Bureau of Labor and Industries

Technical Assistance for Employers Program

Policy Writing Guidelines

A Handbook for Oregon Employers

2012 Edition
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Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

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Bureau of Labor and Industries

Dear Friend of Technical Assistance:

Welcome to the Bureau of Labor and Industries (BOLI)'s newest *Policy Writing Guidelines* handbook. Thank you for investing in this handy manual for human resources professionals, attorneys and managers and employers at all levels. *Policy Writing Guidelines* is a concise guide to crafting clear, effective policies that communicate your practices and help you prevent unnecessary legal claims.

BOLI is committed to helping Oregon's businesses and employers stay strong and successful. Our primary goal through TA is to help employers and businesses stay in compliance with the law and prevent costly litigation. When the law is known and followed in the first place, it's a win for all Oregonians.

Throughout the year, TA provides a variety of services to support Oregon employers. These services are funded almost entirely through the sales of publications like this one and attendance at public seminars on various employment law topics. Customized, on-site seminars for employers are also an important part of TA's work. Through your support, TA continues to answer more than 20,000 employer questions via phone and e-mail each year, conduct more than 150 public and private seminars each year, and produce a high-quality, two-day law conference each December.

I hope you find this book to be a helpful tool for understanding and complying with state and federal employment laws. Any feedback you may have should be directed to TA, and be sure to visit http://www.oregon.gov/boli/ta to learn more about the resources and services that TA has to offer.

Please do not hesitate to contact our offices if you have questions or thoughts to share.

Sincerely,

Brad Avakian, Commissioner
Oregon Bureau of Labor and Industries

A WORD FROM BOLI TECHNICAL ASSISTANCE …

Thank you for purchasing this book! Proceeds from the sale of this handbook support the Technical Assistance for Employers Program (TA), a self-supporting program that receives little taxpayer funding.

As an independent unit within the Bureau of Labor and Industries, TA is dedicated to providing the resources, information and training employers need to comply with state and federal labor and employment laws.

TA offers a number of free and low-cost resources for Oregon employers, including fact sheets, employer advice columns, required workplace posters, and personal assistance by telephone and email. Our informative and practical handbook series is currently available for purchase through our website and includes topics like:

- **Civil Rights Laws;**
- **Wage and Hour Laws;**
- **Family and Medical Leave Laws in Oregon;**
- **Recent Changes in Labor and Employment Laws (for 2010-2011); and**
- **Employee Classification & Wage and Hour Exemptions.**

Revisions to our popular handbook on *Documentation Discipline and Discharge* are also underway and should be available soon!

You can access the seminar descriptions, schedules and registration information for all of our public training sessions online, as well as information about arranging an on-site, customized seminar for your staff.

To contact us, feel free to visit our website at http://www.oregon.gov/BOLI/TA or call our Employer Assistance line at 971-673-0824.

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CONTACTING BOLI

The mission of the Bureau of Labor and Industries is to protect employment rights, advance employment opportunities, and protect access to housing and public accommodations free from discrimination.

The four principal duties of the Bureau of Labor and Industries (BOLI) are to:

(1) Protect the rights of workers and citizens to equal, non-discriminatory treatment through the enforcement of anti-discrimination laws that apply to workplaces, housing and public accommodations;
(2) Encourage and enforce compliance with state laws relating to wages, hours, terms and conditions of employment;
(3) Educate and train employers to understand and comply with both wage and hour and civil rights law; and
(4) Promote the development of a highly skilled, competitive workforce in Oregon through the apprenticeship program and through partnerships with government, labor, business, and educational institutions.

If you have questions or concerns regarding any of these areas, please feel free to contact us!

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ABOUT THIS HANDBOOK

TA has produced this handbook as a general summary and teaching guide in order to help employers understand the basics of creating written policies and procedures for the workplace.

Among other things, a well-written set of policies and procedures provides employers with a powerful tool for effectively and efficiently communicating workplace expectations. A current and consistently applied policy can also help employers to avoid potential liability for violations of Oregon's civil rights and wage and hour laws.

Several sections of this handbook contain answers to commonly asked questions, best practice tips, updates, and, of course, sample policies in order to illustrate the application of policy writing guidelines. Please keep in mind, however, that this handbook is not intended as legal advice regarding any particular situation. Those seeking legal advice should contact an attorney. It is always prudent to have an attorney review draft policies and handbooks to ensure compliance within a particular workplace and industry.

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POLICY BASICS

THE SCENARIO

Deborah Greenburg just came into your office, demanding that she get the last two weeks of August off for her vacation. You know that August is a busy time, and that it would be extremely difficult to spare her. You start to tell her no, when she fires back that Ed from her department has already approved the vacation, and she has started making her plans. Besides, she says, she knows that the "guys" in the department never have a problem getting their vacation requests approved.

There are countless such scenarios in which managers are confronted with questions to which there are no clear answers. Too often, the response is to "wing it" and make a spot decision -- a decision that could prove unwise or even harmful to the company. But a well-crafted written policy can provide everyone with a shared set of expectations and allow for fair, consistent (and hopefully more efficient) decision making on things like the vacation approval process.

THE BENEFITS OF WRITTEN POLICIES

A set of written guidelines provides a number of benefits to employers and employees alike. Consider the following.

Clear communication of the company's mission and goals

Written policies are an excellent way to educate employees as to what the company is all about and where it hopes to go in the future.

Shared sense of common purpose

Just as written policies communicate the function and mission of a company, they can also set out the company's commitment to a fair and respectful work environment. Written policies, combined with appropriate training and consistent application, demonstrate the company's appreciation for the contributions made by each employee, and this in turn can lead to greater commitment among employees.

Established standard for the "rules of the game"

Everyone benefits in an environment where the established policies and procedures are clear and predictable. Although employers need flexibility (and should preserve that flexibility in their policies) the lack of any standards can lead to uncertainty and confusion.

Clearer communication

Many employment disputes result from miscommunication between management and staff. Distributing clearly written policies to all employees will help to prevent this.

Time savings

The task of explaining company procedures to each employee can be very time-consuming. Distributing and referring employees to a set of written policies not only reduces the chance of miscommunication, but it also saves a great deal of time.

