Bureau of Labor
and Industries

Civil Rights Laws

A Handbook for Oregon Employers

2012 Edition

Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

CHAPTER 1

BUREAU OF LABOR AND INDUSTRIES: AUTHORITY AND SERVICES

Purpose and Authority

To ensure the human dignity of all of its inhabitants, the State of Oregon has declared that, as a matter of public policy, its citizens have a right to employment, housing, vocational schools, and public accommodations without unlawful discrimination. Acts of unlawful discrimination against any of Oregon's citizens because of race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status threaten the rights and privileges of Oregon's inhabitants and menace the institutions and foundation of a free democratic state. ORS 659A.006.

In order to eradicate unlawful discrimination, the Oregon legislature drafted chapter 659A of the Oregon Revised Statutes ("ORS"). The purpose of ORS chapter 659A is to institute a program of public education to eliminate unlawful discrimination, to allow for an adequate remedy for persons aggrieved by unlawful discrimination, and to institute an adequate administrative structure to allow for an orderly resolution of complaints of unlawful discrimination. ORS 659A.003.

The Oregon legislature has given the Bureau of Labor and Industries ("BOLI" or "the Bureau") the authority to carry out the goals of chapter 659A of the ORS. ORS 659A.800 sets forth that the Bureau "may take all steps necessary to eliminate and prevent unlawful practices."

Administrative Powers

The Oregon legislature set forth the administrative powers of the Bureau within ORS 659A.800 *et seq*. The Bureau has the power to adopt procedures and rules necessary to enforce Oregon's civil rights statutes. ORS 659A.805. It may also accept and investigate complaints of discrimination. ORS 659A.835. If the Bureau determines that there is substantial evidence of discrimination, it will attempt to settle the complaint through conference, conciliation, and persuasion. ORS 659A.840.

If the conciliation attempts are not successful, the Bureau has the authority to hold a hearing on the case and issue a final order that is enforceable in court. ORS 659A.850. The Bureau also has the statutory authority to initiate complaints of discrimination in cases in which it has reason to believe an unlawful practice has occurred. ORS 659A.825.

This chapter explains the civil rights complaint process and provides an overview of state and federal protected classifications.

DISCRIMINATION COMPLAINTS AND RESOLUTION

Discrimination Defined

In plain English, "discrimination" simply means different treatment. Discrimination is not unlawful unless it occurs because of an individual's race, sex, national origin or membership in some other legally protected classification.

According to OAR 839-005-0010(1), in order for an employment practice to be unlawful, the four elements listed below must be present:

- **A complainant** who is a member of protected class (such as race, color, sex, national origin, etc.);
- **A respondent** as defined by ORS 659A.001(10) and OAR 839-005-0003(10), for example, an employer, employment agency or union;
- **A harm** caused to the complainant by an action of the respondent; and
- **A causal relationship** between the harm alleged by the complainant and the complainant's protected class status.

***EXAMPLE*:** An employer [*respondent*] refuses to hire [*harm*] an individual [*complainant*] because the individual is Hispanic [*causal relationship*].

Types of Discrimination

There are three legal theories under which an individual may prove discrimination.

Specific Intent

Specific intent discrimination occurs when the respondent knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class. OAR 839-005-0010(1)(d)(A).

Unless the respondent can show that a bona-fide occupational qualification or a bona fide voluntary or court-ordered affirmative action plan allows the action, the respondent has unlawfully discriminated. OAR 839-005-0013.

Typically, the respondent has made statements or there is other evidence specifically linking the action to an individual's protected class.

***EXAMPLE 1*:** The general manager at XYZ Corporation tells the foreman, "I don't want anything to do with people who have filed workers' compensation claims."

***EXAMPLE 2*:** A supervisor writes in an employee's file, "She's getting a little old for this job!"

Different Treatment

Discrimination can be also be proven by showing that members of protected classes are routinely treated differently than individuals who are not members of that class. When the respondent makes this differentiation because of the individual's protected class and not because of legitimate, non-discriminatory reasons, unlawful discrimination exists. OAR 839-005-0010(1)(d)(B).

***EXAMPLE*:** A restaurant routinely allows female servers to be ten minutes late to work, but disciplines male servers who are tardy.

Adverse Impact

Although there may be no intent to discriminate, an employer's neutral policy may still disproportionately affect a protected class. If the employer's standard or policy has the effect of screening out or otherwise affecting members of a protected class at a significantly higher rate than others who are not members of that protected class, an "adverse impact" occurs. In such cases, the burden will be on the employer to show that there is a business necessity for that qualification. OAR 839-005-0010(2).

***EXAMPLE*:** An employer requires all employees to be able to lift 50 pounds. As this requirement will have an adverse impact on women and some people with disabilities, the employer will have to establish that this requirement is necessary for the operation of the business. Other examples of adverse impact that would require a showing of business necessity are:

- Certain educational requirements.
- Height and weight requirements.
- Language requirements, such as requiring all employees or applicants to speak English fluently.

Prima Facie Case

The complainant (employee) always has the burden to prove that the respondent (employer) unlawfully discriminated. In order to establish unlawful discrimination, the complainant must present evidence to establish a prima facie case. The complainant establishes a prima facie case if he presents evidence that is sufficient by itself to establish unlawful discrimination by the respondent against the complainant.

Once the complainant has established a prima facie case, the respondent has the burden to establish that it undertook the allegedly unlawful employment action due to a legitimate nondiscriminatory reason. The respondent may produce evidence to establish an intent other than one based on the complainant's protected class for the allegedly unlawful employment action taken.

***EXAMPLE*:** An employee presents a prima facie case of discrimination when he alleges that his employer ended his employment three days after he filed a workers' compensation claim for an on-the-job injury. The employer may present a legitimate business reason for the action. For example, the employer might present evidence that the discharge was unrelated to the employee's injury and claim, and that four other non-injured workers in the same department were laid off at the same time as the complainant due to lack of work.

Showing Pretext

A complainant may be able to show that the employer's proffered "legitimate nondiscriminatory reason" is a pretext for discrimination. For EXAMPLE, the complainant may prove that the employer's explanation is not credible because the employer's actions are not equally applied to other employees who are not members of a complainant's protected class. Complainants are given a full and fair opportunity to prove that the employer's explanation is not plausible or that the employer was more likely motivated by intent to discriminate unlawfully.

***EXAMPLE*:** An employee is terminated after suffering an on-the-job injury and files a discrimination complaint. The employer claims a legitimate nondiscriminatory reason for the termination, namely that the employee violated company safety rules. The employee may present evidence that the employer's stated reason is pretextual, since the employer knew of non-injured workers who violated the same safety rules but were not terminated.

BFOQ Defense

In rare instances, denying an employment opportunity because of a person's protected class may not be unlawful discrimination. Making such a distinction is legal when it is reasonably necessary to the normal operation of the employer's business. This "legal discrimination" is called a bona fide occupational qualification ("BFOQ") under Oregon and federal law. ORS 659A.030(1)(a); OAR 839-005-0013; 42 USC 2000e-2(e)(1); 29 USC 623(f)(1).

An employer's BFOQ defense cannot be justified by mere convenience, custom or preferences of customers. This defense is available only if the BFOQ is reasonably necessary to the normal operation of the business, and

- a factual basis exists for believing that all or substantially all individuals in the protected class would be unable to perform the job, or
- it would be impossible or highly impractical to screen applicants on an individual basis.

The burden is always on the employer to prove a BFOQ.

***EXAMPLE*:** A Methodist church would not be required to hire a Lutheran minister, regardless of qualifications.

Remedies Available to Employees

Employers should note that there are federal laws, state laws, and city ordinances banning discrimination in employment. These laws give employees several options when making formal complaints including:

- Filing a complaint with BOLI's Civil Rights Division.
- Filing a complaint with the federal Equal Employment Opportunity Commission (EEOC).
- Filing a civil suit in state circuit court.
- Filing a civil suit in federal district court.
- Complaining through the company's internal grievance system.
- Filing a grievance under a union contract, where applicable.

It is in the best interest of employers to address any complaints of discrimination swiftly, to take immediate, appropriate corrective action to remedy any discrimination that has occurred, and to prevent discrimination from occurring in the future.

Many businesses have internal grievance processes that provide employees with an opportunity to address discrimination before filing a formal complaint with a city, state or federal agency. Resolution of complaints at this level saves the company and its employees' time and energy.

Civil Rights Division's Investigative Process

The Civil Rights Division (CRD) of BOLI enforces laws granting individuals equal access to jobs, career schools, promotions, and a work environment free from discrimination and harassment. These laws ensure that workers' jobs are protected when they report worksite safety violations, use family leave or invoke the worker's compensation system. Civil rights laws also provide protection for those seeking housing or using public facilities such as retail establishments, or transportation services.

Any person claiming to be harmed by unlawful discrimination in employment, housing, public accommodations or career schools may file a complaint with CRD. Under the process set forth in Division 3 of the Bureau's Administrative Rules, CRD will investigate and resolve all filed discrimination complaints.

How a Complaint is Filed

There are several steps involved in filing a civil rights complaint with the Bureau of Labor and Industries. The steps vary, depending on the findings of the intake officer and the investigator. The entire process generally takes seven months, but may take up to one year.

Initial Contact

A complaint is generally initiated through an aggrieved employee's telephone call or email to CRD. The aggrieved employee ("complainant") is instructed to fill out and return a complaint questionnaire and return it to CRD.

Once CRD receives the questionnaire, it will determine if there is sufficient evidence to draft a formal complaint. CRD may contact the complainant to request more information or documentation. If the evidence provided by the complainant does not fall within the CRD's jurisdiction or there is not enough evidence to warrant an investigation, CRD notifies the complainant in writing.

Formal Complaint

If the complainant provides sufficient evidence to show a basis for alleged discrimination, CRD will draft a formal complaint against the employer ("respondent"). A formal complaint will set forth:

- the name and address of the complainant and the respondent;
- the protected class of the complaint;
- a description of the alleged discriminatory incidents, including:
    - the date(s) of occurrence;
    - the alleged discriminatory action;
    - how it harmed the complainant; and
    - the connection between the complainant's protected class and the alleged harm.

OAR 839-003-0005(4). The formal complaint is mailed to the complainant for review. The formal complaint is considered verified and filed on the date CRD receives a signed and notarized copy from the complainant.

The federal Equal Employment Opportunity Commission ("EEOC") is the agency that investigates violations of federal discrimination law (Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, and the Americans with Disabilities Act). If the basis for filing an employment-based complaint is covered by both state and federal law, a complaint filed with BOLI is automatically filed with EEOC. If the basis for a housing-based complaint is covered by both state and federal law, a complaint filed with BOLI is automatically co-filed with the federal Department of Housing and Urban Development ("HUD"), provided the complaint meets the jurisdictional guidelines. These are called dual filings.

The Investigative Process

After the complaint is filed, CRD sends a notification letter to both the complainant and the respondent. With this notification letter, the respondent also receives a copy of the complaint and a letter requesting a brief position statement responding to the allegations

in the complaint. The respondent is required to submit the requested information to CRD within 14 days. The position statement is the respondent's initial opportunity to answer the allegations made against it and to present evidence in defense of its actions. It is in the respondent's best interest to respond to allegations of discrimination as quickly and thoroughly as possible. Information provided by the respondent is sometimes sufficient to refute allegations and dismiss a case. If the respondent fails to provide a position statement, the complaint is generally submitted for a full investigation.

CRD assigns an investigator to the complaint. The investigator conducts an initial interview with the complainant within 40 days of the filing of the complaint to determine if a link exists between the complainant's protected class and the alleged harm suffered. The investigator asks the complainant to also identify witnesses and comparators. Comparators are other employees or individuals who, in a situation similar to the complainant, were treated the same as the complainant or differently by the respondent. The complainant may also submit additional evidence to support the discrimination claim.

In considering whether to dismiss the complaint or submit it for a full investigation, the investigator examines the evidence offered by both the complainant and the respondent. If the investigation reveals that there is substantial evidence that discrimination has occurred, a Substantial Evidence Determination is issued. "Substantial evidence" is defined in OAR 839-003-0005(13) as "proof that a reasonable person would accept as sufficient to support the allegations of the complaint."

Conciliation

If the evidence presented does not justify a full investigation, CRD dismisses the complaint, notifies the respondent, and sends the complainant a notice of his right to file a civil suit. Filing of a civil suit must take place within 90 days of receipt of the notice. ORS 659A.880.

At any time, CRD may facilitate settlement and conciliation between the complainant and the respondent. If the investigator issues a Substantial Evidence Determination, CRD will contact both parties and attempt to reach a voluntary, no-fault settlement and conciliation of the complaint. If a conciliation agreement is made between the parties, CRD will close the complaint.

If conciliation fails, CRD reviews the case to decide if BOLI will submit the case to an administrative hearings presenter in BOLI´s Hearings Unit for further action. If the case is submitted, an administrative hearings presenter reviews the file and decides if the evidence meets the higher standard (preponderance of the evidence) required for an administrative hearing. Not all substantial evidence determinations meet this standard. If either CRD management or the case presenter decides against an administrative hearing, the case is closed and the complainant is issued a notice of his right to file a civil suit within 90 days.

If the administrative hearings presenter accepts the case, the complainant has the option of continuing with the administrative process, which would include a hearing with an agency administrative law judge, or filing a suit in state or federal court.

CHAPTER 2

EMPLOYER COVERAGE UNDER CIVIL RIGHTS LAWS

Employee's rights are protected by two separate but corresponding bodies of law. Several Federal statues, promulgated by the United States government, cover the civil rights of employees whose employers meet certain jurisdictional requirements. Congruent to these federal statutes, the State of Oregon has its own civil rights statutes, which covers most employers in Oregon.

A number of federal and Oregon civil rights statutes contain jurisdictional requirements, which set forth which employers are obligated to follow the statute. Coverage under the Oregon and federal civil rights statutes depends primarily on the number of workers employed by an organization.

Key Federal Laws

Title VII of the original Civil Rights Act of 1964 continues to prevent unlawful discrimination by employers on the basis of race, color, national origin, sex, religion, or for association with one of the named protected classes or retaliation for opposing unlawful employment practices. Title VII of the Civil Rights Act of 1964 only applies to employers who employ 15 or more employees.

The federal Americans with Disabilities Act of 1990 ("ADA") prevents unlawful discrimination against the physically or mentally disabled. The ADA Title I applies to employers with 15 or more employees. ADA Titles I and V were significantly amended in 2008.

The Age Discrimination in Employment Act ("ADEA") prevents unlawful discrimination practices by employers against individuals 40 years of age or older. The ADEA applies to employers with 20 or more employees.

The federal Family and Medical Leave Act of 1993 ("FMLA") prevents unlawful discrimination practices by employers against employees who lawfully use family medical leave. FMLA applies to employers with 50 or more employees in the United States.

Key Oregon Laws

Chapter 659A of the ORS codifies the civil rights laws of Oregon. Every employer in Oregon is covered by the basic state laws prohibiting employment discrimination. Under ORS 659A.030, employers are prohibited from unlawfully discriminating because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or if the individual is 18 or older. The same statute also prohibits

discrimination due to an individual's associations with a member of one of these protected classes or because an individual has an expunged juvenile record.

Some of Oregon's antidiscrimination laws have jurisdictional requirements like federal statutes and do not apply to small employers.
For example:

- ORS 659A.040 and 659A.046, the statutes protecting injured workers from discrimination and in certain cases requiring employers to offer light duty work, applies only to employers with six or more employees.
- ORS 659A.100 to ORS 659A.145, the Oregon civil rights statutes that prevent unlawful discrimination against individuals with mental and physical disabilities and require reasonable accommodations for qualified individuals, also apples only to employers of six or more employees.
- ORS 659A.043, the statute requiring reinstatement of certain injured workers to the original job-at-injury, applies only to employers with 21 or more employees, either at the time of the injury or at the time of the demand for reinstatement.
- The Oregon Family Leave Act ("OFLA") applies to employers with 25 or more employees in Oregon.

Additional jurisdictional requirements for Oregon civil rights statutes are denoted under the appropriate sections.

Employees Protected Under Civil Rights Laws

Any individual providing services to a person or entity is considered an employee under Oregon's civil rights laws. ORS 659A.001(3) provides limited exceptions, stating that an 'employee' does not include any individual employed by the individual's parents, spouse or child or in the domestic service of any person." Thus, most individuals providing services are protected under these laws unless otherwise excluded.

An "employee" must be involved in "work" or its equivalent. The U.S. Supreme Court established the elements of work as the following:

- Physical or mental exertion (whether burdensome or not);
- Controlled or required by the employer;
- Pursued necessarily and primarily for the benefit of the employer and the business.

Tennessee Coal, Iron, & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944).
Two categories of workers excluded from Oregon's employment laws are independent contractors and volunteers. Frequently, employers misclassify individuals who really are employees as "contractors" or "volunteers," which may lead to liability not only under the civil rights laws but also for violations of wage laws, tax laws, and workers'

compensation coverage requirements. Employers should have a thorough understanding of the legal definitions of these terms.

Independent Contractors

Independent contractors are workers who provide services to another principal under terms of a contract between the two entities. For the purposes of chapter 659A of the ORS, independent contractors are not considered employees of an entity. Note, however, that ORS 670.600 outlines the requirements for independent contractors for purposes of personal income tax, workers' compensation, unemployment compensation, and registration of builders.

While a contract may exist between a worker and an entity, it does not establish prima facie that a worker is an independent contractor. Even if the contract specifically states that an individual is working for an entity on an independent contractor basis, it is not necessarily binding. In cases involving whether a worker is a independent contractor or an employee, the courts and agencies will "look behind" the contract and use a set of criteria to determine if an employment relationship exists.

In determining whether a worker is an independent contractor or an employee, the courts will look at the following significant criteria:

- **The nature and degree of control by the principal**: The courts will look towards whether the worker have the right to determine the method by which the work would be performed, and whether the recipient of services was interested only in the ultimate result. The more that the recipient of services dictates the methods by which the work is performed, the more likely it is that the worker would be considered an employee.
- **Whether the worker's services are an integral part of the business**: If the worker's services are the same as or similar to work done by regular employees, the relationship is more likely to be perceived as an employment relationship.
- **The permanency of the relationship**: The longer the job lasts, the more likely it could be thought of as an employment relationship.
- **The amount of the worker's investment in facilities and equipment**: Contractors usually invest and furnish their own equipment, tools, and materials, and have much more of an opportunity for profit and loss than do employees.
- **The level of skill required in performing the task:** The courts will look at whether the work performed required an extensive amount of skill.
- **The amount of initiative, judgment, or foresight in open market competition with others required for the success of the independent enterprise:** The courts would look at whether the worker's enterprise was independent by looking at factors which make the worker independent from the employer. For example, the courts would view separate job sites, independent advertising by the employer, and open competition for a job as evidence of an independent contractor.

- **The ability to hire others to help complete work:** While employees generally cannot hire others on their own initiative, contractors are usually free to employ their own assistants.
- **Whether a worker performs work for others entities while working for the employer**: If the worker only has one "customer," it is more likely to be perceived as an employment relationship.
- **The ability of the worker to set her own schedule and determine her own hours**: The more control the worker has over her own schedule, the more likely the relationship is perceived to be an independent contractor relationship.

United States v. Silk, 331 US 704 (1947). The above list is not exhaustive. When determining if an individual is an independent contractor or an employee, the courts analyze the issue on a case by case basis.

Volunteers

Bona-fide volunteers are not considered to be "employees" under employment laws. In order to qualify as a volunteer, the work performed must be:

- for no compensation or without expectation of pay;
- for community service, religious, or humanitarian reasons;
- for a public employer or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service.

ORS 653.010(2). If an employee wishes to volunteer time to the employee's employer, they may do so as long as the work performed meets the above criteria and the volunteer duties are not the same as those performed in the course of the employee's regular employment. In addition, the volunteer work must be performed outside the employee's normal work hours. ORS 653.010(2), OAR 839-020-0046(3).

Other Entities Covered by Civil Rights Laws

Unions

It is unlawful for a labor organization to exclude or to expel from its membership or to otherwise discriminate against an individual because of his/her race, religion, color, sex, national origin, marital status, age (18 and over), expunged juvenile record or physical or mental disability. ORS 659A.030(1)(c).

Employment Agencies

It is unlawful for an employer or employment agency, including a temporary employment agency, to print a statement or advertisement or to make any inquiry which expresses any limitation in employment based on race, religion, color, sex, national origin, marital status, age (18 and over), expunged juvenile record or physical or mental disability. An

employment agency may not refer or fail to refer applicants based on their membership in any of these protected groups. ORS 659A.030(1)(d).

DISCRIMINATION IN EMPLOYMENT

Both state and federal laws prohibit discrimination based on enumerated protected classes. Except where noted, Oregon law, primarily ORS 659A.030, covers businesses with at least one employee. Federal law, primarily Title VII of the Civil Rights Act of 1964, applies to organizations with at least 15 employees. Employers covered by both state and federal law must apply the law most favorable to the employee.

EXAMPLE: Federal law prohibits age discrimination against those who are 40 or older. Oregon's age discrimination law protects all individuals 18 or older. Oregon employers must follow the law that provides the most protection for employees. In this case, it is state law.

EXAMPLE: Under the Oregon law, a qualified 19-year-old job applicant could allege age discrimination because a prospective employer turned him away, advising him that he was "too young for the position" and that they were looking for someone "more mature-looking."

Employment at-Will

Oregon is an "at-will" employment state. In an at-will employment environment, either party can terminate the relationship at any time, with or without reason and with or without advance notice. The common law rule regarding the employer-employee relationship allows the termination of the relationship by either party, without notice and without cause. In the absence of a contract or statute to the contrary, Oregon employers may discharge an employee at any time and for any reason, or for no reason at all. Simpson v. Western Graphics, 293 Or 96, 99, 643 P2d 1276 (1982); Nees v. Hocks, 272 Or 210, 216, 536 P2d 512 (1975).

Most employers choose to reserve the right to employ at will with specific language in personnel policies.

EXAMPLE: "We reserve the right to employ at will. This means that employment can be terminated, with or without cause, and with or without notice, at any time, at the option of the company or at the option of the employee."

Declaring and retaining at-will status provides an employer greater flexibility in the workplace, but being an at-will employer is not a substitute for establishing clear employment policies, keeping thorough documentation, and applying consistent disciplinary practices.

As with most rules, there are many exceptions. For example, at-will employers are prohibited from making employment-related decisions based on age, race, sex and other

civil rights protected classifications. Therefore, employers should establish clear workplace policies, counsel employees for performance issues, and document your reasons for discipline or discharge decisions carefully. Since organizations that employ individuals at-will may still be called upon to defend various types of employment claims in court or before state or federal agencies, prudent at-will employers will maintain records showing a legitimate business reason for any important personnel action. If challenged for discrimination, an employer will be in a better position to show that its employment policy was applied uniformly and in a legitimate, nondiscriminatory manner.

Exceptions to Employment at Will

There are many exceptions to the "at-will" doctrine. An employer's at-will status will not serve as a defense if an employer has created a contract, violated public policy, engaged in actions that create tort liability, or violated civil rights laws.

Contracts

In some cases, employers may unwittingly defeat their at-will status by way of the language included in personnel handbooks and other documents. Even if the employee manual states that it should not be construed as a contract, individual managers may inadvertently create verbal contracts through promises made to individual employees.

In other cases, employers deliberately enter into contracts of employment for a particular term with certain employees. Those employees may no longer be employed at will, as they can hold the employer to the terms of the written agreement and may file breach of contract claims if the employer violates those terms.

Employers who are subject to a collective bargaining agreement must follow the standards set out in the union contract, which typically provides that an employer may only discipline or discharge an employee for "just cause."

Employees represented under a union contract generally have far greater rights than at-will employees, as the contract generally allows them to file grievances and appeal personnel actions, guarantees them the right to notice and a hearing, and allows for arbitration of disciplinary matters.

Violations of Public Policy

Employers who violate public policy fall into another exception to the at-will doctrine.

Employers may not discharge or retaliate against employees for a "socially undesirable motive" — for instance, because an employee fulfills an important societal obligation such as serving on jury duty. Nees v. Hocks, 272 Or 210, 536 P2d 512 (1975).

Terminating an employee because the employee refuses to perform an illegal act or refuses to sign a potentially defamatory statement about a former employee would also

constitute public policy violations. Delaney v. Taco Time Int'l., 297 Or 10, 681 P2d 114 (1984).

Tort Actions

Even at-will employers can be sued under various tort theories, including civil suits for defamation, invasion of privacy, assault or battery, false imprisonment, wrongful discharge, and intentional infliction of emotional distress.

Employees may claim intentional infliction of emotional distress in cases where the employer's conduct constitutes an "extraordinary transgression of the bounds of socially tolerable conduct." Lewis v. Oregon Beauty Supply Co.,302 Or 616, 626, 733 P2d 430 (1987); Patton v. J. C. Penney Co., 301 Or 117, 122, 719 P.2d 854; Hall v. The May Dept. Stores, 292 Or 131, 137, 637 P2d 126 (1981).

Civil Rights Laws

State and federal anti-discrimination laws prohibit employment decisions that are based on a variety of protected classifications. The laws also require employers to make reasonable accommodations for employees with disabilities or sincerely held religious beliefs, and require employers to grant family leave in qualifying situations. More details on protected classes under federal and Oregon law can be found in Chapter 3.

FEDERAL CIVIL RIGHTS LAW OVERVIEW

In addition to Oregon civil rights law, federal law prohibits discrimination and may require affirmative action. The following chart lists these laws and the federal agencies to contact for more information.

Federal Law Information Chart

Law	Requirements	Coverage	Contact Information
Title VII of the Civil Rights Act of 1964	Prohibits discrimination on basis of race, color, sex, religion, and national origin.	Employers with 15 or more employees in an industry affecting commerce; unions; employment agencies	Equal Employment Opportunity Commission (EEOC) Federal Office Building 909 1st Ave., Suite 400 Seattle WA 98104-1061 1-800-669-4000 or (206) 220-6883
Equal Pay Act of 1963	Prohibits different rates of pay based on gender.	Employees covered by the Fair Labor Standards Act	EEOC (see above)
Age Discrimination in Employment Act (ADEA)	Prohibits discrimination on the basis of age for people 40 and over.	Employers with 20 or more employees in an industry affecting commerce; unions; employment agencies	EEOC (see above)
Rehabilitation Act of 1973 (Section 504)	Prohibits discrimination on the basis of a disability.	Federally assisted programs	Department of Education Office of Civil Rights 915 2nd Ave., Rm. 3310 Seattle WA 98174-1099 (206) 607-1600
Rehabilitation Act of 1973 (Section 503)	Requires affirmative action in employment for people with disabilities.	Contractors with $2500 or more in federal contracts	US Department of Labor Office of Federal Contract Compliance 620 SW Main Street Suite 410 Portland, OR 97201 (503) 326-4112
Vietnam Era Veterans Readjustment Act of 1974	Requires affirmative action in employment for Vietnam veterans & disabled veterans.	Contractors with $10,000 or more in federal contracts.	US Department of Labor Office of Federal Contract Compliance (see above)
Executive Order 11246 as amended	Required affirmative action in employment for women and minorities.	Contractors with $10,000 or more in federal contracts.	US Department of Labor Office of Federal Contract Compliance (see above)

Federal Civil Rights Law Chart (continued)

Law	Requirements	Coverage	Contact Information
Civil Rights Act of 1968, Title VIII and Title IX	Prohibits discrimination in housing based on race, color, sex, national origin, religion, familial status, and disability.	Single-family or multiple family dwellings for sale, rent or lease, including federally owned or financed housing.	Equal Employment Opportunity Commission (EEOC) Federal Office Building 909 1st Ave., Suite 400 Seattle WA 98104-1061 1-800-669-4000 or (206) 220-6883
Immigration Reform & Control Act of 1986 (IRCA)	Requires employers to complete an employment eligibility verification form on anyone hired after November 6, 1986.	Anyone employing persons to perform labor or services in return for wages or other pay.	U.S. Citizenship and Immigration Services (USCIS) 511 NW Broadway Portland, OR 97209 1-800-375-5283
Americans with Disabilities Act of 1990; Titles I and V were amended 2008.	Prohibits discrimination against qualified individuals with disabilities in hiring, firing, compensation, advancement, training, and other terms, conditions and privileges of employment.	Employers with 15 or more employees.	Equal Employment Opportunity Commission (EEOC) Federal Office Building 909 1st Ave., Suite 400 Seattle WA 98104-1061 1-800-669-4000 or (206) 220-6883 Other numbers for ADA info:1-800-669-4000 x3362 or 1-800-688-9889
Rehabilitation Act of 1973 (Section 504)	Prohibits discrimination on the basis of a disability.	Federally assisted programs	US Department of Labor Wage and Hour Division 620 SW Main Street Suite 423 Portland, OR 97201 (503) 326-3057

CHAPTER 3

What is a Protected Class?

A “protected class” in civil rights is simply a shared trait or characteristic among a group which cannot be targeted for discrimination or harassment. The Civil Rights Act of 1964 originally established race, religion, color, and sex as classes protected from discrimination. Federal and state laws have since expanded protected classes to include a number of different shared traits or characteristics.

Summary of Protected Classes

The following table provides a quick overview of protected classes under federal and state law within Oregon.

Protected Classes	
TITLE VII OF CIVIL RIGHTS ACT OF 1964 Federal laws apply when an employer has 15 or more employees (except where noted)	OREGON REVISED STATUTES CHAPTER 659A State laws apply when an employer has 1 or more employees (except where noted)
Race Color National Origin Sex (includes pregnancy-related conditions) Religion Retaliation Association with Protected Class Genetic Information (under Genetic Information Nondiscrimination Act)	Race Color National Origin Sex (includes pregnancy-related conditions) Religion Retaliation Association with Protected Class Prohibition on Genetic Screening and Brain-wave Testing
Age (40 and older in companies with 20+ employees) (Age Discrimination in Employment Act of 1967)	Age (18 and older)
Veterans (companies with 1 + employees) (Uniformed Services Employment and Reemployment Rights Act of 1994 and the Vietnam Era Veterans Readjustment Assistance Act of 1974)	Members of the Uniformed Services (ORS 659A.082) Taking leave to Serve in State-organized Militia (ORS 399.065) Taking leave prior to deployment by member of the armed forces or spouse (Oregon Military Family Leave Act)
Physical or Mental Disability (Americans with Disabilities Act of 1990)	Physical or Mental Disability (in companies with 6+ employees)
Taking leave under the Family and Medical Leave Act of 1993 (in companies with 50+ employees)	Taking leave under the Oregon Family Leave Act (in companies with 25+ employees)
Additional classes protected by state law, Chapter 659A (Except where noted, laws apply when an employer has 1 or more employees)	
Sexual Orientation and Gender Identity Marital Status Retaliation based upon Family Relationship Prohibition on Genetic Screening and Brain-wave Testing Right to Testify at Employment Division Hearings Access to Employer-owned Housing Right to Report Health Care Violations Leave to Donate Bone Marrow Leave for Victims of Domestic Violence, Sexual Assault or Stalking Prohibition on Polygraph Exams Limits on Breathalyzer and Blood Alcohol Testing Expunged Juvenile Record Credit Records or Credit History	Injured Workers (in companies with 6+ employees) Right to File a Lawsuit, Testify in Criminal or Civil Proceedings or Report Criminal Activities Leave to Serve in the State Legislature, (ORS 171.120-125) Right to Testify Before the State Legislature Prohibition on Employer Requiring Medical Release unless Employer pays out of pocket costs. ORS 659A.306. Medical Release as a Condition of Continued Employment Opposition to Health or Safety Conditions ORS 654.062(5)(a) Use of Lawful Tobacco Products on off-duty hours

RACE, COLOR AND NATIONAL ORIGIN

State and Federal Coverage

State and federal laws prohibit different terms or conditions of employment based on race, color or national origin. An employer may not provide separate facilities, unequal benefits or unequal opportunities because of race, color or national origin.

Association with Persons of Another Race

An employer may not discriminate against an individual because that person associates with members of a particular race, color or national origin.

EXAMPLE: It is unlawful for an employer to scrutinize a white employee more carefully for tardiness because of his relationship with a black woman.

It is unlawful to discharge, to refuse to hire or otherwise to discriminate against an individual who is associated with a group that promotes racial, religious or national group interests, even if that person is not a member of that racial, religious or national group.

National Origin

The term "national origin" refers to birthplace, ancestry, culture, linguistic characteristics common to a specific ethnic group, or accent. Discrimination on the basis of national origin may be found if one is denied an employment opportunity because:

- The individual or the individual's forebears came from a particular country,
- The individual possesses a particular ancestry, heritage or background, or
- The individual's name or the name of the individual's spouse reflects a certain national origin.

Fluent English as a Job Requirement

Requiring employees to speak fluent English may have an adverse impact on persons born in non English-speaking countries. For this reason, employers should impose this requirement only when there is a business necessity to do so. Similarly, an employer cannot discriminate based upon a dislike (or concern for possible customers' dislike) of a particular accent.

Employees should not be prohibited from speaking another language during break time or during work time when safety or efficiency are not affected by the use of another language.

