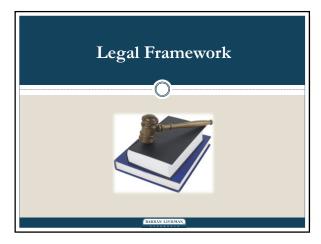


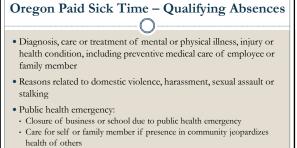
Today's Topics

- Oregon Paid Sick Time
- Oregon Family Leave Act (OFLA)
- Family and Medical Leave Act (FMLA)
- Americans with Disabilities Act (ADA)
- Leave as a reasonable accommodation
- Recognizing stealthy requests for leave & accommodation
- Successfully returning an employee to work



Oregon Paid Sick Time

- Effective January 1, 2016, employers must provide employees up to 40 hours of sick time per year
- Employers w/ 10+ employees (6+ if Portland)
- Available to employee after 90 days of employment
- Time during which employee permitted to be absent from work for a qualifying reason without a reduction in benefits including, but not limited to, health care benefits that employee earns from employer



- Any law requiring employer to exclude employee from the workplace for health reasons
- Any OFLA qualifying reason as defined by ORS 659A.159

OFLA/FMLA Eligibility

Covered Employer

- OFLA: 25 or more employees in Oregon
- FMLA: 50 or more employees within 75 miles

• Eligible Employee

- OFLA: Worked 180 days immediately prior to request at least 25+ hrs/week
- · Parental leave has no per week hourly requirement
- · OMFLA: Works an average of at least 20 hours per week

BA

 FMLA: Worked 12 mos for employer & at least 1250 hrs during 12 mos prior to request & works where employer has at least 50 employees within 75 miles

OFLA/FMLA Qualifying Absences

- Birth, adoption or foster care placement of a child (parental leave)
- Care for family member w/ or employee's own serious health condition
- For pregnancy disability or prenatal care

OFLA v. FMLA Qualifying Absences \bigcirc

• OFLA only

- · Care for sick child who does not have a serious health condition, but requires home care, known as sick child leave
- · Bereavement leave is 2wks: funeral arrangements, attend funeral or to grieve a family member who has passed away
- · Because of spouse or same-gender domestic partner called to or on leave from active military duty

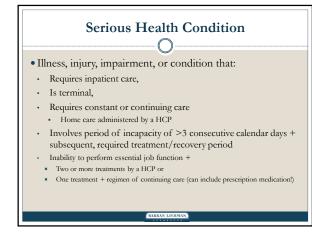
• FMLA only

- · To care for seriously ill/injured service member or veteran
- · Because of "qualifying exigency" arising out of family member being on or called to active military duty

OFLA/FMLA Amount of Leave \bigcirc • OFLA Length of Leave = 12 weeks in a one year period · A female who takes pregnancy-related disability leave may take additional 12 weeks for any OFLA-qualifying purpose · An employee who uses full 12 weeks of parental leave may use up to 12 additional weeks in the same leave year for sick child leave • FMLA = 12 weeks · 26 weeks for military caregivers leave

Intermittent OFLA/FMLA \bigcirc

- OFLA/FMLA leave can be utilized in blocks, intermittently, or on a reduced schedule, based on medical need
- Amount of time available is determined from regular schedule
- Intermittent leave can be used in hourly increments
- Not available for parental leave, unless permitted by your policy or as required by regulation • To effectuate adoption or foster placement
- · To attend birth or give birth to employee's child



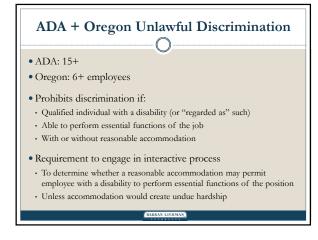
Employer Notice Obligations

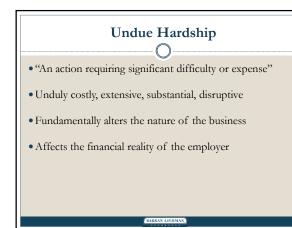
- 1. Eligibility Notice
 - Within 5 business days of request
- Once in a 12-month period if the same reason for leave
- 2. Rights and Responsibilities Notice
- Within 5 business days of request
 Accompanied by any required certification
- Accompanied by any required certification form
 Recommend including job description!
- Employers must responsively answer employee questions
- 3. Designation Notice
- Within 5 business days of knowing absence is OFLA/FMLA protected
 Must state if Fitness-for-Duty will be required to return to work
- *Different for sick child & bereavement leave

BABBAN LIEBMAN

Sick Time & OFLA/FMLA Overlap

- Oregon Sick Time and OFLA and/or FMLA run concurrently if:
- · Employee is eligible under the applicable law
- · Absence is a qualifying reason under the applicable law







EEOC Says...

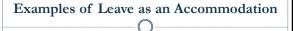
- A reasonable accommodation is generally any change in work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment
- That can include making modifications to existing leave policies and providing leave when needed for a disability
 Even where employer does not offer leave to other employees

BOLI Says...

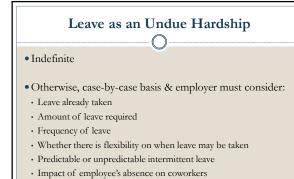
- If an employee's family leave entitlement has been exhausted for a serious health condition that is also a disability, the reasonable accommodation obligation still remains
- Example: employee who suffered permanent injuries to her back
- Able to return to work, but
- Needed special office furniture or equipment to allow her to perform the job after returning from family leave
- AND...