Minimizing legal claims

Establishing and following written policies can dramatically reduce the chances of civil lawsuits or claims with enforcement agencies like the Bureau of Labor and Industries (BOLI). Ensuring those policies are up to date and consistently applied can help reduce the impact of the claims or complaints that do get filed.

FREQUENTLY ASKED QUESTIONS

TRANSLATION OF POLICIES

SPANISH VERSION OF POLICIES ADVISABLE, BUT NOT GENERALLY REQUIRED

QUESTION*: If we create an employee handbook, are we liable in any way if the Spanish-speaking employees don't have a translated version so that they may not understand the policies?*

ANSWER: It is advisable, from a fairness perspective, to make your company policies and procedures known to all employees. And you will be in a better position to defend against potential discrimination claims if you can show all employees had advance notice of your company rules. While there is no Oregon law requiring you to translate your handbook into every language spoken by every employee, you might consider providing a brief notice to employees in their respective languages that indicates each employee is responsible for knowing the content of your policies and who to contact regarding any necessary clarifications.

If you have 50 or more employees in the U.S., you are covered by the federal Family and Medical Leave Act (FMLA). The FMLA not only requires employers to include basic family leave information in their employee handbooks, but also requires, where a significant portion of workers are not literate in English, that employers provide FMLA poster information in a language in which the employees are literate. Employers may purchase required state and federal posters as a composite, "8-in-1" poster in English or Spanish from BOLI's website www.oregon.gov/boli/ta.

COMMON PITFALLS OF POLICIES

Oregon is an "employment at-will" state. In general, this means that an employer can terminate an employee at any time for any reason, and that the employee is similarly free to leave employment at any time and for any reason.

Over the years, however, there have been a variety of laws and court cases that have placed major restrictions on an employer's right to terminate employees. In writing and enforcing policies, employers should take care not to inadvertently violate these laws or place unnecessary restrictions on themselves. The following sections deal with some of the mistakes most commonly made.

Creating Unwanted "Contracts"

Even if the employer does not intend it, an enforceable contract can be created through a written policy. A classic example is the Oregon case of *Yartzoff v. Democrat-Herald*, 281 OR 651, 576 P2d. 356 (1978), in which the employee handbook stated that a new employee would be "on probation" for three to six months, but that the employee could be terminated at any time during this period if he could not "properly handle his job or cannot become a productive member of the team."

In Yartzoff, an employee was terminated during her probationary period. She filed a lawsuit, alleging that she had been able to properly handle her job and be a productive member of the team. Therefore, the employer had violated the "contract" by firing her. The Oregon Court of Appeals ruled that the employee had stated enough information for a contract to exist.

The Yartzoff case demonstrates that your written policies, if not carefully crafted, can be construed as contracts. But even in the absence of written policies, employers sometimes create contract liability without realizing it. A prime example was the case of the well-meaning manager in *Ohanian v. Avis Rent-A-Car*, 779 F.2d 101 (2nd Cir, 1985), who told Ohanian that as long as he did not "screw up" badly, there was no way he was going to get fired, and he would never get hurt in the company. Ohanian relied on those statements in deciding to accept a cross country transfer to a position from which he was later terminated. In upholding an award to Ohanion of $304,693, the court held that evidence of the manager's statements was enough to have created a binding verbal contract for lifetime employment.

Creating Discriminatory Patterns

Employers are generally aware that discrimination based upon race, gender, color or religion is unlawful, but state and federal civil rights laws also protect a host of other classifications. Treating an employee differently because he or she fits into one or more of these protected classifications will usually result in a violation of civil rights laws and potential liability for the employer.

Employers without written policies can find themselves "playing favorites" or establishing discriminatory patterns without being aware of it. Following a well-written and well-enforced policy manual can help ensure equal treatment of all employees.

The chart below summarizes the protected classifications set out under state and federal civil rights laws. A complete discussion on working with protected classes is available in BOLI's *Civil Rights Laws, A Handbook for Oregon Employers, 2012 Ed.*

A Summary of Protected Classifications

FEDERAL LAW	OREGON LAW
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 DISCRIMINATION IN EMPLOYMENT ACT OF 1967	OREGON REVISED STATUTES CHAPTER 659A
Age (40 and older in companies with 20+ employees)	**Age** (18 and older)
Uniformed Services Employment and Reemployment Rights Act of 1994 and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (all employers)	Members of the Uniformed Services (ORS 659A.082) Taking leave to Serve in State-organized Militia (ORS 399.065)
Veteran Status **Leave to Serve in the Military** **Veterans Preference in Hiring and Promotion** (Public Employers)	**Veteran Status** **Leave to Serve in State-organized Militia** **Veterans' Preference in Hiring and Promotion** (Public Employers)
AMERICANS WITH DISABILITIES ACT OF 1990	OREGON REVISED STATUTES CHAPTER 659A
Physical or Mental Disability	**Physical or Mental Disability** (in companies with 6+ employees)
Family and Medical Leave Act of 1993 (in companies with 50+ employees)	Oregon Family Leave Act (in companies with 25+ employees)
Protected leave for: • **Serious health condition of employee (including pregnancy-related conditions)** • **Serious health condition of employee's family Member (includes spouse, parent, biological or adopted or foster child)** • **Parental leave for birth or placement of newborn, adopted or newly-placed foster child**	**Protected leave for:** • **Serious health condition of employee (including pregnancy-related conditions)** • **Serious health condition of employee's family Member (includes spouse, parent, biological or adopted or foster child, parent-in-law, grandparent, grandchild, same-sex domestic partner and parent or child of same-sex domestic partner)** • **Parental leave for birth or placement of newborn, adopted or newly-placed foster child** • **Non-serious health condition of a child requiring home care**
Leave by Spouse, Son, Daughter or Parent of a Covered Military Service Member on active duty or call to active duty status for a qualifying exigency	**Leave by Spouse or Same-sex Domestic Partner of Member of the Armed Forces** prior to or during leave from deployment (under the Oregon Military Family Leave Act, ORS 659A.090 to 659A.099 in companies with 25+ employees)
Leave by Parent, Spouse or Child of Next of Kin to care for a seriously ill or injured service member or veteran (26 weeks)	

