Comparison of *former* FMLA regulations, FMLA regulations effective January 16, 2009, and OFLA statute/administrative rules

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(NOTE: With a few exceptions that involve changes the DOL commentary describes as "clarifications," there are only comments on renumbered or reorganized sections when they reflect a substantive change.)

Former FMLA regulations *(when relevant to cite)* (NOTE: Many former provisions have been renumbered in new or clarified regulations)	**New & "clarified" FMLA regulations**	**OFLA/OFLA administrative rules** (*In the discussion, "OFLA" includes both ORS and OFLA administrative rules)*	**Analysis/comments** (*In the discussion, "OFLA" includes both ORS and OFLA administrative rules*)
825.114(a)(2)(i)(A) included, as a serious health condition requiring continuing treatment, "Treatment two or more times * * * a health care provider." Renumbered.	825.115 is now entitled "Continuing treatment" and defines "serious health condition involving continuing treatment." "Serious health condition" is redefined in 825.800 to mean "an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment by a health care provider as defined in 825.115." 825.115(a)(1) replaces former 825.114(a)(2)(i)(A) and requires "Treatment two or more times, **within 30 days of the first day of incapacity, unless extenuating circumstances exist * * *."** . 825.115(a)(5) defines "extenuating circumstances as "circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider" and provides an example.	OAR 839-009-210(19)(a) requires only "two or more treatments by a health care provider," the same language as in *former* 825.114(a)(2)(i)(A).	OFLA/FMLA employers follow the OFLA regulation, which is more beneficial to the employee's circumstances.
	825.115(a)(3) is new. It provides that, to qualify as a serious health condition involving continuing treatment by a health care provider, the employee must make an **in-person** visit to the health care provider within seven days of the first day of incapacity. This was intended as clarification that it does not include, for example,	There is no similar requirement in OFLA (OAR 839-009-0210(19)), which defines "serious health condition," for an in-person visit within seven days of the first day of incapacity.	OFLA/FMLA employers follow the OFLA regulation, which is more beneficial to the employee's circumstances.

	a phone call, letter, email, or text message.		
	825.115(a)(4) is new. It provides that whether additional treatment visits or a regimen of continuing treatment is necessary within 30 days of the first incapacity shall be determined by the health care provider. This was adopted to avoid the possibility that employees might schedule a follow-up appointment simply to meet the test of a second visit.	There is no similar requirement in OFLA (OAR 839-009-0210(19)), which defines "serious health condition."	OFLA/FMLA employers follow the OFLA regulation, which is more beneficial to the employee's circumstances.
825.114(2)(iii)(A) requires only "periodic visits" for treatment by a health care provider. Renumbered.	825.115(c)(1) modifies the definition of "chronic serious health condition" to require **at least two visits per year** for treatment by a health care provider.	OFLA (OAR 839-009-0210(19) currently requires only "periodic visits," the same as *former* 825.114(2)(iii)(A).	OFLA/FMLA employers follow the OFLA regulation, which is more beneficial to the employee's circumstances.
	825.205(a)(2) is new re: intermittent/reduced leave schedule. "Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or rain, or a laboratory employee is unable to enter or leave a sealed 'clean room' during a certain period of time, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement."	OFLA has no similar provision. ORS 659A.162(7) provides that if BOLI adopts a rule it shall allow intermittent leave "to the extent permitted by federal law." Under the federal Fair Labor Standards Act (FLSA), if an employee is exempt from minimum wage and overtime law, wage deductions may not be made for absences of less than one day, except for part-day absences covered by FMLA. This means if an leave event is covered only by OFLA, an employer may only deduct paid leave for absence of one day or more.	OFLA/FMLA employers may not deduct paid leave for a part-day absence covered only by OFLA.
Former 825.215(2) did not allow denial of a bonus for perfect attendance due to use of FMLA leave.	825.215(2) contains new language that if a bonus is based on perfect attendance and the employee has not met that goal due to FMLA leave, the bonus may be denied, unless otherwise paid to employees on an equivalent leave status that does not qualify as FMLA leave.	OAR 839-009-0320(4) is consistent with *former* 825.215(2) and is now in direct conflict with the amendment.	Follow OFLA rule for leave covered by both OFLA and FMLA.
	825.300(a)(1) now allows electronic posting of FMLA information "as long as it otherwise meets the requirements of this section." The commentary notes at p.116 that all employees and applicants must have access to the	OFLA does not specifically provide for electronic posting. ORS 659A.180 requires covered employers to "post a notice of the requirements of ORS 659A.150 to 659A.186 "in every	OFLA/FMLA covered employers may provide electronic posting but must also continue to