Assignments Based on Race or National Origin

Federal law and guidelines dictate that employers may not assign an employee to particular job duties on the basis of the employee's race or national origin because:
The clientele being serviced is of the same or a similar group.

- Customers would prefer it.
- Persons of that group have traditionally held certain jobs.

However, an employer may assign job duties on the basis of an individual's ability to perform a job function.

EXAMPLE: An employer may require that an employee speak fluent Spanish when the job requires dealing with members of the public who speak Spanish and little or no English.

National origin may be considered a bona fide occupational qualification for security purposes when persons of a particular national group would be unable to get clearance necessary to perform a particular job.

Native American Preference

State and federal law prohibits discrimination against Native Americans. However, federal law allows an employer to give preferential treatment to Native Americans when:

- The business is on or near an Indian reservation,
- The prospective employment has been publicly announced, and
- The individual being preferred is a Native American living on or near a reservation.

Immigration Reform and Control Act (IRCA)

This federal law requires employers to complete an Employment Eligibility Verification Form (I-9) for all employees hired after November 6, 1986. IRCA also prohibits discrimination based on national origin and citizenship.

The I-9 Form

The I-9 Form lists several kinds of documents (such as passports, alien registration cards, driver's licenses and social security cards) that an employee can present to show that he or she is legally authorized to work in the United States.

A common mistake employers make is assuming that they can express a preference for the types of documents an employee should present. This kind of preference is considered discrimination based upon citizenship under IRCA. For more information, contact the US Citizenship and Immigration Services ("USCIS") information line at 1-800-375-5283.

EXAMPLE: An employer requires seeing an alien registration or "green" card if the employee has one, rather than accepting a driver's license or social security card.

QUESTION: RACE / NATIONAL ORIGIN
EMPLOYERS MUST PREVENT HARASSMENT OF EMPLOYEES

Q: Last week, I overheard a group of employees discussing the World Trade Center bombings. One of the employees said, in reference to a co-worker, that "he should go back to his country" and that "we should bomb them." I am sure he was talking about an employee of ours who is originally from Iran. Obviously, these comments are inappropriate, but what are my obligations as an assistant manager? Is this harassment if the Iranian employee wasn't there to hear the comments?

A: These types of comments, even when made to third parties, can amount to harassment when the employee in question learns of them. Workplace behavior that is directed at an individual because of race, religion, national origin or other protected categories becomes harassment when it is severe or pervasive and when it creates a hostile work environment.

Legally speaking, a single comment doesn't rise to the level of harassment, even if it's sexually, racially or otherwise offensive. However, a company shouldn't tolerate these types of remarks, even when they are isolated, infrequent, or made in jest.
Your company would be wise not only to have a policy prohibiting workplace harassment, but also to have a broader policy on workplace conduct that requires staff members to treat others with dignity and respect. Employees should receive training as to what is appropriate and inappropriate workplace conduct. Violations of your conduct policy can and should be addressed as a disciplinary issue.

As an assistant manager, you should understand that your employer could be liable for the discriminatory actions or comments of an employee if management knew or should have known about the behavior yet failed to take appropriate corrective action. Therefore, when you observe discriminatory or harassing behavior, you have an obligation to address it immediately, rather than waiting for someone to come forward with a formal complaint. You should counsel the employee who made these statements, and you should take appropriate action to keep the behavior from recurring. This might mean, for example, issuing the employee a written warning and carefully monitoring the workplace to ensure that it is free of harassment.

AGE

State Law

All Oregon employers are prohibited from firing, refusing to hire, or otherwise discriminating against an individual in compensation or other terms, conditions or privileges of employment because that person is 18 or older. ORS 659A.030(1).

EXAMPLE: A qualified 19-year-old is rejected for employment because the employer is concerned that she may not "fit in" with the other employees, most of whom are in their 30's and older.

Federal Law

The Age Discrimination in Employment Act also covers all employees 40 or older. The Act covers employers with 20 or more employees in industries.

BFOQ

State and federal law provide that age may be a bona fide occupational qualification when it is reasonably necessary to the normal operation of a particular business. As in the case of other BFOQ exceptions, an exception on the basis of age will be narrowly construed.

Federal guidelines allow an employer to discriminate on the basis of age if federal laws or regulations impose age limitations for public safety, or if actors of specified ages are used to promote a product aimed at a certain age group.

Seniority Systems and Benefit Plans

State and federal law permit an employer, employment agency or union to observe the terms of seniority systems and benefit plans such as insurance, pension, and retirement plans, as long as such plans are not a subterfuge to avoid complying with the law. Employers may not use the existence of such plans as a reason for not hiring an individual because of age.

RELIGION

Oregon Law

ORS 659A.030(1) makes it unlawful for any Oregon employer to discriminate against an individual in hiring, termination or any terms and conditions of employment on the basis of religion, unless such discrimination results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business. ORS 659A.006(2) excepts bona fide churches or sectarian religious institutions such as schools, hospitals and church camps. These institutions may prefer an employee of one religious sect over another when:

- The employee or applicant belongs to the same religious sect as that of the institution;
- In the opinion of the church or institution, such preference will best serve the church's purposes; and

- The employment involved is closely connected to primary purposes of the church and is not connected with a business activity that has no necessary relationship to the religious purposes of the church or the institution.

Federal Law

Title VII of the Civil Rights Act of 1964 (Sections 701 and 702) prohibits religious discrimination by employers with 15 or more employees. Federal law also provides the same exceptions found in state law for religious and educational institutions.

Religious Accommodation

When the employee or applicant has a sincerely held religious belief, the employer must reasonably accommodate that belief, unless such accommodation would cause undue hardship to the company.

Sincerely Held Beliefs

A religious belief is considered to be sincerely held if the individual can demonstrate a strict adherence to the belief. An individual claiming to believe that he or she should not work on a particular day of the week for religious observance may not have a sincerely held belief if it could be demonstrated that the person routinely accepts work on that day without protest. However, such a belief might still be protected by law if the individual had experienced a change in his or her religious beliefs.

Reasonable Accommodation

Once an employee or applicant has articulated an employment problem based on a conflict with a sincerely held religious belief, the employer must try to make a reasonable accommodation to the individual's religious needs. There is no prescribed manner in which an employer is required to accommodate the employee. Employers should consider all possibilities as they apply to their own business requirements.

EXAMPLE: If an employee's religion prohibits him or her from working on Fridays, the employer is required, absent an undue hardship, to arrange the schedule so that the employee would not have to work on that day.

In examining the possibilities of accommodation, the courts have considered the following areas:

- The nature of the job, meaning whether it is special or unique.
- The number of employees who can do that job.
- The size of the establishment (larger establishments would have more possibilities for accommodating an individual).
- The effects of transferring the employee.

- The effects of accommodation on other employees and union contract agreements (whether seniority provisions will be violated).
- Scheduling and overtime problems.

Undue Hardship

In 2010, Oregon adopted the Oregon Workplace Religious Freedom Act which requires that an employer is required to provide reasonable accommodation to religious observances of an employee unless doing so would constitute an undue hardship on the employer. This law expands the prior Supreme Court ruling which only required a showing that an accommodation would require more than a "de minimus" cost.

Under the new law, an accommodation imposes an undue hardship when the accommodation requires significant difficulty or expense. The following aspects of the business are considered:

- Nature and cost of the accommodation
- The overall financial resources of the facility, number of persons employed at the facility, and the effect on expenses and resources caused by the accommodation
- The overall financial resources and size of the employer
- The type of business conducted by the employer and operational structure of the employer
- The safety and health requirements of the facility, including the safety and health of those who may be adversely impacted by the accommodation.

Dissension or dissatisfaction of co-workers is rarely enough to cause an undue hardship. In such situations, the courts have looked to see if the employer has done everything possible to minimize the problems.

QUESTION: RELIGIOUS ACCOMMODATION EMPLOYER MUST MAKE REASONABLE ACCOMMODATION FOR EMPLOYEE'S RELIGION

Q: I own and operate a family style restaurant, and Antonio has always been one of my most dependable cooks. Last week, however, he announced that he can no longer work the Friday night shift, because he has converted to a religion that prohibits working from Friday sundown to Saturday sundown. I told Antonio to forget it, because Friday is our busiest night and I can't spare him. Now he's also requesting time off to attend church group meetings during the week, and he insists that I'm legally obligated to give him time off when there's a religious reason. Is he right?

A: It depends on all the facts and circumstances, but it's true that in some situations an employer must grant time off as an accommodation. Religion is a protected class under Oregon and federal statutes. The laws provide a two-pronged protection for employees. First, it's unlawful to discriminate based upon an employee's religion, so you shouldn't

ask about a job applicant's spiritual beliefs, and you can't use religion as the basis for making any employment decisions. Second, at an employee's request, an employer must make "reasonable accommodation" for the employee's sincerely held religious belief. When Antonio requests time off for religious reasons, you should consider whether it would be reasonable for your company to grant the proposed modification to his work schedule so that he could both continue working and practice his religion.

Keep in mind that there are limits to the obligation to accommodate. You are excused from the requirement if the proposed accommodation would create an undue hardship to the company. But in a lawsuit or an agency civil rights claim, the legal burden is on the employer to show why the requested accommodation would have been unduly difficult. A court or agency would consider such factors as the size of the employer, the number of workers, the cost of the proposed accommodation, and any hardship to employees or customers.

You should also note that you're only required to make religious accommodation when it relates to a tenet of the employee's religion. You do have the right to inquire and receive verification as to whether it's a tenet of Antonio's religion that he cannot work Friday nights. Likewise, you have the right to know whether it's a tenet of his religion that he attend a Tuesday afternoon church meeting. If it's simply Antonio's personal preference to attend a particular meeting or service and not a religious requirement, you're not legally required to grant the time off.

In addition, if there's more than one accommodation option available, the employee cannot dictate which one you must select. For EXAMPLE, Antonio may wish to have the whole day off on Friday, but it may be more convenient for you to require him to work until sundown. As long as the accommodation you make is a reasonable one, you are in compliance.

So how does an employer determine what accommodation is appropriate? The best method is to enter into an interactive process. Sit down and talk with your employee about his specific needs and how they correspond with your business requirements. In this case, it may be a reasonable accommodation to allow Antonio Friday nights off, but you would want to consider whether there are other staff members available to swap shifts with Antonio, or whether Antonio is the only employee with the expertise to cook the Friday night dishes.

Other examples of reasonable accommodation could include making an exception to your dress code and allowing an employee to wear a beard if his religion prohibits him from shaving, or allowing him to take time off for religious holidays.

Remember that these laws only apply to "bona fide" religions, and you can require the employees to provide verification of the religion and the need to accommodate. However, bona fide doesn't mean "popular" or "mainstream." It simply means that the organization concerns itself with traditional religious issues, such as the nature of humans and their relationship to the universe.

QUESTION: RELIGIOUS ACCOMMODATION EMPLOYERS MAY REQUEST VERIFICATION FOR SPECIAL REQUEST DUE TO RELIGION

Q: Last week, our employee Gerhard told his supervisor he needed Friday the 7th off for his religious observance of the Beheading of John the Baptist, Monday the 10th off for the Nativity of Mary, and Tuesday the 11th off for the Exaltation of the Holy Cross. This employee has never made a religious request before, and the supervisor suspected he was actually taking a long weekend for a fishing trip, but she granted the leave anyway. Since this kind of request may come up again (there seems to be a different feast or holy day every day of the year), what are our obligations as an employer, and what kind of proof can we require from the employee?

A: You're required to make reasonable accommodations for the sincerely held religious beliefs of an employee, but you do have the right to some verification when an employee makes a special request based on religion.

Oregon civil rights laws and Title VII of the Civil Rights Act of 1964 prohibit discrimination based on an employee's religion and require you to "reasonably accommodate" religious beliefs and practices unless you can show that doing so will result in "undue hardship."

The U.S. Supreme Court has held that employers must attempt to accommodate an employee's belief that is religious in nature and sincerely held – even if the religion is non-traditional or one you haven't heard of before. When an employee makes a religious request, your first step as an employer should be to engage in an interactive process to discuss the employee's religious needs and consider the potential options for accommodation.

Since your supervisor already approved Gerhard's time off, your best bet is to give the employee the benefit of the doubt with regard to this particular absence. Of course, he may indeed have been fibbing – and fishing. We're no experts on Christian feasts and holidays, but our research indicates that in 2010, the named holy days fall on August 29, September 8 and September 14, respectively, if Gerhard's church goes by the Julian calendar or September 11, 21 and 27 if his church uses the Gregorian calendar.

Either way, the dates don't match up, but it's possible that Gerhard's church recognizes these events on different dates. In the future, you do have the right to request that an employee provide you a note from his priest (or minister or rabbi) to verify his religion and clarify whether it's a tenet of that religion that he may not work on particular days. Note that you're not obligated to accommodate requests that are based merely on an employee's personal preference. If, say, attending the service for the beheading of St. John were clearly optional under Gerhard's religion, you wouldn't be obligated to grant his request for the day off.

However, if Gerhard's religion in fact prohibits him from working on particular days, you must determine whether it would be a reasonable accommodation or an undue hardship to grant his request for time off. You should take into consideration the size of your company, the nature of the work Gerhard performs, and the cost involved in granting the request.

Courts generally have not required employers to go as far in accommodating religious requests as they must when accommodating disabled employees under the ADA. Still, you should evaluate an employee's religious restrictions seriously and make a good faith effort to accommodate. If you decide to deny a requested accommodation, you should be prepared to show with documentation why it would have been an undue hardship for your company.

QUESTION: RELIGIOUS ACCOMMODATION ACCOMMODATION DOESN'T MEAN EMPLOYER SHOULD VIOLATE WAGE LAWS

Q: One of our employees is an observant Muslim. During Islam's holy month of Ramadan, we've made a number of accommodations for him. We've allowed him prayer breaks during the day, adjusted his work schedule so that he can leave work before sundown, and given him Fridays off so that he can attend services at his mosque. He's now demanding that we allow him to skip rest breaks and meal periods, and he says we're obligated to allow him to skip these breaks since he's fasting all day anyway. We're reluctant to grant his request, as we don't want to violate the wage and hour laws. What should we do?

A: Your inclinations are correct here. You should insist that the employee take the legally required rest breaks and meal periods.

Since this employee is working an eight-hour shift, he needs to have a 30-minute, uninterrupted meal period somewhere between the third and sixth hour of the shift. He also needs to have two paid 10-minute rest breaks, one at the midpoint of each four-hour segment.

Of course, he is not required to eat or lounge during this time, if it violates his religious beliefs. He can spend the time any way he likes. You simply need to ensure, for health and safety reasons, that he's relieved of work duties during the break periods.
You're required to make reasonable accommodations for an employee's sincerely held religious beliefs, and you've accommodated his religious beliefs by adjusting his work schedule. However, you're not obligated to violate the law to accommodate an employee's religion, and Oregon regulations mandate rest breaks for all non-exempt employees.

MARITAL STATUS

Oregon employers may not discriminate against an employee or prospective employee because of that individual's marital status. ORS 659.030(a).
EXAMPLE: It is unlawful for an employer to refuse to hire single parents.

QUESTION: JOB APPLICATIONS INQUIRING ABOUT JOB APPLICANT'S SPOUSE A BAD IDEA

Q: The company I work for asks on its employment application, "Where does your spouse work?" I have approached our management about the legality of this question, but they say the home office in South Carolina is looking into it, and the question will stay on the application until they hear otherwise. Am I right to be concerned?

A: Absolutely. Your employer would be well advised to remove that question from the job application, because it is possibly in conflict with Oregon civil rights laws. Though the question about the applicant's spouse may not be illegal, it is not sound employment practice. The question is not job-related and does not assess the applicant's skills or qualifications to perform the essential functions of the position. In addition, asking this question, either in a job interview, in a reference request, or on the job application, suggests that your company will be using the information about the spouse in making its employment decision.

Marital status is not one of the protected categories under federal anti-discrimination laws, but it is a protected class under Oregon civil rights law. Just as employers should not ask about an applicant's age, religion or ethnicity, employers should not ask know if the applicant is married, single, separated, or divorced. By asking this question, the company increases the likelihood of a lawsuit for discrimination in hiring and gives an unsuccessful job applicant evidence on which to base the claim of discrimination.

Employment applications and job interview questions should be designed to elicit information about the applicant's skills, experience, and training to perform the job. Questions that are likely to elicit information about protected classifications are inappropriate.

Employers often wonder what to do when an applicant blurts out information during the job interview about his or her age, race, religion, disability, national origin, or even marital status. It is not illegal for your company to hear this information, but it would be illegal to continue asking questions on the subject and to use the information in making a hiring decision. A good strategy when the applicant begins talking about his or her protected class status is to note that the company doesn't use that information in making its hiring decisions, and then to move to more questions about the applicant's qualifications for the job.

After hiring an employee, many companies do ask for emergency contact information, which might include a spouse's work telephone number. This practice is sound, so long as the information is obtained only for the purpose of emergency contact information and is kept in the confidential personnel file, available only to those with a need to know.

Company policies should not make distinctions between married and single workers (e.g., in granting vacation requests or determining who must work on holidays), because current employees can also sue for different treatment and discrimination based on marital status.

FAMILY RELATIONSHIP

Discrimination on the Basis of Family Relationship

Oregon law prohibits an employer from discriminating against an individual "solely because another member of that individual's family works or has worked for that employer." ORS 659A.309

EXAMPLE: It is unlawful for a college to refuse to hire a woman for a science teaching position because her husband already works for the college in the English department, even though neither spouse would be supervising the other.

However, an employer is not required to hire or employ an individual when this would:

- Place either family member in a position of exercising supervisory, appointment or grievance adjustment authority over the other family member;
- Cause the employer to violate a federal or state law or rule;
- Cause the employer to violate the conditions of eligibility for financial assistance from federal or state government; or
- Cause the employer to disregard a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

"Member of an individual's family" means husband, wife, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew or stepparent or stepchild of the individual.

QUESTION: BARRING EMPLOYEE RELATIVES DISCRIMINATION BASED ON FAMILY RELATIONSHIP IS ILLEGAL; NEPOTISM ISN'T

Q: I own a small Italian restaurant with ten employees. We have an opening for a server on the swing shift, and one of the cooks, Ginger, has been pressuring me to hire her daughter-in-law, who has many years of experience as a waitress. I told Ginger that I'm against having family members working together under any circumstances. I think it's bad for morale, and I'm also afraid I'll be accused of nepotism. Ginger claims it would be illegal discrimination if I refuse to hire her relative. Can that be true?

A: Your cook is correct in that you can't refuse to hire someone simply because they are related to a current or former employee. Family relationship is a protected class under

Oregon civil rights law, in addition to the more commonly known categories like race, religion, color, sex, national origin, marital status and age.

Therefore, it's inappropriate to ask a job applicant in an interview or on an application form if she is related to any of your employees. And it would be illegal to have a general policy against hiring relatives of employees.

In most cases, you're prohibited from considering family relationship when making hiring or workplace decisions. There are a few exceptions, the most significant one being that you don't have to hire a person if doing so would place her in a supervisory-subordinate relationship with her family member. So you could legally refuse to hire Ginger's daughter-in-law if Ginger would be supervising her, either directly or indirectly, or if she would be supervising Ginger.

Many employers misunderstand the law to mean that it's illegal to have an employee supervising her relative. It's not illegal, if you choose to allow it, but the law gives you the discretion not to allow it. That may be a wise policy to implement in order to avoid perceptions of favoritism.

As for your concerns about "nepotism," the family relationship statute doesn't address that issue, and in fact there's no law against hiring one's own family members, treating them more favorably, or paying them at a higher rate than other workers.

SEX

State and Federal Coverage

State law prohibits discrimination in employment on the basis of sex for any employer in Oregon with one or more employees. Federal law (Title VII of the Civil Rights Act of 1964) prohibits discrimination based on sex by any employer who employs 15 or more persons. Employers doing business in Oregon are covered by state law or by both state and federal law. Sex discrimination is prohibited in hiring, compensation, terms or conditions of employment, on-the-job treatment and termination.

Federal government agencies doing business in Oregon are not covered under the state discrimination statutes.

Equal Pay

Oregon law and federal law (under the Equal Pay Act) requires non-discrimination in pay between men and women. When members of both sexes perform work that requires equal skill, effort and responsibility and is performed under similar working conditions, the Act requires that they be paid equally. However, different wages may be paid pursuant to a seniority system, a merit system, a system that measures earnings by quality or quantity of production or a differential based on any factor other than sex.

When a violation of the Equal Pay Act is found, an employer may not lower the wages of the higher-paid employee. Rather, the wages of the lower-paid employee must be raised to eliminate the effects of the unlawful pay differential.

Substantially Equal

Equal work does not mean that employees have identical jobs, but rather that their job duties are substantially equal. Different tasks that are only occasional and incidental do not justify a difference in wages.

The courts have determined that the following two reasons for paying women less are invalid:

- Women will work for less than men.
- Employing women results in higher costs for unemployment insurance, workers' compensation, and group insurance.

BFOQ Defense

Although it is permissible in rare instances to discriminate based upon sex when it is compelled by business necessity, the following situations are not considered BFOQs:

- Refusing to hire a woman because of assumptions about the comparative employment characteristics of women in general. For example, assuming that the turnover rate among women is higher than among men.
- Refusing to hire an individual based on gender stereotypes including for example, "men are less capable of assembling intricate equipment," or "women are less capable of aggressive salesmanship."
- The principle of nondiscrimination requires that people are evaluated on the basis of individual qualifications and not on the basis of any characteristic generally attributed to a particular group.

BFOQ Exception: Authenticity

A business may discriminate based on sex when it is necessary for the purpose of authenticity or genuineness. For example, an actor, actress or model may have to be either male or female to authentically portray a role.

BFOQ Exception: Same Sex

The courts have also allowed employers to hire employees of the same sex as that of the client or customer when the job directly involved a potential invasion of another's privacy. This exception has been allowed only where respect of privacy is necessary to the primary purpose of the job and not a related duty that might be avoided by restructuring the job. Custom or convenience will not justify a BFOQ exception.

Insurance

Employers are required to provide equal fringe benefits to employees of both genders. Greater cost in providing benefits to one gender is not considered justification to deny equal benefits. Insurance plans that cover dependents for employees of one sex, but do not cover dependents for employees of the other sex, are discriminatory, even if the employees themselves are covered equally. Coverage that is only extended to the "principal wage earner" or "head of household" has an adverse impact on women and is considered unlawful.

Retirement plans that allow one gender to receive benefits earlier than the other, charge one gender a higher rate for the same benefits or give one gender lesser benefits have been found unlawful by the courts. While women as a class live longer than men, the U.S. Supreme Court has found that retirement plans that require larger contributions from females are discriminatory because an individual woman may not live as long as an "average" man and because other factors which also affect longevity have not been considered in constructing such plans.

Maternity Benefits

Both state and federal law require employers to cover a temporary disability due to pregnancy in the same manner that other temporary disabilities are covered. Women may not be denied the opportunity to work while pregnant if they are physically able to do so.

Medical Certification

An employer may require medical certification for periods of absence, or a statement of intention to return from the pregnant employee if the employer has the same requirements for all employees taking leave for temporarily disabling conditions.

Additional Insurance Costs

Oregon's attorney general has issued a written opinion stating that employers may not pass on the cost of additional insurance coverage for pregnancy to female employees only.

QUESTION: PREGNANCY ISSUES ACCOMMODATION FOR PREGNANT EMPLOYEE NOT REQUIRED

Q: My company provides janitorial services for private businesses. My newest employee, Paula, recently brought in a doctor's note indicating that she is pregnant and should not perform any heavy lifting or work with chemicals. Paula's normal job duties are fairly strenuous, involving the use of vacuum cleaners and power mops, as well as the use of various cleaning solvents. For the past month, we have

accommodated her by allowing her to do light duty clerical work in our office. We had to hire a temporary employee to cover her regular shift.

We like Paula, but we're a small company (only 16 employees) and this arrangement is really cutting into our profits. Do we have to continue the light duty assignment as an accommodation, or can we put Paula on an unpaid leave of absence?

A: In this particular situation, you're not obligated to make accommodations, and whether you grant a leave of absence will be up to your company policy. To see how we arrive at that answer, you need to understand a number of laws that could come into play here.

Pregnancy is considered a temporary condition and is not considered a "disability" which would require accommodation under Oregon law or under the Americans with Disabilities Act. As such, your company is not required to accommodate Paula's pregnancy by providing light duty work.

Typically, leave for pregnancy is covered under either Oregon Family Leave Act (OFLA) or the federal Family and Medical Leave Act (FMLA). Both OFLA and FMLA allow an eligible employee to take 12 weeks of unpaid leave in a number of situations, including for incapacity related to pregnancy. Your company, however, isn't covered by either of these leave laws, since OFLA covers only companies with 25 or more employees in Oregon, and FMLA covers only companies with 50 or more employees in the country.

The federal Pregnancy Discrimination Act (PDA) doesn't require accommodation for pregnancy, but it does prohibit you from treating pregnant employees differently than other employees who are temporarily disabled. So in deciding whether and for how long you will offer Paula a leave of absence, consider what you would do in the case of a male employee who broke his ankle and was temporarily unable to perform his job duties. Another option you may choose to pursue is to seek clarification from Paula's doctor as to her restrictions and capabilities. The prohibitions on "heavy lifting" and "chemicals" are somewhat vague, and you may want to send Paula back to the doctor along with your detailed job description for the janitorial work. If the doctor evaluates Paula based on the essential functions listed in your position description, you will have a better idea of precisely what duties she is capable of performing. Since you have a job-related reason here, you do have the right to require an updated medical evaluation, but Oregon law requires you to pay any out-of-pocket cost for the examination when you choose to require it.

QUESTION: BREASTFEEDING AT WORK
CERTAIN EMPLOYERS ARE REQUIRED TO PROVIDE REST PERIODS FOR THE EXPRESSION OF BREAST MILK

Q: What is an employer's obligation to allow breastfeeding in the workplace? Are extra breaks for this purpose legally mandated?

A: Oregon Law requires certain employers to provide unpaid breaks for the expression of breast milk. Under ORS 653.077, employers with 25 or more employees must provide no less than 30 minutes of rest period per 4 hour work period for the expression of breast milk. This rest period must be taken in approximately the middle of the work period.

Employers are only required to pay the employee for the first 10 minutes of the rest period as part of their normally paid rest period. The additional 20 minutes that the employee may use may be unpaid.

The only accommodation that an employer must attempt to reasonably provide is a private location within close proximately to the employee's work area to express milk. A private location can include any place, other than a public restroom or toilet stall, where a employee may express milk concealed from view and without intrusion by other employees or the public.

Oregon did enact a law in 1999 (ORS 109.001) that permits women to breastfeed in all public places. This means that employers may not exclude a woman who chooses to breastfeed in a public area on the premises.

A furor recently erupted after a Burger King employee in Salt Lake City asked a customer who was a nursing mother to either go to the bathroom or leave the restaurant. As a result, Burger King has now adopted a family-friendly corporate policy of allowing breast-feeding in all of its restaurants. Over 20 states, including Utah, now have laws protecting a woman's right to breastfeed in public.

Seniority Lists, State Protective Legislation, Separate Facilities

It is an unlawful employment practice to maintain separate lines of progression or separate seniority lists by gender unless a BFOQ has been established for that job. Use of the terms "heavy" and "light" job is unlawful if the classifications are based on gender. It is also unlawful for an employer to provide separate facilities when hiring members of a certain gender, this will not be considered a BFOQ justifying sex discrimination.

Training Programs

Trainees may be paid at a different rate than other employees if they are part of a bona fide training program. When examining trainee positions for equal pay violations, the courts have considered whether employees knew of the existence of the program, whether members of both sexes participated in the program, whether the program exists in written form, whether formal instruction is included, whether duties are assigned according to a regular system or rotation, and whether advancement depends on completion of the program.

Sexual Harassment

Harassment based upon an individual's gender is a form of sex discrimination. More information on sexual harassment can be found in Chapter 4.

SEXUAL ORIENTATION

The Oregon Equality Act, which went into effect on January 1, 2008, prohibits discrimination against persons in employment, housing and public accommodations based on sexual orientation. The law defines sexual orientation broadly, and includes "actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth."

Gender Identity

Gender identity is a person's sense of self as being either male or female. It is what a person feels on the inside as opposed to the sex of a person, which is what the person's body looks like on the outside. A person's sexual orientation characterizes who the person is emotionally and physically attracted to. A person's sexual orientation has nothing to do with a person's gender identity.

Gender expression describes how a person communicates the person's gender identity to the world through behavior, clothes, haircut, etc. So, an employee who self-identifies as a female, but wears male clothing is protected from discrimination. This would also be true for a self-identified male employee who is perceived as effeminate or wears feminine attire.

An employer, however, is not prohibited from enforcing an otherwise valid dress code or policy, as long as the employer provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual. What in the world does this mean? It means the employer makes its decision based on the facts of each case with consideration for any potential harm that may occur to the employee as a result of enforcing the dress code or policy.

"Transgender" is an umbrella term that encompasses many variations of gender. What is most important to know is that a transgendered person is one whose gender identity or gender expression is different from the person's sex. This person may or may not pursue sex-reassignment surgery.

What do I do if one of my employees says he or she is going to transition into the opposite sex?

You can start by asking the employee what the person needs from you, the employer, in order to make the workplace transition as smooth as possible. Always respect the person's privacy by not asking questions that do not involve work-related issues. It is important to allow the transgendered person, if the person is interested, to be involved in the planning and decision making with regard to advising and educating staff.

What kinds of workplace changes can I expect when an employee transitions? Most likely, the transgendered employee will change her or his name and want to be referred to by the new name. The person will also want others to use the pronoun that is appropriate to the person's expressed gender.

What about the bathroom issue?

An Oregon employer must allow a transgendered person to use whichever bathroom is consistent with the person's expressed gender. So, if one of your male employees comes to you one day and says he is going to transition into a female (M to F), expect that at some point this employee will begin to use the female bathroom. The transgendered employee is the best judge of when it is time to switch bathrooms.
Remember, transgendered individuals want to use the bathroom for the same reason everyone else does, not to cause problems.

What if my other employees are uncomfortable with sharing a bathroom or a workplace with a transgendered employee?

Explain to your other employees that you comply with Oregon law regarding the rights and protections of transgendered individuals and you expect the same from them. You and the transgendered employee may want to think about scheduling an educational seminar to help the other employees better adjust to the situation. You should also ensure that you have clear discrimination and harassment policies in place that are uniformly and consistently enforced. Remember, it's up to you as the employer to set a tone for your employees and managers about your commitment to a respectful and professional workplace.

Exceptions

The Oregon Equality Act contains two important exemptions. First, it will not be unlawful for a bona fide church or other religious institution to take employment actions based upon a sincere religious belief about sexual orientation, as long as those actions are only focused on employment positions directly related to religious activities. Examples would include employment in a church, a non-profit religious school or summer camp, or a non-profit religious bookstore.

Second, employers will be allowed to enforce otherwise valid dress codes or policies, as long as the employers also provide reasonable accommodations on a case-by-case basis based on the health and safety needs of an individual.

WHISTLEBLOWING

Oregon has a number of statutes protecting employees from retaliation for reporting wrongdoing. Prior to 2010, Oregon whistle blowing statutes limited protection from retaliation to specific situations. A new law passed in 2010 greatly expanded whistleblowing protections to include employees who reported in good faith information

that the employee believed to be evidence of a violation of a state or federal law, rule or regulation.

Prior to 2010, it was unlawful for an employer to discriminate or retaliate against an employee who in good faith reports criminal activity, has caused a complaint to be filed against any person, has cooperated with a law enforcement agency, has brought civil action against an employer or has testified in good faith at a civil proceeding or criminal trial. ORS 659A.230.

Public employees are covered under ORS 659A.200 to ORS 659A.224, which makes it unlawful for a public employer to retaliate against an employee who has disclosed information that the employee reasonably believes is evidence of a violation of any federal or state law, rule, or regulation by the agency, mismanagement, gross misuse or waste of public resources or funds, abuse of authority in connection with the administration of a public program or the execution of a public contract, or a substantial and specific danger to public health or safety resulting from agency action.

Employees who are employed in health care or residential care related fields are protected under ORS 659A.233. Employers are prohibited from discriminating or retaliating against an employee who has, in good faith, reported a possible violation of health care facility or residential care facility standards contained in ORS Chapter 441 and ORS 443.400 – 455. ORS 659A.233 (formerly ORS 659.035(1)(a)).

The 2009 Legislature expanded protection for "whistleblowers," employees who report illegal activity by their employers. For years, Oregon public employee whistleblower statutes prohibited public employers from taking action against or prohibiting employees from responding to legislative requests, disclosing information the employee believes is evidence of violation of laws, disclosing evidence of mismanagement, gross waste or abuse of authority, or reporting public endangerment resulting from an action by a public employer.

Under ORS 659A.199, employees are protected from retaliation by an employer for reporting in good faith information that the employee believes is evidence of a violation of a state or federal law, rule, or regulation. This statute effectively extends the protections provided to public sector employees to private employees when reporting violations of the law or health and safety dangers.