ADDITIONAL CLASSES PROTECTED BY OREGON LAW
OREGON REVISED STATUTES CHAPTER 659A (Except where noted, laws apply when an employer has 1 or more employees)
Access to Employer-owned Housing **Credit Records or Credit History** **Injured Workers** (in companies with 6+ employees) **Lawful Use of Tobacco Products on off-duty hours** **Leave to Donate Bone Marrow** **Leave to Serve in the State Legislature** (ORS 171.120-125) **Limits on Breathalyzer and Blood Alcohol Testing Expunged Juvenile Record** **Marital Status** **Medical Release as a Condition of Continued Employment** **Opposition to Health or Safety Conditions** (ORS 654.062(5)(a)) **Prohibition on Employer Requiring Medical Release unless Employer pays out-of-pocket costs** (ORS 659A.306) **Prohibition on Polygraph Exams** **Family Relationship** **Right to File a Lawsuit, Testify in Criminal or Civil Proceedings or Report Criminal Activities** **Right to Report Health Care Violations** **Right to Testify at Employment Division Hearings** **Right to Testify Before the State Legislature** **Sexual Orientation and Gender Identity** **Victims of Domestic Violence, Sexual Assault, Stalking or Harassment, including Leave Provisions**

EMPLOYEE HANDBOOK VS. POLICY AND PROCEDURE MANUAL

Before beginning the task of committing policies and procedures to writing, there are a few questions that should be asked and answered about the needs of the company and how written policies will be used to meet those needs. At a minimum, employers should consider:

- **Who is the target audience?**
- **What aspects of company operations require written policies and procedures?**
- **What level of detail is necessary?**

The answers to these questions can help employers to determine whether their written policies and procedures should take the form of an "employee handbook" or that of a "policy and procedures manual."

Employee handbooks are typically general statements of company policy using clear language to communicate the company's mission statement, workplace expectations and basic administrative procedures. Policy and procedure manuals are by comparison much more detailed descriptions set out as a resource references for managers, supervisors, and human resources personnel. The chart set out below summarizes the basic differences separating an employee handbook from a policy and procedure manual.

	Employee Handbook	Policy and Procedure Manual
Audience	• All employees	• Managers, supervisors, and human resources personnel
Format	• Straightforward, succinct statements of policy and procedures (no legal language) • Typically indexed / sectionalized for quick reference	• Comprehensive statements of policy and detailed descriptions of company procedures
Content	• Company's mission and goals • Legally required disclosures • Benefit programs • Administrative procedures (e.g., leave request, discipline policy)	• Detailed policy/procedure names, identifying numbers • Purpose statements or rationale for specific policies • Effective dates • Definitions • Applicable departments • Full statement of policy/procedure • Legal analysis and authority for policies • Statutory / administrative citations • Sample documents / forms • Appendices
Purpose	• Provide general descriptions of workplace expectations • Familiarize employees with basic procedures of the company	• Provide management with rationale and supporting documentation for policy language as aid to implementation

As a guide to policy writing basics, this book sets out the practical elements of creating and maintaining an employee handbook. The same principles can also be applied, however, as a basis for handling the more detailed material of a policy and procedure manual.

EMPLOYEE HANDBOOK CHECKLIST

There are probably about as many ways to create an employee handbook as there are employers. However, a checklist like the one set out below can be a helpful way to conceptualize the steps involved in that process.

_____ **Identify key personnel**

_____ **Select topics**

_____ **Survey existing policies and practices**

_____ **Draft policy statements**

_____ **Review completed handbook**

_____ **Deploy completed handbook**

_____ **Provide necessary training**

_____ **Obtain acknowledgments**

_____ **Set revision schedule**

Identify Key Personnel

Who should be involved in writing a handbook? For some companies, the answer to that question seems obvious. Where there is only one office manager or one human resources professional on staff, the task will naturally falls to that person. Still, even small companies should keep in mind that the process of creating a written policy guide will require input from a number of sources.

Managers, supervisors and long term employees can provide invaluable insight into:

- **Current practices and any "unwritten policy"**
- **Rationale supporting current practice (getting beyond "this is how we've always done it!")**
- **Problem areas (e.g., labor management friction, inconsistent leave administration, insufficient training) and potential policy fixes.**

Executive and administrative personnel are often keenly aware of regulatory requirements and potential compliance issues that should be addressed in any new or revised employee handbook.

Whether the organization has attorneys on staff or on retainer, timely legal advice is a critical component to creating and maintaining a sound employee handbook.

Select Topics

An employee handbook will typically include a selection (if not most) of the following components:

1. **Introduction and Welcome**
2. **General Information about the Company**
3. **Compensation Policies**
4. **Working Conditions**
5. **Leave Policies**
6. **Benefits Programs**
7. **Workplace Expectations / Rules**
8. **Disciplinary Process**

9. **Grievance System / Complaint Process**
10. **Termination Procedures**
11. **Summary and Acknowledgment**

While these are good standard subjects, the decision on what specific topics to include under these headings should reflect the actual needs of the workplace. In addition, the handbook should include policy regarding the employer's and employees' obligations under applicable state and federal employment laws.

Survey Existing Policies and Practices

Whenever an employer creates a written policy (or changes existing policies), an inventory should be made of any old policies, memos, and meeting minutes that may have created expectations among staff. While employers have a right to change existing policies and practices, it is wise to credit employees with everything they may have accrued under the previous policies in order to avoid possible contract claims.

The survey is also an opportunity to identify any "unwritten" policies floating around various departments in one form or another. Finally, a survey provides the chance to remedy any policy gaps and provide guidance on new laws or emerging problem areas like cell phone usage and social networking.

FREQUENTLY ASKED QUESTIONS

INVALIDATING AN OLD POLICY

A NEW POLICY SHOULD STATE THAT IT SUPERSEDES ANY FORMER POLICIES

QUESTION: ***Our current vacation policy has begun to cost us more than we can afford to offer in this economy. We want to replace the policy with a scaled back version, but the word is out and several employees have already stated that we are obligated to continue the current system. Can that be right?***

ANSWER: No. Employers do have a right to change existing policies and practices, including items related to compensation and benefits. That said, any changes to compensation packages need to be made prospectively – i.e., before any work that will be compensated under the new package has been performed. Employers should credit employees with everything they may have accrued under a previous compensation or benefit policy in order to avoid possible contract claims.

