


When Sick Time, Family Leave, & the ADA Collide: Common Pitfalls & Strategies for Employer Success



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Presented by Nicole Elgin
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Yikes!



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Worse?!

- Manager wants to fire employee because of serious performance issues (plus she took medical leave)
- He even wrote it in an email to HR!
 - “We need to move to termination as soon as possible for several reasons...including that Debby submitted a request for medical leave.”
- Then in her lawsuit, Manager is deposed:
 - “I’m not really familiar with the FMLA because I’m on the front line.”



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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

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Legal Framework



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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

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Oregon Paid Sick Time – Qualifying Absences

- Diagnosis, care or treatment of mental or physical illness, injury or health condition, including preventive medical care of employee or family member
- Reasons related to domestic violence, harassment, sexual assault or stalking
- Public health emergency:
 - Closure of business or school due to public health emergency
 - Care for self or family member if presence in community jeopardizes health of others
 - Any law requiring employer to exclude employee from the workplace for health reasons
- Any OFLA qualifying reason as defined by ORS 659A.159

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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
 - 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

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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

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OFLA v. FMLA Qualifying Absences

- 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

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OFLA/FMLA Amount of Leave

- 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

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Intermittent OFLA/FMLA

- 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

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Serious Health Condition

- Illness, injury, impairment, or condition that:
 - Requires inpatient care,
 - Is terminal,
 - Requires constant or continuing care
 - Home care administered by a HCP
 - Involves period of incapacity of >3 consecutive calendar days + subsequent, required treatment/recovery period
 - Inability to perform essential job function +
 - Two or more treatments by a HCP or
 - One treatment + regimen of continuing care (can include prescription medication!)

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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 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

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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

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ADA + Oregon Unlawful Discrimination

- ADA: 15+
- Oregon: 6+ employees
- Prohibits discrimination if:
 - Qualified individual with a disability (or “regarded as” such)
 - Able to perform essential functions of the job
 - With or without reasonable accommodation
- Requirement to engage in interactive process
 - To determine whether a reasonable accommodation may permit employee with a disability to perform essential functions of the position
 - Unless accommodation would create undue hardship

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Undue Hardship

- “An action requiring significant difficulty or expense”
- Unduly costly, extensive, substantial, disruptive
- Fundamentally alters the nature of the business
- Affects the financial reality of the employer

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Leave as a Reasonable Accommodation



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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

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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...

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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

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Examples of Leave as an Accommodation

- 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

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Leave as an Undue Hardship

- Indefinite
- Otherwise, case-by-case basis & employer must consider:
 - Leave already taken
 - Amount of leave required
 - Frequency of leave
 - Whether there is flexibility on when leave may be taken
 - Predictable or unpredictable intermittent leave
 - Impact of employee's absence on coworkers
 - Impact on employer's operations and ability to serve customers

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Recognizing Requests



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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 FMLA-protected leave, employee must specifically reference qualifying reason for leave or need for FMLA

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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

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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

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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
 - 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

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When Authorized Leave Ends:

- If authorized leave ends without employee returning to work & employer has reason to believe continued absence qualifies for leave:
 - Must request additional information &
 - May not treat continuing absence as unauthorized unless:
 - Requested information is not provided or
 - Does not support OFLA qualification



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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?

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Employer's Right to Information

- 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

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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

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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

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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

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Questions to Ask

- 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?

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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

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Returning the Employee to Work



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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 employer's notice that employee may need a reasonable accommodation!

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ADA

- 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

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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

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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

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When in Doubt...

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

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Thank You!



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