave Oregon/PFMLI

Increments of Leave

- Leave may be taken and benefits may be claimed in increments of one work day or one work week. (Unlike FMLA/OFLA/Oregon Sick Time, which can be taken in as little as hourly increments.)
- Employees who work for more than one employer in the same work week must take the leave from all employers in order to claim for the week. Similarly, if they work for more than one employer in the same day, they must take leave from all employers in order to claim for the day.
- Weekly benefits are prorated if leave is taken in day increments.

Paid Leave Oregon/PFMLI Employee Notice to Employer

- Foreseeable (e.g. planned surgery, anticipated birth/adoption): At least 30 days notice.
- Unforeseeable: verbal notice within 24 hours; written notice within three days.
- If the OED determines claimant did not provide the required notice to employer, it may impose a penalty of a 25% reduction of the first week's benefits (but no less than the minimum weekly benefit amount), unless good cause is shown (e.g. incapacitation).

Paid Leave Oregon/PFMLI Benefit Applications/Decisions

- Benefits begin 9/3/23.
- Claimants can submit applications to the OED up to 30 days prior to start of leave and up to 30 days after start of leave (unless there is good cause shown).
- Verification of need for leave is required, and OED may request additional information.
- OED notifies employer of application.
- OED provides written administrative decision allowing or denying benefits and reasons.
- Claimants have 60 days to request hearings to appeal administrative decisions.

Confidentiality (PLO)

ORS 657B.400: general confidentiality provision

OAR 471-070-0900 through 0930: permanent confidentiality rules effective 1/12/24

OED can only share with employer:

- Information specific to employer contributions
- “The department will share with the employer only claim information necessary to properly administer claim (including but not limited to, the leave dates and duration of leave) unless the department has the express consent of the claimant or the claimant’s designated representative, or unless otherwise required by law.” OAR 471-070-0930(1)(c).

Paid Leave Oregon/PFMLI Job Protection

- If employed for at least 90 consecutive calendar days: right to return to former position, even if employer filled with replacement worker.
- If the position has been eliminated (not merely renamed or reclassified):
 - Large employers (25 or more employees) must restore to available, equivalent position. SB 999 (2023) added: if equivalent position is not available at same job site, must offer equivalent position at site within 50 miles and nearest to former site.
 - Small employers can restore to different position, but with the same pay/benefits and similar working conditions.

PLO Job Protection (cont.)

- Seniority and benefits accrued prior to the leave must be restored.
- Health care benefits must be maintained during the leave (if employee continues to pay premium share). If employer discontinues benefits due to non-payment of premium share, it must still restore the benefits upon employee's return to work.
- SB 999 (2023): If employer fronts employee share of benefit premium, it can deduct from pay upon return to work, but no greater than 10% of gross pay.
BARGAIN IT!
- BOLI enforces job protection provisions.

Unlawful Employment Practices/PLO

It is an unlawful employment practice for an employer to:

- Violate the job protection provisions
- Deny leave or interfere with one's rights under the law
- Retaliate or discriminate against one for inquiring about or exercising their rights under the law

Enforcement:

- BOLI complaint
- Lawsuit

Paid Leave Oregon/PFMLI Equivalent Plans

Can be employer or third-party administered.

Employers with equivalent plans are exempt from making employer contributions.

Equivalent plans must:

- 1) cover all employees who have been employed for 30 calendar days;
- 2) provide leave for the same family, medical, and safe leave reasons;
- 3) provide no less leave than under PLO;
- 4) provide benefits equal to or greater than PLO;
- 5) allow leave to be taken in one-day or one-week increments;
- 6) impose no greater conditions or restrictions on the use of paid leave;
- 7) require employee contributions no greater than those under PLO;
- 8) ensure that employee contributions are used solely for equivalent plan expenses, are not part of the employer's assets for any purpose and are held separately from other employer funds.

Paid Leave Oregon/PFMLI Bargain It!!!



PAY AND LEAVE ARE MANDATORY SUBJECTS OF BARGAINING!

- ❖ The statute expressly states that employers may elect to pay employee contributions, in whole or in part, so bargain for them to pay 100% (or more than the 40% minimum).
- ❖ Seniority and benefits do not accrue during PFMLI, “unless the terms of a collective bargaining agreement . . . Provide otherwise.”
- ❖ Bargain for the employer to cover the employee’s health insurance premium share while they’re on leave (either completely or to be repaid over time upon return to work) so they don’t have to send in checks.
- ❖ Bargain for **employees to choose** whether to supplement their PFMLI benefits with accrued paid contractual leave (up to 100% wage replacement). Statute says employers “may” permit this, so lock it in!

Medical Certification

- Must be provided before leave if leave is foreseeable
- If unforeseeable, have 15 days from employer's request to submit
- Employers can ask employees to cure deficiencies (e.g. answers left blank). FMLA: 7 days to cure; OFLA: reasonable time to cure
- FMLA: certain managers (not the employee's supervisor) can contact health care provider for purposes of "authentication" (did you complete/sign this) or "clarification" (I can't read what you wrote for #7); OFLA: only the employer's health care provider can contact employee's health care provider and only for these reasons.
- Employer can obtain 2nd opinion if it has reason to doubt the certification. Can't be the company doctor. If the two opinions differ, then the employer and employee can mutually select a third provider.

Recertification

- If the minimum duration of a condition is more than 30 days, then the employer must wait until that duration expires to request recertification.
- But, the employer can seek recertification of the same condition at least every six months, even if the duration of the condition is longer than six months.
- The only reasons justifying recertification in less than 30 days are:
 - the employee requests an extension of the leave;
 - circumstances described by the previous certification have changed significantly (e.g. use of substantially more intermittent leave)
 - the employer receives information that casts doubt on the validity of the certification
- There are no 2nd and 3rd opinions on recertifications

Oregon Sick Time Law

- Accrual Method: 1 hour of sick leave for every 30 hours worked
- Frontloading Method: 40 hours frontloaded at the beginning of the year
- It must be paid sick leave if the employer has at least 10 employees anywhere in Oregon or if it employs at least 6 employees in a city with a population greater than 500,000.
- Can be used for own or family member illness, injury, medical care (including preventative), any OFLA reason, safe leave reasons, to donate to sick bank, public health emergencies