The new policy should also specifically state that going forward, it supersedes any former policies, memos, and verbal or written statements. As with any new policy, employers should obtain a written acknowledgement of the change from each employee.

> **EXAMPLE:** *ABC Company* has traditionally given full time employees three weeks of paid vacation time each year. For economic reasons, *ABC Company* has determined it is now necessary to decrease that amount to two weeks a year, effective July 1, [year certain]. *ABC Company* will allow employees the full use of any previously earned vacation time (even if it exceeds the new two-week maximum), and then apply the new policy only to vacation hours earned after that date.

Draft Policy Statements

Consultation with key personnel and taking stock of existing practices should provide a fairly good idea as to what needs to find its way into a written policy guide for a given employer.

For each policy topic, employers should set out each corresponding proposed policy in clear language. Save the legal analysis, rationale and supporting documentation for the policy and procedure manual.

For those working in a collaborative environment, the draft stage also provides a convenient check point to ensure that the policy statements are heading in the right direction before too much time and energy have been invested.

Review Completed Handbook

The draft is ready for review once it addresses each of the topics identified as an item to be included in the employee handbook and any appropriate specifics have been added.

At this point, employers may wish to have the management staff who will be implementing the new and revised policy review the draft and provide feedback. Some employers also invite feedback on draft policy from employees who will be affected by changes to existing policy or practice. Apart from providing another source of valuable input, an expanded review process can promote a sense of ownership and responsibility for the new policy among employees.

Apart from the content of the policies, some thought should be given to the overall format of the handbook. Features like a table of contents and an index keyed to page numbers are a must for all handbooks. It is also worth the effort to make electronic copies of the handbook searchable or connect sections of the index or table of contents to policy language by way of hyperlinks. Remember, the purpose of the handbook is to create another channel of communication with employees; any feature that will promote the handbook's ease of use is worth consideration.

Finally, before the final draft of the handbook is deployed, an attorney should review it. As noted above, a poorly written policy can create contractual obligations or expose the company to liability under a number of workplace employment laws.

Deploy Completed Handbook

Individual copies of the employee handbook can be distributed to each employee, or the employer can keep copies where employees have easy access to them. In order to avoid misunderstandings, however, it is usually best to distribute individual copies of the manual to each employee.

As an alternative to paper, many employers elect to place their employee handbooks online or on company intranets. So long as employees have ready access to the material, electronic versions of policies and procedures can be a cost effective solution to the expense of hard copies.

Another way to avoid excessive costs is to omit the long and often complex information about certain benefits that may not be applicable in many cases. Instead, the handbook can simply advise employees where to find further information about such topics.

EXAMPLE: Employees have the option of enrolling in *ABC Company's* life insurance program. If the employee wishes to do this, the premium payments can be automatically deducted from the employee's paycheck. For more information about this and other insurance plans, contact the human resources department.

Provide Necessary Training

A policy is most effective when it is clearly explained at the time of implementation. For new employees, the handbook provides a natural opportunity to introduce and explain company policies. Where a new employee handbook is rolled out (or even just a new or revised policy), it is important to provide any appropriate training at the same time. Employers may wish to distribute copies of the new handbook or policy to employees ahead of such trainings, and reserve the training for addressing concerns and questions employees may have.

Obtain Acknowledgments

Employers should obtain from each employee a written acknowledgment of having received and read the employee handbook (or a copy of any new or revised policy). The employee acknowledgment should be filed in an employee's personnel file as documentation of the employee's awareness of company policy.

Set a Revision Schedule

While the purpose of written policies is to provide company personnel with a shared set of expectations and a guide for fair, consistent (and hopefully efficient) decision making,

the backdrop to that policy, is an ever-changing landscape – government regulations change, business models adapt, and administrative processes evolve.

Employers should immediately review any policy directly affected by legislative or regulatory changes, and as a rule of thumb the entire employee handbook should be reviewed at least every three years.

ADDITIONAL CONSIDERATIONS

Different Policies for Different Types of Employees

Employers often have separate policies for separate classifications of employees. This is not necessarily a problem, as long as employees are treated equally within these classifications. Be sure that there is no confusion among employees about which policy applies to them by clearly defining classifications (like "full time," "management employee") in your policy and by providing employees with documentation of their status in current job descriptions or employee reviews.

SUMMARY: POLICY BASICS

Among other things, a well-written set of policies and procedures provides employers with a powerful tool for effectively and efficiently communicating workplace expectations. A current and consistently applied policy can also help employers to avoid potential liability for violations of Oregon's civil rights and wage and hour laws.

INTRODUCTORY LANGUAGE

The following material identifies several of the elements commonly found in the introductory sections of policy manuals. This material also includes several examples of sample language. Please be advised, however, that the following language is for illustrative purposes only. The best material is custom-made, written specifically to meet the individual company's needs, and reflective of the company's unique culture and mission.

WELCOME AND INTRODUCTION

The introduction section of an employee handbook sets the tone for the rest of the policy manual. A good introduction will enthusiastically welcome the new employee and provide information as to what the company is about, including its mission and future goals. Information can also be included about the company structure and various departments.

The introduction is also the best place to lay out the overall purpose the handbook, what kinds of information it will contain, how it is to be used, as well as any necessary disclaimers. Because the introduction provides the framework for what follows, it is especially important to (1) avoid language that implies any part of the handbook is a contract and (2) make it clear that the company reserves the right to make changes to its policies.

INTRODUCTION: SAMPLE #1

INTRODUCTION

1. This Handbook identifies the personnel policies of the Company and provides to the Board, Management and Staff a usable guidebook for administration of these policies. This handbook should increase the understanding and help to eliminate confusion on any given policy. However, this handbook is not a contract or a promise of any employment.