	information.	establishment of the employer in which employees are employed" and requires BOLI to provide the notices to covered employers. OAR 839-009-0300 requires the notice to be "displayed in each building or worksite in an area that is accessible to and regularly frequented by employees."	comply with OFLA which requires posters.
	825.300(a)(3) clarifies that an employer's existing employee handbook or other written materials concerning leave rights must include the FMLA general notice and adds the provision that distribution may be accomplished electronically.	OFLA contains no similar requirement.	OFLA/FMLA covered employers follow FMLA.
Consolidates requirements from former 825.110 and 825.301 into one section. Former 825.110(d) required notification by employer within two business days.	825.300(b)(1) provides that the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days of the request.	OFLA has contains no similar requirement.	OFLA/FMLA covered employers follow FMLA for leave covered by OFLA and FMLA.
Employers had a previous obligation to notify employees that they were not eligible for FMLA leave under 825.110 and 208(b), but not to give a specific reason.	825.300(b)(2) now requires that, if the eligibility notice states that the employee is not eligible for FMLA leave, the notice must state "at least one reason why the employee is not eligible."	OFLA contains no similar provision.	OFLA/FMLA covered employers follow FMLA for leave covered by OFLA and FMLA.
	825.300(b)(3) is a new provision. It provides "If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed * * * the employer must notify the employee of the change in eligibility status within five business days,	OFLA contains no similar provision.	OFLA/FMLA employers follow FMLA as to leave that would be covered under FMLA.

	absent extenuating circumstances."		
	825.300(c)(1)(iii) adds required language to the employer's "rights and responsibilities" notice. The notice must now also include "the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave." 825.300(c)(1)(vi) adds more required language to the employer's "rights and responsibilities" notice. The notice must also include a statement of "the employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave."	OFLA contains no similar provisions other than requirements to post information on OFLA rights.	OFLA/FMLA covered employers follow FMLA regulation.
	825.302(a) adds a new provision: "In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information." However, DOL commentary states this was implicit in the former regulation and it is not an added burden on employees. (p.137)	OFLA contains no similar requirement.	OFLA/FMLA covered employers may apply FMLA provision only to FMLA leave.
	825.302(c) amends the regulation for the content of the employee notice in the case of foreseeable leave. It provides additional guidance by means of example of the information the employee must provide. The commentary (p.141) states that the new language clarifies "what information the employee must provide to make the employer aware of the employee's need for FMLA-protected leave." The new language is: "When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave."	OFLA contains no similar provision.	OFLA/FMLA covered employers can require this only for FMLA leave.
Related to employee notice, 825.303(a) explained "as soon as	825.303(a), which regulates timing of notice of unforeseeable leave, substitutes the phrase "it generally should be practicable for the employee	ORS 659A.165(3) requires "oral notice to the employer within 24 hours of the commencement of the leave," and	OFLA/FMLA covered employers apply the regulation most

practicable with the words: "It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible."	to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."	"written notice within three days after the employee returns to work."	beneficial to the employee's circumstances for leave under both OFLA and FMLA.
	825.303(b) clarifies that "FMLA" doesn't need to be mentioned specifically the first time an employee requests unforeseeable leave. (b) There is a new requirement that the employee specifically reference either the qualifying reason for leave or the need for FMLA leave when the employee "seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave." (c) There is a new provision that calling in "sick without providing further information" does not trigger any employer obligation under FMLA. (d)Finally, there is a new provision stating that "[f]ailure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying."	(a) OAR 839-009-0250(1) provides that when an employee gives notice of foreseeable leave, the "employee is not required to specify that the request is for OFLA leave." (b) OFLA contains no similar provision. (c) OFLA contains no similar provision. (d) ORS 659A.165(4) and OAR 839-009-0250(4) provide for a three week reduction in OFLA leave or disciplinary action when an employee fails to give notice in compliance with the employer's uniformly applied policy or practice. OFLA has no similar provision for denial of OFLA leave if, after giving notice, the employee fails to respond to inquiries.	OFLA/FMLA covered employers apply regulation that is more beneficial to employee's circumstances for leave that is under both OFLA and FMLA.
	825.303(c) is new. It provides "[w]hen the need for leave is not foreseeable, an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." Provides examples of "unusual circumstances." Provides that "[if] an employee does not comply with the employer's usual notice and procedural	See note immediately above. OFLA provides no exception for "unusual circumstances" and creates a statutory 24 oral notice requirement for employees without any consideration for "unusual circumstances."	OFLA/FMLA covered employers apply regulation that is more favorable to employee's circumstances for leave covered under both laws.

	requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied." Commentary states the last sentence is to make it consistent with 302(a).		
See note on new 825.300(a)(3).	825.304(a) contains language from *former* .304(c) regarding the notice an employee must have before the onset of FMLA leave can be delayed due to lack of required employee notice. More stringent language is added – now the employer must have posted FMLA notice <u>and</u> provided the written notice in an employee handbook or employee distribution, as required by 825.300.	OFLA does not provide for delay of leave, only reduction in leave, except that OAR 839-009-0250(4)(a) provides that the employee "may also be subject to disciplinary action under the employer's uniformly applied policy or practice, consistent with the employer's discipline for similar violations of comparable rules. OAR 839-009-0250(4)(b) provides that an employer may not reduce an employee's leave or take disciplinary action unless the employer has posted the OFLA notice or "can otherwise establish that the employee had actual knowledge of the notice requirement."	OFLA/FMLA covered employers apply regulation that is more beneficial to employee's circumstances for leave taken under both laws.
Former rule provided "two business days" and only covered foreseeable leave.	825.305(b) provides that, for <u>both</u> foreseeable and unforeseeable leave, an employee must provide the requested certification to the employer within 15 calendar days.	ORS 659A.168 provides that if an employee is required to give notice under ORS 659A.165(1)(which provides that the employer "may require" 30 days notice in the case of foreseeable leave), the employer may require the employee to provide medical verification before commencing leave. OAR 839-009-0260(1) provides that the employer may require the employee to provide medical verification of the need for OFLA leave before the leave starts "when an employee gives 30 days notice for OFLA leave[.]" OAR 839-009-0260(2) provides that "if the employee's need for OFLA leave precludes giving 30 days notice, the employee must provide medical verification within 15 days of	OFLA/FMLA covered employers apply certification/verification provision that is more beneficial to the employee's circumstances for leave covered under both OFLA and FMLA.

		the employer's request for verification.	
Former 825.305(d).	825.305(c) clarifies the nature of certification that must be provided by an employee upon an employer's request as "complete and sufficient." The employer must advise the employee whenever the employer finds a certification "incomplete or insufficient" and must state in writing what additional information is necessary to make the certification "complete and sufficient." Provides that a certification is "incomplete" if "one or more of the applicable entries have not been completed * * *" or "if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive." The employer must give the employee seven calendar days to cure any such deficiency. If the employee does not cure the deficiencies, FMLA leave may be denied.	OAR 839-009-0260(1) provides that the employer may require the employee, in the case of foreseeable leave, to provide medical verification of the need for OFLA leave before the leave starts. OAR 839-009-0260(2) requires the employee to provide medical verification "within 15 days of the employer's request for verification" if the employee cannot give 30 days notice. OAR 839-009-0260(3) states that the "employer must provide the employee with written notice of any requirement to provide medical verification of the need for leave and the consequences for doing so" but does not state a specific consequence for failure to provide certification. Page 91 of TA's FLL handbook states, for employers covered by OFLA and FMLA, leave is not protected if the employee doesn't provide certification. ORS 659A.168(1) merely permits the employer to require "medical verification of the need for leave;" OAR 839-009-0260(1) & (2) parrot this language. OAR 839-009-0260(3) requires the employer to provide the employee with "written notice of any requirement to provide medical verification of the need for leave and the consequences for failure to do so." OFLA does not have a provision containing a "cure" time.	OFLA/FMLA covered employers apply the regulation most beneficial to the employee's circumstances when leave is under both OFLA and FMLA.
	825.305(d) is new. Sets out consequences for	Unlike FMLA, OFLA itself does not	OFLA/FMLA covered