QUESTION: WHISTLEBLOWER LAWS EMPLOYEE WHISTLEBLOWER HAS CIVIL RIGHTS PROTECTED STATUS

Q: I know that Oregon law prohibits employers from retaliating against employees who are "whistleblowers," but would it be legal for my company to terminate or take disciplinary action against an employee who reports misconduct if the reporting employee was involved in the wrongdoing? Here is my situation. Alfred and Bruce, two employees of mine, are involved in criminal acts and violations of our bank's

policy. After a period of time, Alfred became uncomfortable with the activities and chooses to report them. If, after investigating the allegations, the company finds that Alfred was also originally involved in the misconduct, can we terminate him?

A: It's always legal for you to follow your legitimate, non-discriminatory company policies and discipline employees for violations of those rules. If your company has conducted a thorough investigation and concluded there's sufficient evidence that Alfred engaged in misconduct, you can discipline him as you would any employee who violated the same policies the same number of times. If your normal policy would be to terminate a similarly situated employee, then yes, you could discharge Alfred.

However, you should discuss with your employment attorney whether you want to risk a claim of whistleblowing retaliation. As you noted, an Oregon statute, ORS 659A.230, protects employees who report criminal activity, file lawsuits, cooperate with police investigations, or testify in court proceedings.

Do you have sufficient documentation to show that the discharge is based on Alfred's misconduct and not based on the actual reporting of Bruce's misconduct? It's always risky to terminate an employee soon after she engages in some legally protected activity, because the timing of events can make your action appear retaliatory.

If you had to defend against a whistleblowing retaliation claim by Alfred, it would be helpful for you to show "comparator" evidence. For example, can you show that other whistleblowers are still with the company and that there's no pattern of discharging them or otherwise taking adverse action? Can you show that you've also terminated other employees who committed the same misconduct as Alfred? If not, you should proceed cautiously and think twice before discharging Alfred.

EMPLOYEE QUERY: WHISTLEBLOWER STATUTES SARBANES-OXLEY ACT PROTECTS EMPLOYEE WHISTLEBLOWER

Q: I work for a publicly traded company, and I report to the Chief Financial Officer. I have discovered what I believe are irregularities in the corporation's accounting practices. I am thinking of going over my supervisor's head to advise management, but I am worried about losing my job. Would I have legal protection?

A: There are both Oregon and federal laws that provide protection to employees who report illegal activities. Based on the information you've provided, you might have protection under the Oregon whistleblower statutes, and there is also a newer federal law that would protect you against retaliation if you report financial abuses within your company.

Let's start with the Oregon civil rights statutes, which include a general whistleblower law and one that applies to employees of public agencies.

Oregon's general whistleblower statute, ORS 659A.230, protects employees from discrimination or retaliation when they in good faith report criminal activity to the police, cooperate with a criminal investigation, bring a civil proceeding against an employer, or testify at a civil proceeding or criminal trial.

Some courts have also granted this protection when employees report internally what they in good faith reasonably believe to be a criminal violation. So you may have protection under this law if you make a report to management, but it will depend on what type of "irregularities" you are reporting.

For employees of state agencies, The Oregon Whistleblower Law at ORS 659A.200 to 659A.224 provides some additional protection. This law can apply when a public employee complains about mismanagement, gross waste of funds, abuse of authority, or some state action that poses a danger to public health and safety.

The federal law that could give you protection as a whistleblower is the Sarbanes-Oxley Act. This law became effective July 30, 2002 and was enacted by Congress in the wake of corporate scandals at companies like WorldCom and Enron.

The Sarbanes-Oxley Act makes it unlawful for an employer to take adverse action against an employee who provides information or cooperates in an investigation related to financial fraud. The Act also includes a provision for criminal penalties for persons who interfere with an individual's employment because of protected activity. Under the law, publicly traded companies must establish complaint procedures regarding financial matters and internal accounting. Companies must allow employees to make confidential, anonymous reports regarding questionable accounting or auditing matters. The U.S. Department of Labor adopted rules in May of 2003 to implement the Sarbanes-Oxley whistleblower protections. An employee who reports what he or she reasonably believes is a securities law violation is protected from discharge, demotion, harassment or discrimination. The protection applies not only when the employee reports a violation to Congress or a federal agency, but also when the employee reports internally to those with "authority to investigate, discover, or terminate misconduct."

An employee who wishes to file a complaint under the Sarbanes-Oxley Act must do so within 90 days of the date of the alleged discrimination. The Occupational Safety and Health Administration (OSHA) is the division at the U.S. Department of Labor that will conduct the investigation. To prevail on a whistleblower discrimination claim, an employee must show that he or she engaged in protected activity (reported a violation), that the employer knew or suspected the employee did so, and that the employee suffered some adverse employment action as a result.

OPPOSITION TO UNSAFE WORKING CONDITIONS

No employer may bar or discharge from employment or otherwise discriminate against employees or prospective employees because they have opposed unsafe or unhealthy

working conditions or have complained or assisted in a proceeding under state law. ORS 654.062(5)(a)

Employees may file civil rights complaints or civil suits if they believe that an employer has discriminated against them because they opposed safety or health hazards. This opposition can consist of formal or informal complaints, a conversation or anything putting the employer on notice that an employee believes there is a health or safety problem in the workplace.

There are special complaint filing deadlines for those alleging discrimination on the basis of reporting unsafe working conditions. An individual alleging such discrimination must contact BOLI within 30 days of the time that the individual had reason to believe that an illegal action under this statute occurred.

This law usually does not protect an employee who refuses to work, unless that refusal is based upon a reasonable belief both that the employee is at risk for serious injury or death, and that the employer is not willing to take corrective action.

QUESTION: RETALIATION BY CO-WORKERS EMPLOYEES WHO FILE SAFETY COMPLAINTS HAVE LEGAL PROTECTIONS

Q: I run a small warehouse, and one of our employees, Hector, has raised a number of safety concerns. He's complained numerous times that our forklifts need basic maintenance and more frequent tune-ups. He's also insisted that all warehouse staff wear a seatbelt when operating a forklift. Hector's supervisor and I looked into his concerns, and we concluded they were well founded. So we've increased the number of tune-ups on the equipment, and we've advised employees that they can be disciplined for not wearing a seatbelt. Several employees resent the new safety rules, and Hector has reported that they are "retaliating" against him — including calling him a "sissy" and a "complainer." What is our responsibility here?

A: Oregon law protects employees who oppose unsafe or unhealthy working conditions. The Oregon Safe Employment Act (and ORS 654.062(5), in particular) makes it unlawful for an employer to discharge or otherwise discriminate against an employee who raises safety concerns.

It's also illegal for management to allow retaliation against such a worker. So in order to avoid legal liability, you should promptly investigate Hector's complaints and take appropriate corrective action if your investigation confirms that fellow employees are engaging in retaliatory or harassing behavior towards him.

The law is broadly worded, providing protection from discrimination when an employee opposes any illegal health practices, makes any safety-related complaints, files a formal complaint with OSHA, or testifies in an OSHA investigation.

The law also protects an employee who opposes health and safety hazards in the workplace, whether he is exercising these rights on his own behalf or on behalf of other employees or prospective employees. There are numerous forms of "opposition." The employee is protected whether he opposes the safety hazards in a conversation with co-workers which is overheard by management, in a letter to a newspaper read by management, or by written protest to the employer.

However, an employee is not protected when he simply refuses to work or walks off the job, unless he is acting on a reasonable belief that he is at risk of serious injury or death. Your employee definitely would not meet the "reasonable person" standard if he were complaining of an imminent risk related to an impending alien invasion from Mars. But he may well have the right to refuse work if he had a good faith belief that the forklift was seriously malfunctioning.

Employees who have reason to believe that they may have been discriminated against under this law may file a complaint with the Civil Rights Division of the Bureau of Labor and Industries and must do so within 90 days of the alleged discriminatory act.

But hopefully, you can proactively address your workers' concerns by encouraging employees to come forward when health or safety issues arise, welcoming employee input, and assuring that your company won't take adverse action.

TESTING FOR THE PRESENCE OF DRUGS AND ALCOHOL

Employers may only administer a breathalyzer test if the employee consents or if the employer has reasonable grounds to believe an employee is intoxicated. A blood alcohol test may be administered by a third party or an employer may require a breathalyzer if the employer has reasonable grounds to believe that the individual is intoxicated. ORS 659A.300. The issue of testing for drugs is not mentioned within the Oregon civil rights statutes. Since drug testing and alcohol testing raises a number of privacy issues and concerns, however, employers are advised to set forth a clear testing policy and apply the policy consistently.

QUESTION: BREATHALYZER TESTS
CIVIL RIGHTS LAW SETS LIMITS ON EMPLOYEE ALCOHOL TESTING

Q: I work as a supervisor for a large national company, and one of my employees accused another of being drunk on the job. As an employer, do we have the right to ask that employee to submit to a breathalyzer? If so, can the employee be fired for saying no?

A: In some circumstances, testing an employee for alcohol use can be legal, and an employee's refusal to submit to a test could be grounds for discipline or discharge. But tread very carefully here, because alcohol testing raises privacy concerns and also has civil rights implications.

You should first look to your company policies. Does your personnel manual or employee handbook clearly prohibit the use of alcohol in the workplace or prohibit employees from being under the influence of alcohol in the workplace?

Does your policy define acceptable limits for blood alcohol content? Have you provided notice to employees as to how and when they may be subject to drug or alcohol testing? Have you advised employees that refusing to submit to such tests may result in termination?

Without such policies in place, you risk a lawsuit for invasion of privacy when you spring a drug or alcohol test on an employee. When employers conduct workplaces searches, monitor employee phone calls, videotape work areas, or conduct drug or alcohol tests, courts examine whether the employee had a reasonable expectation of privacy.
With regard to drug or alcohol testing, your employee may assert that he had a reasonable expectation of privacy as to his breath, blood or urine and that you violated that expectation.

That's why many employment attorneys recommend you give at least 30 days' advance notice to employees before implementing a new drug or alcohol testing policy.
Even if you do have an alcohol testing policy in place, keep in mind that the law sets a higher standard for alcohol testing than for drug testing. An Oregon civil rights statute, ORS 659A.300, prohibits employers from subjecting an employee to a breathalyzer test unless the individual consents to the test, or unless the employer has "reasonable grounds" to believe the individual is under the influence.

In your case, it's questionable whether one employee's accusation against another, by itself, constitutes "reasonable grounds" to believe the employee is drunk at work. As a supervisor, you'd be in a better position to require a breathalyzer test if you personally documented that the employee was slurring his speech, smelled of alcohol or showed other signs of intoxication.

QUESTION: DRUG TESTING
EMPLOYERS SHOULD ESTABLISH A CONSISTANT DRUG TESTING POLICY

Q: Andrew is a member of my office staff whose job performance recently has not been up to par. Based on rumors I've heard from my other employees, I suspect that Andrew may be using illegal drugs. Can I require him to submit to a drug screen? What are the rules for drug testing employees?

A: The Oregon civil rights laws don't specifically address drug testing of employees. But the absence of specific statutes in this area doesn't mean that employers have carte blanche to conduct drug tests in every situation. In fact, while it's generally legal for employers to conduct drug tests, you should proceed very carefully, because this type of testing can infringe on an employee's constitutional privacy rights.

So how can you conduct drug tests without infringing on an employee's privacy? Here are a few tips:

- **Create a clear policy**. Your first step is to implement a clear written policy on drug testing and to fully explain the policy to all your employees. Work with your employment law attorney and a qualified laboratory testing service to draft a legal policy that advises employees they could be subject to testing.

- **Articulate your standard for testing**. Advise employees how they can be selected for testing. Although some employers may choose to test randomly, many employment attorneys suggest that you limit testing to situations where there is "cause" (when the employer has reasonable suspicion of drug use), or when an employee is involved in a workplace incident or accident.

- **Apply your policy consistently**. To avoid charges of discrimination or wrongful discharge, enforce your drug testing policy in a fair and consistent manner. If you test employees randomly, be certain you can document that your selection methods are truly random. If you test employees "for cause," be certain you can articulate the facts (not merely rumors or gossip) which gave you reasonable suspicion of an employee's drug use.

  You can set different drug testing standards for different classifications of workers, as long as your standards are based on business reasons. For example, you might decide to set higher drug testing standards for your delivery drivers than for your clerical staff.

  Obviously, it would be discriminatory to drug test only Asian employees, or only female employees, or only employees over 40 years old. Likewise, you should realize that employees who suffer on-the-job injuries fall into a protected class, and thus it would be discriminatory to drug test only employees who get hurt at work. So if you test employees based on their involvement in a work-related accident, test all the employees involved, regardless of whether they were injured.

- **Provide advance notice**. It's typically recommended that you provide your current employees with at least 30 days advance notice before starting a new drug-testing program. Without such notice, your employees have a "reasonable expectation of privacy," an expectation that they'll be free from drug testing in the workplace. Spring a surprise drug test on an employee without a drug testing policy in place, and you may get a surprise of your own—in the form of a lawsuit.

If you do drug test employees in a proper manner, you can discipline or terminate employees who screen positive for current use of illegal drugs, because such individuals are not considered a protected class.

In your situation with Andrew, ask yourself the following questions: Did we previously advise Andrew that our company has a drug testing policy? Did we explain in the policy that employees can be tested "for cause?" Did we give sufficient advance notice of the policy? Do we really have reasonable suspicion to believe that Andrew is using illegal drugs?

If you answered "no" to any of these questions, watch out! Instead of requiring a drug test, you´ll be much safer addressing Andrew´s specific performance deficiencies by following your regular disciplinary policies. If Andrew is arriving late for work, acting in a bizarre or inappropriate manner, or simply not completing his job duties on time, focus on those issues and apply your existing discipline rules as you would with other employees.

QUESTION: MEDICAL MARIJUANA
OREGON LAWS DOES NOT OFFER PROTECTION TO EMPLOYEES USING MEDICAL MARIJUANA

Q: One of our employees tested positive for marijuana on a random drug screen we conducted last week, and our company policy is to terminate employees for using illegal drugs. However, when presented with the test results, the employee showed us a medical marijuana card and told us his use of the drug has been legally authorized because he's undergoing chemotherapy. Are we required to ignore our drug-free workplace policy?

A: Oregon's medical marijuana law (ORS 475.300 to 475.346) provides that a person who possesses a properly issued registry identification card may engage in the medical use of marijuana as justified to treat symptoms of a debilitating medical condition. While the law specifically stated that an employer does not have to accommodate an employee's use of medical marijuana in the workplace, it was unclear on whether an employer should accommodate an employee who used medical marijuana outside the workplace. A recently Oregon Supreme Court case, however, found that that employers are not required to accommodate the use of medical marijuana in Oregon.

In Emerald Steel Fabricators, Inc. v BOLI, Emerald Steel sought to permanently hire a temporary employee. In anticipation of a drug test that was required by Emerald Steel, the employee told his supervisor that he was registered to use and had been using marijuana medicinally in accordance with Oregon's medical marijuana law. Emerald Steel dismissed the employee a week later. After the employee filed a complaint with BOLI, an administrative law judge found Emerald Steel failed to engage in an interactive process to accommodate

On appeal, the Oregon Supreme Court ruled that Emerald did not violate Oregon law when it failed to engage in the interactive process because medical marijuana users are not entitled to the protections under Oregon's disability law. Oregon law permits the discharge of an employee for current "illegal use of drugs," which includes any drug prohibited by either state or federal law. While Oregon law allows the legal use of

marijuana for medicinal purposes, the federal law still deems any use of marijuana as illegal. The employee was therefore not protected by Oregon laws because medical marijuana falls within the definition of "illegal use of drugs."

While an employer does not have to accommodate an employee's use of marijuana for medicinal purposes, it may be still required to accommodate the employee initial condition that necessitated the use of medicinal marijuana. If an employer uses an employee's use of medicinal marijuana as a pretext for discriminating against an employee due to her disability, it may be in violation of federal and Oregon laws protecting disabled individuals from discrimination.

SMOKING AND TOBACCO USE

It is unlawful for an employer to require, as a condition of employment, any employee or prospective employee to refrain from using lawful tobacco products during non-working hours except when the restriction relates to a bona fide occupational requirement or when an applicable collective bargaining agreement prohibits off-duty use of tobacco products. ORS 659A.315.

Although an employer can have a smoke-free workplace, the employer cannot refuse to employ an individual simply because the individual uses lawful tobacco products during off-duty hours.

EMPLOYEE QUERY: IS ODOR POLICY DISCRIMINATORY? EMPLOYER CAN ADDRESS OFFENSIVE ODORS — EVEN WITH SMOKER

Q: Can my employer tell me that smelling like cigarettes is grounds for termination?

A: Maybe. It wouldn't be legal to discharge you simply because of your status as a smoker. An Oregon civil rights statute, ORS 659A.315, prohibits your employer from requiring you to refrain from using lawful tobacco products when you're off-duty. However, an employer can discipline or terminate an employee for poor hygiene or for offensive odors in the workplace under its non-discriminatory work rules.

QUESTION: SMOKEFREE WORKPLACE SMOKERS STILL PROTECTED DESPITE OREGON'S SMOKEFREE WORKPLACE LAW

Q: We've heard that Oregon has a Smokefree Workplace Law. Does it apply to all Oregon companies? Does this mean we can ask job applicants if they smoke and legally refuse to hire smokers?

A: Oregon's Smokefree Workplace Law (ORS 433.835-433.990) requires almost all employers to maintain smokefree workplaces and display "No Smoking" signs. There are

exceptions for bars and taverns, bingo parlors, tobacco stores, bowling centers and hotel and motel rooms designated as smoking rooms.

This law doesn't change the existing protections smokers enjoy under Oregon's civil rights laws. Under ORS 659A.315, employers may not refuse to employ an individual simply because he or she uses lawful tobacco products during off-duty hours. You can certainly advise job applicants that you have a smokefree workplace, but it would not be advisable to ask applicants whether they are smokers.

CRIMINAL RECORDS

Under Oregon law, it is allowable to use the prior criminal records of an employee or prospective employees for an employment decision. Criminal felons are not considered a protected class in Oregon. One should, however, obtain an employee's authorization and release prior to obtaining her criminal records in order to avoid any privacy concerns.

Expunged Juvenile Record

State law allows the removal and destruction of a person's juvenile records after a hearing by the juvenile court. Records expunged in this manner may not be used to disqualify an individual from any employment opportunity. Once a record has been expunged, the individual's record shall be treated as if it had never existed. ORS 659A.030(a).

A person who is the subject of an expunged record may say that such a record never existed without incurring any penalty for perjury or making a false statement.
EXAMPLE: An applicant who denied having a conviction record on an application form could not be later terminated for misrepresentation if the record had been legally expunged.

QUESTION: CRIMINAL RECORDS
JOB APPLICANT NEEDN'T DISCLOSE EXPUNGED JUVENILE RECORD

Q: We recently hired a 23-year-old office assistant, Brad, who indicated on our job application form that he had no criminal convictions. But another employee who went to high school with Brad recalled a theft conviction when Brad was 14 or 15. When we confronted Brad, he didn't deny the conviction but claimed he had the incident removed from his record. Could we legally terminate Brad for misrepresenting his history?

A: No. If Brad's juvenile record was legally removed after a hearing by the juvenile court, an Oregon civil rights law (ORS 659A.030) prohibits you from using the information to disqualify him from any employment opportunity.
Oregon law provides procedures for the removal and destruction or sealing of certain juvenile records. Once a juvenile record has been legally expunged, you're to treat it as if

it had never existed. This means that Brad can legally answer "no" to a job application question that asks if he has any convictions without incurring any penalty for misrepresentation or making a false statement.

This particular statute does not apply to adult convictions or to minors who are convicted in adult court, so the Bureau of Labor and Industries wouldn't have jurisdiction to investigate complaints of discrimination based on expunged adult records. However, another law in the criminal statutes, ORS 137.225(3), does state that when a court issues an order setting aside an adult conviction, the individual "for purposes of the law shall be deemed not to have been previously convicted." So as a practical matter, any employee — adult or minor — with an expunged record needn't disclose it to an employer.

CREDIT HISTORY

In July 2010, the Job Applicant Fairness Act ("JAFA") went into effect. JAFA prevents most employers from legally obtaining or using, for employment purposes, an applicant or employee's credit history information. The legislature of Oregon determined that applications for employment and employees have a right to privacy in their credit history information.

Under JAFA, it is unlawful to obtain or use for employment purposes an applicant's or employee's credit history information. JAFA defines "credit history" as any communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing or credit capacity. OAR 839-005-0065(2). Neither the law nor the rules that interpret it (OAR 839-005-0060 through 839-005-0085) defines the terms "obtain" or "use for employment purposes". In such cases, the term's ordinary meaning is considered. "Obtain" means to gain possession of something by planned action. "Use" means to put into action or service. The law also specifically prohibits the refusal to hire or to promote, the termination, discipline or demotion of, or the retaliation or discrimination against an applicant or employee based on that individual's credit history.

JAFA covers most employers in Oregon. The bill does make special exceptions for federally insured banks and credit unions, for law enforcement agencies and agencies that provide security at airports, and for employers that are required by law to use individual credit histories for employment purposes. In addition, there is an exception that allows employers that obtain or use credit history information because it is "substantially job related" and only then if the reasons for use of the information are disclosed in writing to the employee or applicant.

Credit history information is considered "substantially job related" if:

> (1) an essential function of the job requires access to financial information not customarily required in a retail transaction other than a loan or extension of credit (i.e., beyond check information, credit card numbers or debit card numbers); or

(2) the employer is required to obtain credit history information as a condition of bonding or insuring the employee.

How courts will interpret the law concerning the extent to which a particular position requires access to financial information remains to be seen. If an essential job function of an employee requires the employee to obtain the type of financial information required to approve a loan or extension of credit, which could include such things as financial institution account numbers and amounts and sources of income, the employer could make an argument that obtaining that the employee's credit history information is "substantially job related" and therefore permissible.

QUESTION: CREDIT HISTORY EMPLOYEE'S JOB DUTIES MUST BE "SUBSTANTIALLY JOB RELATED"

Q: I'm a small business owner who sells jewelry out of three stores. I've been looking to hire another employee to handle a majority of the sales at one of my more popular locations. As this employee would be responsible for handling a large volume of sales of very expensive jewelry, I would like to first check the credit history of prospective employees before I hire them. I recently heard that Oregon does not allow for credit checks except for certain exceptions. Do I fall under those exceptions? Is there any other way for me to determine the trustworthiness of a prospective employee?

A: In this case, you would be unlawfully discriminating against the prospective employee if you used their credit history to hire her. Under Oregon law, the job that the prospective employee would be doing is not one where obtaining or using credit history would be substantially job related. BOLI, in setting forth the definition of "substantially job related," specifically noted that the job function had to include access to financial information beyond that required in ordinary retail transactions. The exception was intended to be narrowly tailored, and not to include every position that handled money or financial information. JAFA does not make an exception for retail transactions that are of a greater quantity or scope than normal retail transactions.

The only exception which may allow you to obtain credit information of a prospective employee legally is if your business insurer requires a credit history of your employees to bond/insure them. JAFA does have a special exception for that particular purpose. Even if your insurer does require credit information, you must provide the prospective employee with written notice of the use of this credit information. In addition, it is still unclear within JAFA, if you, as an employer, may legally use the credit information as a basis for not hiring the prospective employee even if the insurer will still bond/insure the prospective employee after viewing her credit history.

Other options are available to you to determine whether a prospective employee is trustworthy. It is still legal to conduct a criminal background check with notice and authorization from a prospective employee, and highly advisable to do so (with certain

exceptions. See Criminal Records on page TK). In addition, checking the references of a prospective employee with authorization and releases is an excellent method for determining the trustworthiness of a prospective employee.

Miscellaneous Oregon Civil Rights Protections

Coercion Prohibited

It is unlawful for any person, whether employer or employee, to aid, abet, incite, compel or coerce an employer, union or employment agency to violate the provisions of Oregon civil rights law. ORS 659A.030(g).

Retaliation Prohibited

It is unlawful for an employer, union or employment agency to fire, expel or otherwise discriminate against anyone because of opposition to practices forbidden by civil rights law or because of a complaint or testimony given about a possible violation of the law. ORS 659A.030(f).

Genetic Screening

Previously, genetic testing was completely prohibited. Under current law, employers may conduct such testing with the employee's informed consent as long as the test assists in determining a bona fide occupational qualification. ORS 659A.300, 659A.303

Cost of Doctor's Release or Medical Exam

An employer may not require an employee, as a condition of continuing employment, to pay the cost of medical examination or the cost of furnishing any health certificate unless:

- The costs are paid by health and welfare fringe benefit monies contributed solely by the employer; or
- The examination or health certificate is required pursuant to a collective bargaining agreement, state or federal statute or city or county ordinance. ORS 659A.306.

Right of Access to Employer-Owned Housing

Employers cannot restrict access to employees living in employer-owned housing by government officials, medical doctors, certified education providers, county health care officials, representatives of religious organizations or any other providers of services for farmworkers or invited guests. Any authorized person shall provide, upon request, credentials identifying the person as representing a qualifying agency or organization. A person need not disclose to the employer the name of the employee who extended the invitation before gaining access to the housing. The employer shall ensure that the resident employees have access to an operating telephone within two miles of the housing at all times. ORS 659A.280-95.

Giving Legislative Testimony

Employers are also prohibited from discriminating against an employee solely because the employee has testified before the legislature or any of its committees. ORS 659A.236.

Testifying at Employment Department Hearings

It is an unlawful employment practice to retaliate against an employee who has testified at an unemployment compensation hearing or other hearing conducted pursuant to ORS chapter 657. ORS 659A.233.

Source of Income (City Ordinances)

It is an unlawful employment practice to discriminate on the basis of source of income in the cities of Portland, Eugene, Corvallis and Ashland.

Leave to Donate Bone Marrow

It is an unlawful employment practice for an employer to deny a leave of absence to an employee who donates bone marrow or to deny the use of accrued paid leave during such leave of absence. The total length of the leave shall not exceed the amount of accrued leave or 40 work hours, whichever is less, unless agreed to by the employer. ORS 659A.312.

Leave to Serve in the Legislature

It is an unlawful employment practice for an employer to discipline or to harass an employee who takes a leave of absence to participate in a regular or special session as a member or prospective member of the legislative assembly. ORS 171.120- 171.125.

Olympic Athletes

It is an unlawful practice for an employer to infringe on an employee's right to participate or to discriminate because an employee participates in any athletic event sanctioned by the national government body for that sport as recognized by the United States Olympic Committee. ORS 659A.865.

QUESTION: EMPLOYEE ATTENDANCE AND CIVIL RIGHTS MANY EMPLOYEE ABSENCES ARE LEGALLY PROTECTED

Q: I have a problem employee, Ron, who is chronically absent from work — typically on Mondays, Fridays, and good weather days! Under my attendance policy, I assign employees a point for each unexcused absence, and I terminate employees who accumulate four points or "incidents" during the year.

The problem is that every time I try to discipline Ron for an absence, he claims that one law or another protects him. One day, he calls in with a sick child, and another day he's on jury duty. A month ago, he missed four consecutive days of work because he donated bone marrow to a sick family member. Last week, he missed a full day of work because his babysitter arrangements fell through and he couldn't find daycare for his kids. And this week, he was out Tuesday due to "car problems" and out Friday because his Labrador retriever needed an EKG for a heart murmur.

A: Is my employee correct that these are all protected absences for which I cannot discipline him? I understand that some absences are legitimate, but I have a business to run. How are employers supposed to survive with so many employee-friendly laws?

Some of the absences you describe are indeed protected by Oregon law, but others can be treated as unexcused absences under your attendance policy. You may be relieved to learn that Ron's most recent absences are not legally protected.
Although many people consider "Fido" to be a member of the family, there is no current law giving employees the right to take "pet leave." So you're not obligated to allow Ron time off for the vet visit, and you could choose to treat that absence as an "incident" or disciplinary "point" under your policy.

Likewise, even if Ron brings you a signed affidavit from his mechanic proving that his BMW really blew a head gasket on Tuesday, you could discipline him for the absence. There is no protected leave for transportation issues such as "car troubles."

You indicate that Ron had difficulty finding childcare last week, and many working parents encounter such problems. But the lack of a babysitter doesn't give employees the legal right to miss work, so whether you excuse this absence is up to your policy.

You should note, however, that Ron's absence to donate bone marrow is protected under Oregon civil rights law. ORS 659.358 makes it an unlawful employment practice for an employer to deny a leave of absence to an employee who donates bone marrow, or to deny the use of accrued paid leave during the absence. An employee is entitled to take as much as 40 hours of leave for this reason.

Jury duty, another type of absence you mentioned, is also protected under Oregon law. ORS 10.090 states that employers "shall not discharge or threaten to discharge, intimidate, or coerce any employee by reason of the employee's service or scheduled service as a juror on a grand jury, trial jury or jury of inquest." So when tracking Ron's attendance, put the jury duty in the column for excused absences and don't count it as a "point" or "incident."

If your company has 25 or more employees, you're covered by the Oregon Family Leave Act, and if Ron has worked for you for 180 days and 25 hours per week or more, he is eligible for protected OFLA leave. That means he can take up to 12 weeks off in

qualifying situations, including when he has a sick child with a non-serious health condition which requires home care.

Numerous other laws permit employees to take protected absences, including the federal Family and Medical Leave Act, state and federal disability laws, and statutes pertaining to military service and service in the state legislature. Employers should have attendance tracking systems that carefully distinguish between unexcused and legally protected absences. To avoid disciplining a worker for a protected absence, be sure you have a thorough understanding of the civil rights laws.

Polygraph Tests

It is unlawful for an employer to subject any employee or prospective employee to a polygraph test or a psychological stress test (which is another method of testing veracity), even if the employee consents. ORS 659A.300.

QUESTION: LIE DETECTOR TESTS
EMPLOYMENT LAWS STRICTLY LIMIT POLYGRAPH TESTING

Q: We strongly suspect that one of our staff members is stealing money from the till. Can we legally require employees to take lie detector tests?

A: Only in very rare circumstances may employers administer polygraph tests. The use of “lie detectors” is highly regulated, both under Oregon and federal law, so you should always seek legal advice before deciding to use a polygraph test.

The federal Employee Polygraph Protection Act (EPPA), enacted in 1988, prohibits most private employers from using lie detector tests either for pre-employment screening or during the course of employment. This law doesn’t apply to government employers or to tests given to certain individuals engaged in national security-related activities. The EPPA also contains exemptions allowing testing of certain prospective employees of security service firms and pharmaceutical companies.

Otherwise, the EPPA virtually bars polygraph testing by employers. As a private employer, you can generally ask an employee to submit to a polygraph test only if it is part of an ongoing investigation involving an incident of theft, embezzlement or other economic injury to your business. The employee must have had access to the property, and you must have a reasonable suspicion that the employee was involved in the incident.

Even in those instances when polygraph testing is permitted, it is subject to very strict standards concerning the conduct and length of the test. The EPPA gives examinees numerous rights, including the right to a written notice before testing, the right to refuse or discontinue a test, and the right not to have test results disclosed to unauthorized persons.

The written notice you provide the employee must be signed and must include a number of elements, including the basis for your reasonable suspicion that he or she was involved in the incident of theft or embezzlement. In providing such a statement, you may well be buying yourself a defamation claim, so you should proceed with great caution.

Also, as an Oregon employer, you're subject to even stricter standards than those set by federal law. State civil rights laws — specifically, ORS 659A.300 (formerly ORS 659.225 and 659.227) — prohibit polygraph tests as a condition for employment or continuation of employment. There's just one exception under our law. An Oregon employer may administer a polygraph test only "if the individual consents to the examination, during the course of criminal or civil judicial proceedings in which the individual is a party or witness or during the course of a criminal investigation conducted by a law enforcement agency . . . , a district attorney, or the Attorney General."

Employers must post the Employee Polygraph Protection Act poster (WH Publication 1462) where employees and job applicants can readily see it. You can download this poster and others required under Oregon and federal law from the BOLI website at www.oregon.gov/boli. Click on "Required Postings" to download, or click on "Publications" to order the 8-in-1 poster, "Commonly Required Postings in Oregon."

CHAPTER 4

HARASSMENT

Harassment of a protected class at the workplace is a form of discrimination. The Bureau views harassment as any unwelcome verbal or physical actions related to a protected class that is sufficiently severe or pervasive tat it unreasonably interferes with work performance or creates a hostile, intimidating or offensive working environment.

While the prevalent form of harassment is sexual harassment, harassment is unlawful if it is directed towards any protected class, including race, national origin, age, disability, etc.

QUESTION: DISCRIMINATION VS. HARASSMENT SEX DISCRIMINATION AND SEXUAL HARASSMENT RELATED BUT NOT IDENTICAL

Q: Is discrimination the same thing as harassment?

A: Not exactly, although the two concepts can overlap. The difference exists in the degree of the behavior. Harassment is a form of discrimination that generally involves repeated, unwelcome behavior directed at an individual because of a protected class. Workplace conduct rises to the level of harassment when it is severe or pervasive and creates a hostile work environment. Discrimination is a broader term that encompasses not only harassment but also other forms of different treatment based on a protected class.