2. From time to time, this handbook may need to be modified or revised. When a policy is revised or modified, the "old" policy page should be removed from the manual and the new page inserted reflecting its effective date. These policies and procedures are subject to modification, suspension and elimination at any time, with or without notice, at the discretion of the Company except as provided in the following paragraph. Each employee is responsible for adhering to the policies and procedures of the Company. It is the employee's responsibility to read and understand this handbook. Any questions as to the interpretation of any policy should be forwarded in writing to the employee's immediate supervisor for resolution by the Chief Executive Officer, who is the only employee authorized to

interpret this manual on behalf of the Company. Interpretations of policies and procedures by the Board of the Company shall be final and binding.

3. The Company is an at-will employer and reserves the right to terminate an employee at any time for any or no reason, with or without notice just as an employee has the right to terminate employment with the Company at any time for any or no reason with or without cause or notice. This at-will employment policy is not subject to change.

4. This information supersedes all previous employee handbooks, personnel policies, procedure manuals or internal memoranda which addressed personnel matters.

INTRODUCTION: SAMPLE #2

ABOUT OUR HANDBOOK

This handbook gives you some basic information on our current personnel policies, procedures and benefits effective as of _____. It supersedes any prior written or oral policies, statements or understandings on these subjects.

This handbook and the guidelines it contains are not intended to be a contract and do not create any contract rights of employment or a promise or guarantee of specific treatment in specific situations. Our President may change these guidelines at any time. All employees of the Company are "at-will," which means that either you or we may terminate the employment relationship at any time, with or without cause, with or without notice. Our President is the only person who is authorized to modify our policy of employment at-will, and any such modification must be in writing and signed by our President.

This Handbook is property of the Company, to be used while you are employed here and returned to your supervisor when your employment terminates for any reason.

INTRODUCTION: SAMPLE #3

ABOUT THIS HANDBOOK

This employee handbook contains information about the employment policies and practices of *ABC Company* in effect at the time of publication. All previously issued handbooks and inconsistent policy statements or memoranda are superseded.

This handbook sets forth the terms and conditions of employment of all full-time, part time employees and supervisors.

ABC Company reserves the right to revise, modify, delete or add to any and all policies, procedures, work rules or benefits stated in this handbook or in any other document, except for the policy of at-will employment. All such revisions, modifications, deletions or additions must be in writing and must be signed and approved by _____. No oral statements or representations can change the provisions of this handbook.

This handbook is an integrated agreement between you and *ABC Company* with respect to the duration of employment and the circumstances which employment may be terminated; it sets forth the entire agreement concerning those terms, and there are no oral or collateral agreements of any kind. Nothing in this employee handbook, or any other personnel document, including benefit plan descriptions, creates or is intended to create, a promise or representation of continued employment for any employee.

Not all *ABC Company* policies and procedures are set forth in this handbook. We have summarized only some of the more important ones. If you have any questions or concerns about this handbook or any other policy or procedure, please ask your supervisor.

INTRODUCTION: SAMPLE #4

The materials contained in this handbook are presented solely for information purposes. The contents do not constitute a contract of any kind; they do not create, change, or nullify any rights or obligations; and they do not constitute any limitation on the discretion of *ABC Company* ("Company") in managing or supervising employees.

The handbook is simply an informational summary of our current policies, rules, procedures and benefits. The Company reserves the right to update or change the contents at any time.

Any questions or situations not covered by this handbook should be brought to the attention of your supervisor and/or Company Personnel/Labor Relations.

RETAINING "AT-WILL" STATUS

Oregon is an employment at-will state. As mentioned in the previous chapter, a poorly written policy can create an enforceable contract, even if the employer does not intend it.

For this reason is wise to include a prominent statement at the beginning of the policy manual regarding employment at-will – even if the language will appear elsewhere. In order to help preserve at-will status, it should be clearly stated that the manual is not a

contract, that management reserves its right to employ at-will, and that both the employer and employee can terminate the employment relationship at any time for any reason. Employers may wish to set out how (if at all) the company (or particular people within the company) may deviate from this policy. Such language should be clear and prominent -- perhaps in bold typeface and with larger letters than the rest of the text.

That said, including at-will language in the employee handbook cannot by itself eliminate the possibility of a claim if the rest of the handbook is not written in a consistent manner. A court could still view the handbook itself as a contract, particularly if it is, say, 400 pages long and makes too many promises of specific outcomes in specific situations.

Another potential problem for preserving at-will status tends to present itself in disciplinary policies. Many employers use a progressive discipline policy that promises something like a verbal warning for the first violation, written warning for the second, suspension for the third, and finally, termination. While progressive discipline is an excellent tool for demonstrating fairness and providing employees notice of performance problems, it is dangerous to promise such a rigid disciplinary sequence - some policy violations warrant immediate termination. For this reason, it is a good idea to reiterate the at-will employment status within any written disciplinary policy and state that the disciplinary measures listed there are only guidelines, leaving management with the discretion to initiate discipline at any step, to skip steps in the disciplinary process, or to immediately discharge an employee.

Finally, employers may also wish to include at-will language in other key places, even outside the employee manual. Employers can require job applicants to sign a statement on the employment application form acknowledging that if hired, they will be employed at-will. New-hires may also be required to sign an acknowledgment form during orientation indicating that they have read the employee handbook, and that they understand it is not a contract and that their employment is at-will.

AT-WILL STATUS: SAMPLE #1:

ABC Company is an employment at-will company. That means that both the employer and employee can terminate the employment relationship at any time for any reason.

AT-WILL STATUS: SAMPLE #2:

This policy is neither a contract nor a guarantee of continued employment, but will be used by the company as a guideline only. *ABC Company* reserves the right to deviate from this policy and use its discretion in making all employment decisions.

AT-WILL STATUS: SAMPLE #3:

ABC Company is an employment at-will company. That means that both the employer and employee can terminate the employment relationship at any time for any reason. Our President is the only person who is authorized to modify our policy of employment at-will, and any such modification must be in writing and signed by our President.

