



# Oregon Employers' Strategy Plan For Families First Coronavirus Response Act Compliance

Insights

3.20.20

Wednesday was a busy day for Oregon employers – both from a federal and local level. In Washington, D.C., President Trump signed into law the Families First Coronavirus Response Act, introducing an emergency expansion of the Family and Medical Leave Act (FMLA) and federal paid sick leave, among other things. Back here in Oregon, the Commissioner of the Bureau of Labor and Industries (BOLI) issued an emergency rule amending OFLA's sick child leave as it relates to school closures, which is relevant considering Governor Brown's March 17, 2020 executive order closing schools through April 28, 2020. **[Ed. Note: Governor Brown announced on April 8, 2020 that schools will remain closed for the rest of the academic year.]**

Many Oregon employers were left wondering how to navigate the interplay between the new federal leave law and Oregon's Sick Leave law and OFLA. This article will attempt to help you guide you through the complexities in an easy-to-understand manner.

## Oregon Sick Child Leave Rule Amended

To understand the interplay between the state and federal laws, it is important to know that BOLI Commissioner Val Hoyle announced an emergency rule amending OFLA's sick child leave rule on March 18. The new emergency rule amends OAR 839-009-0230 to specifically include leave to care for a child when schools have been closed due to a public health emergency. The relevant portion of the emergency rule states:

Sick child leave is leave taken to care for an employee's child suffering from an illness, injury, or condition that requires home care but is not a serious health condition.

- Sick child leave includes absence to care for an employee's child whose school or place of care has been closed in conjunction with a public health emergency declared by a public health official.
- An employer is not required to grant leave for routine medical or dental appointments.

BOLI has stated that it is relying on the word "*condition*" in the existing statute – that mandates leave to care for a child of the employee who is suffering from an illness, injury or "condition" that requires home care to give them this authority. This appears to be Governor Brown's basis for her pre-emergency rulemaking position that OFLA applies to closed school situations. Although the early interpretation might be a stretch, the new emergency rule (that applies through September 13

early interpretation might be a stretch, the new emergency rule (that applies through September 15, 2020) removes any such discrepancy related to whether an employee is entitled to OFLA leave due to the current school closures.

Considering these developments, the following questions remain: How does OFLA and the emergency FMLA leave interact? And can we reduce our prior sick leave in light of the new Emergency Paid Sick Leave?

### **Interplay Between Emergency FMLA Leave And OFLA Leave**

The new emergency FMLA leave and the emergency rulemaking related to OFLA significantly overlap. We have asked BOLI for guidance on how it will interpret the emergency FMLA law and how it will interact with OFLA, and will update you accordingly.

Generally speaking, for employers with more 500 or more employees, the new OFLA rule is instructive on how to handle employees' leave for school closures (as these employers are specifically carved out of the emergency FMLA law). To the extent an employee qualifies for OFLA, employers should grant an employee's request for OFLA leave "to care for an employee's child whose school or place of care has been closed in conjunction with a public health emergency declared by a public health official."

For employers with 1-499 employees, the FMLA emergency leave is instructive on how to handle the leave for school closures. Unlike OFLA, the emergency FMLA leave is partially paid as follows. First, the first 10 days of Emergency FMLA may be unpaid. During this 10-day period, an employee may elect to substitute any accrued paid leave (like vacation, PTO, or sick leave) to cover some or all the 10-day unpaid period.

Second, after the 10-day period, the employer generally must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. Finally, the new federal law limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.

Upon an employee's return from leave, employers with 25 or more employees will have the same obligation as under traditional FMLA/OFLA. You will have to return any employee who has taken this leave to the same or equivalent position upon the return to work.

Employers with fewer than 25 employees (who admittedly may be unfamiliar with FMLA/OFLA job restoration requirements) are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA/OFLA leave due to COVID-19. However, this exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

As noted above, we will provide additional information should BOLI clarify the interplay between the emergency FMLA leave and OFLA.

## Interplay Between Emergency Paid Leave And Oregon's Sick Leave Laws

Bearing in mind the new Emergency Paid Sick Leave, many employers are wondering if they still must provide protected sick leave as required in Oregon. As a reminder, Oregon law requires employers with 10 or more employees (six or more for Portland employers) to provide their employees who work in Oregon with up to 40 hours of paid sick leave per year. Employers with fewer than 10 employees (fewer than six for Portland employers) are also required to provide employees with up to 40 hours of sick leave, but this bank of leave time can be unpaid. The new federal Emergency Paid Sick Leave provides 80 hours of paid leave.

Section 5107 of the Emergency Paid Sick Leave Act provides guidance for the question posed by many employers. It specifically includes a catchall provision, which states that nothing in this act shall diminish the rights or benefits that an employee is already entitled to under an existing employer's policy or state/local law. Arguably this section indicated this federal Emergency Paid Leave is in addition to of Oregon's sick leave. However, an argument could be made that that is not the case. Specifically, the Emergency Paid Sick Leave Act removed a provision in the original bill that specifically prevented employers from changing their current policies and benefits in response to the Act.

That said, there is significant risk related to reducing your current sick leave considering Section 5107 of the Act. First, if your current sick leave policy is currently more generous than Oregon's sick leave requirements, you could run afoul of the new federal law by diminishing your current leave because of the new law. Second, if your current sick leave policy is minimally compliant with Oregon's sick leave requirements, reducing your sick leave policy would possibly run afoul of Oregon's sick leave laws, given that Oregon's sick leave is broader in usage than that provided by the new federal law. Finally, doing so exposes employers to potential public relations issues.

We will continue to seek guidance from BOLI as to whether it believes the Emergency Paid Sick Leave is in addition to Oregon's sick leave laws and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in [our Portland office](#), or [any member of our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

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