A key defining factor of whether behavior is harassment is whether the behavior is severe or pervasive. Courts have looked at behavior that is frequent, physically threatening, humiliating and interferes with a person's work as harassment. Rude and annoying behavior is insufficient to be considered severe or pervasive. Isolated instances of poor behavior are also insufficient, unless the isolated incidences are "extremely serious."

QUESTION: EQUAL OPPORTUNITY HARASSER? OWNER'S ABUSIVE BEHAVIOR PROBLEMATIC, BUT MAYBE NOT HARASSMENT

Q: What are employees' rights with regard to an abusive boss? I am a store manager, and the company owner periodically visits my store and terrorizes the employees. What I mean is that he swears at everybody, sometimes physically pulls employees aside to talk to them, waves his finger in their faces, and verbally abuses them by calling them

derogatory names. After his latest visit to my store, two employees are threatening to quit. Does BOLI investigate this kind of complaint?

A: The behavior you're describing is probably not the sort of harassment that's prohibited under Oregon and federal civil rights laws. It sounds as though you're dealing with an "equal opportunity jerk" who treats all his employees horribly, regardless of their age, race, sex or other protected classifications.

That's not to say that the owner's treatment of employees is acceptable — just that it's not the type of claim that agencies like BOLI and the EEOC can address under civil rights and harassment regulations, because it appears that the bad behavior isn't linked to the recipients' protected class membership.

There are, however, many other remedies potentially available to your employees. For example, if the owner's behavior is sufficiently outrageous, employees could bring claims of "intentional infliction of emotional distress," a tort action that can be filed in court. Employees might also file a civil claim of assault based on the owner's threatening behavior, not to mention criminal complaints for battery when the employer physically grabs them.

The kind of behavior you describe often leads to employees filing workers' compensation stress claims and even claims of constructive discharge, where the employee alleges that he or she had no reasonable option but to resign because of intolerable workplace conditions. In some cases, that type of claim can lead to liability for unemployment benefits and lost earnings.

Hopefully, you can talk some sense into the owner and convince him to change his ways to avoid liability for both the business and himself as an individual.

Sexual Harassment

The most prevalent type of harassment reported is sexual harassment, composing almost a quarter of all harassment and discrimination claims filed in the private sector. In 2009, the EEOC obtained over $51 million in settlements on sexual harassment claims alone. Sexual harassment does not differ from harassment with the exception of the added element of Quid Pro Quo.

What is sexual harassment?

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, or conduct of a sexual nature (verbal, physical, or visual), that is directed toward an individual because of gender. It can also include conduct that is not sexual in nature but is gender-related. Sexual harassment includes the harassment of the same or of the opposite sex.

What are some other examples of conduct that could be considered sexual

harassment?

Sexual harassment can take many forms, including repeated sexual flirtations, advances or propositions, continued or repeated language of a sexual nature, graphic or degrading comments about an individual or his or her appearance, the display of sexually suggestive objects or pictures, or any unwelcome or abusive physical contact of a sexual nature. Sexual harassment also includes situations in which employment benefits are conditioned upon sexual favors (quid pro quo); or in which the conduct has the effect or purpose of creating a hostile, intimidating, or offensive working environment (must be sufficiently pervasive or severe to create a hostile environment)

Quid Pro Quo

Quid pro quo means "this for that" in Latin. This terminology describes harassment that typically involves a supervisor giving or withholding employment benefits based upon an employee´s willingness to grant sexual favors. Quid pro quo case harassment occurs when the employer demands sexual favors in exchange for employment benefits, advancement, hire or continued employment. Under both state and federal law employers are liable for quid pro quo harassment by their supervisors.

EXAMPLE: A supervisor tells a subordinate that if he goes out to dinner with her, she'll remember that when she is doing his performance appraisal. She also implies that if he refuses her invitation, he may not be considered a "team player."

Hostile Work Environment

A "hostile environment" is a work atmosphere in which a pattern of offensive sexual conduct is involved. The administrative rules describe it as "Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment." OAR 839-005-0010(3)(A). Such conduct includes comments that are verbal or physical, embarrassing, suggestive or degrading to an individual on the basis of his or her sex. Examples of hostile environment harassment include sexual posters, jokes or comments as well as unwelcome touching and body language.

EXAMPLE: Tom, Nicole´s supervisor, regularly compliments her figure and clothing. He frequently walks up behind her and massages her shoulders, despite her objections. On Monday mornings, Tom tells the crew the "dirty joke of the week" from his Saturday night poker game. Other employees laugh, but Nicole usually walks away. Tom also keeps a calendar of semi-nude women posted in his office, despite Nicole´s comments that she finds the calendar demeaning. Based on all of the foregoing conduct by Tom, Nicole files a hostile environment sexual harassment claim.

EMPLOYMENT QUERY: HOSTILE WORK ENVIROMENT

AVOID THE CREATION OF A HOSTILE WORK ENVIROMENT

Q: I've been reading quite a bit about sexual harassment in the news lately and wonder if I should be concerned. I'm a shareholder and member of the board of directors of a corporation. The president of the company is known for being a bit of a ladies' man. In fact, he boasted at the annual board meeting that he has a "close working relationship" with one of his attractive subordinates and seemed to imply that the relationship had become intimate. Is this something the board or the shareholders should be worried about or would any potential issue be the president's problem alone?

A: You have good reason to be concerned. Any sexually inappropriate conduct in the workplace on the part of the president may create problems not only for him but also for the company itself. If the misconduct is sufficiently severe, as with a sexual assault, it may result in criminal sanctions against the offending party. Typically, in the case of an alleged sexual assault, a complaint is filed with a local law enforcement agency. If an unwanted sexual touching can be proved beyond a reasonable doubt, the district attorney may choose to prosecute the perpetrator of the assault. Even if there is not enough evidence to prosecute him criminally, however, there may be significant liability for both the offending president and for the company under state and federal laws against sexual harassment. As a shareholder, your financial stake in the company may be at risk. Unlike in a criminal case, the standard of proof required to prevail in a civil or administrative action is much lower. The plaintiff or complainant, as the case may be, need only prove that sexual harassment was more likely than not to have occurred.

Sexual harassment is a form of discrimination that generally involves repeated unwelcome behavior directed at an individual because of the individual's gender. Workplace conduct rises to the level of harassment when it is severe or pervasive and creates a hostile work environment. A person of either gender can be the victim of sexual harassment, and it can be perpetrated against someone of the same gender as the perpetrator or of the opposite gender. The perpetrator might be a supervisor, a coworker of the same or inferior rank as the victim, or even a third party, such as a customer or a client of the victim's workplace. Sexual harassment can also occur outside the office, for example at company sponsored events like holiday parties or trainings. The employer has exposure to liability if the company knew of the harassment or should have known of it, but failed to take immediate and appropriate corrective action to make it stop.

Sexual harassment can consist of unwelcome sexual advances, requests for sexual favors or conduct of a sexual nature directed at an individual because of the individual's gender. It is particularly problematic when there is a degree of control involved, as with your president and his subordinate. In these situations, the victim may feel as though submitting to the overtures of the supervisor is an implicit term or condition of employment. The employer also has exposure in a situation where a third party or coworker repeatedly harasses an employee and the employer does nothing to protect the victim.

If an employer has reason to believe that harassment is happening in the workplace, it should conduct an investigation immediately and determine what remedial action is appropriate to end the offensive conduct. Care must be taken to insure there is no retaliation against the victim or the perception that the reporting party is being punished for coming forward. For example, removing the subordinate to another position or shift can be viewed as an adverse employment action, which would enhance rather than reduce the employer's liability. Instead, the company may choose to counsel and discipline the supervisor, require training, or increase monitoring to prevent further harassment. In any event, it is important to have good written policies in place to let employees know what is expected of them and to provide a means for a victim of sexual harassment to report the unwelcome behavior. If the perpetrator is the president of the company, the victim may need to know that he or she can report the harassment to the chairman of the board or the chief executive officer. Of course, it might be a good idea to get legal advice to help navigate a difficult situation like this.

QUESTION: HARASSMENT BY THIRD PARTY OREGON REGULATIONS DETERMINE LIABILITY FOR WORKPLACE HARASSMENT

Q: An important client of ours, Rick, has visited our worksite over the past few weeks to attend a series of meetings on his account. Our receptionist, Grace, has told us she's very uncomfortable when Rick comes to the office, because he's been telling her off-color jokes, making sexually suggestive remarks, and asking her out for drinks. She feels this is harassment, and she's asked us to put a stop to it. We're certainly doing our best to keep Rick away from Grace, but we don't want to jeopardize one of our biggest accounts. What is our legal obligation here? Could we be liable for Rick's behavior even though he's not our employee?

A: According to court cases and the Oregon regulations on workplace harassment, your company could be liable even for the behavior of a non-employee. If you have reason to know that Rick may be harassing Grace, you have an obligation to promptly investigate and take immediate and appropriate corrective action to protect your employee and stop the offensive behavior.

Sexual harassment can consist of unwelcome sexual advances, requests for sexual favors, or conduct of a sexual nature that is directed toward an individual because of gender. The behavior is illegal when it is severe or pervasive enough to interfere with an individual's work or create a hostile work environment.

Liability standards for employers differ depending on whether the harasser is a supervisor, a co-worker, or a third party. In cases where the alleged harasser is a non-employee, BOLI's Civil Rights Division and the courts will consider how much control the employer has over the individual. Since you have invited Rick into your worksite, you do have a great degree of control over the situation.
This doesn't mean you have to cancel your contract with one of your biggest clients, but it does mean that you must do whatever is necessary to stop the sexual comments and

advances. You should tactfully tell Rick that his comments have made Grace uncomfortable and ask that he not make sexual remarks in her presence. You can also arrange to have a member of management present to greet Rick to ensure that discussions remain on a professional level.

If Grace is still uncomfortable in Rick's presence, you could offer to have another employee relieve her at the front desk when he is due to arrive. You should make it clear to Grace that you appreciate her coming forward and that you will not retaliate against her for doing so. To limit her future contact with Rick, you might consider holding future meetings with him off-site.

Note that harassment isn't always sexual in nature. The courts use similar liability standards to judge cases where harassment is based on age, race, religion, and other classifications protected under Oregon and federal civil rights laws.

There are a number of actions every employer should take to prevent harassment in the workplace. You should have policies prohibiting discrimination, harassment and retaliation. You should train managers and employees alike on their rights and responsibilities, and you should monitor the workplace to ensure that employees follow your rules on workplace conduct.

QUESTION: SAME-SEX HARASSMENT
HARASSMENT NOT LIMITED TO BEHAVIOR BY OPPOSITE SEX INDIVIDUALS

Q: Can it be sexual harassment if a male in the workplace is directing sexual language or behavior at another male employee?

A: Absolutely. The U.S. Supreme Court ruled on this issue in 1998 in the case of Oncale v. Sundowner Offshore Services, Inc. In that case, the Court determined that same-sex sexual harassment is a type of discrimination prohibited under Title VII of the Civil Rights Act of 1964.

The plaintiff in that case, Joseph Oncale, worked for four months as a roustabout on a Chevron oil rig off the coast of Louisiana. He reported that male supervisors and co-workers repeatedly taunted him about having sex, threatened him with rape, and sexually assaulted him in the shower.

Oncale resigned and filed a sexual harassment claim in federal district court because the company failed to address the behavior, and he feared for his safety. Company representatives argued that what happened to Oncale was nothing more than locker room horseplay or hazing.

The federal trial court and appellate court both ruled that same-sex harassment was not covered under Title VII. The U.S. Supreme Court, however, overruled those decisions and found by a unanimous vote that same-sex harassment is actionable.

The opinion indicated that Title VII does not necessarily bar a discrimination claim merely because the plaintiff and the defendants are of the same sex.

Furthermore, according to the Court, it is not necessary that the harasser or victim be homosexual. There can be liability for same-sex harassment when the conduct is sex-specific and derogatory in nature, or when the harasser treats men and women differently. Of course, simple teasing or roughhousing is generally not enough to create a legal liability under the discrimination laws. In order for an employee to succeed with a sexual harassment claim, he or she must prove that workplace conduct was so severe or pervasive that it created a hostile or abusive environment.

As a result of the Oncale decision, employees who can meet that burden of proof may prevail, regardless of whether the individuals involved are of the opposite or same sex.

SEXUAL HARASSMENT Q & A

Is an employer automatically liable for sexual harassment by a supervisor?

An employer is automatically liable for sexual harassment by a supervisor when a "tangible employment action" occurs in connection with the harassment. A tangible employment action is very broadly defined and need not be negative. EXAMPLEs include changes in work assignment or schedule, terminations or failure to promote. OAR 839-005-0030(4)

What about harassment by a supervisor when there is no tangible employment action?

The employer is still liable if the employer knew about the harassment, unless the employer took immediate and appropriate corrective action. Furthermore, the employer is liable if it should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can show:

- That it exercised reasonable care to prevent harassment, and
- That the complaining employee unreasonably failed to take advantage of preventive opportunities, such as the employer´s complaint process.

OAR 839-005-0030(5)

May an employer also be liable for harassment by co-workers?

Yes, if the employer knew or should have known of the conduct but failed to take immediate and appropriate corrective action. OAR 839-005-0030(6)

What is an employer’s responsibility for sexual harassment by a non-employee?

An employer is liable for harassment by a non-employee if the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action. When evaluating a complaint, the Civil Rights Division considers how much control the employer has over the non-employee. For example, an employer is considered to have a great deal of control over an individual who is on the premises to fill a vending machine. An employer can call the vending company and request a different service person, can hire an alternate company, or can even have the machines removed. OAR 839-005-0030(7)

What is the best way to prevent sexual harassment?

The Equal Employment Opportunity Commission (EEOC) Guidelines recommend that employers discuss sexual harassment with employees and express strong disapproval. The employer should develop appropriate sanctions, inform employees of the right to raise complaints and how to raise them, and develop methods to sensitize all concerned.

The employer should emphasize the importance of its sexual harassment policy through communication and training. Employers should write and implement an anti-harassment policy, define unacceptable behavior in the policy, establish a grievance procedure for all employees, and investigate all alleged instances of harassment.

Training for staff is essential. Employers should have departmental or unit meetings where the harassment policy and grievance procedure is explained and distributed to all employees. Employees should emphasize that employees should treat everyone with dignity and respect, explain what prohibited conduct is under the anti-harassment policy, and how to complain about it.

Employers should also train managers and supervisors about the anti-harassment policy, and also how to respond to complaints filed by employees. Employers should emphasize that all employee complaints should be taken seriously by managers. When appropriate, employers should instruct managers to involve human resources or outside counsel while investigating complaints.

What should an employer do if an employee complains of sexual harassment?

The employer must make a prompt, thorough investigation to determine whether harassment has occurred. The employer should take detailed statements from the complaining person, the alleged harasser, and witnesses, and determine if the allegations are supported by the investigation. All steps of the investigation should be thoroughly documented. Employers may wish to consult an attorney for assistance with harassment investigations.

What if the investigation shows that harassment has occurred?

The employer must take "immediate and appropriate corrective action," which means doing whatever is necessary to put a stop to the harassment. Depending on the severity of

the harassment, appropriate corrective action could include any of the following: verbal or written warning; counseling; suspension; sensitivity training or education on harassment laws and appropriate workplace conduct; reassignment of workers to different locations or shifts; or dismissal of the harasser.

Roseanne, an employee of mine, used to delight in telling off-color and sexually explicit jokes, but has now joined a new church and is strongly objecting when other employees tell such jokes. Is the company obligated to take any action?

Yes. Even though Roseanne previously consented to and even actively participated in the conduct, the company must act if she communicates that she now finds it offensive. Sexual jokes or conversations in the workplace can form the basis of a hostile environment claim, and an employer is liable if he or she knew or should have known that the offended employee withdrew consent to such conduct.

Must an employee complain to the harasser or to the company before taking legal action?

No. An employee alleging sexual harassment can file a lawsuit or a complaint with an administrative agency, without first exhausting intra-company remedies.

What types of damages can be awarded to an employee who has a successful sexual harassment lawsuit?

A court or administrative law judge may award damages including: back pay, counseling or medical costs; attorney fees, pain and suffering, and punitive damages.

Where can I find Oregon's law on sexual harassment?

The relevant rule is OAR 839-005-0030 in Division 5 of the Bureau's regulations.
Sexual Harassment

Liability for Unlawful Harassment

The harasser always risks personal liability. Employers are responsible for acts of sexual harassment by agents, employees and customers if they knew or should have known of the occurrences of specific acts — unless the employer took immediate and appropriate corrective action to end the harassment. Such action could include discipline, counseling, education and/or termination.

Establishing a Harassment Policy

Every employment policy should include a section on harassment. A number of experts suggest making the harassment policy separate from regular disciplinary system in order to emphasize its importance.

Employers should establish a clear policy with respect to sexual harassment in the workplace. This policy should include a strong statement defining and prohibiting harassment, guidelines for handling violations of policy and a procedure for an employee to file a complaint of harassment for the company to investigate.

The policy should define sexual harassment and emphatically state that it is not tolerated. Employers should allow verbal or written complaints, and should provide a grievance procedure that bypasses the immediate supervisor if he or she is the alleged harasser. The policy should also describe the disciplinary actions that may be taken, up to and including termination.

For more information on establishing a harassment policy, including samples of harassment policies, please see the Bureau's Policy Writing Guideliness handbook.

QUESTION: FRATERNIZATION RULES PROCEED CAUTIOUSLY IN SETTING DATING POLICY FOR EMPLOYEES

Q: What rules can we put in place as to an employee's conduct with our customers outside the normal work hours? We're concerned that an employee dating another employee might prove detrimental to our business and raise sexual harassment concerns if the dating relationship sours. Can we prohibit our employees from dating other employees?

A: This is a tricky one. Employers risk invasion of privacy claims when they go too far in regulating what employees do on personal time. On the other hand, courts may uphold certain policies on fraternization if employers can articulate job-related reasons for such rules.

Some employers, for example, have rules restricting supervisors from dating staff members. Others require that employees who enter into intimate relationships advise the company and agree to work in different departments to limit conflicts of interest.
But a non-fraternization policy can be fraught with problems. Enforcement of the rule can prove difficult, since it relates to after-hours conduct. If you discipline an employee under a no-dating policy, you could wind up defending a privacy lawsuit. And if your policy isn't applied evenhandedly, you might also face claims of discrimination. The best advice is to ask your employment law attorney before implementing this type of policy.

QUESTION: INTEROFFICE DATING IS LOVE BLIND TO LAWSUITS?

Q: I own and operate a family-style restaurant. I say "family style" because we serve a lot of comfort food like fried chicken and apple pie. But we also want to maintain a

family-friendly atmosphere, so we supply crayons, coloring books and hand out lollipops to our young customers.

About three months ago, I hired Ginger, a new waitress. She does her job very well, but it's quite obvious that she and the restaurant manager, Bob, are very attracted to each other. I've seen them giggling and touching when they pass each other and one of my employees said he saw Bob and Ginger "making out" at the wine cooler. In my opinion, this certainly does not fit the family-friendly atmosphere we are trying to create. It also hasn't escaped my notice that Bob seems to be scheduling Ginger for some of the more desirable shifts, where she's more likely to get good tips.

Should I be concerned about this situation? It seems good for employees to feel positive about their co-workers. Also, I feel that what they do on their own time is none of my business and I don't want to get involved in anyone's personal life. In fact, my brother married a co-worker 10 years ago, and they've done just fine. So should I just look the other way when I see them carrying on?

A: You are right that in general, it's not a good idea to get involved in employees' personal lives. It's also usually not appropriate for an employer to regulate employees' behavior when they are off the clock. Such intrusions could certainly lower employee morale as well as leave you vulnerable to invasion of privacy claims. But while it's understandable that you don't want to interfere in your employees' personal lives, the fact is that their personal lives are now interfering with your business.

It is thus not only appropriate – but probably your duty – to get involved. Here's why: Bob is a manager, and state and federal law provide that actions of a manager are generally considered to be the actions of their employer for purposes of liability. Bob may already be scheduling Ginger so she can make better tips than other employees. He also may have influence in determining who gets promoted. And let's say Ginger is up for a promotion to bartender. Any favoritism by Bob toward Ginger is unfair to the other employees he supervises and sends a message that it helps to flirt or engage in a relationship with the boss if you want to make better tips or get promoted.

Oregon law provides that there may be employer liability when employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances, requests for sexual favors, or other sexual harassment, and other individuals were qualified for but denied that opportunity or benefit. (OAR 839-005-0030 (9)) In addition, if what appears to you to be a mutual flirtation between manager Bob and employee Ginger is actually being instigated by Bob, you may be vulnerable to a charge by Ginger that she is being sexually harassed by Bob. Finally, whether mutual or not, if the workplace flirtation offends other employees they may complain of a sexually harassing atmosphere.

There's simply no way that Bob as a manager or you as an employer can win in this situation. Ginger or other employees could file a harassment claim against the company as well as against Bob in his personal capacity.

You should definitely get legal advice here. Your attorney may suggest that you immediately tell Bob that flirtatious or romantic behavior between employees is not acceptable in your workplace, and discuss your suspicion that he is scheduling Ginger for more favorable shifts. If your business is large enough to place Ginger under someone else's supervision, that should be done right away. However, demoting or terminating either employee, unless their behavior has been egregious, is probably not the best choice as it could lead to a charge of discrimination based on the gender of the affected employee.

After dealing with the immediate situation, your attorney may advise you to develop written policies and train all your employees to make it clear that you comply with all laws required in workplaces, and do not tolerate any discrimination including harassment based on "protected" characteristics such as sex and race. Such a policy may prohibit in your workplace behavior that is sexual or romantic in nature and clarify that personal relationships must be conducted away from the workplace. A prohibition against supervisors engaging in sexual or romantic relationships with subordinates helps prevent claims that such relationships either result in favoritism or are based on sexual harassment.

CHAPTER 5

JURED WORKER AND DISABILITY

Injured Worker Laws Overview

Statute	Covers employers with this number of employees	Summary
ORS 659A.040	6 or more (at time of alleged discrimination)	General anti-discrimination provision. Makes it illegal to discriminate because a worker has invoked the workers' compensation system (broadly interpreted).
ORS 659A.043	21 or more (either at time of injury **or** at time of demand for reinstatement)	Allows **reinstatement** rights to the original time-of-injury job when: 1. Employee has an on-the-job injury; 2. Employee has an accepted (compensable) worker's compensation claim; **and** 3. The treating physician for the compensation claim releases the employee to full duty (*i.e.*, with no restrictions) **Note**: Employee must make timely demand
ORS 659A.046	6 or more (either at time of injury **or** at time of demand for reemployment)	Allows **reemployment** (light duty) rights to an available, suitable job (if one exists) when: 1. Employee has an on-the-job injury; 2. Employee has an accepted (compensable) workers' compensation claim; **and** 3. Treating physician for the worker's compensation claim released the employee for partial, modified, or light duty work. **Note**: Employee must make timely demand

Note: These statutes — ORS 659A.040, 659A.043 and 659A.046 — apply only to work-related, on-the-job injuries and occupational illnesses. However, employees injured off the job may still have protection under Oregon and federal family leave laws (if the injuries result in a "serious health condition") and/or under Oregon and federal disability laws (if the injuries result in a permanent or long-term condition, or if the injuries result in impairments that are transitory and major, which substantially affects a major life activity).

COVERAGE QUESTIONS

How do we know if our company is covered by the Oregon injured worker laws?

An employer is covered by ORS 659A.040 if it has six or more employees at the time of the alleged discriminatory act.

An employer is covered by ORS 659A.043 if it has 21 or more employees, **either** at the time of the compensable injury **or** at the time of the worker's demand for reinstatement.

An employer is covered by ORS 659A.046 if it has 6 or more employees, **either** at the time of the compensable injury **or** at the time of the worker's demand for reemployment.

Which employees do we count to determine if we're covered by these laws?

An employer must count all employees, whether in Oregon or not, full-time or part-time, regular or seasonal, exempt and non-exempt, etc.

Injured Worker Leave Questions

When is a worker eligible to take Injured Worker Leave?

Employees are eligible even on the first day of employment.

When an injured employee is off work on a workers' compensation claim, how long are must the employer hold his job?

An injured worker's reinstatement rights (ORS 659A.043) or reemployment rights (ORS 659A.046) last for up to three years from the date of injury.

However, the injured worker loses the right to reinstatement and/or reemployment if **any** one of the following occurs:

- The worker is determined to be medically stationary and not physically able to return to the former position (for loss of reinstatement rights) or to any position (for loss of reemployment rights);
- The worker is eligible for and participates in vocational assistance under ORS 656.340;
- The worker accepts suitable employment with another employer after becoming medically stationary;
- The worker refuses a bona fide offer of suitable light duty or modified employment from the employer before becoming medically stationary;
    - *NOTE: This is considered a triggering event that commences OFLA leave.*
- Demand for reinstatement is not made by the worker within seven days from the date the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician has released the worker to the former position or for reemployment;
- Three years have elapsed since the date of the worker's original injury;
- The employer discharges the worker for reasons not connected with the injury and for which others are or would be discharged;

  - *NOTE: From a best practices perspective, BOLI strongly recommends documenting any termination decisions unrelated to the workers' compensation claim and recommends consulting your attorney.*
- The worker clearly abandons future employment with the employer; or
- The worker does not report to work as specified in the employer's suitable job offer.

May injured worker leave be deducted from OFLA or FMLA leave entitlements?

OFLA – No, if the injury is compensable (accepted). See OAR 839-009-0240(8). However, if the injured worker refuses a valid offer of suitable light duty before becoming medically stationary, OFLA leave commences immediately upon the refusal. During the time when a claim is pending, an employee may be entitled to use OFLA. However, once the claim is accepted, any OFLA leave used must be restored to the employee. If the claim is denied, any OFLA leave will be deducted from the employee's entitlement.
FMLA – Injured Worker leave **is** counted against FMLA.

General Questions

Do I have to continue paying my employee's insurance benefits during a workers' compensation absence?

The answer depends on your policy and your insurance plan. For most employers, there is no automatic obligation to continue insurance coverage during an employee's workers' compensation absence. For EXAMPLE, if you normally do not continue insurance coverage for other employees who are off work for a given period of time, you needn't continue coverage for injured workers either. However, if you normally continue insurance benefits for employees who are off work on other types of leave, you must do so during workers' compensation absences in a similar fashion, since it would be discriminatory to treat workers differently in terms and conditions of employment based on their injured worker status.

If the workers' compensation absence is also concurrently covered by the Federal Family and Medical Leave Act of 1993 (FMLA), you would be required to continue basic group health coverage during the first 12 weeks of the workers' compensation absence.

Only agencies of the State of Oregon are statutorily required to continue group health benefits during the workers' compensation absence. See ORS 659A.052 and 659A.063.

If we have a collective bargaining agreement which provides that workers lose seniority after a certain time away from work, which takes precedence — our contract or these laws?

Conditions of reinstatement or reemployment are subject to seniority and other employment restrictions contained in a valid collective bargaining agreement.

May I discipline an employee who has excessive absences due to an on-the-job injury?

No. An employer may not discipline an employee for any absence related to a compensable workers' compensation claim.

Does that mean you can never discipline an injured worker? Our bookkeeper has been off an injured worker leave for the past three months, but during his absence we have discovered that he had been routinely embezzling from us. Because he is an injured worker, are we prohibited from terminating him?

It's a common misconception that employers may never discipline a worker who has filed a workers' compensation claim. In fact, you can discipline or even discharge an injured worker for reasons not connected with the injury, as long as you would do so with other workers in the same circumstances. (Similarly, you can terminate a woman, or a 73-year-old worker, or an African-American employee — just not because of their protected class status.)

Even though such a termination is legal, it is also risky, and you may wish to consult with your attorney to be sure you have the proper documentation in place to defend against a potential discrimination claim.

I have a policy which provides that anybody who is gone from work for 30 days or more is automatically discharged. Can I terminate an injured worker under this policy?

You may, but the worker still retains reinstatement/reemployment rights.

Is it legal to fire an employee who had an on-the-job injury if our reason for the termination is unrelated to his workers' compensation claim? We have an injured worker who's back to work on light duty, but his attitude is bad, and he isn't completing his work on time.

The answer is a qualified "yes." You can terminate an injured worker — or, for that matter, an employee who is Hispanic or 66 years old or pregnant or Catholic or Canadian — if you have a legitimate, non-discriminatory reason that has nothing to do with the worker. If you find yourself facing an injured worker discrimination claim, having clear policies and good documentation in your personnel files will be critical to your defense, hopefully allowing you to show that you've applied your company rules uniformly.

You should proceed with caution, because some employers haven't fared well in similar situations.

In one recent BOLI case involving Wal-Mart, an employee who had suffered an on-the-job injury was later terminated for violating the employer's policy prohibiting offensive language in the workplace. However, the agency determined after a contested case hearing that the employer had not terminated other non-injured workers who violated the same policy.

The Commissioner found that the employer's stated reason for the discharge was a pretext for discrimination and that the employer discharged the employee because of his workers' compensation claim.

In another BOLI case decided in 1999, a restaurant terminated a dishwasher/prep cook after he cut his thumb while cleaning a knife, because he violated the employer's safety policy requiring employees to wear protective cutting gloves.

However, it was determined in that case that this employee was the only kitchen employee discharged for violating the policy. Several other workers violated the policy, but none of them filed workers' compensation claims, and they received only verbal reminders and, in one case, a written warning. Because the employer did not terminate these other employees who violated the policy, the Commissioner found that the termination of the injured worker was discriminatory.

Injured Worker Retaliation Questions

Who is protected from retaliation?

Both job applicants and current employees are protected against retaliation for "invoking the protection" of the workers' compensation system.

What qualifies as "invoking the protections" of the workers' compensation system?

ORS 659A.040 applies when the employee "has applied for benefits or invoked or utilized the procedures" of the workers' compensation system. The term "invoked" is interpreted broadly, so it would be unlawful to discriminate against an applicant or employee for any of the following reasons:

- An employee simply informs the employer of an on-the-job injury;
- An employee talks about filing a workers' compensation claim;
- An employee requests a workers' compensation 801 claim form;
- An employee discusses a workers' compensation claim filed with a former employer;
- The employer learns of the applicant's or employee's prior workers' compensation claim;
- An employee actually files a claim (or completes an 801 or 827 form);
- The employer is informed by a co-worker of the employee's on-the-job injury;
- An employee supports or participates in another worker's claim.

I have a pregnant employee, and I am afraid she might fall and hurt herself on the job. To avoid that liability, can I change her job duties or terminate her if I believe she is unsafe and likely to suffer an on-the-job injury?

No. It would be improper under ORS 659A.040 to treat your employee differently in terms or conditions of employment or to terminate her simply because of your suspicion that she might suffer an on-the-job injury. Also, pregnancy is a protected class under the "gender" category of the Oregon and federal civil rights laws, and it would be illegal to make employment decisions based on your employee's pregnancy, if she is physically able to perform the job.

On the other hand, you can discipline or terminate an employee who is violating your safety rules, as long as you apply such rules in a non-discriminatory fashion. Also, you may require your employee to undergo a medical evaluation when you have a job-related

reason consistent with business necessity. If a physician indicates that the employee is a danger to herself or others in the workplace, you are not obligated to keep the employee on the job. But remember that a pregnant employee may be entitled to protected time off under state or federal leave laws.

What unlawful employment practices are prohibited under these rules?

An injured worker cannot be discharged, or denied hiring, promotion or a raise, or given undesirable shifts or assignments, or disciplined for absences related to Injured Worker Leave. Essentially, the "terms and conditions" of the injured worker's employment cannot be altered based on the worker "invoking the protections" of the workers' compensation system. It is even illegal to aid, abet, or coerce someone to commit unlawful practices, or to even attempt to do so.

Reemployment (Light Duty) Questions

What are the requirements an injured worker seeking reemployment (i.e., light duty) must meet?

The injured worker must have a compensable (accepted) workers' compensation claim, must have light (modified) duty release, and must make a timely demand for return to work or demand must be made by the insurance company.

"Timely" demand, defined in OAR 839-006-0135(8)(d) and OAR 839-006-0136(5), is within 10 days of the insurance company's notice to the worker if the employee lives in Oregon, or 14 days if the employee lives outside of Oregon.

What are the obligations for the employer when an employee seeks reemployment?

If there is an available and suitable position, the employee must be offered the position. The employee is entitled to remain in the position as long as his restrictions continue to allow him to perform the duties of the position and the position is not eliminated for bona fide reasons.

What is a "suitable" position?

The position must meet the injured worker's medical restrictions, the worker must possess the necessary skills and abilities, and the injured worker must be qualified to perform the job.

What does "qualified" mean?

"Qualified" means that the injured worker meets the minimum standards, the injured worker has performed the job in a suitable manner, or the injured worker would be qualified for the position with the same training given to other newly placed workers.

If we offer a light duty job to an injured worker, do we have to pay the worker at the same salary he or she originally earned?

No. You are only obligated to pay the normal rate paid for the specific light duty job being performed. Note, however, that workers' compensation laws may provide for additional time loss payments. Thus, , some employers choose to pay the injured worker

at the prior wage rate, in order to avoid time loss payments and increased workers' compensation rates.