FREQUENTLY ASKED QUESTIONS

RETAINING AT-WILL STATUS

PRESERVING "AT-WILL EMPLOYMENT" STATUS EXTENDS BEYOND POLICY STATEMENTS

QUESTION: ***Isn't it true that since Oregon is an employment at-will state and since we have an "at-will" policy in our handbook we don't have to show cause to terminate an employee?***

ANSWER: It is true that employment in Oregon is "at-will," meaning an employer may terminate an employee at any time for any reason, and an employee is similarly free to leave employment at any time for any reason. There are, however, several exceptions to the rule. State and federal civil rights laws prohibit employers from discriminating against employees, and employers may also be liable in court under tort theories, for employment actions that violate public policy, or for breach of contract.

For example, if a manager with the apparent authority to do so makes verbal promises of job security, promotions, or pay raises, an employee who can prove such promises were made may be able to hold your organization to an oral contract for those promises. Although the at-will language in your policies is important, it's not enough by itself to insulate you from liability.

Therefore, if you want to retain at-will status, it is critical that you train managers not to make guarantees of employment for any specific term and not to make promises to employees that could constitute a contract.

Although you probably want to retain at-will status, you also shouldn't rely on it when making employment or discharge decisions. Even if you're an at-will employer, it's still advisable to establish clear policies, to counsel and discipline employees who fail to meet your expectations, and above all, to keep written documentation that shows your actions were taken for legitimate, non-discriminatory reasons.

EEO STATEMENT

While an Equal Employment Opportunity (EEO) statement is not legally required, an EEO statement does demonstrate a company's commitment to following applicable civil rights laws.

EEO statements may set out the company's process for accommodating disabilities and may also include guidance for employees on resources available to address any potential violations of the company's EEO policy.

As with all policies, employers may not want to be so specific that the policy quickly becomes stale. Such policies need not include, for example, the names of specific employees to contact; a title or position will suffice.

EEO STATEMENT: SAMPLE #1

ABC Company is an equal opportunity employer and does not discriminate on the basis of race, religion, color, sex, age, national origin, disability, veteran status, or any other classification protected by law.

EEO STATEMENT: SAMPLE #2

ABC Company is committed to providing equal employment opportunities to all persons regardless of race, color, religion, sex, national origin, marital status, disability, injured worker status, age, or any other characteristic protected by applicable law. Discrimination or harassment based upon any of these factors is inconsistent with our philosophy and will not be tolerated. If you are aware of any violation of this policy, report it immediately to your supervisor or our Human Resources Manager.

EEO STATEMENT: SAMPLE #3

ABC Company ("Company") strives to provide equal opportunity to all employees and applicants in accordance with state and federal law. This policy statement is intended to remind all employees that its policy is not to discriminate in employment based on race, color, sex, religion, creed, age, national origin, citizenship status, physical or mental disability, veteran's status or any other status protected under applicable local, state or federal law. The Company tries to administer employment decisions, including hiring, promotions, compensation, benefits, transfers, layoffs, return from layoffs, terminations, training, Company sponsored education, tuition assistance and other programs in a nondiscriminatory manner.

It is also the policy of the Company that all employees work in an environment where the dignity of each individual is respected. Harassment due to race, color, sex, religion, creed, age, national origin, citizenship status, physical or mental disability, veteran's status or any other status protected under applicable local, state or federal law is prohibited. Such harassing behavior should be avoided because conduct appearing to be welcome or tolerated by one employee may be offensive to another employee.

EEO STATEMENT: SAMPLE #4

ABC Company offers equal employment opportunities without regard to race, color, religion, national origin, sex, sexual orientation, age, marital status, source of income, disability, veteran or other protected status. *ABC Company* requires that all employees cooperate fully to ensure the fulfillment of this commitment in all actions and decisions, including:

- Hiring, placement, promotion, transfer, and discharge;
- Recruitment, advertising, or solicitation for employment;
- Compensation and benefits; and
- Selection for training.

Selection of personnel for hiring and promotion is based on such factors as education, experience, proven skills, initiative, dependability, cooperation, availability, and growth potential. *ABC Company* employees are encouraged to recommend for promotion those individuals whose past performance demonstrates an ability to assume greater responsibility. Such recommendations are in no way allowed to be influenced by an individual's race, sex, or other protected factors.

ABC Company will make reasonable accommodations for the known physical or mental disabilities of an otherwise qualified applicant or employee, unless an undue hardship would result. Any applicant or employee who requires accommodation in the hiring process or to perform the essential functions of a job should contact the Human Resources Manager, and advise *ABC Company* of what accommodation he or she believes is needed.

EEO STATEMENT: SAMPLE #5

_____ is an equal opportunity employer and makes employment decisions on the basis of merit. We want to have the best available persons in every job. ____ policy prohibits unlawful discrimination based on race, color, sex, religion, national origin, ancestry, a physical or mental impairment that substantially limits one or more major life activities, marital status, age or any other consideration made unlawful by federal, state or local

laws. All such discrimination is unlawful.

The _____ is committed to complying with all applicable laws providing equal employment opportunities to individuals regardless of race, color, sex, religion, national origin, ancestry, a physical or mental impairment that substantially limits one or more major life activities, marital status, age or other legally protected category. This commitment applies to all persons involved in the operations of _____ and prohibits unlawful discrimination by any employee of _____, including supervisors and coworkers.

To comply with applicable laws ensuring equal employment opportunities to qualified individuals with a disability, the ____ will make reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee unless undue hardship would result.

Any applicant or employee who requires an accommodation in order to perform the essential functions of the job should contact the _____ and request such an accommodation. The individual with the disability should specify what accommodation he or she needs to perform the job. The ____ will consider the requested accommodation and any other possible accommodations of which the _____ becomes aware that will help eliminate the limitation. IF the accommodation is reasonable and will not impose an undue hardship, the ____ will make the accommodations.

Complaint Procedure. If you believe you have been subjected to any form of unlawful discrimination, provide a complaint to your own or any other supervisor. _____ encourages all employees to report any incidents of discrimination forbidden by this policy immediately so that complaints can be quickly and fairly resolved. Your complaint should be specific and should include the names of the individuals involved and the names of any witnesses. The _____ will immediately undertake an effective, thorough and objective investigation and attempt to resolve the situation.

If the ____ determines that unlawful discrimination has occurred, effective remedial action will be taken, commensurate with the severity of the offense. Appropriate action will also be taken to deter any further discrimination. Whatever action is taken will be made known to you, subject to the confidentiality rights of those involved. The ___ will not retaliate against you for filing a complaint and will not knowingly permit retaliation by management employees or your coworkers.