BOLI Example

- Additional unpaid leave, and/or
- Adjusted work schedule to accommodate therapy treatments
- May also be reasonable accommodations under disability laws
- Employer may be required to engage in meaningful interactive process with returning employee to identify potential accommodations



- Leave even if employee is not eligible under employer's policy
- Leave even when employee has exhausted leave employer provides as a benefit
- Leave even when employee has reached employer's "maximum leave" policy limits



Impact on employer's operations and ability to serve customers



OFLA/FMLA Requests Rule

- Employee must provide enough info for employer to reasonably determine whether OFLA/FMLA applies to request
- Employee need not even mention FMLA/OFLA
- If employer previously provided employee FMLAprotected leave, employee must specifically reference qualifying reason for leave or need for FMLA

OFLA/FMLA Requests

- May include info that:
- Condition renders employee unable to perform the functions of the job
- · Employee is pregnant or has been hospitalized overnight
- Employee or family member is under continuing care of a health care provider
- Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations

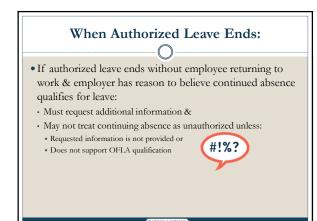
Once Upon a Time...

- Mikyla RN terminated for exceeding attendance policy
- Charge nurses aware of migraine headaches + medication
- Frequent call-offs: some = migraine; some = headache
- Vague attendance logs noting "headache" as reason for absence
- At termination meeting, asks if FMLA can be applied to some of her absences

Employer's Notice Procedure

• When need for leave is unforeseeable:

- Employee must comply with employer's usual & customary notice requirements for requesting leave, absent unusual circumstances
- ${\boldsymbol{\cdot}}$ Requests should go to HR rather than direct supervisor if possible
- Employee needing more leave than authorized must give employer reasonable notice prior to end of leave, following employer's known, reasonable & customary procedure for requesting leave



Questions to Ask

• What is the reason for the absence?

- Is this for treatment or an unplanned absence?
- Have you previously taken leave for this reason?
- When did this start and when do you expect to return?



- Employer expected to obtain any additional required information through informal means
- Employee has obligation to respond to employer's questions that are designed to determine whether absence is potentially OFLA/FMLA-qualifying
- Failure to respond to reasonable employer inquiries regarding leave request may result in denial of OFLA/FMLA protection if employer is unable to determine whether leave is OFLA/FMLA-qualifying

ADA Accommodation Requests Rule

- Employers must engage in interactive process when:
- Employee requests accommodation, OR
- · Employer recognizes the need for accommodation
- Request is when an employee requests a change at work for a reason related to a medical impairment
- No magic words, need not be in writing, need not be made by employee
- Sufficient if job problem is linked to a medical condition

Interactive Process Triggered By...

• HCP notes

- Knowledge of disability benefits
- Workers' comp injuries
- Employee's use of mitigation measures (medication, medical equipment, prosthetics, hearing aids, mobility devices, etc.)
- Discussion w/ employee
- Email requests for assistance
- Prolonged or frequent absences

Request for Leave = Request for Accommodation

• EEOC says:

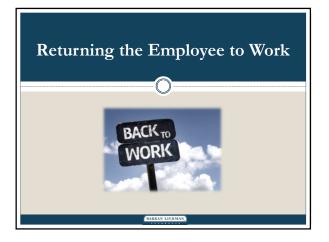
- · When employee requests leave for a medical condition
- Employer must treat request as one for reasonable accommodation
- Unless leave available under OFLA/FMLA or other leave policy first

• What is the specific reason you need an accommodation? • Unless disability is obvious

- Are there any other accommodations that will allow you to work?
- Will leave be a block of time or intermittent?
- When will the leave end?

We Recommend Form to HCP

- Employer may ask employee to have HCP respond to questions designed to enable employer:
- · To understand need for leave
- · Amount & type of leave required
- When reasonable accommodation other than leave may be effective





OFLA/FMLA

- An employee returning from leave is entitled to the former job, or to an available equivalent job if the former job has been eliminated.
- Remember: Can only require fitness for duty certification if the employee was notified of the requirement in the designation notice!
- Be aware that employee's HCP may provide information in fitness for duty certification triggering employee's notice that employee may need a reasonable accommodation!

- Employer policies that require employees to return to work without restrictions after leave are a violation of ADA
- Employer must engage in interactive process if employee requests an accommodation in returning to work
- Consider reassignment
- Consider alternate work schedule
- Ask employee (or HCP) whether accommodation other than leave will still allow employee to perform essential functions

Handling Employee Medical Records

- All medical information should be:
- · Collected on separate forms
- Maintained in separate files &
- · Treated as confidential records
- Records should be locked in HR office separate from supervisory files
- If records stored electronically, they should be encrypted

Sharing Employee Medical Information Medical information/records should only be shared with those who have legitimate business reason to have the info: Front line managers/supervisors may need information about an accommodation but should not be provided with intimate details of employee's medical condition or diagnosis Safety personnel may need to know of employees with mobility issues to assist them in case of need to evacuate premises

 When in Doubt
• Don't say: • Yes!
• 1651 • No!
• Say:
 Let me check on that! Is there anything we can do to support you in meeting your performance requirements?
GARRAN LICEMAN