	an employee's failure to provide required certification. Clarifies that employees have the burden of ensuring that a complete and sufficient FMLA certification, whether the initial certification, a recertification, a second or third opinion, or a fitness for duty certification, is submitted to the employer upon request in order to substantiate their right to FMLA-protected leave. An employer may deny FMLA leave when the employee fails to provide complete and sufficient certification or the employee fails to furnish the health care provider providing the certification with any necessary authorization from the employee in order for the health care provider to release a complete and sufficient certification to the employer to support the FMLA request after the employer has given the employee an opportunity to cure any deficiency in the certification.	state a specific consequence for failure to provide certification. However, p. 91 of TA's FLL handbook states, for employers covered by OFLA and FMLA, leave is not protected if the employee doesn't provide certification. OFLA does not have a provision containing a "cure" time. ORS 659A.168(1) and OAR 839-009-0260(7) allow employers to require employees to obtain a 2nd and 3rd opinion. ORS 659A.171(4) allows employers to require employees to provide a fitness for duty certificate. OAR 839-009-0270(7) allows employers to require fitness for duty certificate before employees return to work.	employers apply the regulation most beneficial to the employee's circumstances when leave is under both OFLA and FMLA.
Former 825.305(e) provided that "[i]f the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized * * *, only the employer's less stringent sick	825.305(e) replaces *former* 305(e), which DOL believed created "needless confusion and conflicted with the statutory right of employers to require certification of a serious health condition from a health care provider to substantiate the employee's right to FMLA-protected leave." The new 305(e) provides that the employer "may require the employee to provide a new medical certification in each subsequent leave year" when the "employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year."	OAR 839-009-0260 allows an employer to request subsequent medical verifications every 30 or more days in connection with an absence by the employee.	OFLA/FMLA covered employers follow provision more beneficial to employee's circumstances for leave covered by both laws.

leave certification requirements may be imposed. This provision was deleted.			
	825.306(a) clarifies what the "medical facts" are that an employer can request. New language allows employer to require a medical certification that states the health care provider's specialization and the health care provider's diagnosis of the employee's condition. New language allows the health care provider to state the "nature of any other work restrictions" on the employee.	ORS 659A.168(1) permits the employer to require "medical verification of the need for leave;" OAR 839-009-0260(1) & (2) parrot this language. OAR 839-009-0260(5) provides that the employer's health care provider may contact the employee's health care provider, with the employee's permission, "for purposes of clarification and authenticity of the medical verification."	OFLA/FMLA covered employers may use FMLA medical certification forms for serious illness of employee and for serious illness of family member.
	825.306(b) creates two new forms for obtaining medical certification, one for the employee's serious health condition, and one for a family member's serious health condition.	OFLA has no similar forms.	OFLA/FMLA covered employers may use FMLA medical certification forms for serious health condition of employee and for serious health condition of family member.
	825.306(c) clarifies that if an employee is on FMLA/ worker's compensation benefits or FMLA/disability paid leave, the employer may ask for medical information it is entitled to under worker's compensation and disability provisions and can use that information to determine the employee's entitlement to FMLA leave. This replaces *former* 825.307(a)(1). The commentary states that the deletion of *former* 825.305(e) and new language in this provision "reflect both an employer's statutory right to require a minimally sufficient certification to substantiate the employee's right to FMLA-protected leave in all cases, and an employer's right to additional information when another benefit plan or program requires greater information in order to qualify the	OFLA has no similar provision. OFLA does not allow OFLA and Worker's Comp leave to run concurrently so that part of FMLA regulation is inapplicable.	OFLA/FMLA covered employers may use FMLA medical certification forms for employee serious health condition and family member serious health condition but for OFLA-covered leave may not ask medical questions beyond what the forms require and what is relevant to determine OFLA eligibility.