EFFECTIVE DATE

It should be clear from your introductory materials that the company reserves the right to make changes to its policy. In addition to this, the employer should identify the date that the policy becomes effective, and specifically invalidate all past policies and procedures that are inconsistent with the new policy. This should be done every time the employer wishes to change any portion of a previously distributed policy manual.

TIP: The employer should also invalidate any memos, statements or handbooks that might imply a commitment on the company's part.

EFFECTIVE DATE: SAMPLE

This policy manual is effective on January 1, 2012. This manual supersedes all previous statements, memos, policies and practices that are in conflict with its provisions.

TRIAL SERVICE PERIOD

Some experts discourage employers from having a trial service period because of possible confusion over what rights the employee may or may not have when the period is completed. Others feel that as long as the conditions before and after the period are fully explained, this can be a useful time for the employer and employee to determine if they are a good match. Generally the employee will not be subject to the progressive disciplinary system during a trial service period, and may also not accrue seniority or benefits.

TIP: The policy manual should make it clear that termination may occur at any time during or after the trial service period, and that there is no guarantee that the employment will continue after this period. In addition, be careful when using phrases such as "probationary period" or "permanent employee" as they may imply that an employee would have certain employment rights after the introductory period is over.

TRIAL SERVICE: SAMPLE

All new employees will have a trial service period of 90 days. This is a chance for both the employee and *ABC Company* to see how well we work together. As always, *ABC Company* may terminate the employee at any time for any reason during or after this period, and the progressive disciplinary system will not be in effect during trial service. Employees will not accrue any benefits during this period.

TRIAL SERVICE POLICIES

EMPLOYEES HAVE WORKPLACE RIGHTS EVEN DURING "PROBATION" PERIOD

QUESTION: ***Should our company have a 90-day probationary period for new employees? What laws would apply? Is it true you can just tell a probationary employee that "things aren't working out" and terminate her without issuing written warnings or giving a reason?***

ANSWER: Although many employers choose to have a "probationary" period for new employees, there are no specific laws that define or require such a period.

Oregon is an employment at-will state, meaning that either you or your employee can end the employment relationship at any time and for any reason. There are, however, many exceptions. For instance, it's illegal to terminate an employee because of race, sex, religion and other classifications protected under state and federal civil rights laws.

Since at-will employers can generally terminate an employee at any time, you should understand that instituting a "probationary" period for new employees doesn't give you greater rights than you already have. But you might still choose to establish an introductory time for new employees as a waiting period for benefits eligibility, or simply as your own timeline to determine whether the new employee is a "good fit" with your company.

If you do decide to implement such a period, consider calling it an "introductory service" or "trial service" period rather than "probation," which has a negative connotation.

And tread carefully if you establish a trial service period. You could inadvertently create a contract with employees by giving the impression that after 90 days (or perhaps six months) they'll become "permanent" employees. If you wish to retain your "at-will" status – and most employers do – it would be much safer to refer to the post-probation worker as a "regular" status employee. The idea is that even after completion of trial service, the employment remains "at-will."

Many employers erroneously believe that newer employees have fewer rights than other workers. The common thinking goes something like this: "Mary is a probationary employee, so there's no need for us to address or document her performance problems. It's uncomfortable to confront Mary, and I don't want to alienate her. Hopefully, she'll figure it out and fix the problem on her own. And if she doesn't, we can just let her go. After all, she's on probation."

That sort of thinking can be dangerous. The fact is that even brand new or

"probationary" employees can file discrimination claims, wage claims, tort actions, and breach of contract claims. And it's difficult to defend against such claims if you have little or no documentation in your personnel file. You may ultimately convince a jury that your actions were not unlawful, but going through the litigation process will cost you in time, money and aggravation.

It is true that as an at-will employer, you're under no obligation to explain the reason for a termination, whether during or after a trial service period. But leaving the employee in the dark and conducting a surprise termination isn't a great strategy.

If you were the one being terminated, you probably wouldn't be satisfied with a vague explanation such as, "Things just aren't working out." Indeed, you might suspect that the employer was hiding the "real" reason for the discharge and might attribute it to discrimination or some other unlawful motive.

That's why it's wise to give each new employee notice of your rules and expectations from the very start and to promptly address any performance problems. That way, the employee will have a fair opportunity to correct any deficiencies, and a termination for failure to do so won't come as a complete shock.

Counseling the new employee and documenting your efforts will also help you to show that you're applying your company policies evenhandedly, in a legitimate and non-discriminatory manner.

EMPLOYEE ACKNOWLEDGMENT

It is useful to have employees acknowledge receipt of the policy manual in writing. There should be two copies of the sign-off sheet, one to remain in the manual and the other to be placed in the employee's personnel file. The same procedure should be followed whenever a specific portion of the manual or handbook is amended.

EMPLOYEE ACKNOWLEDGMENT: SAMPLE

I have received and read the policy manual for *ABC Company*. I also understand that this manual is not a contract and that *ABC Company* can change the manual at any time.

Name (Please Print): _____

Signature: _____

Date: _____

GLOSSARY OF TERMS

Among other things, the employee handbook is an important tool for helping employees, particularly new hires, to get a feel for the company's culture. Including a glossary of potentially unfamiliar terms, acronyms, and the like can be a great way to reduce confusion and promote a smooth integration of new employees.

The employee handbook also serves to communicate a set of expectations for performance and behavior. Words such as "cause" or "insubordination" will inevitably mean different things to different people. To avoid confusion, employers may also wish to define some otherwise commonly used terms. For example, if health benefits are only available to "full-time" employees, identify the standard that will be used to define "full-time."

TIP: In defining these terms, employers should avoid the use of phrases which imply guaranteed employment. For example, instead of classifying certain employees as "permanent," employers may wish to use the term "regular."

GLOSSARY: SAMPLE #1

All employees who have completed their 90 day trial service period shall be classified as regular employees.

GLOSSARY: SAMPLE #2

…

Full-time Employees: Include all employees whose weekly scheduled hours equal or exceed 32 hours.