We have an employee who was injured on the job. After many months of treatment, she has been released for work. According to the workers' compensation treating physician, she has lifting restrictions that prevent her from returning to her original job, but she is able to perform light duty work. We have a job in a different department that is vacant and appears to be within her physical limitations. Our question is whether we're obligated to offer this job to her, because several qualified employees in the department are interested in the job opening.

Yes, an Oregon civil rights statute, ORS 659A.046, requires you to offer the available, suitable job to this injured worker. That law applies to you if you have six or more employees, and it says that a worker with a compensable injury (an accepted workers' compensation claim) must be offered an available, suitable job if such a job comes open anytime within three years of her injury.

This injured worker reemployment law requires you to offer the available, suitable job to the employee before considering others for the position. There's an exception in this law if you have a valid collective bargaining agreement that gives other employees greater seniority rights to the open position.

Note that this law doesn't require you to retrain the injured worker in a brand new occupation. Nor does it require you to create a new light duty job or modify the injured worker's original job. You're only required to offer light duty work if there's an existing and suitable vacancy. Still, many employers choose to create light duty work to get the employee back in the workplace and reduce workers' compensation costs.

You are required to look at all vacant jobs — even those in different departments — to see if they are suitable for the injured worker.

Once you offer an available, suitable job, an injured worker who refuses the work will lose her reinstatement rights.

What if there are no suitable positions available?

There are several options if no suitable position is available. There is no obligation for the employer to create a position that satisfies the injured worker's medical restrictions. However, the employer may choose to create a position, particularly if requested to do so by the insurance company. But once created, there is no obligation for the employer to continue the created position and the position may be discontinued at any time. However, a modified version of the worker's former position is not considered a created position. See OAR 839-006-0135(6)(a).

My employee Jane had an on-the-job injury and has now been released for "light duty," but the doctor's restriction limits her to lifting no more than ten pounds. Jane's normal job involves regular lifting of 30 pounds, and I have no other vacant jobs she can perform with her current restrictions. Am I obligated to create a new light duty job for her?

No. ORS 659A.046 does not require you to create a new light duty position or to modify the original job to meet Jane's medical restrictions. Your obligation is only to determine whether you have a regularly existing vacant job which Jane can perform, i.e. a job for which Jane already has the requisite training and skills and which meets her doctor's restrictions. Since you indicate you have no such job, there is no obligation at this time to reemploy Jane. However, Jane's reemployment rights last for up to three years from the date of her injury, so you are obligated to offer her any suitable job vacancy that arises during that time.

Some employers choose to work with the employee and treating physician to structure a special new light duty job. Creating such a job for the injured worker can cut off workers' compensation time loss payments and reduce your insurance rates, but you are not obligated to do this under ORS 659A.046.

Reinstatement Questions

We reemployed an injured worker in a light duty position. However, she has now received a full-duty release from her doctor. Does ORS 659A.043 now require us to reinstate her to the original job?

If the full release and the demand for reinstatement occur within three years of the original injury, you are still obligated to return the worker to the original job, even if that job is currently being performed by someone else.

Employee Demand: Once the injured worker is released to full duty, when is he or she required to make a demand for reinstatement?

The worker must make a "timely demand" for reinstatement, which is defined as no later than 10 calendar days (if the employee lives in Oregon) or 14 calendar days (if the employee lives outside of Oregon) from the date the worker is notified by certified mail by the insurer or self-insured employer that the worker's attending physician has released the worker for employment. Demand may be made by the injured worker, the injured worker's attorney, or the workers' compensation insurance carrier. Extenuating circumstances may, in very rare instances, extend the requirement for timely demand.

Exact Same Position: When an injured worker makes the demand for reinstatement, must he be put back in the exact same position, or the employer change his work location or shift?

The worker is entitled to be reinstated to the exact same position held at the time of injury, as long as you have 21 or more employees at the time of injury or at the time of demand for reinstatement. This means that if the original job still exists, the employee is entitled to the same shift, same location, same duties, same job title, same salary, and same benefits – even if it means bumping a replacement employee.

What if the injured worker's job at injury no longer exists?

If the original position no longer exists, the employer must offer the employee any suitable, vacant job. If there is no suitable, vacant job, the injured worker must be offered a vacant, suitable position when one becomes available within three years from the date

of injury. There is no obligation for the employer to create a position. If the employer chooses to create such a position, it may be discontinued at any time.

What does "suitable" mean?

A suitable position is one that is substantially similar to the former position in compensation, duties, skills, location, duration (full or part-time, temporary or permanent) and shift.

Note: "Compensation" means the same that you would pay others of the same education, skill and seniority to do that job. "Location" means in Oregon and within a reasonable commuting distance, unless the former job site is no longer in operation, the nature of the employer's business routinely involves the transfer of employees, or the employer and employee mutually agree on a job outside of Oregon.

Medical Verification: Can an employer require medical evidence of the employee's ability to return to the former position?

Yes. Although the attending physician's approval is prima facie evidence, the employer may require, within a reasonable period of time and at the employer's expense, a "fitness for duty" certificate as further evidence of the worker's ability to perform the job. The employer may also directly consult the worker's physician.

DISABILITY LAWS

The ADA and Oregon Disability Laws: An Overview

Federal and state laws protect people with disabilities against discrimination in terms, conditions or privileges of employment. Also, both the federal and state statutes require employers to make reasonable accommodations for applicants or employees who have disabilities.

The ADA

The Law:	The Federal Americans With Disabilities Act of 1990, ADA Amendments Act of 2008
Where to Find It:	42 USC §12101 et seq.
Employers Covered:	Employers of 15 or more employees

The Oregon Disability Law

The Law:	Civil Rights of Persons with Disabilities
Where to Find It:	ORS 659A.103 to 659A.145 (statutes pertaining to discrimination against disabled persons in employment, last amended 2010)
Employers Covered:	Employers of 6 or more employees

What is a “disability” under the Federal and State laws?

Under both the ADAAA and state law, a “person with a disability” is an individual who has a physical or mental impairment that substantially affects one or more major life activities. But the definition of disability under both laws is more expansive:

The three-part definition of disability includes:

A physical or mental impairment that substantially affects a major life activity;	• The individual has a physical or mental impairment that substantially limits one or more major life activities of the individual. • Mitigating measures are not considered when evaluating whether an individual is "substantially affected" in a major life activity, except ordinary glasses or contact lenses
A record of a disability; or	• Employers are prohibited from discriminating against a job applicant or employee based on past medical conditions or workers' compensation claims. • The disability laws bar employers from asking medical questions in a job interview or on a job application.

Perceived disability	• Applicants or employees "regarded as having a disability" are also protected. • Employers should not make assumptions about an employee's possible medical condition. • Employers who substitute their judgment for that of the employee's physician risk a discrimination suit based on "perceived disability." • An individual is not perceived as disabled if the individual has an impairment that is minor and that has an actual or expected duration of six months or less.

What are “major life activities”?

As noted above, to be disabled, an individual must be substantially affected in one or more “major life activities.” Major life activities include, but are not limited to, self-care, walking, talking, breathing, hearing, seeing, performing manual tasks, learning, sleeping, working in general, considering the individual’s experience and education (as opposed to performing a particular job), and ability to acquire, rent or maintain property. Major life activities also include “major bodily functions,” that is, the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological systems, brain, respiratory system, circulatory system, endocrine system and reproductive functions.

They are activities that the average person in the general population can perform with little or no difficulty. For EXAMPLE, most people can walk three blocks with little difficulty. An inability to do so **could** be considered a disability. In contrast, the average person cannot walk ten miles without growing fatigued. The inability to perform this activity **would not** constitute a disability.

January 2002, the U.S. Supreme Court ruled in Williams v. Toyota Motor Corp. that the proper test for whether a worker is disabled involves whether the worker’s impairment affects tasks “that are of central importance to most people’s daily lives,” such as bathing or brushing one’s teeth. Williams’ carpal tunnel syndrome prevented her from performing a specific job duty, but the Court concluded that this didn’t amount to a protected disability, as she was still able to perform regular activities of daily life.

When working is the major life activity in which the person is substantially limited, the person must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes when compared to the ability of the average person of comparable skill, experience, education or other job-related requirements needed to perform these same jobs.

What conditions are excluded from protection under disability laws?

“Disability” does not include: transvestitism, pedophilia, exhibitionism, voyeurism, or other sexual behavioral disorders, compulsive gambling, kleptomania, pyromania, current use of illegal drugs or psychoactive substance abuse. Under federal (but not state) law, transsexualism is also excluded.

Homosexuality and bisexuality are not considered disabilities under state and federal law and are therefore not covered.

What does "substantially limits" mean?

In order to be substantially limited under the disability laws, a person must be unable to perform a major life activity that the average person in the general population can perform, or the impairment must significantly restrict how the person can perform a particular major life activity as compared to how the average person in the general population can perform the same major life activity.

Factors to be considered in determining whether a person with an impairment is substantially limited in a major life activity include:

- The nature and severity of the impairment;
- The length of time the impairment persists or is expected to persist; and
- The permanent or expected long-term effect resulting from the impairment.

Essentially, this means that determinations regarding whether someone is "substantially limited" in a major life activity must be made on a case-by-case basis.

What are "mitigating measures"?

Mitigating measures are things that cannot be used in making the determination about whether an impairment substantially limits a major life activity of an individual. Such things include medication; medical supplies, equipment or appliances; low vision devices or other devices that magnify, enhance, or otherwise augment a visual image; prosthetics; hearing aids; oxygen therapy equipment or supplies; assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.

What does "regarded as having a disability" mean?

An applicant or employee who is "regarded as having a disability" must show that the employer perceived the individual as having a mental or physical impairment, whether or not the impairment is perceived to limit a major life activity. An individual is regarded as having a disability if the individual has been subjected to an illegal employment practice because of an actual or perceived disability. Such an employee is not entitled to reasonable accommodation.

QUESTION: "DISABILITY" DEFINITIONS

STATE, FEDERAL LAWS PROTECT HIV-POSITIVE EMPLOYEE FROM DISCRIMINATION

Q: We're concerned about an employee who handles food in our restaurant and has a contagious disease. To be specific, this employee has confided in some co-workers that he is HIV-positive. Are we within our rights as an employer to reassign or terminate him?

A: Not unless you have medical evidence that the individual poses a "direct threat" in the workplace, and that's unlikely in your case. A reassignment or termination of this employee could constitute illegal discrimination under Oregon and federal disability laws.

The U.S. Supreme Court decided in 1998 in *Bragdon v. Abbott* that even asymptomatic HIV infection is a protected disability under the Americans with Disabilities Act.

Disability is defined as an impairment that substantially limits an individual in one or more major life activities, and HIV infection substantially limits an individual in reproduction, which the Court determined to be a major life activity.

When an employee discloses that he has a disability that may impact the workplace, you're entitled to inquire about any accommodations the individual may require. You're also entitled to require a medical evaluation, if you have a job-related reason consistent with business necessity, and if you pay the cost of the exam.

It's debatable here whether you have such a business necessity, and you should be very cautious about relying on secondhand information or rumors about an employee's medical condition. Under Oregon and federal law, even an employee who doesn't have a disability may sue because of discrimination based on "perceived disability."

Still, if you're proceeding based on reliable information about your employee's condition, you do have the right to make some medical inquiries when you have reason to think there's a workplace risk. Say, for EXAMPLE, the employee is a prep cook who uses sharp blades to chop vegetables, and there's a likelihood of cuts or bleeding.

The disability laws permit you to exclude an employee from the workplace when you can show the individual poses a "direct threat" to himself or others. But it's highly unlikely you can demonstrate that level of imminent risk simply because an individual has the HIV virus.

Keep in mind that HIV is transmitted through unprotected sex, sharing of contaminated needles, childbirth or breastfeeding by an infected mother, or receiving a contaminated blood product. The kind of exchange of bodily fluids required for HIV transmission is highly improbable in a restaurant setting. And at least one court has ruled that even a person with AIDS is entitled to continue working as a food handler because there is no evidence that HIV is spread through casual contact or exposure to food and water.

Bottom line? Your HIV-positive employee is entitled to continue working as long as he can fulfill the essential functions of his job.

QUESTION: COMPULSIVE GAMBLING IS NOT CONSIDERED A DISABILITY

Q: I have a small business with just seven employees, and one of them has a gambling addiction that has been affecting his attendance and his work. He's a valuable employee, so I'm planning to allow him some time off to seek treatment, but I don't know if I have other legal obligations here. Is a gambling addiction considered a disability?

A: No. Since you have six or more employees, your company is covered by the Oregon law requiring reasonable accommodation for employees with disabilities. However, compulsive gambling is specifically excluded from the law's definition of "disability," along with sexual behavior disorders, kleptomania and pyromania.

You're not legally obligated to make reasonable accommodations for an employee with one of these conditions. So, as you would expect, you can legally discipline an employee who gambles at work, plants video cameras in your locker room, removes company equipment, or sets the occasional office fire.

The same holds true under the federal Americans with Disabilities Act, but that law doesn't apply to your company because you have fewer than 15 employees.

QUESTION: ADA PROTECTS ALCOHOLICS, BUT EMPLOYER CAN STILL ENFORCE WORK RULES

Q: Is an alcoholic employee legally protected as having a disability?

Yes. Alcoholism is a disability under the federal Americans with Disabilities Act (ADA) and the Oregon disability laws, so a job applicant or employee who is alcoholic is protected under these laws. That means you can't discriminate based on the individual's disability status. It doesn't mean, however, that you have to put up with someone who comes to work drunk, late, or not at all, or someone who fails to meet work expectations. You can hold individuals with disabilities to the same standards as any other employee. You are, however, required to reasonably accommodate an employee with a disability. For EXAMPLE, if it were not an undue hardship on your company, you'd be obligated to provide a few weeks of leave without pay to an employee who requests time off to enter an alcohol treatment program.

What Individuals Are Protected By the Disability Laws?

To be protected under federal or state law, an individual with a disability must be qualified to perform the essential functions of the job, with or without reasonable accommodation. Recall also that someone "perceived as disabled" will receive protections from the disability laws as well. Additionally, someone with a record of a disability (*i.e.*, someone who used to be disabled in the past) is also protected from the disability laws.

What does qualified mean?

A qualified person with a disability is a person with a disability who satisfied the requisite skills, experience, education, and other job-related requirements of a person that

the person holds or desires, and who can, with or without reasonable accommodation, perform the essential functions of the position.

QUESTION: ARE PERSONS WITH DISABILITIES ALWAS PROTECTED?

Q: "I have six job applicants for a current vacancy, and one of them has indicated that he has a disability. Do I have to give the disabled job applicant special consideration?" No. These laws are not intended as a "free ride" for persons with disabilities, nor is an employer required to hire a disabled person who is not qualified (i.e. does not have the necessary licenses, training or experience necessary to perform the work).

A: The disability laws are only intended to "level the playing field" by eliminating barriers that have traditionally limited employment opportunities for disabled people.

You can offer the job to the applicant you determine to have the best skills and experience, regardless of the protected class status of job applicants — but you must consider whether the disabled applicant, either with or without reasonable accommodation, is the best qualified.

A Job Description Can Help Provide a Defense under the Disability Laws

- Tip: Develop a detailed job description prior to the recruiting and hiring process.

How? – Define the "Essential Functions"

Job descriptions should include minimum skills and qualifications, essential and non-essential functions, and details pertaining to work environment.

- Essential functions include tasks that are integral to job performance and fundamental to accomplishing the job.
    - Considerations in determining essential functions include:
        - The time it takes to perform the function;
        - The consequences of not performing the function;
        - Whether the position exists to perform that function;
        - Whether there are a limited number of employees qualified to perform the function.
    - Evidence that a function is "essential" includes but is not limited to:
        - The employer's determination that the function is essential.
        - Written job descriptions.
        - Time spent on the job performing the function.
        - Consequences to the employer of not having the function performed.
        - Terms of a collective bargaining agreement.

- Work experience of past incumbents.
- Current work experience of incumbents in similar jobs.

The Interactive Process

The interactive process is a mandatory step an employer must make whenever an employee (or applicant) with a disability says he or she cannot do certain tasks, or discloses to the employer that he or she has a disability.

Once notified of the employee's disability and need for accommodation, the employer has an obligation to enter into an "interactive process" with the employee to explore accommodation options. An employer need not necessarily offer the specific accommodation requested or preferred by the employee. Any reasonable accommodation the employer chooses to offer will satisfy the employer's obligation. An employer may opt to reach an agreement on a reasonable accommodation through a course of negotiation with the employee.

The interactive process must be meaningful – it is meant to be an information process between the employer and the applicant/employee in an effort to identify potential reasonable accommodations. This is particularly useful when a reasonable accommodation (see next section) is not readily identifiable. A meaningful interactive process will identify the nature of the limitations resulting from the disability and seek to address them in a way that will allow the applicant/employee to perform the essential functions of the job at issue.

If a qualified individual with a disability can perform the essential functions of a job with reasonable accommodation, that person cannot be discriminated against because of the need for this accommodation.

What Is The Requirement To Make "Reasonable Accommodation"?

An employer must make reasonable accommodations for a qualified person with a disability, if that would allow the individual to perform the essential functions of the job.

Reasonable accommodations may include:

- Physical alterations to the workplace;
- Providing special equipment;
- A modified or flexible work schedule;
- Assistance with certain tasks;
- Re-assigning non-essential job functions to another employee;
- Permitting leave without pay; or
- Reassignment to a different vacant position, if the employer and employee voluntarily agree.
- Making existing facilities readily accessible to disabled persons, such as building a ramp, acquiring hearing amplifiers or visual aids.
- Providing qualified readers or interpreters.

Note: A person is not necessarily entitled to a preferred accommodation, but rather is entitled to an accommodation that allows the individual to perform the essential functions of the job.

For additional information on reasonable accommodations related to specific disabilities, contact the ADA Job Accommodations Network (JAN) at 1-800-526-7234.

When is a "reasonable accommodation" not required?

There are two situations in which an employer is not required to make a reasonable accommodation: (1) when the accommodation would create an **undue hardship**; or (2) when placing the applicant/employee in the job at issue creates a **direct threat** to the applicant/employee or others.

When would an accommodation qualify as an "undue hardship"?

Accommodation is not required where the employer can show it would create an "**undue hardship**." Any accommodation that would be unduly costly, extensive, substantial, or disruptive, in relation to the size of the employer and the resources available, and any accommodation that would fundamentally alter the nature or operation of the business is an undue hardship. Generally, if the accommodation would run counter to the employer's seniority system (particularly one governed by a collective bargaining agreement), it will be considered to have created an undue hardship.

When can a "direct threat" arise?

Even if an accommodation would enable the employee to perform the job, the employer need not accommodate if placing the individual in the job would result in a "**direct threat**." A direct threat is a significant risk of substantial harm to the health or safety of the individual or third parties that cannot be eliminated or reduced by reasonable accommodation. The existence of direct threat should be determined by the treating physician — not the employer.

QUESTION: REASONBLE VS. UNREASONABLE ACCOMMODATIONS

Q: I'm a small employer, and one of my employees has brought me a doctor's note that says she needs to use an ergonomic keyboard and mouse pad. I've priced these at around $150 and want to know if I'm required to provide this equipment or if I can tell the employee she has to provide it.

A: The Oregon laws apply to your company if you have six or more employees, and the ADA also applies if you have 15 or more employees. Providing this type of equipment for your employee may be a "reasonable accommodation" that you're required to make, if the employee has a qualifying disability and if paying for the equipment wouldn't pose an undue hardship for your business.

You do have the right to obtain medical certification to determine whether the employee's condition is covered under the Oregon disability statutes and the federal Americans with Disabilities Act.

QUESTION: SHIFT CHANGE NOT NECESSARILY REQUIRED AS A DISABILITY ACCOMMODATION

Q: An employee at our mill notified us she has Raynaud's phenomenon, a condition that affects the blood flow to the extremities. Like many of our employees, she normally rotates between our three shifts, but she has now requested that we allow her to work straight swing shift because it's the warmest of the three shifts. The problem is that she's a relatively new employee, and our union contract gives those with greater seniority first rights to vacancies on the swing shift. Are we obligated to grant her request?

A: Probably not. The U.S. Supreme Court addressed this issue in 2002 in *US Airways, Inc. v. Barnett*. The Court determined that under the federal Americans with Disabilities Act, which applies to employers of 15 or more employees, employers are not ordinarily required to make an accommodation that conflicts with an established seniority system.

The ADA requires employers to make a "reasonable accommodation" for a disabled employee to enable the employee to perform his or her job. But in the *Barnett* case, the Court held that employers are entitled to a rebuttable presumption that an accommodation is unreasonable when it violates a bona fide seniority system for job assignments.

The Supreme Court also indicated that in "special circumstances," it may be reasonable for an employer to grant an accommodation despite seniority rules — for EXAMPLE, in cases where the employer has unilaterally changed its seniority rules before, or where the seniority system already has many built-in exceptions so that one more exception wouldn't impact the system.

Raynaud's phenomenon can certainly be an ADA-qualifying disability, depending on the frequency and severity of symptoms and whether the condition substantially affects your employee in one or more major life activities. It would be wise for you to enter into the interactive process with your employee to explore the different options for accommodation. Because you have a job-related reason here, both Oregon and federal disability laws give you the right to require an evaluation and medical certification from your employee's doctor.

There may be accommodations other than the one your employee has requested that will still allow her to perform her essential job functions. For EXAMPLE, after reviewing the employee's job description, the doctor may tell you that the employee is able to work the graveyard shift provided she wear protective gloves and socks and layers of clothing to trap body heat.

QUESTION: SUPREME COURT DECIDES EMPLOYEE'S "THREAT TO SELF" RELEVANT UNDER ADA

Q: Under the ADA, could we exclude from employment someone whose disability would put them at risk of getting hurt on the job?

A: In some cases, yes. Both the federal and Oregon disability laws prohibit employers from discriminating against job applicants and employees with disabilities. These laws also require employers to make reasonable accommodations for employees with disabilities who are qualified to perform the essential functions of the job. However, an

employer isn't required to make an accommodation if it would be an "undue hardship." And the employer isn't required to retain a disabled employee who poses a "direct threat" in the workplace.

A key ADA decision from the U.S. Supreme Court, *Chevron USA, Inc. v. Echazabal* (536 US. 73., 2002), has to do with the application of the "direct threat" defense. In this unanimous decision issued on June 10, 2002, the Court held that an employer may consider whether a worker's disability poses a direct threat to the worker's own health.

The employee in this case, Echazabal, was working for an independent contractor at a Chevron oil refinery. He applied to work directly for Chevron and was offered a position, conditioned on his passing a physical exam. When the doctors reported to Chevron that working in the refinery would aggravate the employee's liver disease, Chevron withdrew its job offer, and the employee sued under the ADA. Chevron raised the defense, allowed under an EEOC regulation, that Echazabal's disability would pose a direct threat to his health.

The Ninth Circuit Court of Appeals (which covers Oregon and other western states) rejected that defense in 2000, deciding that under the ADA an employer may only consider whether an employee poses a threat to others in the workplace. The Ninth Circuit concluded that the EEOC exceeded its authority in issuing its rule and that employers could not deny employment based on "paternalistic concerns" about an employee's health. The U.S. Supreme Court overturned the Ninth Circuit decision, supporting the EEOC regulation and allowing the "threat-to-self" defense.

Employers should note that this defense only applies when an employee's disability creates an imminent risk of **serious** harm in the workplace and not simply when there is a possible risk. Employers should rely on medical professionals for this determination rather than making assumptions about an employee's disability.

The Supreme Court's decision suggests that it is critical for employers to maintain detailed position descriptions for each job category so that a doctor evaluating an employee or potential employee can provide an "individualized assessment" of the individual's ability to perform the essential job functions.

Also, an employer may be required to make a reasonable accommodation such as reassigning a non-essential job function if doing so would ameliorate the risk posed by the employee's disability.

MEDICAL EXAMINATIONS AND INQUIRIES

When Do the Disability Laws Permit Medical Inquiries?

The rules for conducting medical exams differ depending on the stage of the employment process involved: (1) Pre-offer testing of job applicants; (2) Post-offer testing; or (3) Testing of current employees.

Note that all applicants and employees of covered employers are protected by these requirements — not only those considered disabled under the law.

Pre-Offer, Pre-Employment Stage	An employer may not: • Ask if a job applicant is disabled or inquire about the nature or severity of a disability. • Require medical examinations or make medical inquiries. An employer may: • Ask an applicant about his/her ability to perform job-related functions. *Note: Tests for illegal drugs are not considered "medical exams" under the ADA and may be administered to job applicants prior to an offer of employment.*
Post-Offer, Pre-Employment Stage	An employer may: • Require a medical exam, as long as all entering employees in that same job category are subject to such an exam. • Make medical inquiries. *Note: The job offer may be conditioned on the results of the post-offer medical exam if all entering employees in the same job category are required to take the exam.*
Current Employees	An employer may: • Require medical exams of employees or ask about disabilities **if** such exams or questions are **job-related <u>and</u> consistent with business necessity**. • Conduct voluntary medical examinations that are part of an employee health program. *Note: ORS 659.330 requires an employer to pay the out-of-pocket cost of any medical exam required as a condition of continuing employment. For purposes of this statute, drug tests are considered medical exams.*

QUESTION: INQUIRING ABOUT HEALTH

MEDICAL INQUIRIES PROHIBITED DURING JOB INTERVIEWS

Q: I'm a manager at an office supply store, and my employees have to load and unload heavy boxes. I do our hiring, and I don't want to put someone to work if they can't handle the lifting. So I always ask applicants if they've ever had back injuries or if they have any health problems that would prevent them from doing the job. Other managers are telling me that those questions are illegal and can get us into trouble. If that's true,

then how am I supposed to find out if people I hire can do the job? We're concerned about liability for injuries if we hire someone who's not physically able to do the work.

A: Your fellow managers are correct. You shouldn't ask about a job applicant's medical condition or history of injuries – but there are many questions you can ask to determine whether an individual is qualified to work for you.

Oregon civil rights laws on disability and the federal Americans with Disabilities Act (ADA) prohibit inquiries as to whether a job applicant is disabled or inquiries as to the nature and severity of any medical conditions. So in a job interview, before you've extended an offer of employment, you may not ask about the applicant's back injuries, history of workers' compensation claims, physical limitations, or prescribed medications. And in this "pre-offer" stage, you should also stay away from questions that are likely to elicit medical information.

On the other hand, it's perfectly legal to ask about the applicant's ability to perform the job. You can explain, for instance, that the job involves moving 40-pound boxes 15 times per day. You can ask the applicant whether she is able to perform that duty, and you can ask her to describe how she has performed similar functions in prior jobs. You can also ask about any special training or qualifications the applicant has relating to the job duties.

During the interview, you're even permitted to have the applicant demonstrate how she would perform the work, as long as that is something you ask of all applicants. If the applicant can perform the required task but needs an accommodation, you're required to make reasonable accommodations.

Before you begin the interview process, it's invaluable to develop a detailed written job description that lists all of the essential functions of the job. This will assist you in formulating good, legal questions pertaining to specific job duties.

Since you're concerned about liability and worker safety, you may choose to require new employees to pass a "post-offer" physical exam. The disability laws allow you to require a medical exam after you've made an offer of employment and before the job duties have begun – as long as you require this of all entering employees in the same job category and store any medical records in a confidential medical file, separate from the employee's personnel file.

Once an employee has begun working, the law only permits you to make medical inquiries or require medical exams if they are "job-related and consistent with business necessity." Oregon law generally requires you to pay the cost of a medical exam, if you require it as a condition of continuing employment.

QUESTION: DISABILITY LAWS LIMIT SCOPE OF EMPLOYER MEDICAL INQUIRIES

Q: I recently went to work for a large Oregon-based corporation. Part of my new employee paperwork included completing a four-page medical and work history. There were many medical questions, such as during the last year have I had diarrhea, lip sores, wheezing, trouble sleeping, etc. Does my employer have a right to know all about my medical history?

A: No. In the job application process, before the employer has made you an offer of employment, the employer is prohibited from asking any medical questions. Oregon and federal disability laws say that after the employer makes you an offer of employment and before you begin work, the employer may require a medical examination — but only if it's required of all persons entering into your job category and if the records are kept in separate, confidential medical files.

Employers are prohibited from discriminating based on disability or past record of disability, so it's wisest for the employer to leave the medical questions to the doctor who conducts the post-offer medical exam.

The law says that once you've already begun working, the employer may make medical inquiries only when there's a job-related reason consistent with business necessity.

QUESTION: COLORBLINDNESS MAY DISQUALIFY CERTAIN EMPLOYEES

Q: We're trying to address performance issues with several employees who work in our lab, and we'd like to test three electrical technicians to see if they are colorblind. Would that be illegal discrimination?

A: Under Oregon and federal law, you're permitted to make medical inquiries or require medical exams of current employees as long as you have a job-related reason consistent with business necessity. If you're noticing what appear to be vision-related performance issues with certain lab employees, and if the ability to discern colors is an essential job function for those individuals, you can legally test them for colorblindness.

For instance, if your technicians must routinely distinguish among color-coded wires but often make mistakes in doing so, you'd certainly be justified in requiring a vision exam. An Oregon civil rights law, ORS 659A.306, requires you to pay the costs associated with any medical evaluation or certificate you decide to require.

If the employees in question are not colorblind but instead are simply making careless errors in their work, you can address that as a disciplinary issue. If it turns out that a particular employee is colorblind and unable to meet your job requirements, you could legally discharge that individual.

Depending on the type and severity of the condition, colorblindness may be a disability protected under the federal Americans with Disabilities Act and the Oregon laws relating to employees with disabilities. Still, an employer might legitimately refuse to hire colorblind individuals in professions where distinguishing colors is a critical function. Examples include pilots, jewelers, graphic designers, photographers, electricians, ship's captains, law enforcement officers or train engineers.

The U.S. Supreme Court recently determined that a physical limitation doesn't rise to the level of a protected disability when it only prevents an employee from performing a specific job function but doesn't substantially limit the individual in his or her regular daily activities. Of course, even in cases where colorblindness is not a disability, you

could choose to make accommodations for a colorblind employee to help him or her perform required job duties.

Also, you should understand that any employee could sue under disability laws if an employer makes decisions based on a "perceived disability." This means that you shouldn't make medical assumptions or regard your employees as visually disabled. Instead, rely on the doctor's determination as to their abilities and restrictions and proceed accordingly.

QUESTION: EMPLOYERS MAY REQUIRE DOCTOR VISITS BUT MUST PAY COSTS

Q: We want to implement a policy at our company requiring employees to bring in a doctor's note if they miss more than three days of work for medical reasons. Is there any problem with requiring this type of "fitness for duty" certificate or doctor's release before we put the employee back to work?

Also, one of my employees is insisting that we don't have the right to send him out for a medical evaluation — even though we're noticing he is having physical difficulties performing his regular job duties. What does the law say about requiring an employee to see a doctor?

A: As an employer, you can require an employee to see a doctor if you have a job-related reason consistent with business necessity. But the Americans with Disabilities Act (ADA) and Oregon disability laws prohibit employers from making medical inquiries when an employee's medical condition or disability is unrelated to job performance.

In both of the examples you have given — where an employee misses several days of work, or where an employee is clearly having physical difficulty performing his work — you do have a job-related to reason to obtain medical information. Therefore, it's perfectly legal to require a doctor's release when an employee returns from a medical absence. And you can also require that your employee see a doctor to help you determine whether he can safely perform the essential functions of his job, whether he is restricted from certain duties, or whether he might need some accommodation due to a disability.

You should note, however, that in many situations you don't have a job-related reason to make medical inquiries. Say, for example, that your employee John has 12 different disabilities. If John comes to work on time and is able to perform all of his job functions satisfactorily, you don't have the right to require information about his medical condition, symptoms or treatments.

It's also important for you to be familiar with ORS 659A.306, another law in the Oregon civil rights statutes pertaining to employee medical exams. This statute prohibits an employer from requiring an employee to pay the cost of a medical examination or the cost of furnishing a health certificate, if the employer has required the doctor visit as a condition of continuing employment.

So even though you can require an employee to see the doctor in proper situations, you have to pay any out-of-pocket cost to the employee. If the doctor visit is already covered under your insurance plan, you're not obligated to pay. But if, for instance, an employee is charged a $10 co-pay or deductible for the doctor visit required under your policy, you

must pay that amount. And if the employee has no medical insurance, you will be responsible for the full cost of the doctor visit.

If the medical exam or health certificate is required pursuant to a collective bargaining agreement, state of federal statute, or city or county ordinance, the law doesn't require you to pay the cost.

And if an employee decides on his or her own to see a doctor, you're not obligated to pay the medical cost, since you didn't require the visit as a condition of employment.

QUESTION: CIVIL RIGHTS LAW SETS LIMITS ON EMPLOYEE ALCOHOL TESTING

Q: I work as a supervisor for a large national company, and one of my employees accused another of being drunk on the job. As an employer, do we have the right to ask that employee to submit to a breathalyzer? If so, can the employee be fired for saying no?

In some circumstances, testing an employee for alcohol use can be legal, and an employee's refusal to submit to a test could be grounds for discipline or discharge. But tread very carefully here, because alcohol testing raises privacy concerns and also has civil rights implications.