	employee for payment or benefits beyond those provided by the FMLA." (p.162)		
	825.306(d) is new. It provides that if an employee's serious health condition may also be a disability under the ADA, FMLA does not prevent the employer from following the procedures for requesting information under the ADA and any information received may be used in determining the employee's entitlement to FMLA-protected leave.	OFLA has no similar provision and is silent on this issue.	OFLA/FMLA covered employers may use FMLA medical certification forms for employee serious health condition and family member serious health condition. In establishing eligibility for OFLA-covered leave employers may consider only relevant medical information. OFLA does not prohibit an employer from requesting information for purposes of ADAA compliance; however only medical information relevant to OFLA/FMLA eligibility may be used to determine such eligibility.
Former 825.307(a)(1) permitted the employer, with the employee's permission, to have its own health care provider contact the employee's health care provider in order to clarify or authenticate a FMLA certification. *Former* 825.307(a)(2) provided that the leave would not be	825.307(a) now provides that the employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification <u>after</u> the employer has given the employee an opportunity to cure any deficiencies. The employer must use a health care provider, a human resources professional, a leave administrator, or a management official, but cannot use the employee's direct supervisor. "Authentication" is defined as requesting verification that the information on the medical certification was completed by the health care provider. "Clarification" is defined as contacting	OAR 839-009-0260(5) is the same as *former* 825.307(a)(1) and is now in direct conflict with the amendment.	OFLA/FMLA covered employers follow OFLA regulation for leave covered by both laws.

designated as FMLA leave if the "certifications [did] not ultimately establish the employee's entitlement to FMLA leave." In addition, HIPAA did not exist when FMLA was originally enacted.	the health care provider "to understand the handwriting on the medical certification or to understand the meaning of a response." [*NOTE: DOL's commentary, at p.171, states this limits employers to asking the health care provider to read the handwriting on the certification or asking the meaning of a response.*] HIPAA applies when a health care provider shares medical information with the employer. If an employee fails to provide the employer with the authorization to clarify the certification with the health care provider and does not otherwise clarify the certification, the employer may deny the taking of FMLA if the certification is unclear. The authorization must be valid under the HIPAA Privacy Rule.		
	825.307(b) contains the first three sentences of *former* 825.307(a)(2), then adds new language stating that the consequences in 305(d) apply "if the employee or the employee's family fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion."	OFLA allows a second opinion, but has no similar provision for a consequence to an employee who does not, or whose family member does not, cooperate in authorizing the release of medical information related to the serious health condition to be used by the health care provider who is providing a second opinion for the purpose of medical verification.	OFLA/FMLA covered employers may apply FMLA regulation to leave covered by FMLA only.
	825.307(c) contains all the language of *former* 307(c) and adds new language stating that the consequences in 305(d) apply "if the employee or the employee's family fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion."	OFLA allows a third opinion, but has no similar provision for a consequence to an employee who does not cooperate in authorizing the release of medical information related to the serious health condition to be used by the health care provider who is providing a third opinion for the purpose of medical verification.	OFLA/FMLA covered employers may apply FMLA regulation to leave covered by FMLA only.
Former 825.307(d) required that copies must be provided within	825.307(d) requires that upon request by an employee, an employer must provide the employee copies of second and third medical	OFLA has no similar provision.	OFLA/FMLA covered employers must apply FMLA rule to leave

two business days.	opinions within five business days.		covered under both laws.
	825.307(f) adds language requiring that, "where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request." The commentary notes (p.173) that "this approach recognizes the legitimate need of employees to take FMLA leave to care for family members in foreign countries and the need of employers to be able to verify that such leave is being appropriately used."	OFLA has no similar provision.	OFLA/FMLA covered employers may apply FMLA regulation to leave covered by FMLA only.
Former 825.308 provided that when the medical certification indicates the minimum duration of the period of incapacity was more than 30 days, recertification generally could not be required until the specified minimum duration had passed.	825.308(b) adds provision that when the medical certification indicates the minimum duration of the condition is more than 30 days, "an employer may request a recertification of a medical condition every six months in connection with an absence by an employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months, (e.g. for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence." The commentary notes (p.177) that the six-month interval "generally coincides with the requirement of periodic visits of twice per year for treatment in the definition of a chronic serious health condition in Sec. 825.115(c)(1)." The commentary also clarifies (p.177) that recertification of long-term or permanent conditions is not permitted unless the conditions set forth in 825.308(c) are met.	OAR 839-009-0260(6) allows an employer to request subsequent medical verifications every 30 or more days in connection with an absence by an employee.	OFLA/FMLA covered employers follow regulation that is more favorable to employee's circumstances for leave covered by both OFLA and FMLA.
	825.308(e) is new. It deals with the content requested by the employer in the recertification request. It provides: "The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in Sec. 825.306. The	(a) Presumably, the same OFLA standards that apply to original certification would apply to obtaining a subsequent medical verification, including an employee's obligations to cooperate. See OFLA note after	OFLA/FMLA covered employers may only utilize the pattern of absences provision of the FMLA regulation for leave covered only by

	employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. * * * As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern."	825.306(a) above. (b) OFLA has no provision that allows or discusses an employer's ability to "provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern."	FMLA.
Former 825.310 regulated "fitness-for-duty" certification	825.312(a) is the same as *former* 825.310(a), with the following language added: The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. See Sec. 825.305(d)." The commentary (p.192) states this clarifies that employees have the same obligation to provide the information directly to the employer in the fitness-for-duty certification process as they do in the initial certification process."	ORS 659A.171(4)(a) and OAR 839-009-0260(7) allow an employer to require an employee to present "certification from the employee's health care provider that the employee is able to resume work." OFLA says nothing more about an employee's obligation in this context.	OFLA/FMLA covered employers may apply FMLA regulation only to leave covered only by FMLA.
Former 825.310(c) provided that the fitness-for-duty certification "need only be a simple stmt of an employee's ability to return to work" and did not contain a provision for the certification to address the employee's ability to perform the essential functions of the job.	825.312(b) replaces *former* 310(c). In seeking a fitness-for-duty certification, an employer may now "require that the certification specifically address the employee's ability to perform the essential functions of the employee's job no later than with the designation notice required by Sec. 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or	ORS 659A.171(4)(a) provides only for certification "that the employee is able to return to work" <u>and</u> provides that the employer may only require certification "pursuant to a uniformly applied practice or policy of the employer." OAR 839-009-0260(7) provides that the employer "may request the employee to present certification from the employee's health care provider that the employee is able to resume work" before restoring the employee to work.	OFLA/FMLA covered employers use FMLA regulations for FMLA covered leave only.

	her job." The fitness-for-duty certification from the health care provider must now certify that the employee is able to resume work.		
	825.312(d) contains similar language to that in the first sentence of *former* 825.312(e), and adds the requirement that an employer must include, in its designation notice, whether the "fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job."	OFLA does not require an employer designation notice, except that OAR 839-009-0260(4) states that an employer "may designate the leave as provisionally approved subject to medical verification."	OFLA/FMLA covered employers apply FMLA regulation to FMLA only leave.
	825.312(e) contains the same language as *former* 825.310(f) regarding delaying restoration to employment until an employee submits a required fitness-for-duty certification, but adds "[i]f an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA."	OAR 839-009-0270(7) provides that an employer can require that an employee present certification from the employee's health care provider "that the employee is able to resume work" before restoring the employee to work. ORS 659A.171(4) provides that the employer can only require this if required "pursuant to a uniformly applied practice or policy of the employer."	OFLA/FMLA covered employers apply the more beneficial OFLA regulation to leave covered under both laws.
Taken from *former* 825.310(g), which did not allow the employer to request a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule.	825.312(f) creates a new exception that entitles an employer to a fitness-for-duty certification "up to once every 30 days [for leave taken on an intermittent or reduced leave schedule] if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave." Specific conditions that the employer must meet for requiring this fitness-for-duty certification are set out. The employer is prohibited from terminating the employee "while awaiting such a certification of fitness to return to duty for an intermitted or reduced schedule leave absence." "Reasonable safety concerns" are defined.	OFLA contains no provision on the issue of "reasonable safety concerns."	OFLA/FMLA covered employers apply FMLA regulation to FMLA only leave.
Formerly 825.311.	825.313(a) now provides that an employer may "deny" FMLA coverage instead of "delay" FMLA coverage. The commentary (p.205) states that this substitution was made for clarification's sake	See comments related to changes to 825.305.	OFLA/FMLA covered employers may apply this provision only to FMLA-only leave.

	to ensure that both employees and employers understand the potential impact of failure to provide medical certification in a timely manner and that this is not a substantive change.		
	825.313(c) is new. It relates to failure to provide "recertification" and contains the same provisions as 313(a) and (b) regarding employee responsibilities and possible consequences for failure to provide recertification.	See comments related to changes to 825.305.	OFLA/FMLA covered employers may apply this provision only to FMLA-only leave.
	825.800 changes definitions for "continuing treatment," "chronic conditions," "eligible employee," "parent," "son or daughter," "serious health condition," "employee," and "health care provider" to conform to changes and clarifications in the new regulations.	These are addressed in previous comments.	OFLA/FMLA employers follow the OFLA regulations, which are more beneficial to the employee's circumstances.

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