

Oregon or Washington: which paid leave program applies?

To date, nine states have enacted paid family leave programs, offering eligible employees paid time off for specific qualifying purposes. Given all these programs are state-mandated, and especially for states like Oregon that are bordered to the north and south by states with their own paid leave laws, the way each state defines eligibility under its respective program is increasingly important for employers to understand – especially employers whose employees travel between states for job-related purposes or who work remotely from another state.

Specific to Oregon employers that have employees who cross the Oregon-Washington border to perform job duties, or who reside in one state and work in the other, the question becomes: which paid leave program applies?

Oregon: performance analysis

In 2019, Oregon passed the Paid Family and Medical Leave Act, now referred to as Paid Leave Oregon, which will provide eligible individuals up to 14 weeks of paid time off from work for certain qualifying purposes. With Paid Leave Oregon scheduled to begin on Jan. 1, 2023, the Oregon Employment Department (OED) has issued guidance – some of which has been finalized, but the majority of which remains in proposed form – to help Oregon employers and employees understand how the program will operate.

Based on the proposed and final



COMPLIANCE CORNER

Stacie Damazo

COMMENTARY

rules OED has issued to date, eligibility for benefits under Oregon’s program will depend, at least in part, on where the employee performs services. If the employee performs all services within Oregon, that is where the inquiry ends. If, however, the employee does not perform all services entirely within Oregon, the question becomes whether services performed outside of Oregon are “incidental” to the services the employee performs within Oregon. To determine whether the services are incidental, the services performed outside of Oregon must be temporary or transitory in nature or consist of isolated transactions.

Washington: the localization test

Washington’s Paid Family and Medical Leave (PFML) went into effect in 2017 and, much like Paid Leave Oregon, offers eligible Washington employees up to 18 weeks of combined paid medical and family leave.

In part, eligibility under Washington’s PFML program depends on whether the employee satisfies a “localization” test. Generally speak-

ing, the localization test also analyzes where the employee performed services but takes different factors into consideration. If the employee performed services that were not localized in Washington, the employee’s eligibility depends on whether the employee’s (1) base of operations is in Washington; (2) services are directed or controlled from Washington; and/or (3) residence is in Washington.

A distinction with a difference

You may be wondering, if both Paid Leave Oregon and Washington’s PFML program offer, at least generally, comparable benefits, why does the distinction matter?

While Paid Leave Oregon and Washington’s PFML program provide (at least generally) comparable benefits, the risk of exposure to penalties or a potential lawsuit weigh heavily against an employer assuming that one program applies in lieu of the other.

For example, both Paid Leave Oregon and Washington’s PFML program set out separate notice, reporting, withholding, and contribution requirements. Failure to comply with any of these requirements may result in the issuance of certain penalties and interest, or give rise to a potential civil lawsuit. Under Paid Leave Oregon, failure to file requisite reports to OED or a delinquency resulting from failure to timely pay contributions owed under the program may result in a penalty equal to 1 percent of the wages of the

employer’s employees in the preceding calendar year. Washington’s program, however, goes one step further. Under PFML, delinquency may also result in the state of Washington seeking an injunction, preventing an employer from continuing to do business or employ individuals in Washington until the amounts are paid or a sufficient bond is secured.

Barring additional guidance from either state expressly delineating when one state’s paid leave program may apply in lieu of the other state’s program, there will inevitably be circumstances in which either state’s paid leave program could arguably apply. In addition to proposing the above-referenced place of performance test, OED has also proposed examples – some of which are specific to this Oregon-or-Washington discussion – that may help guide employers through the place of performance inquiry. Even so, employers that have doubts as to which state’s paid leave program applies should carefully consider their obligations (if any) under both programs.

Stacie Damazo is an attorney at Barran Liebman LLP. She advises and represents employers on various issues. Contact her at 503-276-2121 or sdamazo@barran.com.

The opinions, beliefs and viewpoints expressed in the preceding commentary are those of the author and do not necessarily reflect the opinions, beliefs and viewpoints of the Daily Journal of Commerce or its editors. Neither the author nor the DJC guarantees the accuracy or completeness of any information published herein.