You should first look to your company policies. Does your personnel manual or employee handbook clearly prohibit the use of alcohol in the workplace or prohibit employees from being under the influence of alcohol in the workplace?

Does your policy define acceptable limits for blood alcohol content? Have you provided notice to employees as to how and when they may be subject to drug or alcohol testing? Have you advised employees that refusing to submit to such tests may result in termination?

Without such policies in place, you risk a lawsuit for invasion of privacy when you spring a drug or alcohol test on an employee. When employers conduct workplaces searches, monitor employee phone calls, videotape work areas, or conduct drug or alcohol tests, courts examine whether the employee had a reasonable expectation of privacy.

With regard to drug or alcohol testing, your employee may assert that he had a reasonable expectation of privacy as to his breath, blood or urine and that you violated that expectation.

That's why many employment attorneys recommend you give at least 30 days' advance notice to employees before implementing a new drug or alcohol testing policy.

Even if you do have an alcohol testing policy in place, keep in mind that the law sets a higher bar (no pun intended) for alcohol testing than for drug testing. An Oregon civil rights statute, ORS 659A.300, prohibits employers from subjecting an employee to a breathalyzer test unless the individual consents to the test, or unless the employer has "reasonable grounds" to believe the individual is under the influence.

In your case, it's questionable whether one employee's accusation against another, by itself, constitutes "reasonable grounds" to believe the employee is drunk at work. As a supervisor, you'd be in a better position to require a breathalyzer test if you personally

documented that the employee was slurring his speech, smelled of alcohol or showed other signs of intoxication.

QUESTION: OREGON LAWS DO NOT OFFER PROTECTION TO EMPLOYEE USING MEDICAL MARIJUANA

Q: One of our employees tested positive for marijuana on a random drug screen we conducted last week, and our company policy is to terminate employees for using illegal drugs. However, when presented with the test results, the employee showed us a medical marijuana card and told us his use of the drug has been legally authorized because he's undergoing chemotherapy. Are we required to ignore our drug-free workplace policy?

A: In general, you're free to enforce a drug-free workplace policy, because an employee's current use of illegal drugs is not protected under Oregon or federal disability laws. Similarly, as is the case with use of other prescription or illegal drugs, you don't have to keep your employee on the job if he can't perform the essential job functions, if his presence poses a direct threat to himself or others in the workplace, if his behavior is disruptive, or if he is observably "under the influence" at work.

Oregon's medical marijuana law (ORS 475.300 to 475.346) provides that a person who possesses a properly issued registry identification card may engage in the medical use of marijuana as justified to treat symptoms of a debilitating medical condition.

In April 2010, the Oregon Supreme Court held that the federal Controlled Substances Act trumps the voter-enacted Oregon Medical Marijuana Act, which allows medical marijuana users a defense against state criminal charges. *See* Emerald Steel Fabricators, Inc., v. BOLI, 230 P.3d 518, 348 Or. 159 (2010). The Supremacy Clause of the US Constitution allows federal laws enacted by Congress to supersede a state law when the state and federal statutes conflict. Thus, Oregon employers have no obligation to accommodate an employee's disability through the use of medical marijuana

Similarly, the federal Americans with Disabilities Act does not offer protection to employees using medical marijuana. That's because the ADA defines "illegal use of drugs" based on whether substances are unlawful under the federal Controlled Substances Act, and marijuana is one such substance. Therefore, the position of the federal Equal Employment Opportunity Commission is that use of marijuana disqualifies an individual from protection under the ADA.

However, it is important to keep in mind that, although an employer need not accommodate and employee's use of medical marijuana, the employer may need to accommodate the employee's underlying debilitating medical condition.

QUESTION: EMPLOYER WORRIES ABOUT COMMUNICABLE DISEASES

Q: One of our production workers is taking a two-week vacation that begins next week. We didn't know her destination, but other employees tell us she's traveling to China to visit relatives. We're concerned because we've had three of our staff hospitalized with pneumonia this year, and we don't want to risk exposing employees to the SARS virus.

Can we restrict this employee from the workplace for a period of time when she returns from vacation, at least until she's cleared by a doctor? Which laws apply, and what can we tell our employees?

A: There isn't a clear answer here, as the status of the Severe Acute Respiratory Syndrome (SARS) has changed over time. You should consider guidance offered by the Center for Disease Control (CDC), which issues updated fact sheets available at www.cdc.gov. You may wish to share this information with your employee and other staff and assure them you are staying informed and will take appropriate steps to safeguard the workplace.

If you confirm with your employee that she is in fact traveling to China, it would be wise to consult your employment attorney as to how best to proceed when she returns. You don't want to overreact to the news about SARS, but it's prudent to assess any risks.

Oregon and federal disability laws allow employers to require medical examinations and make medical inquiries that are "job-related and consistent with business necessity," but it's debatable whether an employee's travel to a SARS-affected area, by itself, meets this legal threshold.

At the height of the SARS outbreak, the CDC issued a travel advisory that recommends postponing nonessential travel to places including mainland China, Hong Kong, Taiwan and Singapore, and has issued lower-level "travel alerts" for other destinations, along with recommendations on precautions travelers should take to reduce the risk of SARS infection.

Since these warnings expired some time ago, it is unlikely that you have a business necessity for medical certification upon your employee's return from China.

CDC guidance suggests that the risk of SARS transmission in the workplace is low, since the virus "appears to spread primarily by close person-to-person contact, such as in situations in which persons have cared for, lived with, or had direct contact with respiratory secretions and/or body fluids of a person known to be a suspect SARS case." The CDC also says that use of surgical masks or gloves is not recommended in the general workplace, outside the health-care setting.

If your employee doesn't exhibit SARS-like symptoms (fever, cough or difficulty breathing) upon her return, her doctor probably won't advise she stay away from work. But if the medical advice were to exclude the employee from your workplace during a possible incubation period, perhaps you could allow her to "telecommute" until she is released to return to work. According to the CDC, the incubation period for SARS is typically two to seven days, but could be as long as 10 days.

The courts likely won't view SARS as a "disability" covered under the Americans with Disabilities Act, since it's a temporary condition. However, employers can be liable for discriminating based on "perceived disability" under both Oregon and federal laws, so it would be inadvisable to exclude your employee from the workplace based only on a theoretical risk.

Some employers made that mistake when HIV became a workplace issue and found themselves facing discrimination claims because they made medical assumptions and regarded certain workers as being disabled.

You may wish to do some workplace education on SARS, because an employer can be liable if co-workers stigmatize an employee either because she is Asian or because they perceive her as being disabled.

QUESTION: REQUIRING A FLU SHOT MAY BE HAZARDOUS TO THE EMPLOYER'S HEALTH

Q: I am a small employer, and when someone is out sick it really has an impact on our operations. Because the cold and flu season is upon us, I want everyone here at work to get a flu shot. A couple of the employees, Debbie and Lorena, have indicated to me that they will not get one. I feel they are blatantly working against my interests by unnecessarily risking long absences when they are stricken with the flu! Lorena did not get a shot last year and was out with the flu for over a week, but I guess she didn't learn her lesson. So, I am thinking of making it mandatory for all employees to have a flu shot, and those who refuse will be disciplined for insubordination.

When I mentioned this to Lorena she launched into a lengthy explanation about how her religion precludes her from getting vaccinations of any kind, but I cut her off, told her I don't want to hear any excuses, and reiterated that I just want her to get the shot.

I'm thinking that I will require employees to show me proof that they received a flu shot or they will not be allowed to use sick days to excuse absences. Another idea is to tell employees they have to get a shot or they will not receive a holiday bonus this year. What else can I do to force Debbie, Lorena and any other recalcitrant employees to get the flu vaccination?

A: None of the above! You may not require employees to get a flu shot; likewise you may not discipline employees who refuse to get a flu shot. Further, it would not be proper for you to manipulate accrued sick leave or bonus dollars based on an employee's refusal to obtain a flu shot, which is akin to retroactively changing employee benefits.

There are actions an employer may take in order to increase chances that employees will be vaccinated against the flu. EXAMPLEs include offering the flu shot at no cost, and/or making vaccinations available at the work site or other convenient location by scheduling a flu shot clinic.

There are many reasons - with which you may or may not agree - why an employee may genuinely not want to get a flu vaccination: religious convictions (consider Lorena's explanation), concerns about infection or adverse effects from the vaccine, commitment to naturopathic practices that discourage injection of chemical compounds, or simple fear of needles, just to name a few.

Thus an employer must limit its role in vaccinations to that of a facilitator, and avoid ultimatums and other efforts to force employees to be vaccinated.

The flu and the common cold do not generally qualify as a "serious health condition" under federal and state family leave laws (FMLA and OFLA). However, if an illness results in a period of incapacity for more than three consecutive calendar days, and also involves either two or more treatments or a single treatment followed by a regimen of continuing treatment by a

health care provider, it constitutes a serious health condition. In such cases, employers must allow employees leave (although the leave may be unpaid).

In situations when an employee's child has a cold, the flu, or other health condition that requires care but does not satisfy the definition of a serious health condition, OFLA provides for "sick child leave" which entitles the employee to take time off to care for the child.

Other Disability Issues

QUESTION: LAYOFF OF DISABLED EMPLOYEE PERMITTED IF NOT DISCRIMINATORY

Q: Our company is based outside of Oregon. For financial reasons, we've decided to close our local office and lay off our seven Oregon employees. One of those employees, however, has multiple sclerosis and was off on long term disability prior to our layoff announcement. She insists that her job is legally protected under the ADA and that we can't lay her off. Is this true?

A: No. If you're conducting a reduction in force that involves a layoff of all your Oregon employees, then you can proceed with that action, regardless of the age, race, sex, religion, or disability status of employees. The key is that you're not discriminating by singling out any individuals for layoff because of their protected class membership.

The federal Americans with Disabilities Act and the Oregon disability laws protect disabled employees from discrimination and require employers to make reasonable accommodations for qualified individuals. However, these laws don't give an employee greater rights to her job than she otherwise would have. You've articulated a legitimate, non-discriminatory reason for eliminating this employee's position that is unrelated to her disability.

QUESTION: EMPLOYMENT DECISION BASED ON CLIENT PREFERENCE CAN BE DISCRIMINATORY

Q: I run a staffing agency and have a worker who's male, 300 pounds and diabetic. My client has ordered me to limit this employee's job assignments at their worksite because he at times has an odor. On the other hand, they will allow me to place an employee without experience into a critical job posting because she is more pleasing to look at. Help!

A: You're right to be concerned. Making staffing decisions based on who's more pleasing to look at could leave you and your client facing claims of disability and sex discrimination. Morbid obesity and diabetes could both qualify as protected disabilities. An employer's first step in disability situations should be to enter into the interactive process with the employee to determine if there's a reasonable accommodation that would enable him to perform the essential job functions and meet the required standards. If the odor your client describes is a side effect of the employee's diabetes, perhaps the issue can be addressed with medication. If it's purely a matter of hygiene, it would be wise for you or your client to counsel the employee and provide him an opportunity to address the problem.

Common Questions Relating to Employment Rights of People With Disabilities:

Are temporary conditions considered disabilities?

No. Temporary impairments of short duration, such as colds, flu, sunburn, or even broken bones that heal normally, are excluded from the legal definition of "disability." (Note, however, that an employee with a temporary medical condition may have protections under workers' compensation laws and/or family leave laws.)

What kinds of conditions may qualify as disabilities?

Many kinds of physical and mental impairments can qualify as disabilities, but disability status must be determined on a case-by-case basis. For EXAMPLE, diabetes can certainly qualify as a disability, but the employer should not make an assumption that an employee with diabetes is automatically "disabled." In each case, the employer should have a physician determine if the employee's physical or mental condition substantially impacts one or more major life activities.

Are alcoholism or drug addiction considered disabilities?

Alcoholism is considered a disability under state and federal laws. Current use of illegal drugs is not considered a disability. Company policy may prohibit employees from consuming or having alcohol or illegal drugs on the premises, or from coming to work impaired by alcohol or illegal drugs. However, employees undergoing treatment for drug or alcohol addiction are protected under both state and federal laws.

How does an employer know if an employee needs reasonable accommodation?

Since an employer may not ask medically related questions of an applicant, the employer may not discuss reasonable accommodation unless the applicant initiates the discussion. Once a person is hired, if the need for accommodation is obvious (for EXAMPLE, the individual uses a wheelchair), the employer may ask what accommodations the person will need. After hire, if the disability is not obvious to the employer, the burden is on the employee to tell the employer about the disability and the need for accommodation. Once alerted of a disability, the employer should begin an interactive process with the employee to learn what accommodation, if any, the employee requires. With this information, the employer can decide if an how the accommodation can be provided.

Are there limitations on the questions an employer can ask an applicant?

Yes. An employer may not ask if an applicant is disabled or inquire about the nature or severity of a disability. Employers may be liable if they ask questions that would be likely to elicit information about a disability (i.e., "How many times have you been sick in the last year?") Employers should focus only on an applicant's ability to perform job-related functions (i.e., "This job requires you to type three hours per day. Are you able to do that?).

What if someone blurts out in a job interview that they have a disability? Have we somehow broken the law? Can we use that information?

It is not illegal merely to hear information about a job applicant's age, race, religion, disability or any other protected class when the applicant volunteers the information without prompting. But it would be illegal to use that information in making the hiring decision, and it would be dangerous to ask further questions that might elicit any information about an applicant's protected class status. The ADA regulations do permit you to make limited inquiries once a disability has been disclosed — but only related to possible accommodations.

If an employee asks for reasonable accommodation, may an employer require medical verification of the disability?

Yes. Upon receiving a request for reasonable accommodation, an employer may request additional information, including medical verification of the condition requiring accommodation.

When could disability leave be considered a reasonable accommodation?

If an employee needs leave to deal with a disability, the employer may have to provide the disabled employee time off without pay. The length of leave would be whatever was determined to be reasonable under the circumstances. If attendance is critical and an essentially function, or if the disabled employee's absences create an undue hardship, the employer may not have to provide the employee with unpaid leave.

Keep in mind, however, that when employees need time off because of a medical-or-disability-related issue, they may have rights under state disability laws, the ADA, the FMLA, the OFLA, and/or state workers' compensation laws, at the same time. For example, an on-the-job injury requiring hospitalization generally qualifies as a serious health condition under the FMLA. If the same injury caused a non-temporary mental or physical impairment that substantially limits a major life activity, the employee could be entitled to additional disability leave as a reasonable accommodation under the ADA and state disability laws.

Can medical information be kept in an employee's personnel file?

No. All medical information must be collected and maintained on separate forms and in separate files, and treated as confidential medical records.

Disability and Service Animals

QUESTION: ADA ALLOWS SERVICE ANIMALS ON BUSINESS PREMISES

Q: We have a customer who insists on bringing a poodle-type dog with her when she comes to our building. We do not allow pets in the building, but she claims this pet is a service dog. What rights do we have to ascertain this?

A: You have the right to ask whether the animal is a service animal required because of a disability, but you generally have to accept the customer's word and allow the animal on

the premises even if the customer isn't carrying formal documentation. The Civil Rights Division of the U.S. Department of Justice and the National Association of Attorneys General have issued the following Q & A information on service animals in places of business:

Further Questions and Answers on Service Animals

What are the laws that apply to my business?

Under the Americans with Disabilities Act (ADA), privately owned businesses that serve the public, such as restaurants, hotels, retail stores, taxicabs, theaters, concert halls, and sports facilities, are prohibited from discriminating against individuals with disabilities. The ADA requires these businesses to allow people with disabilities to bring their service animals onto business premises in whatever areas customers are generally allowed.

What is a service animal?

The ADA defines a service animal as any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. If they meet this definition, animals are considered service animals under the ADA regardless of whether they have been licensed or certified by a state or local government. Service animals perform some of the functions and tasks that the individual with a disability cannot perform for him or herself. "Seeing eye dogs" are one type of service animal, used by some individuals who are blind. This is the type of service animal with which most people are familiar. But there are service animals that assist persons with other kinds of disabilities in their day-to-day activities.

How can I tell if an animal is really a service animal and not just a pet?

Some, but not all, service animals wear special collars and harnesses. Some, but not all, are licensed or certified and have identification papers. If you are not certain that an animal is a service animal, you may ask the person who has the animal if it is a service animal required because of a disability. However, an individual who is going to a restaurant or theater is not likely to be carrying documentation of his or her medical condition or disability. Therefore, such documentation generally may not be required as a condition for providing service to an individual accompanied by a service animal. Although a number of states have programs to certify service animals, you may not insist on proof of state certification before permitting the service animal to accompany the person with a disability.

What must I do when an individual with a service animal comes to my business?

The service animal must be permitted to accompany the individual with a disability to all areas of the facility where customers are normally allowed to go. An individual with a service animal may not be segregated from other customers.

I have always had a clearly posted "no pets" policy at my establishment. Do I still have to allow service animals in?

Yes. A service animal is not a pet. The ADA requires you to modify your "no pets" policy to allow the use of a service animal by a person with a disability. This does not mean you

must abandon your “no pets” policy altogether but simply that you must make an exception to your general rule for service animals.

Am I responsible for the animal while the person with a disability is in my business?

No. The care or supervision of a service animal is solely the responsibility of his or her owner. You are not required to provide care or food or a special location for the animal.

What if a service animal barks or growls at other people, or otherwise acts out of control?

You may exclude any animal, including a service animal, from your facility when that animal’s behavior poses a direct threat to the health or safety of others. For example, any service animal that displays vicious behavior towards other guests or customers may be excluded. You may not make assumptions, however, about how a particular animal is likely to behave based on your past experience with other animals. Each situation must be considered individually.

Can I exclude an animal that doesn’t really seem dangerous but is disruptive to my business?

There may be a few circumstances when a public accommodation is not required to accommodate a service animal — that is, when doing so would result in a fundamental alteration to the nature of the business. For example, when a dog barks during a movie, the animal can be excluded.

If you have further questions about service animals or other requirements of the ADA, you may call the U.S. Department of Justice’s toll-free ADA Information Line at 800-514-0301.

CHAPTER 7

FAMILY LEAVE LAWS: OFLA & FMLA

State and Federal Family Leave Laws

The Oregon Family Leave Act (OFLA), enacted by the Oregon Legislature in 1995, and the federal Family and Medical Leave Act (FMLA), enacted by Congress in 1993, each require employers to provide eligible employees up to 12 weeks of protected leave during a leave year in certain qualifying situations.

These laws set guidelines for employers and workers in the granting and taking of leave. Both OFLA and FMLA define various types of qualified absences and provide safeguards for employees who utilize protected leave.

Employers may not treat OFLA or FMLA leaves as unexcused absences or disciplinary incidents under attendance policies, and employees have reinstatement rights when their protected leave ends.

OFLA is enforced by the Civil Rights Division of the Bureau of Labor and Industries (BOLI). FMLA is regulated by the U.S. Department of Labor, Wage and Hour Division. Each of these agencies has adopted regulations for compliance and enforcement purposes.

Following is a brief summary of the provisions of OFLA and FMLA. For further details about OFLA and FMLA, see the Bureau's *Family Leave Laws* handbook.

Provisions

Both OFLA and FMLA allow employees at least 12 weeks of leave in a one-year period for the following:

- The birth, adoption or foster placement of a child (parental leave).
- To seek treatment or to recover from the employee's own serious health condition, including pregnancy-related conditions (serious health condition leave).
- To care for a family member with a serious health condition. FMLA defines family member as parent, child or spouse. OFLA includes the same relatives but also includes a parent-in-law or a same-sex domestic partner in the definition of family member. OFLA also allows care for a sick child with an illness or an injury that is not a serious health condition but that requires home care (sick child leave).

Both OFLA and FMLA provide time off for the serious health conditions of employees or their family members, or for the birth, adoption or foster care placement of a child. Both

laws provide leave time to pregnant employees for prenatal and postnatal care. Both give eligible employees the right to take up to 12 weeks of family leave per year,

OFLA and FMLA also differ in important ways. A few notable differences include:\

- Due to a recent change in federal law, FMLA now permits an eligible employee to take a combined total of 26 workweeks of leave during a single 12-month period to care for a family member who is serving in the military and has a serious injury or illness incurred in the line of duty while on active duty.
- FMLA allows leave for any "qualifying exigency" occurring because an employee's spouse, son, daughter or parent is on active duty in the military or has been notified of an impending call to active duty status in support of a contingency operation.
- OFLA allows a covered employee up to 14 calendar days of leave for the impending call or order to active duty of a spouse or domestic partner.
- OFLA entitles a pregnant employee 12 weeks of leave for pregnancy-related disabilities and an additional 12 weeks for any OFLA purpose.
- Under OFLA, any employee who takes a full 12 weeks of parental leave (leave to care for and bond with a new child) may also use an additional 12 weeks of "sick child leave" for the child's non-serious health condition requiring home care.

OFLA and FMLA differ in many other ways, including the number of employees required for coverage, the length of employment required for eligibility, the definition of covered family members, the requirement for written designation of leave, and the statute of limitations periods.

Despite these differences, the Oregon Legislature has expressly stated its intent that OFLA be as similar to FMLA as possible. ORS 659A.186 provides that OFLA "shall be construed to the extent possible in a manner that is consistent with any similar provisions" of FMLA. Oregon law also states that OFLA leave must be taken concurrently with any leave taken under FMLA.

Still, the differences between OFLA and FMLA can be complex for employers covered by both laws when tracking family leave. In some cases, depending upon the amount of hours worked and time period employed, an employee may be eligible under one law but not the other. In other cases, the type of leave taken may be covered under one law but not the other. For EXAMPLE, OFLA allows sick child leave, but not leave for "qualifying exigencies" related to family members in the military, whereas FMLA does not provide for sick child leave, but allows leave for such "qualifying exigencies." In those cases, OFLA and FMLA leave runs separately and the employee may be entitled to more than 12 weeks of protected leave in a single year. See the OFLA regulations at OAR 839-009-0220(1), stating that FMLA leave will count as OFLA leave only if the employee is eligible for OFLA leave. For more information on tracking OFLA and FMLA leave, see the Bureau's *Family Leave Laws* handbook.

Covered Employers

Under OFLA, employers with 25 or more full or part-time employees in Oregon for 20 or more weeks in the year in which the leave will be taken or in the preceding year must provide OFLA leave.

Under FMLA, employers with 50 or more employees for 20 or more weeks in the year in which leave will be taken or in the preceding year must provide FMLA leave.

When determining coverage, count full-time and part-time employees on the payroll, employees on paid or unpaid leave, and leased or temporary employees. Employers meeting both coverage standards are subject to both state and federal laws. When "dual coverage" exists, the employer must track both OFLA and FMLA. Whenever the laws differ, the employer must apply the standard most beneficial to the employee.

Employers with fewer than 25 employees are covered by neither law and may determine their own policies as to when and how to grant leave, provided those policies are administered in a nondiscriminatory manner. Public (government) agencies and private elementary and secondary schools are FMLA-covered employers regardless of the number of employees employed. 29 CFR §825.104(a), §825.108.

QUESTION: SMALL EMPLOYERS SMALLER FIRM NOT SUBJECT TO LEAVE LAWS MAY DETERMINE ITS OWN POLICY

Q: My wife is an attorney at a Portland law firm that has 14 employees. One of her colleagues is pregnant and wants to take four weeks of leave when the baby comes, but her request has been denied. Doesn't this employee, who has worked full-time for the firm for several years, have the right to take pregnancy leave?

A: Not necessarily. Because your wife's law firm only employs 14 people, it is not a covered employer under the Oregon Family Leave Act (OFLA) or the federal Family and Medical Leave Act (FMLA). This employer's policy, not the leave laws, will determine when employees are entitled to leaves of absence.

A small organization not covered under OFLA or FMLA is free to set its own leave rules, as long as it applies those rules in a non-discriminatory manner. For EXAMPLE, if a firm grants several weeks of leave to a male employee with a broken ankle, it should also grant a similar amount of leave to a woman who is temporarily incapacitated during pregnancy or after childbirth. Otherwise, the firm could be liable for pregnancy or sex discrimination. In addition, if an employee suffered an on-the-job injury or developed a disability covered under the Americans with Disabilities Act (ADA), the employer might have to grant leave under those laws.

If your wife's employer were subject to OFLA or FMLA, then a long-term employee like the one you describe would be entitled to 12 weeks of job-protected leave for various qualifying events, including pregnancy disability and parental leave (time for bonding with a new child).

In fact, under OFLA, a woman who uses pregnancy disability leave is entitled to 12 additional weeks of OFLA leave in the same leave year, which could be taken for parental leave or another qualifying event, such as the serious health condition of a family member.

Eligible Employees

Under OFLA, employees must have been employed by a covered employer for at least the 180-day calendar period before the first day of the leave. Except for parental leave, employees must also have worked an average of 25 hours or more per week. There is no 25-hours-per-week requirement for parental leave.

Under FMLA, employees must have worked for a covered employer for at least one year total (need not be consecutive employment), must have worked 1250 hours in the year immediately preceding the leave, and must work at a location where there are at least 50 employees within a 75-mile radius of the employee's job site.

The OFLA/FMLA Eligibility Gap

An employee who has worked at least 180 days but fewer than 12 months may be OFLA-eligible but is not FMLA-eligible. OFLA leave taken by such an employee in the "eligibility gap" does not reduce the employee's potential FMLA entitlement. If the employee becomes eligible for FMLA later in the same leave year, the employee could be entitled to up to 12 weeks of additional FMLA leave if a qualifying situation arises.

Length of Leave

FMLA provides 12 weeks of leave in a 12-month period with one exception: An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered member of the Armed Forces who is recovering from serious illness or injury sustained in the line of duty on active duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the ill or wounded military service member. 29 U.S.C. 2612(a)(3). During the single 12-month period, if the eligible employee has other FMLA qualifying events (for EXAMPLE: he or she needs leave to care for his/her own serious health condition,) the eligible employee will be entitled to a combined total of 26 weeks of FMLA leave, no more than 12 weeks of which is for any qualifying reason other than to care for the ill or wounded service member." 29 U.S.C. 2612(a)(4), 29 CFR §825.127(c)(3).

OFLA limits employees to 12 weeks of leave in a 12-month period, except that (1) a woman using pregnancy disability leave may take an additional 12 weeks of OFLA leave during the same leave year, and (2) a man or woman who uses a full 12 weeks of parental leave may also use up to 12 weeks of sick child leave. Employees taking a full 12 weeks of OFLA parental leave are also entitled to up to an additional 12 weeks of sick child leave for the non-serious condition of a child. It is possible, although unlikely, that a female employee could receive as many as 36 weeks of OFLA leave in a year.

OFLA Length of Leave Exception #1: Pregnancy Disability

This exception allows a woman to take pregnancy disability leave of up to 12 weeks, as well as an additional 12 weeks of protected OFLA leave during the same year.

OFLA and FMLA both use the word “disability” to refer to this type of leave, and a variety of absences related to pregnancy incapacity may qualify for OFLA and FMLA leave. However, it is important to note that, since pregnancy is a temporary condition, it is not a covered disability that requires reasonable accommodation under the federal Americans with Disabilities Act or the Oregon disability statutes.

Pregnancy disability leave covered under both OFLA and FMLA may include:

- partial day or full-day absences for serious morning sickness;
- periods of bed rest ordered by the pregnant employee’s physician
- a reduced work schedule necessitated by pregnancy complications;
- a routine prenatal visits to the doctor; and
- leave following the childbirth, when the employee is still incapacitated (since pregnancy disability is defined to include incapacity due to pregnancy or childbirth).

Under OFLA, an eligible female employee may take up to 12 weeks of pregnancy disability leave for any of these reasons and will still be eligible for up to 12 additional weeks of any type of OFLA leave in the same 12-month leave year. The additional 12 weeks of OFLA leave may be taken before or after the pregnancy leave. The additional 12 weeks of OFLA leave permitted under this exception may be used for any OFLA-qualifying purpose.

Although the employee will often opt to use the additional time for parental leave, she could also use the time for qualifying purposes such as caring for her father-in-law who is having heart surgery, her 6-year-old child who is home from school with the sniffles on Tuesday, her husband who was in a motor vehicle accident, or for her own serious health condition, such as a broken leg. In fact, she could take the additional 12 weeks of leave for another pregnancy-related incapacity or even a continuation of the same pregnancy-related serious health condition.

Under FMLA, a woman who uses 12 weeks for these pregnancy-related forms of serious health condition exhausts her FMLA entitlement for the year.

OFLA Length of Leave Exception #2: Parental Leave

The second exception that allows an employee more than 12 weeks of OFLA leave in a single year applies when either a male or female employee uses a full 12 weeks for parental leave. In such cases, the employee may also use up to 12 weeks of “sick child leave” for the non-serious health conditions of children requiring home care.

This exception is narrow. It only applies when an employee uses the full 12 weeks for parental leave and sick child leave is the only additional type of leave the employee is permitted to take.

The requirement that the employee take a full 12 weeks of parental leave before the employee qualifies for up to 12 additional weeks of sick child occurrences is based on a strict interpretation of ORS 659A.162(2)(b), which states that an employee "who takes 12 weeks of family leave within a one-year period" for parental leave "may take up to an additional 12 weeks of leave within the one-year period" for sick child leave.

If an employee takes less than 12 weeks of OFLA parental leave, he or she is still entitled to use the balance of the 12-week entitlement for any other OFLA qualifying purpose, but will not qualify for an additional 12 weeks of OFLA sick child leave. For EXAMPLE, if a new mother takes only 8 weeks for OFLA parental leave and then chooses to return to work, she will still have 4 weeks of OFLA available that she can use for serious health conditions or sick child leave

QUESTION: PREGNANCY LEAVES

PREGNANT EMPLOYEE MAY HAVE RIGHT TO MORE THAN 12 WEEKS OFF

Q: We know that the Oregon Family Leave Act applies to our company, since we have recently grown and now have at least 25 employees working in Oregon. What we are still not clear on is how much leave pregnant employees are allowed to take. One of our employees, Megan, is pregnant and about to begin family leave because her doctor says she needs bed rest. Megan says the law gives her the right to 36 weeks of protected time off. Is that right?

A: Possibly, but only in rare circumstances. OFLA generally allows eligible employees to take a maximum of 12 weeks off during the year when qualifying situations arise. There are two exceptions in OFLA, each of which allows up to 12 weeks of additional leave. Since a pregnant woman could potentially qualify under both of these exceptions, it is possible she could have the right to 36 weeks of protected time off work.

OFLA allows an employee up to 12 weeks of leave during a 12-month leave year for any combination of the following reasons:

- the employee's own serious health condition (including an incapacity related to pregnancy);
- the serious health condition of a family member;
- "parental leave," which is time off to care for and bond with a newborn baby, newly adopted child, or newly placed foster child; or

- "sick child leave," which is time off to care for a child with a non-serious health condition that requires home care.

- Oregon Military Family Leave which is time off for the spouse or same-sex domestic partner of a service member who has been called to active duty or notified of an impending call or order to active duty, or who is on leave from active duty during a period of military conflict.

Assuming Megan has worked for you long enough to be eligible for OFLA leave, she is entitled to take up to 12 weeks of protected leave for her pregnancy disability. That includes time off when she is physically incapacitated from working – not only during the pregnancy, but also following the delivery when she is recovering from childbirth. The 12 weeks for pregnancy disability may also include intermittent absences due to morning sickness or for routine prenatal doctor visits.

The first exception to the 12-week maximum rule is that a female employee who uses any pregnancy disability leave is entitled to take up to 12 more weeks of leave during the same leave year for any OFLA-qualifying reason. That additional 12 weeks could be used for the serious health condition of a family member, parental leave, sick child leave, Oregon Military Family Leave or even a continuation of the woman's pregnancy disability.

The second exception to the 12-week maximum rule is that both male and female employees who use a full 12 weeks of parental leave may still use up to 12 weeks of sick child leave during the same leave year.

Putting these two exceptions together, if Megan were to take a full 12 weeks of OFLA pregnancy disability leave, followed by a full 12 weeks of parental leave, followed by 12 weeks' worth of non-serious sick child incidents, she could reach the maximum 36-week level. It is possible, but unlikely, as OFLA leave is generally unpaid leave and many employees cannot afford to take 36 weeks off work even when the law permits it.

QUESTION: LENGTH OF LEAVE

EMPLOYEES GET MORE THAN 12 WEEKS OF OFLA LEAVE BUT ONLY IN CERTAIN CASES

Q: If an employee used only 4 weeks of her pregnancy leave, gave birth to premature twins, and used 12 weeks of her parental leave, would she then be entitled to use 8 weeks of additional OFLA leave for her twins' serious health condition?

A: No. Under OFLA, which applies to companies with 25 or more employees in Oregon, an employee who uses pregnancy disability leave may use 12 additional weeks of OFLA leave in the same leave year. In your EXAMPLE, however, the employee has already used up that 12 additional weeks for parental leave and is not legally entitled to extra time for serious health conditions during the same leave year. Of course, in this case, an

employer may choose to be more generous than the law requires and grant additional leave without pay.

Following the full 12 weeks of parental leave, the employee is permitted additional time off for “sick child leave,” but that type of leave only applies to the non-serious condition of a child requiring home care. Exampless include a child with a cold, flu or ear infection.

However, what many employers do not realize is that the time immediately following delivery of the child is not necessarily parental leave. This period may instead be designated as pregnancy disability leave, as the woman is sometimes incapacitated for four, six or even eight weeks, depending on the doctor’s determination. The employee may choose to characterize this time as pregnancy disability leave so that she will still be eligible for 12 additional weeks of leave beyond the date she is released for work by the doctor. The additional 12 weeks may be used for any OFLA purpose, including parental or serious health condition leave. In your EXAMPLE, this option would extend the employee’s leave time.

QUESTION: LENGTH OF LEAVE

PARENTS WHO WORK FOR SAME EMPLOYER SUBJECT TO SPECIAL RULES —PARENTAL LEAVE

Q: Is it true that parents who work for the same employer are each entitled to 12 weeks of parental leave when they have a newborn child? I thought that was the case but my colleague heard somewhere that parents who work for the same employer only get a combined total of 12 weeks of leave under those circumstances.

A: It depends on whether OFLA or FMLA applies.

Under FMLA, a husband and wife working for the same employer may be limited to the aggregate of 12 weeks in a leave year for parental leave, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. When using parental leave, a husband and wife are limited to a combined total of 12 weeks during the year after their child’s birth or within one year of an adoption or foster child placement. For EXAMPLE, the wife could choose to take eight weeks of FMLA parental leave, and the husband who works for the same employer could choose to use the remaining four weeks.

This limitation on the total weeks of leave applies to leave taken for the reasons stated above, so long as a husband and wife are employed by the “same employer.” It even applies when the spouses are employed at two different operating divisions of the same company or at two different worksites of the same employer when those worksites are located more than 75 miles from each other. However, if one spouse is ineligible for FMLA leave, the other spouse is entitled to a full 12 weeks of FMLA leave.

When the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the purposes stated above, they will each be entitled to the

difference between the amount he or she has taken individually and 12 weeks for FMLA leave for another qualifying reason. For EXAMPLE, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Many state pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods are considered FMLA leave for a serious health condition of the mother and are not subject to the combined limit.

Under OFLA, parents working for the same employer may each take a full 12 weeks of parental leave. Unlike FMLA, OFLA limits parents' rights to take parental leave concurrently ORS 659A.162(3). When the leave is covered under OFLA only, an employer may require employees who are family members to stagger their parental leave time. However, when OFLA and FMLA contain similar provisions, employers covered by both OFLA and FMLA must apply the law most beneficial to the employees. In the case of parental leave, FMLA regulations limit the husband and wife to 12 weeks of parental leave in the aggregate, but OFLA entitles each to 12 weeks parental leave. OFLA allows employers to refuse concurrent leave, but FMLA allows concurrent leave. When leave is FMLA covered, the result is that the husband and wife could choose to take concurrent parental leave until they exhaust their aggregate 12 weeks of FMLA leave. After that, OFLA entitles them, should they choose to do so, to take a combined total of 12 weeks additional parental leave separately.

QUESTION: PARENTS OR FAMILY MEMBERS WHO WORK FOR SAME EMPLOYER SUBJECT TO SPECIAL RULES — SERIOUS HEALTH CONDITION LEAVE

Q: Is it true that family members who work for the same employer may be limited to 12 weeks of family leave for reasons other than parental leave and may be required to take concurrent leave?

A: Again, it depends on whether OFLA or FMLA applies.

Under FMLA, a husband and wife working for the same employer may be limited to the aggregate of 12 weeks in a leave year to care for an employee's parent with a serious health condition (29 CFR 825.120(a)(3).

OFLA does not specifically address the rights of a "husband and wife," but does speak to the issue of "two family members" working for the same covered employer. OFLA, unlike FMLA, does not limit the amount of leave such employees may take, but does limit their right to take leave concurrently.

In other words, under OFLA, the two family members (or spouses) could each take 12 weeks of leave for covered events, but may be required to take leave at different times. Exceptions to this requirement are:

- When one employee needs to care for the other employee who is suffering from a serious health condition;

- When one employee needs to care for a child who has a serious health condition while the other employee is also suffering a serious health condition;
- When both family members are suffering from a serious health condition; or
- When the employer allows the two family members to take concurrent leave.

QUESTION: EXHAUSTION OF LEAVE
APPLY NORMAL ATTENDANCE POLICIES AFTER LEAVE ENDS

Q: What happens when family leave is exhausted and the employee still can't return to work?

A: You should apply your normal absenteeism or leave policies to determine if you will allow extra time off. Once the 12 weeks of OFLA and FMLA leave have been exhausted, further absences may be treated as disciplinary incidents.
After the conclusion of family leave, you can begin applying your attendance rules, so long as the absences counted as OFLA and FMLA leave are in no way counted against the employee or used as a basis for disciplining the employee. An employee who has taken OFLA and FMLA leave should be in no worse position because of taking leave.

Note that other laws, such as injured worker reinstatement statutes and the Americans with Disabilities Act, may provide additional protected time off beyond the 12 weeks of family leave, so it is important to consider whether the employee is covered under such laws before taking any disciplinary measures.

Finally, the federal Pregnancy Discrimination Act requires that employees absent for pregnancy-related disabilities be treated at least as favorably as the employees absent for other short-term disabilities. Oregon's sex discrimination laws that cover pregnancy disability also prohibit the different treatment of employees in such

Requesting Leave

Under both OFLA and FMLA, employees are required to notify employers that they need to take family leave and to provide some information about the condition for which they are taking or propose to take leave, depending on whether the leave is foreseeable or unforeseeable. The chart below describes the employee notification requirements in OFLA and FMLA

How Much Notice Must Employees Give Before Taking Leave?

NATURE OF LEAVE	OFLA NOTICE REQUIRED BY EMPLOYEE	FMLA NOTICE REQUIRED BY EMPLOYEE
Foreseeable Leave	Employers may require up to 30 days advance written notice. Employee must follow employer's policy.	An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember.
Foreseeable Leave Less than 30 Days in Advance	If 30 days notice is not possible, employees must give as much notice as is practicable. Any written notice requirements should be flexible.	The employee must give notice as soon as practicable considering circumstances - within one or two business days of when the need for leave is known. The determination of when is practicable must take into account individual facts and circumstances.
Unforeseeable or Emergency Situations	Employees are required to give oral or written notice within 24 hours before or after starting leave. Employer may require written notice within three days after the employee's return to work.	It should generally be practicable for the employee to provide notice of unforeseeable leave within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.

Consequence for Failure to Give Timely Notice of Foreseeable Leave	Employers may reduce employee leave by up to three weeks or take disciplinary action consistent with the employer's policy	Employers may delay coverage until up to 30 days after notice was received
	OAR 839-009-0250.	29 CFR §825.302 - .304.

Practice Tips:

- In emergencies, notice may be provided by the employee or any other person providing information on the employee's behalf, such as a family member.

- No "magic words" are required under OFLA or FMLA. The employee need only describe the situation that exists. It is then the employer's obligation to inquire further to obtain enough information to determine whether a qualifying situation exists.

- It is prudent to provide at least some minimal training to employees so that they understand their obligation to provide notice and understand why the employer is required to inquire about the reasons for their absences.

- In emergency situations where leave is unanticipated, OFLA states that employers may require employees to provide written notice within three days after returning to work.

- As part of their leave tracking efforts, employers may choose to require employees to complete a leave request form before taking OFLA or FMLA leave. Note that this type of form is not required, but it may aid supervisors in communicating key information to the human resources staff that often track and designate family medical leave.

- An employer may waive employees' FMLA notice requirements.

Failing to Give Notice

If the employee fails to give the required notice, FMLA allows the employer to delay the commencement of leave by up to 30 days. OFLA allows the employer to reduce the leave period by up to three weeks (or to follow the FMLA rule when both state and federal laws apply), or to discipline the employee pursuant to a consistent policy.

Medical Verification

Employers may require that employees who give notice of intent to take family leave (for any purpose other than for childbirth or adoption) provide medical verification of the

need for leave. Once the employer makes a written request for medical certification, the employee must provide it within 15 days.

A special rule applies with respect to OFLA sick child leave. For this type of leave, an employer may only require a doctor's note beginning with the fourth day (or part of day or incident) of leave during a leave year. The employer may not require any medical verification for the first three incidents of OFLA sick child leave during a leave year.

When an employer does require a doctor's note, examination or medical certification to verify the need for any OFLA or FMLA leave, the employer must pay any costs not covered by an insurance or other medical plan, consistent with ORS 659A.306.

QUESTION: MEDICAL VERIFICATION

EMPLOYER ENTITLED TO INQUIRE ABOUT LEAVE TO DETERMINE PROPER DESIGNATION

Q: My doctor took me off work for two weeks because of stress and depression. I brought my supervisor a note releasing me from work and asked to use paid leave for the two-week period, since I have over 300 hours of accrued sick leave. My employer is demanding more specific information from the doctor and saying they will probably charge my absence as "family leave." I feel it's an invasion of my privacy to require more medical information when I've already provided a doctor's note. Can my employer legally count this time against me for family leave even though I only requested sick leave?

A: Your employer doesn't have the right to invade your privacy when it comes to medical issues, but it does have the right to make medical inquiries whenever they are "job-related and consistent with business necessity." An employer covered by OFLA and FMLA is entitled to require sufficient medical verification to determine if your absence is for a qualifying family leave reason.

An absence related to stress and depression may or may not qualify as a "serious health condition" leave under OFLA and FMLA, depending upon whether you are incapacitated for more than three days, whether you must see a doctor two or more times, or whether the condition qualifies under another category such as a "chronic" condition.

If you do have a qualifying serious health condition, your employer is entitled to designate your absence as family leave and count the time towards your 12-week entitlement, even though you haven't specifically requested OFLA or FMLA leave. Although the family leave designation may seem like a punishment to you, it actually benefits and protects you in a number of ways.

When you are on a family leave, the employer may not count the absence against you or discipline you for excessive absenteeism. That is not necessarily the case when you are just taking sick leave, as employees can be disciplined or terminated for excessive sick absences or "abuse of sick leave." You also have reinstatement rights to your job at the end of family leave, and under FMLA you have the right to have your group health insurance coverage continued throughout the leave. Even though family leave is an unpaid leave, generally, you can use available paid leave concurrently with an OFLA or

FMLA absence. In addition, as of January 1, 2008, employers are required to allow employees on OFLA to use any accrued sick leave for that purpose, even if they might not otherwise be eligible for sick leave under the employer's policy.

The U.S. Department of Labor has created a four-page medical verification form that employers may use to help determine whether an employee's medical condition qualifies as a serious health condition under FMLA. The doctor answers a series of questions on the form and indicates whether the individual's condition qualifies under any one of six categories. The employer is entitled to seek the information outlined on this form, but could be violating the Americans with Disabilities Act and invading your privacy if it asks questions that are not job-related and that go beyond the information necessary for medical verification.

Since the "serious health condition" definitions under OFLA and FMLA are very similar, employers can use the Department of Labor form for verification purposes for both laws.

Designating the Leave

The law does not require employers to inform employees that leave is being counted towards the OFLA entitlement, although this is highly recommended. As of February 2010, however, employers are required to notify employees within 5 days whether the employee is eligible for OFLA leave and whether the event qualifies for protected leave under OFLA.

An employer must designate all FMLA leave with a written notice issued to the employee within two business days, if feasible, from the time the employer has notice of the leave. (The U.S. Department of Labor has created a prototype form of notice, Form WH-381, which meets the requirements of the FMLA regulations.) See the Bureau's Family Leave Laws handbook for more information.

Wages/Benefits During Leave

Generally, family leave is unpaid. However, employees have the right to use accrued paid vacation time during leave.

Under OFLA, employees using leave are allowed to use any accrued sick leave, even if it would not normally be available under the employer's policy. Employers may require employees to use particular accrued leave balances and dictate the usage so long as employers notify employees of this requirement before foreseeable leave is taken or within two days of unforeseeable leave.

EXAMPLE: Company XYZ allows the use of sick leave in case of the employee's illness or injury. Under OFLA, the company would nevertheless be required to allow a healthy employee to use accrued sick time during a leave even if it is for a family member's serious health condition. For all other purposes, the use of sick leave is governed by the employer's policy or collective bargaining agreement.

Benefits the employee received or was entitled to before starting leave must be restored in full when the employee returns (except for those benefits used while on leave), unless those benefits have been eliminated or altered for similarly situated employees.

QUESTION: DESIGNATING LEAVES

EMPLOYEE'S FAMILY LEAVE AND PAID SICK LEAVE OFTEN OVERLAP

Q: Our employee, Martha, claims we are violating the law by forcing her to use family leave. Martha's mother is undergoing major surgery and the doctors say she will be confined to bed and recuperating for at least 12 weeks. Martha told us she intends to take the entire 12 weeks off to care for her mother.

Our store is part of a national office supply chain and Martha has been with the company full-time for more than seven years. We know that means she has the right to take 12 weeks of leave. So we approved Martha's request for time off and told her we would count it as family leave.

That is where the dispute began. Our generous sick leave plan allows employees to use sick leave to care for family members, and Martha has over 500 hours of accrued paid leave. She insists she has the right to use the paid sick leave instead of family leave. What does the law say? Who decides when family leave is taken or whether it is paid leave?

A: As an employer, you are entitled to designate an absence as family leave as soon as there is a qualifying event. OFLA and FMLA only provide for unpaid leave, but when an employer offers paid leave benefits, the employees are entitled to use any accrued leave time for family leave purposes. Family leave often runs concurrently with various types of paid leave. Whether an employee can use paid leave during the family leave depends on the kind of leave and, to some extent, your company policies.

Martha has given you notice of a qualifying leave event — the serious health condition of her mother. She has the right to use 12 weeks of family leave for that purpose, and you have the right to designate this 12-week absence concurrently as OFLA and FMLA leave. OFLA and FMLA guarantee Martha protected time off to care for her mother, meaning that she cannot be disciplined for the absence and must be reinstated at the end of the leave.

Although family leave is not a paid leave, OFLA and FMLA permit an employee to use accrued paid leave during family leave. If Martha has accrued paid vacation leave or any other paid leave you offer in lieu of vacation leave, she is entitled to use that leave during her family leave.

Additionally, Martha is entitled to use her paid sick leave during her OFLA leave, regardless of your policy. Under FMLA, she may use her accrued paid sick leave as long as it is consistent with your regular sick leave policy. Your policy may require her to exhaust the paid leave.

It is not Martha's choice to save her family leave for some future date. Rather, it is your responsibility as an employer to track and designate family leave. Martha seems to think you are punishing her by counting this time as family leave. It may help if you explain to her that the family leave designation actually benefits her. Her absence will be legally protected, she will have reinstatement rights, and she will have the right under FMLA to

continuation of her group health insurance for the entire leave period — guarantees which sick leave policies alone often do not provide.

Health Insurance

Under OFLA, employers are not required to continue health insurance coverage during an employee's OFLA leave, but are required to reinstate the employee to the former position with the same benefits (i.e., the health insurance must offer the exact coverage) as before the leave commenced. Employers may find that it is more cost-effective to continue insurance benefits during an OFLA leave than to reinstate the insurance and pay higher premiums for a lapse in coverage.

If an employer pays any part of the employee's share of health or other insurance coverage while an employee is on family leave, the employer may deduct up to 10 percent of the employee's gross pay each pay period after the employee returns to work until the amount is repaid.

If the employee fails to return to work after leave, the employer may use any legal means to recover the amount paid toward the employee's benefits. However, if the employee does not return because of conditions that would qualify the employee for leave or for other reasons beyond the employee's control, the employer may not recoup the cost.

Under the FMLA, the employer must continue an employee's group health coverage throughout the 12 weeks of FMLA leave. If the employer normally pays 100 percent of the premium, the employer must continue to do so during the FMLA leave. If the employee normally contributes a portion of the premium, then the employer can require the employee to continue contributing the same portion during the FMLA leave.

Reinstatement

Under both OFLA and FMLA, employers must return the employee to the position held before leave was taken, with one major exception. Under OFLA, the employer must return the employee to the same position when the leave commenced, regardless if the employer has hired a replacement worker. FMLA only requires that the employer to reinstate the employee to the same position or to an equivalent position. In cases where an employer is covered by both FMLA and OFLA, the employer must apply the OFLA standard and return the employee to his original position.

If the position has been eliminated, the employer must restore the employee to an available equivalent position. The definition of "equivalent" is different under OFLA and FMLA. Under OFLA, an equivalent position is one that is the same as the former position in as many aspects as possible. FMLA considers an equivalent position as one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites and status.

A position that does not meet the definition of "equivalent" under FMLA may nevertheless be considered equivalent under OFLA if it is the available position that most closely matches the employee's former job. For EXAMPLE, while a teacher is on family leave, the district eliminates his job due to a budget shortfall (legitimate business reason). The only available job is assistant director of student activities, for which the teacher is

qualified but that has a much lower salary and fewer benefits. Under OFLA, the employee is entitled to be reinstated to an available, equivalent position, and the assistant director position will qualify if it is the most similar to the teacher's former job. Under FMLA, there is no duty to reinstate the employee if the employee's job has been eliminated for a legitimate business reason. The employer must follow the more generous OFLA provision and reinstate the employee to the assistant director position.

OFLA also has no "key employee" concept, so employers covered under OFLA may not refuse to reinstate an employee on this basis, even in the rare situation when the individual qualifies as a "key employee" under FMLA. Although OFLA must be construed consistently with FMLA when the laws contain similar terms, OFLA is completely silent on the topic of "key employees." Therefore, employers may utilize this provision only for FMLA leaves that are not also covered by OFLA.

Note: Reinstatement to the former position is not necessary if the employee has voluntarily and without coercion agreed to take another position.

FMLANSWER: Employers must return the employee to the position held before leave was taken or to an equivalent position.

QUESTION: LAYOFF AFTER REINSTATEMENT

RETALIATORY LAYOFF PROHIBITED

Q: Do I still have to reinstate an employee who, but for taking family leave, would otherwise be terminated or laid off?

A: As long as the employer is not acting in retaliation for the employee having taken the leave, the reinstated employee may be held to the same standards as other employees, and may also be subject to the same layoff system or termination.

Of course, it is always somewhat risky to lay off or terminate an employee soon after the employee has engaged in any legally protected activity such as invoking family leave, since the timing of events may appear retaliatory to the employee, and, in the worse case scenario, to third parties such as administrative agency investigators or jury members. Therefore, it is prudent for an employer to seek legal advice in such situations.

The employer should also maintain good documentation of the nondiscriminatory criteria used to select employees for layoff, which could include seniority level, production level, job category, work shift, and a variety of other job-related factors.

Interaction Between Federal and State Leave Laws

If an employee leave is covered under both OFLA and FMLA, leave time can be counted against both the federal and state entitlements.

EXAMPLE: An employee wishes to take leave to care for his seriously ill father. That leave is covered under both OFLA and FMLA, and the time off may be simultaneously

counted against the employee's OFLA and FMLA leave allotment. However, if the employee's father-in-law then became sick, any remaining leave time could only be counted against the OFLA entitlement, since that kind of leave is not covered under FMLA.

Employers counting a leave under both federal and state law must be sure that the employee is receiving the most generous provision of the two laws.

EXAMPLE: OFLA's reinstatement requirements are stricter than FMLA's. Therefore, upon returning from a leave covered concurrently under OFLA and FMLA, the employer must return the employee to the same position held at the time the leave began (and not merely an equivalent position).

More information on the interaction between OFLA and FMLA and the tracking of leave under both systems is available in the Bureau's *Family Leave Laws* handbook.

Required Postings

Each covered employer must display the required OFLA and FMLA notices in an area accessible to and regularly frequented by employees in each building or work site where employees are located. See the Bureau's *Family Leave Laws* handbook for the state and federal posters. You can also download the OFLA poster, FMLA poster, and other required posters from the BOLI website at http://www.oregon.gov/BOLI/CRD/C_Postings.shtml.

INTERPLAY OF OREGON AND FEDERAL LEAVE LAWS QUESTION: OFLA — FMLA DIFFERENCES OREGON AND FEDERAL LEAVE LAWS ARE NOT IDENTICAL

Q: Our company has 63 employees working in several states, including Oregon. We've been covered by the federal Family and Medical Leave Act (FMLA) for three years now, ever since we hit 50 employees. However, we have not had to follow the Oregon Family Leave Act (OFLA), because we've had fewer than 25 employees working in Oregon. Recently, we've hired several new Oregon employees, and we're quickly approaching the 25-employee threshold. Since OFLA as well as FMLA will soon apply to us, what differences should we be aware of?

A: The Oregon and federal family leave laws are similar, but there are many significant differences between them. You've already pointed out one major difference between the laws, namely the number of employees required for employer coverage. OFLA applies to employers with 25 or more employees in Oregon, and FMLA applies to employers with 50 or more employees anywhere in the country.

In general, OFLA and FMLA allow an eligible employee to take up to 12 weeks of protected leave during a 12-month period. Leave may be taken for the employee's serious health condition, the serious health condition of a family member, or parental leave – bonding time with a newborn baby, newly-adopted child, or newly-placed foster child.

The Oregon law is broader in its coverage in a number of ways, including that it allows time off for “sick child leave,” when an employee stays home to provide care for a child with a cold or other non-serious health condition.

Also, the OFLA eligibility period for employees is shorter than under federal law. An employee must work 12 months and 1250 hours to become FMLA-eligible, but can become eligible for OFLA leave after just 180 days and an average of 25 hours of work per week. For OFLA parental leave, there is no hourly requirement at all; the employee will be eligible for parental leave as long as you have employed him or her for 180 days.

Another key difference between the laws is that OFLA’s definition of “family member” is broader than FMLA’s. The federal law allows leave only for the parent, spouse, or child of your employee, but the Oregon regulations also allow time off for a parent-in-law or a same-sex domestic partner or a parent or child of a same-sex domestic partner, or a grandparent or grandchildwith a serious health condition.

OFLA and FMLA leave usually run concurrently. However, when an absence is covered under only one of the laws, you must track OFLA and FMLA separately, and the employee may be eligible for more than 12 weeks of leave.

Yet another distinction between OFLA and FMLA is the total amount of leave permitted. FMLA generally allows for a maximum of 12 weeks of leave per year, but the Oregon law contains some exceptions under which an employee can take more than 12 weeks of OFLA leave in a year. A female employee who uses any OFLA leave for pregnancy disability may take another 12 weeks of OFLA leave during the same year. Also, a man or woman who uses a full 12 weeks of OFLA parental leave may take up to 12 more weeks for OFLA sick child incidents.

At the conclusion of FMLA leave, the federal law permits the employer to reinstate an employee to the same job or to an equivalent job. The Oregon law, however, sets a more stringent standard, requiring the employer to reinstate an employee to the same job the employee held at the time OFLA leave began. When an employee’s leave is covered under both laws, Oregon employers must follow the stricter state standard for reinstatement.

There are many other differences between OFLA and FMLA, and the overlap of these laws often raises complex tracking issues. Frequently, employees using OFLA and FMLA leave for their own serious health condition are also protected under state injured worker laws and state and federal disability laws, so employers must also comply with the requirements of those laws, when they apply.

CHAPTER 8

OTHER PROTECTED LEAVES

Militia and Military Service

It is an unlawful employment practice for Oregon employers to refuse to grant a leave of absence to an employee who is a member of the organized militia of this state and is called into active service by the governor under ORS 399.065. Employers must give such an employee a leave of absence until release from active service permits the employee to resume employment. ORS 399.235.

EXAMPLE: If the governor orders the state national guard to provide assistance in a natural disaster (for EXAMPLE, flooding or earthquakes), members who are called out must be returned to their jobs. Whether vacation or other paid leave is given is up to the employer's policy.

QUESTION: MILITARY LEAVE
JOB PROTECTIONS APPLY DURING EMPLOYEE'S MILITARY SERVICE

Q: We have 60 employees in Oregon, and one of them who is in the Army Reserve was just called to active military duty. What are our obligations with regard to continuing this employee's benefits and holding her job?

A: Both Oregon and federal laws provide protection for employees on military leave, and all Oregon employers are covered by these laws.

A state law provides protection to an employee in the Oregon National Guard who is called to active duty. This law applies only when the governor orders your employee into service in cases such as disaster or riots. The law doesn't require you to pay an employee during such an absence, but does require you to restore her to work when she is released from service.

Although the Oregon law is narrow, there's a federal law which also applies to you and which is much broader. That federal law is the Uniformed Services Employment and Re-employment Rights Act (USERRA). Signed into law in 1994 by President Clinton, the act revised the veterans reemployment rights law that had been in place since 1940. The act doesn't apply to state call-ups of the National Guard for riots or disaster relief, but it does protect employees in almost every other type of uniformed military service. The federal act applies to both voluntary and involuntary military service, either in peace or war. The law covers leaves for active duty and training duty. All employees are protected under this law, with the exception of temporary employees.

The act makes it illegal to discriminate in any way against an employee who volunteers for or is called for military leave. This means, for EXAMPLE, that employers should not ask in a job interview or on a job application about potential military service obligations. Under USERRA, employers must generally grant an employee military leave for up to five years and must restore the employee to work at the conclusion of the leave, if the employee has made a timely request for reinstatement, and if the employee was not dishonorably discharged.

While on military leave, an employee may not be forced to use accrued vacation pay, but may elect to do so. You must continue providing your company's insurance coverage when an employee is on military leave for less than 31 days. An employee on military duty for more than 30 days must be allowed, at her expense, to continue her insurance coverage under your plan for up to 18 months.
Upon completing her military service, your employee has the right to return to her same job or one that's equivalent. You're required to reinstate her with the same seniority, pay and benefits she would have had if she had remained continuously employed and never missed work for military service. If you offer group health insurance, you're required to reinstate the employee with the same level of coverage when she returns from military leave, without imposing any waiting period.

Since you're a larger employer with 25 or more employees in Oregon and 50 or more employees in the U.S., you're covered by both the Oregon Family Leave Act (OFLA) and the federal Family and Medical Leave Act (FMLA). The U.S. Department of Labor has issued a press release with regard to military service and FMLA eligibility. The agency advises employers that USERRA protects FMLA rights for the many thousands of individuals who have been called to active duty since the September 11 attacks.
To qualify for FMLA leave, an employee must have worked 1250 hours in the preceding 12-month period. The Labor Department advises that the months and hours your employee would have worked for you but for her military leave must be counted when determining her FMLA eligibility. This means that she may be eligible for family leave immediately upon her return from military service.

For more information on USERRA, check with the Department of Labor's Veterans Employment and Training Service at (503) 947-1490 or on the internet at www.dol.gov/vets or http://www.dol.gov/elaws/userra.htm.

Military Leave and Reemployment Rights Q & A
Employees taking time off for military duty or who wish reinstatement to their former jobs when they return are protected by federal law. One type of leave allows current employees time off for active duty or to comply with "reserve training obligations," such as the Army Reserve or National Guard duty. Returning veterans are also guaranteed reinstatement rights in most cases. The following are the most frequently asked questions about military leave.

Which employees are covered by the federal law on military leave?

Employees who leave employment in “other than a temporary position” for the purpose of military training, service or examination. The phrase “other than a temporary position” has been interpreted broadly by the courts and includes part-time, seasonal and temporary employment when the work was to be continuous for an indefinite period or regularly recurs.

Which employers are covered by this law?

All employers are covered.

How long can an employee take military leave and still be eligible for reemployment?

A returning veteran cannot have served more than five (5) years on active duty since leaving the job to which the veteran requests reinstatement. There is no time limit on the amount of time reservists spend in training.

What must the returning veteran do to obtain his or her reemployment rights?

Veterans and reservists returning from active duty must notify their former employers of their intention to resume their former jobs within ninety (90) days of release from duty. Reservists and guardsmen returning from training must inform their employers of their training obligations and report back at the next regularly scheduled working period. No particular form of notification is required by the law.

Does the employer have to create a position for the returning veteran?

No. An employer is not required to create a “new” position in order to reemploy the veteran, if the new job would be useless if there was a reduction of the work force. If the job still exists, the employer must give the job back to the returning veteran even if a replacement has been hired. The courts have held that the employer should reinstate the veteran or reservist, even if the replacement employee may be disadvantaged.

What are veterans’ or reservists’ reemployment rights?

The veteran or reservist is to be re-employed in the same position or a position of “like seniority, status and pay,” as if he or she had remained on the job instead of performing military service. The alternate position of “like seniority, status and pay” is given when the returning veteran is physically disabled from performing the former job by the military service.

What about the employee’s seniority during the time of military leave?

If a seniority system exists, the employer must treat returning veterans as though they continued to accrue seniority during their military service.

What about pay rates, vacations, holidays and promotions?

Pay and fringe benefits may not be denied or reduced due to military leave. An employer may not require a reservist or National Guard member to use his or her accrued vacation leave time for military training. For EXAMPLE, if the employee would have received a five (5) percent pay increase based on time at the job, the employee would still receive the raise since military service is counted as if he or she never left the job.

May an employer require a worker to give notice of leaving a job to go on active duty in the military service?

No. The worker is not required to notify the employer that military service is the reason for leaving a job.

Can I discharge a veteran during his or her military service?

No. Additionally, once the veteran is re-employed, the employer cannot discharge the veteran except for cause, for one (1) year or six (6) months in the case of a reservist.
Can I refuse to hire someone who is a reservist or member of the National Guard?
No. The Veterans' Reemployment Rights Law was amended in 1986 to forbid refusal to hire someone because of such responsibilities, along with the former prohibitions against discrimination.

Whom should I contact if I need more information?

Contact the US Department of Labor, Veterans' Employment and Training Program (VETS), Employment Division Central Office, Employment Building, 875 Union Street, N.E., Room 303, Salem, OR 97311-0100. Salem phone: (503)612-4328, Portland phone: (503)947-1490.

Oregon Military Family Leave Act

In 2009, the Oregon legislature passed the Oregon Military Family Leave Act (OMFLA). The purpose of the Act was to provide employees with protected time off from work to spend time with a spouse or domestic partner who has been called to active duty or notified of an impending call or order to active duty or who is on leave from active duty during a period of military conflict. This leave is counted as leave taken under the Oregon Family Leave Act (OFLA).

Who Is A Covered Employer?

OMFLA covers all public and private employers who employ 25 or more individuals in the State of Oregon for each working day during each of 20 or more calendar workweeks in the calendar year in which an eligible employee takes OMFLA leave, or in the

calendar year immediately preceding the year in which an eligible employee takes OMFLA leave.

Who Is An Eligible Employee?

An eligible employee is "an employee employed in the State of Oregon on the date OMFLA begins" and who:

- Work for an employer an average of at least 20 hours per week;
- Is the spouse or same-sex domestic partner of a member of the Armed Forces of the United States, the National Guard, or the military reserve forces of the United States. who has been:
    - Called to active duty, or
    - Notified of an impending call or order to active duty, or
    - Is on leave from active duty during a period of military conflict.

Purposes for Which Employees May Take OMFLA Leave

Covered employers are required to allow up to 14 calendar days of leave per order to active duty or notification of a leave from deployment. An eligible employee is the spouse or same-sex domestic partner of a member of the Armed Forces of the United States, the National Guard, or the military reserve forces of the United States who has been:

- Called to active duty, or
- Notified of an impending call or order to active duty, or
- Is on leave from active duty during a period of military conflict.

Length of OMFLA Leave

OMFLA leave is not required to be taken in one uninterrupted period, but may be taken intermittently. Some or all OMFLA leave may be taken before deployment after notification of an impending call or order to active duty, and some or all may be taken during leave from deployment. The 14 day entitlement is per deployment. If multiple deployments occur in an employee's OFLA leave year, the employee is entitled to use all OFMLA leave until the leave entitlement is exhausted.

The 14 days of unpaid leave are individual days which the employee would work if on the normal schedule.

Leave taken for OMFLA is counted against the employee's OFLA leave entitlement.

OMFLA Notice Requirements

An employee seeking OMFLA leave is required to give the employer notice of the intention to take leave within five business days of receiving official notice of an impending call or order to active duty or of a leave from deployment, or as soon as is practicable in situations where official notice is provided less than five days from commencement of the leave.

The employee must follow the covered employer's "known, reasonable and customary procedures for requesting any kind of leave."

The employer may require in writing that the employee provide a photocopy of the service member's orders. The employee must provide the required photocopy of the orders within a reasonable time after receiving the employer's written request. The leave may be provisionally designated as OMFLA leave pending receipt of the photocopy. OAR 839-009-0430.

Practice Tips:

OFLA requires an eligible employee to work an average of 25 or more hours a week for at least 180 calendar days immediately preceding the date the leave begins, while OMFLA requires an employee to work at least 20 hours per week. Work need not occur solely in Oregon.

There is no minimum number of days the employee must have worked for the employer to be eligible for the leave.

If a service member is denied OMFLA leave for failing to satisfy the hours requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA, but not under OMFLA.

CRIME VICTIMS' LEAVE

ORS 659A.98 grants certain crime victims and immediate family members the right to protected leave from work to attend criminal proceedings. It applies to any organization that employs six or more persons in Oregon for 20 or more weeks in the calendar year in which the employee takes leave or in the immediately preceding year.

In order for an employee to eligible for leave under this law, the employee must have worked an average of more than 25 hours per week for at least 180 days immediately before the leave begins.

The employee must also be a "crime victim," meaning that he or she "has suffered financial, social, psychological or physical harm as a result of a personal felony." The law treats immediate family members of the person as crime victims as well and defines

"immediate family" to include a spouse, domestic partner, father, mother, sibling, child, stepchild or grandparent.

How much of this crime victims' leave is an employee entitled to take?

The law doesn't set a specific time limit on the amount of leave an employee may take, but does say that an employer may limit the leave if it creates an undue hardship to the business, meaning "a significant difficulty and expense," taking into consideration the size of the business and any critical need for the employee.
If an employer limits the employee's leave due to undue hardship, the law provides that the employee may notify the prosecuting attorney, who is then required to notify the court. The court must then take the employee's work schedule into consideration when scheduling the criminal proceedings

Is crime victims' leave required to be paid leave?

The law only provides for unpaid leave, unless paid leave is promised under a union contract or other employment agreement. However, eligible employees who take this type of leave are permitted to use any paid accrued vacation — or other paid leave offered by the employer in lieu of vacation — during the period of leave. If the employee has different types of paid leave available, the employer's policy may dictate the order in which the employee must use paid leave.

How much notice does an employee have to provide before taking crime victims' leave?

The law requires that the employee provide "reasonable notice" of the intention to take leave and copies of any notices of scheduled criminal proceedings that the employee receives from a law enforcement agency. Employers must treat any such documentation as confidential records.

What are the prohibitions in this law, and what penalties apply to employers for non-compliance?

The statute makes it an unlawful employment practice for an employer to deny leave to an eligible employee, or to discharge, threaten to discharge, intimidate or coerce the employee because the employee takes leave to attend a criminal proceeding.
Employees who believe the employer has violated the law are authorized to file civil actions, and a court may order injunctive relief and other equitable relief, including reinstatement, back pay and reasonable attorney fees.

VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING

In 2007, the Oregon legislature passed the Oregon Victims of Certain Crimes Leave Act, which has been codified as ORS 659A.270 to 659A.285. In 2009, the legislature changed

the act to Leave for Victims of Domestic Violence, Sexual Assault or Stalking. The purpose of the Act is to provide employees with protected time off from work to deal with real life events arising from acts of domestic violence, sexual assault and stalking, and thereby prevent employees from having to make a choice between their employment and the very real need to protect themselves and their family members from physical and/or emotional harm. Leave for Victims of Domestic Violence, Sexual Assault or Stalking entitles eligible employees to take reasonable leave to address these circumstances and covers a substantial number of public and private employers in Oregon. In 2009 additional requirements were added regarding reasonable safety accommodation.

Leave for Victims of Domestic Violence, Sexual Assault or Stalking covers all public and private employers who employ six or more individuals in the State of Oregon for each working day during each of 20 or more calendar workweeks in the calendar year in which an eligible employee takes Leave for Victims of Domestic Violence, Sexual Assault or Stalking, or in the calendar year immediately preceding the year in which an eligible employee takes Leave for Victims of Domestic Violence, Sexual Assault or Stalking.

The coverage definition is the same as for the Oregon Family Leave Act (OFLA) except OFLA requires an employer to employ 25 or more employees for coverage purposes.

An eligible employee is “an employee employed in the State of Oregon on the date Leave for Victims of Domestic Violence, Sexual Assault or Stalking begins” and who:

- has worked an average of more than 25 hours per week for at least 180 calendar days immediately preceding the date the employee takes Leave for Victims of Domestic Violence, Sexual Assault or Stalking; and

- is a victim of domestic violence, sexual assault or stalking, or is the parent or guardian of a minor child or dependent who is the victim of domestic violence, sexual assault or stalking.

A “minor child” is a child who is under 18 and is a biological, adopted, foster, stepchild or a child with whom the employee is or was in an in loco parentis relationship and also includes the minor child of the employee’s same sex domestic partner. OAR 839-009-0340(10).

A “dependent” is an adult dependent child substantially limited by a physical or mental impairment, or any adult over whom the employee has guardianship. OAR 839-009-0340(3).

Who Is A Victim Of Domestic Violence, Sexual Assault Or Stalking?

Domestic Violence	Sexual Assault	Stalking
A victim of domestic violence is: o A victim of abuse as defined at ORS 107.705; or o Any other person who has suffered financial, social, psychological or physical harm as a result of domestic violence committed against the victim, including a member of the victim's immediate family. ORS 659A.270(4), OAR 839-009-0340(14)(a)(b)	A victim of sexual assault is: o An individual against whom a sexual offense has been committed as described at ORS 163.305 to ORS 163.467 or 163.525; or o Any other person who has suffered financial, social, psychological or physical harm as a result of a sexual assault committed against the victim, including a member of the victim's immediate family. ORS 659A.270(5), OAR 839-009-0340(16)(a), (b)	A victim of stalking is: o An individual against whom stalking has been committed as described at ORS 163.732; or o Any other person who has suffered financial, social, psychological or physical harm as a result of stalking committed against the victim, including a member of the victim's immediate family. ORS 659A.270(6), OAR 839-009-0340(17)(a), (b)
In no event will alleged perpetrators of domestic violence, sexual assault or stalking be considered "victims" for purposes of Leave for Victims of Domestic Violence, Sexual Assault or Stalking		

A victim's "immediate family" includes spouses, domestic partners, parents, siblings, children (regardless of age), stepchildren (regardless of age), grandparents, or any person who had the same primary residence as the victim at the time of the domestic violence, sexual assault or stalking.

Purposes for Which Employees May Take Leave for Victims of Domestic Violence, Sexual Assault or Stalking:

Covered employers are required to allow eligible employees to take "reasonable leave" for any of the following purposes, all of which are related to incidents of domestic violence, sexual assault or stalking:

1) To seek legal or law enforcement assistance or remedies to ensure the health and safety of the eligible employee or the eligible employee's minor child or dependent, including preparing for and participating in protective order proceedings or other civil or criminal legal proceedings related to domestic violence, sexual assault or stalking.

2) To seek medical treatment for or to recover from injuries caused by domestic violence, sexual assault or stalking against the eligible employee or the eligible employee's minor child or dependent.

3) To obtain, or to assist the eligible employee's minor child or dependent in obtaining counseling from a licensed mental health professional related to an experience of domestic violence, sexual assault or stalking.

4) To obtain services from a victim services provider for the eligible employee or the eligible employee's minor child or dependent.

5) To relocate or take steps to secure an existing home to ensure the health and safety of the eligible employee or the eligible employee's minor child or dependent. Relocation includes:

a. Transition periods spent moving the eligible employee or the eligible employee's minor child or dependent from one home or facility to another, including but not limited to time to pack and make security or other arrangements for such transitions related to domestic violence, sexual assault or stalking;

b. Transportation or other assistance required for an eligible employee or the eligible employee's minor child or dependent related to the domestic violence, sexual assault or stalking.

ORS 659A.272, OAR 839-009-0345.

Length of Leave for Victims of Domestic Violence, Sexual Assault or Stalking

Unlike OFLA and FMLA leave, an employee's entitlement to Leave for Victims of Domestic Violence, Sexual Assault or Stalking is not fixed at any specific period of time. Instead, employers are required to grant "reasonable" leave" to an eligible employee who seeks to take Leave for Victims of Domestic Violence, Sexual Assault or Stalking for a qualifying purpose. ORS 659A.272, OAR 839-009-0350.

OAR 839-009-0340(13) defines “reasonable leave” as any amount of leave that does not cause an “undue hardship” on the employer’s business. “Undue hardship” is “a significant difficulty and expense to a business and includes consideration of the size of the business and the employer’s critical need for the employee.” ORS 659A.275(1), OAR 839-009-0350(1). A covered employer may limit the amount of Leave for Victims of Domestic Violence, Sexual Assault or Stalking an employee takes if it creates an undue hardship on the employer’s business. ORS 659A.275(2), OAR 839-009-0355.

An employer may consider a number of factors in determining whether Leave for Victims of Domestic Violence, Sexual Assault or Stalking will cause an undue hardship to the employer’s business. They include, but are not limited to:

- Length of the leave and relative cost to the business.
- Overall financial resources of the facility, number of employees, and the effect on expenses and resources or other impacts on the operation of the facility if the leave were granted.
- Overall financial resources of the employer, overall size of the business with respect to the number of its employees, and the number, type and locations of the employer’s facilities,
- The type of operations conducted by the employer; including composition, structure and functions of the employer’s workforce.

Intermittent and Alternate Duty Leave

Leave for Victims of Domestic Violence, Sexual Assault or Stalking allows eligible employees to take leave in multiple blocks of time (intermittent leave) or on an altered or reduced work schedule. OAR 839-009-0360(1). It also allows employers to transfer an employee on intermittent leave or a reduced work schedule to an alternate position with the same or different duties, in order to accommodate the leave. OAR 839-009-0360(2). Such transfers are allowed when all of the following conditions exist:

- The employee voluntarily accepts the transfer without coercion;
- The transfer is temporary and lasts no longer than necessary;
- The position to which transferred must have equivalent pay and benefits;
- The transfer may be made only when there is no other reasonable option which allows the employee to access leave; and
- The transfer does not cause a chilling effect, does not discourage, or create an undue hardship for the employee using the leave.

An eligible employee transferred to an alternate position for the purpose of a reduced work schedule must be returned to the employee's former position when the employee notifies the employer that he or she is ready to return to that position.

Except for a circumstance in which an employee transfers to an alternate position for the purpose of a reduced work schedule, Leave for Victims of Domestic Violence, Sexual Assault or Stalking, unlike OFLA, includes no explicit statutory requirement that employers reinstate employees taking Leave for Victims of Domestic Violence, Sexual Assault or Stalking leave to their former position when the employee notifies the employer that the employee is ready to return to work. However, the language prohibiting discrimination under Leave for Victims of Domestic Violence, Sexual Assault or Stalking is more explicit than the nondiscrimination language in OFLA. Leave for Victims of Domestic Violence, Sexual Assault or Stalking provides, at ORS 659A.277: "It is an unlawful employment practice for a covered employer to deny leave to an eligible employee or to discharge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment because the employee takes leave as provided in ORS 659A.272." Consequently, employers should carefully consider any plan to return the employee to any position other than the one from which the employee took Leave of Victims of Domestic Violence, Sexual Assault or Stalking, and make certain that their actions would withstand scrutiny under ORS 659A.277. In addition, employers should keep in mind that discrimination theory includes an analysis of whether an employee is treated differently than similarly-situated employees who take leave not covered under Leave for Victims of Domestic Violence, Sexual Assault or Stalking.

Leave for Victims of Domestic Violence, Sexual Assault or Stalking Notice Requirements

An employee seeking Leave for Victims of Domestic Violence, Sexual Assault or Stalking is required to give the employer reasonable advance notice of the employee's intention to take leave unless giving the advanced notice is not feasible. ORS 659A.280(1), OAR 839-009-0362(1).

When an employee is able to give advance notice, the employee must follow the covered employer's "known, reasonable and customary procedures for requesting any kind of leave."
OAR 839-009-0362(3).

When taking leave in an unanticipated or emergency situation, an employee must give oral or written notice "as soon as is practicable." This notice may be given by any other person on behalf of the employee. OAR 839-009-0362(2).

Leave for Victims of Domestic Violence, Sexual Assault or Stalking Certification Requirements

Employers may require an employee seeking Leave for Victims of Domestic Violence, Sexual Assault or Stalking to provide certification that:

> (1) the employee or the employee's minor child or dependent is a victim of domestic violence, sexual assault or stalking; and
>
> (2) that the leave is for a qualifying purpose set out in ORS 659A.272. ORS 659A.280(2), OAR 839-009-0362(4). The employee must provide the certification "within a reasonable time after receiving the covered employer's request." ORS 659A.280(3), OAR 839-009-0362(7). The employee is not required to provide certification unless the employer's request is in writing. OAR 839-009-0362(7). While waiting for certification, the employee may provisionally designate the leave as covered under Leave for Victims of Domestic Violence, Sexual Assault or Stalking. OAR 839-009-0362(8).

Any of the following meets Leave for Victims of Domestic Violence, Sexual Assault or Stalking's certification requirement:

- A copy of a police report indicating the employee or employee's minor child or dependent was a victim of domestic violence, sexual assault or stalking. ORS 659A.280(4)(a), OAR 839-009-0362(5)(a).

- A copy of a protective order or other evidence from a court or attorney that the employee appeared in or was preparing for a civil or criminal proceeding related to domestic violence, sexual assault or stalking. ORS 659A.280(4)(b), OAR 839-009-0362(5)(b).

- Documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the eligible employee or the eligible employee's minor child or dependent is undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, sexual assault or stalking.

ORS 659A.280(4)(c), OAR 839-009-0362(5)(c).

The employer must pay the cost of medical verification not covered by insurance or other benefit plan. ORS 659A.306

Extension of Leave

An employee on Leave for Victims of Domestic Violence, Sexual Assault or Stalking who needs to take more leave than originally authorized should give the covered employer notice as soon as is practicable prior to the end of the authorized leave, following the covered employer's known, reasonable and customary procedures for requesting any kind of leave. When an authorized leave ends and an employee does not

return to work, an employer having reason to believe the continuing absence may qualify as Leave for Victims of Domestic Violence, Sexual Assault or Stalking may request additional information. If the covered employer requests additional information, the eligible employee will provide the requested information as soon as is practicable. The covered employer may not treat a continuing absence as unauthorized unless requested information is not provided or does not support leave qualification. OAR 839-009-0362(9).

Confidentiality Requirements

All records and information kept by a covered employer regarding an eligible employee's leave under Leave for Victims of Domestic Violence, Sexual Assault or Stalking, including the fact that the eligible employee has requested or obtained leave under Leave for Victims of Domestic Violence, Sexual Assault or Stalking, are confidential and may not be released without the express permission of the eligible employee, unless otherwise required by law. ORS 659A.280(5), OAR 839-009-0362(10).

Reasonable Safety Accommodation

It is an unlawful employment practice to refuse to make a reasonable safety accommodation requested by an individual who is a victim of domestic violence, sexual assault or stalking, unless the employer can demonstrate the accommodation would cause an undue hardship on business operations. Employers must work with an employee who requests a safety accommodation. These accommodations could include a transfer, reassignment, modified work schedule, unpaid leave, changed work telephone number, changed work station, installed lock, implemented safety procedure or any other adjustment to the job structure, workplace facility or work requirement in response to actual or threatened domestic violence, sexual assault or stalking. Prior to making an accommodation, an employer may require the individual to provide certification that the individual is a victim.

Leave for Victims of Domestic Violence, Sexual Assault or Stalking – Paid or Unpaid?

Leave for Victims of Domestic Violence, Sexual Assault or Stalking is designed to be a leave without pay. However, factors that determine when the employer must grant the leave with pay include provisions outlined under collective bargaining agreements, or other employment contracts, agreements or policies that allow paid leave.

Eligible employees subject to the above mentioned agreements may use any paid accrued vacation leave or any leave offered in lieu of vacation during any Leave for Victims of Domestic Violence, Sexual Assault or Stalking qualifying leave. Generally the employer gets to choose the order in which the paid leave is taken unless specifically barred by collective bargaining agreement, policy, contract or other employment agreement entered into by the employer and employee.

Compliance and Enforcement

Under Leave for Victims of Domestic Violence, Sexual Assault or Stalking, it is an unlawful employment practice for an employer to:

- Refuse to hire an otherwise qualified individual because the individual is a victim of domestic violence, sexual assault, or stalking.

- Discharge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment because the individual is a victim of domestic violence, sexual assault, or stalking.

- Count Leave for Victims of Domestic Violence, Sexual Assault or Stalking against an employee in determining the employee's compliance with attendance policies.

- Count Leave for Victims of Domestic Violence, Sexual Assault or Stalking against an employee when determining eligibility for bonuses based on attendance.

- Discharge, expel or otherwise discriminate against any person because the person has filed a complaint, testified or assisted in any proceeding in connection with Leave for Victims of Domestic Violence, Sexual Assault or Stalking.

- Aid, abet, incite, compel or coerce the doing of any of the acts in violation of Leave for Victims of Domestic Violence, Sexual Assault or Stalking or attempt to do so.

ORS 659A.277, OAR 839-009-0365.

Employees who believe they have been a victim of one of the unlawful employment practices listed above may file complaints alleging violations of Leave for Victims of Domestic Violence, Sexual Assault or Stalking with BOLI's Civil Rights Division. Complaints must be filed no later than one year from the date of the alleged harm. ORS 659A.820, OAR 839-009-0365.

Leave for Victims of Domestic Violence, Sexual Assault or Stalking's Relationship to Other Types of Leave

The purposes for which employees access Leave for Victims of Domestic Violence, Sexual Assault or Stalking may overlap with other statutorily required leaves or protected areas of the law. For EXAMPLE, an employee's need for Leave for Victims of Domestic Violence, Sexual Assault or Stalking may also be considered a serious health condition under both OFLA and FMLA. In those situations the employer may count the absences concurrently.

It is also possible that the need for Leave for Victims of Domestic Violence, Sexual Assault or Stalking may qualify for protection under the ADA, Oregon's disability discrimination laws, or Oregon's injured worker discrimination laws. For EXAMPLE, an employee of a covered employer who is a victim of a sexual assault and now suffers from post-traumatic stress disorder would qualify for Leave for Victims of Domestic Violence, Sexual Assault or Stalking and may also have a disability. If that assault occurred at work, the employee may also be an injured worker.

Employers should carefully examine these situations and look at the overall circumstances creating the need for leave to determine if the employee is entitled to protection or leave

CHAPTER 8

PERSONNEL PRACTICES

Company Policies

Employers are not required by law to have any particular personnel policies, nor are they required to have written policies. However, having written policies that clearly outline what employees can expect from the employer, and what the employer expects from its employees, can help to avoid confusion and employee dissatisfaction and help ensure that all employees are treated fairly. Personnel policies may differ for different job categories, but applicable policies should be applied to all employees equally.

More comprehensive information on writing company and employee policies is available in the Bureau's *Policy Writing Guidelines* handbook.

Employee Selection

Oregon law does not specify that an employer must use any particular method to recruit employees. However, since the discrimination laws apply to recruitment as well as to other employment practices, employers should adopt recruitment strategies aimed at reaching all qualified individuals in the community. This could include advertising in different newspapers, websites, and trade publications, as well as using the Oregon Employment Department and community billboards and organizations.

Necessary Information

Civil rights laws prohibit discrimination, but still allow employers to seek job-related information. If there are certain characteristics about a person that need to be known in order to determine if he or she can perform the duties of the job, then it is not discriminatory to ask for such information.

The relationship between the information sought and the abilities necessary to perform the job is the key to deciding if an inquiry is appropriate. When designing or evaluating an application form, an employer should decide if the information requested is necessary and is directly related to the duties of the job.

Questions after Hire

Questions regarding an applicant's medical condition are generally prohibited, although certain job-related questions can be asked after hire. If there is a need, because of the type of job, for an employer to require proof of age or citizenship, the job can be offered on the condition that the person furnish such proof.

Choosing the Qualified Candidate

Choosing candidates whose qualifications meet the employer's needs ensures the employer better employees and diminishes the chance that an applicant will be denied a job for reasons not related to required job duties and that could prove to be discriminatory.

Job Assignment/Wages/Benefits

Job assignments should be made on the basis of the employer's needs and the employee's abilities, not because individuals of a particular sex, race, national origin, or characteristic usually perform that type of job.

Compensation must not be based on sex, race, marital status or any characteristic protected by law. Benefits, when offered by the employer, are part of the employer's wage agreement with the employee and must not be increased or decreased because an individual belongs to a particular protected class. Maternity benefits should be allowed by the employer to the same extent that benefits for other physical conditions are allowed.

Promotion

Promotional opportunities should be afforded to employees regardless of their membership in a protected class. Employers who wish to know if their system of promotion is operating in a nondiscriminatory fashion should compare the group of individuals qualified for promotion to the persons promoted.

If members of a particular group are promoted at a much lower rate than members of other groups, the promotional system should be re-examined to determine what is causing these individuals to be screened out. If the stumbling block is a qualification that is not necessary to the performance of the higher level job, it should be eliminated. When the requirement is necessary to the job, the employer might provide development and training to such employees to improve their potential to be promoted.

Employee Review

Many employers regularly review their employees' progress. Performance reviews help employees know how they are doing and alert them to any problem areas. If a review process is used to evaluate employees, care should be taken to standardize the process so that employees of different protected classes who perform the same job are not subjected to different requirements.

Documentation

All personnel actions should be documented in writing and dated. Careful documentation is the employer's best defense to a charge of discriminatory treatment. Documentation does not have to be of a particular form, but should be an accurate reflection of the action taken. Employees are entitled by law to examine their personnel records and to obtain certified copies of them. ORS 652.750.

Termination

Most of the complaints filed with the Bureau of Labor and Industries concern termination. Employees who are aware of their employer's policies regarding termination and of the reasons for which they may be terminated are less likely to believe that they have been the subject of unlawful discrimination if they are terminated. For EXAMPLE, an employer who fires one employee for behavior or poor quality work, while tolerating the same behavior or poor quality work from others is more susceptible to a charge of

discrimination than one who applies behavior and work standards equally. To avoid the possibility of discrimination in termination, employers should:

- Let employees know the reasons for which they may be terminated.
- Get all the facts prior to making a termination decision by checking the employee's file, supervisor's reports, etc.
- Check other personnel files to make sure that there is no pattern of discrimination.
- Clearly explain the reason for termination to the employee.

PERSONNEL RECORDS: EMPLOYEE'S RIGHT TO VIEW

In Oregon, employees are permitted the right to view and obtain a copy of their employment record any time during their employment and up to 60 days after termination of the employment. ORS 652.750 establishes this right for all employees, and applies to all employers within Oregon.

Under ORS 652.750, a personnel record is any document or items which are used or have been used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action. The statute specifically excludes criminal records or confidential records.

The employee may obtain a certified copy of his personnel record at any time during his employment. If the employee is terminated, the employer must keep his employment record for at least 60 days should the employee request a certified copy of the record. Although ORS 652.750 legally requires an employer to retain the employee's personnel record for 60 days, other state and federal laws may mandate longer periods for retention. In addition, former employees are entitled to file certain legal claims against the employer several years after the termination of their employment. A good guideline for employers is to retain all personnel records for a period of seven years so that documentation will be available should any litigation arise.

If an employee requests a certified copy of his personnel record, the employer may charge a fee to reasonably recover the actual cost of reproducing the personnel record.

QUESTION: PERSONNEL RECORDS

OREGON EMPLOYEES ARE LEGALLY ENTITLED TO VIEW PERSONNEL RECORDS

Q: My employee, Lane, is late for work about four to five times a month. Although I've told him this is unacceptable, he hasn't changed his ways. So I sat down with him yesterday and we had a more serious conversation, in which I told him that he would be subject to discipline if the behavior continues. I didn't give him a formal written warning, but I did tell him that I had been making notes about the tardiness in his

personnel file. He then angrily retorted that I was breaking the law, and that I didn't have a right to put anything in his personnel file unless he had the opportunity to view it and to write a formal rebuttal. Now he's demanding to inspect his entire personnel file. What are my legal obligations here?

Oregon laws don't require you to advise an employee each time you place something in his personnel file, nor do they require you to allow the employee to submit a rebuttal.

But in Oregon, as in several other states, an employee does have the right to inspect his personnel records, and the employer must provide a reasonable opportunity for the employee to view these records at the workplace.

In addition, at the employee's request, the employer must provide a certified copy of the records. Providing a "certified" copy doesn't entail a complicated legal process. Rather, the person in charge of maintaining the records certifies in writing that the documents provided are a true and accurate copy of the personnel records. The law pertaining to personnel records, ORS 652.750, permits an employer to charge a reasonable fee to recover the cost of making the copies.

The law defines "personnel records" broadly as any records "which are used or have been used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action." So any records you use to monitor or rate Lane's performance fall under this definition.

Note that the definition isn't limited to the contents of the employee's official file. Employers are often surprised to learn that records outside of the personnel file, such as documents in a supervisor's "working file," also fall within the definition of "personnel records" if those documents are used to evaluate the employee. Other material outside of the physical personnel file — such as notes written on your home computer — may also need to be included. Say, for EXAMPLE, that you sent an e-mail to Lane's supervisor, asking her if his tardiness has improved. That e-mail, as well as the supervisor's response, is within the definition of "personnel records" if it contributed to any decisions you made about Lane's employment.

There are some limits to this law. It does not require employers to turn over confidential reports from previous employers, nor records pertaining to the conviction, arrest or investigation of illegal conduct. And it wouldn't require you to provide routine records like payroll or insurance documents that aren't used to evaluate the employee.

The bottom line is that you should create any documentation for the personnel file in a neutral, factual and objective manner. Don't write anything in your employee's file — or anywhere else, for that matter — that you're not comfortable with the employee eventually viewing.

What about allowing Lane a rebuttal? Some states give employees the right to place a formal rebuttal in the file whenever the employer takes disciplinary action, but Oregon is not one of them. So unless you have a contract or collective bargaining agreement which allows workers this right, you could refuse Lane's demand. Still, many employers choose to allow the employee's written response. Doing so shows that you're fair and willing to consider all of the facts, and it doesn't mean you have to retract any disciplinary action. Denying Lane the chance to file a rebuttal is likely only to increase the tension between

you. And with most issues in the workplace, you're better off when the emphasis is on greater — not fewer — opportunities for communication.

OBTAINING AND PROVIDING JOB REFERENCES

Guidelines for Communicating References Q & A

The main risk associated with giving references is that the employer may end up defending a defamation claim. Statements that adversely reflect on an employee's abilities or character are defamatory. If those statements are also false, the employee could prevail in a defamation claim.

Employers have a "qualified privilege" to communicate defamatory information if the statements:

- Are made with a good-faith belief that they are true.
- Serve a business interest or purpose.
- Are limited to that specific purpose.
- Are made on a proper occasion.
- Are communicated to proper parties.

If an employee files a defamation suit, he or she may be entitled to a jury trial to decide if the employer has abused the privilege and is in violation of the foregoing guidelines.

To avoid a defamation suit, employers should take the following steps:

- Develop a consistent response to all reference requests.
- Route all requests for references to one or two key personnel who understand the legal issues raised by reference inquiries.
- Give only specific, documented facts, not subjective opinions.
- Provide only information that is job-related.
- Provide information only to those who have a business need to know.
- Obtain signed releases before giving responses to reference requests.

Are employers required to give references for current or former employees?

No. Employers are not required to give references. However, a consistent policy should be adopted. If the policy is to decline requests for references, prospective employers should be informed of the policy and advised that no negative or positive reflection on the employee is intended.

Should employers answer telephone requests for references?

Since one of the conditions of qualified privilege is to provide information only to proper parties, it is better to require that all requests be in writing on company letterhead. Additionally, written communication provides documentation of the information provided.

Is it necessary to get a signed release from the employee?

Although releases are not required by law, they can provide support to the employer's position that the information was given for a business purpose and on a proper occasion.

Many inquiries center on subjective information. How can employers demonstrate a "good faith belief" of truth under those circumstances?

When answering questions, avoid opinions and limit comments to documented observations. Never repeat rumors, gossip or information received from anonymous sources.

Prospective employers frequently telephone directly to the former employee's manager or supervisor for information. How can employers protect themselves?

It is a good idea to adopt a consistent policy that all requests for references will be handled by one person or a particular department. Managers and supervisors should be trained to refer all such requests to the appropriate person or department and to consistently refuse to comment when contacted directly.

Are employers required to check references before hiring employees?

No. There is no law that requires reference checks. However, employers must exercise reasonable care to insure that employees, customers, clients and visitors are free from harm inflicted by unfit employees if the employer either knew or should have known of the employee's dangerous propensities. Employers who fail to exercise reasonable care to screen out unfit employees may be sued for negligent hiring or negligent retention of unfit employees.

What steps should an employer take to help reduce liability for negligent hiring or retention?

Most lawsuits focus on the failure to contact all prior employers, the failure to attempt to verify the trustworthiness of the applicant and failure to verify activities when there are suspicious gaps in the employment history. The following practice tips may be useful:

- Write a letter requesting references from each employer listed.
- Verify educational degrees.
- Look for gaps in employment history, obtain explanations for the gaps, and verify the explanation.

May employers request information from previous employers relating to attendance?

Information may not be requested or obtained from third parties that could not be requested directly from the individual. Employers may inquire about an individual's attendance record with former employers; however, follow-up questions regarding reasons for absence are unwise because they are likely to elicit information relating to disabilities. Employers may also ask questions designed to detect abuses of sick leave. For EXAMPLE, an applicant or former employer may be asked how many Mondays or Fridays were missed other than for approved types of leave.

May employers inquire about or give information relating to on-the-job injuries or workers' compensation claims?

Again, since this information could not be obtained from the individual directly, it may not be discussed when obtaining or giving references. Additionally, there must be no discussion about disabilities or physical or mental limitations.

What is blacklisting?

Blacklisting is the intentional prevention of the future employment of an employee by the former employer. Blacklisting usually occurs when the former employer makes representations to prospective employer(s) that the individual should not be hired. It should be distinguished from a reference, which is essentially a request for information about job performance. Blacklisting is an unlawful employment practice in Oregon. ORS 659.805.

POSTING REQUIREMENTS

QUESTION: WORKPLACE POSTERS

OREGON EMPLOYERS MUST COMPLY WITH A VARIETY OF POSTING REQUIREMENTS

Q: I'm confused about what posters I'm legally required to have up in my workplace. I thought I was in compliance, but I've recently received several mailings from private companies suggesting I could be fined thousands of dollars if I don't purchase their posters. Have the posting requirements changed recently? What are the different agencies that require me to post information for employees?

There haven't been any significant recent changes in the posting requirements for employers. In some cases, mailings sent by private companies contain misinformation or rules that don't apply to local employers. It's true that as an Oregon employer, you're required to comply with a number of posting requirements set by various state and federal agencies. But you can obtain free copies of the required posters by either contacting the appropriate agencies or downloading the posters directly from the internet.

We'll give you a brief rundown of the posting requirements here, but for more complete information, agency contacts, and links allowing you to download all the posters, check the posting information section at www.oregon.gov/boli on the Bureau of Labor and Industries' website.

The number of workers you employ determines which posters you're required to have. If you have 50 or more employees, you need all seven of the posters described below. To determine your coverage, you must count all employees on your payroll (full-time, part-time, temporary and seasonal). If you had the designated number of employees on your payroll during 20 calendar weeks in either 1999 or 2000, the posting requirement applies to your company. You should have the required posters conspicuously displayed in a place where employees can regularly view them — in your break room, for instance, but not in the broom closet, where only the janitor will see them!

Oregon Minimum Wage Poster: All Oregon employers (except federal government) must post the state minimum wage poster, issued by BOLI. Your poster is up-to-date if it reflects the current minimum wage.

Job Safety and Health Poster ("It's the Law"): Issued by the Department of Consumer & Business Services and required for all Oregon employers with one or more employees.

Federal Minimum Wage Poster: Issued by the U.S. Department of Labor, this poster is required for all employers covered by the Fair Labor Standards Act (all employers who gross $500,000 or more annually or whose employees work in interstate commerce).

Employee Polygraph Protection Act Poster: Issued by the U.S. Department of Labor and required for all employers.

Equal Employment Opportunity is "THE LAW" Poster: Issued by the Equal Employment Opportunity Commission and required for all employers with 15 or more employees during 20 weeks of the year.

Oregon Family Leave Act Poster: Issued by BOLI and required for all employers with 25 or more employees in Oregon.

Federal Family and Medical Leave Act Poster: Issued by the U.S. Department of Labor and required for employers with 50 or more workers.

The Uniformed Services Employment and Reemployment Act (USERRA) Poster: Employers are required to provide to persons entitled to the rights and benefits under The Uniformed Services Employment and Reemployment Rights Act (USERRA), a notice of the rights, benefits and obligations of such persons and such employers under USERRA.

All of the posters listed above are available in an eight-in-one format entitled "Commonly Required Postings in Oregon." The eight-in-one wall poster is available in English or Spanish. See the BOLI website for order information.

In addition to these seven posters, all Oregon employers must post a Workers' Compensation Notice of Compliance, issued by the Workers' Compensation Division after employers purchase workers' compensation insurance. Employers with at least a $225 payroll in a calendar quarter must also post an Employment Insurance Notice, issued automatically by the Employment Department after an account is set up or reopened.

Contact List for State and Federal Agencies

The Technical Assistance for Employers Program at the Bureau of Labor and Industries answers employer questions on a wide range of personnel practices and employment laws.

You may contact the Technical Assistance Department of BOLI at 971-673-0824 or by email at bolita.ta@state.or.us with questions on legal hiring practices, recordkeeping requirements, civil rights laws, wage laws, leave laws, discipline and discharge.

For questions in other areas, Technical Assistance provides referrals to a number of different state and federal agencies. The chart with contact information is available on the website at www.oregon.gov/boli/ta