Part-time Employees: Include any employee whose weekly scheduled hours are less than 32.

Seasonal Employees: All employees whose employment is anticipated last not more than 180 days from date of hire or first date of work, whichever is later.

…

EMPLOYEE BENEFITS

Employers often find themselves competing for good employees. One of the best ways to maintain a competitive edge is to offer benefits, such as holiday and vacation pay. Many employers also offer general "personal leave" days or "paid time off ("PTO") banks, which are intended to cover what was traditionally covered under separate sick, vacation and holiday pay leave banks.

Apart from benefits required by law (e.g., unemployment insurance contributions, social security, etc.), employers are not required to offer additional fringe benefits to employees. However, once such benefits are promised, they may not be arbitrarily withheld. Wage claims and other legal actions frequently arise because employers and employees understand benefits policies differently. Creating clear and precise fringe benefits policies is an excellent way to avoid such disputes.

TIP: Whatever fringe benefits an employer decides to offer, it is critical that the policy clearly define:

- **What the benefit is,**
- **How it is earned,**
- **Who is entitled to it, and**
- **When it can be taken.**

Employers should also determine what happens to benefit accruals in the event of a termination or separation from employment. Can employees cash out unused vacation or sick leave or is there a "use it or lose it" policy?

Finally, keep in mind that state and federal family and medical leave laws can affect an employer's benefits, absenteeism and leave policies. For example, although there is no requirement that protected family leave be paid, the employee must be allowed to use any existing accrued paid leave, including sick leave, vacation leave or any paid leave provided in lieu of vacation leave, regardless of the employer's normal policy. So, for example, even if a sick leave policy provides that the employee must actually be sick to use it, eligible employees may use sick leave when taking family leave to care for a covered family member with a serious health condition.

FREQUENTLY ASKED QUESTIONS

BENEFITS ELIGIBILITY

COMPANY RULES DETERMINE WHICH WORKERS ARE FULL-TIME

QUESTION: ***How many hours per week must an employee work to be considered a full-time worker eligible for benefits?***

ANSWER: You won't find a definition of "full-time" or "part-time" in the law, as employment statutes don't distinguish between employees based on the number of hours worked. Civil rights and wage and hour laws apply to all workers, regardless of whether you classify them as full-time or part-time. It's up to your company policy to define those terms and to determine which employees are eligible for group health insurance and other fringe benefits. You can set any minimum hourly requirement you choose. Some companies even allow part-time employees to receive a prorated portion of benefits.

VACATION

Because vacation leave is not required by law, employers are generally free to set up their policy on personal leave in whatever way best suits their business needs.

The employee handbook should address whether vacation leave will be provided, whether it will be paid time or leave without pay, who qualifies for vacation, the rate at which it is accrued, and any other conditions placed on its use. Other considerations to be addressed could include:

- How far in advance employees must request vacation leave
- Whether seniority, "first come, first served," or some other consideration affects vacation request approvals
- The circumstances under which the employer may deny vacation leave
- Whether employees are eligible for leave without pay when no vacation leave is available
- Maximum accruals
- "Use it or lose it" restrictions
- Disposition of unused vacation accruals in the event of a termination.

VACATION POLICY: SAMPLE #1

All full-time employees of *ABC Company* will earn eight hours of vacation time each month, paid at the same rate as the employee's regular wage. The use of this vacation pay is subject to management's approval, and will be based on factors such as staffing needs, the employee's workload, other vacation requests and the needs of the company.

Any earned but unused vacation pay will automatically be carried over into the following

year. However, employees will not be allowed to accrue more than 250 hours of vacation leave, and will forfeit any vacation time in excess of 250 hours. If the employee leaves the company, any earned but unused vacation pay will be paid out in cash in the employee's final paycheck at the rate of pay the employee earned at the time the vacation hours were earned.

> **[[NOTE:** Oregon law does not prohibit a "use it or lose it" clause, and an employer may enforce such a policy as long as the employer gives employees a reasonable opportunity to use their vacation time before it is forfeited.**]]**

FREQUENTLY ASKED QUESTIONS

CHANGING THE RULES

COMPANIES CAN MAKE PROSPECTIVE CHANGES TO THEIR BENEFITS OFFERINGS

QUESTION: ***For years now, our company has paid out accrued vacation benefits to employees who leave on good terms with the company. At this point, however, we would like to implement a "use it or lose it" policy – is that legal?***

ANSWER: If you're an at-will employer, as most Oregon businesses are, then you're free to prospectively change the terms and conditions of employment, including the benefits package you offer your employees.

Of course, any vacation hours already on the books (i.e., before implementation of the new policy) were accrued with the understanding that you would pay them upon any amicable separation. You would risk a breach of contract claim if you did not maintain that practice with respect to those hours. That said, you could require that employees draw down any existing leave balances prior to taking any leave accrued after the new policy goes into effect. Over time, the liability for accrued vacation balances would diminish.

VACATION POLICY: SAMPLE #2

Full-time employees accrue paid vacations in accordance with the following schedule:

Length of Employment	Rate	Vacation Accrued
6 months through 1st year	.0385 per hour	5 days per year

2nd year through 4th year	.0385 per hour	10 days per year
5th year through 14th year	.0575 per hour	15 days per year
15th year and thereafter	.0769 per hour	20 days per year

Temporary and part-time employees do not accrue paid vacation time.

There is no accrual during the first six months of employment. No vacation time may be taken until after completion of the first year of employment.

During the second six months of continuous employment, an employee who is scheduled to and does work for 40 hours per week would normally accrue five working days or 40 hours of vacation.

In the second, third and fourth years of continuous employment, an employee who is scheduled to and does work 40 hours per week would normally accrue five working days or 40 hours of vacation.

In the fifth years through fourteenth years of continuous employment, an employee who is scheduled to and does work 40 hours per week would normally accrue 10 working days or 80 hours of vacation.

In the fifteenth and following years of continuous employment, an employee who is scheduled to and does work an average of 40 hours per week would normally earn 20 working days or 160 hours of vacation.

(Option A)
ABC Company encourages employees to take vacation on an annual basis. Vacation time must be taken within the year following accrual. Vacation time not used in the year following accrual will be lost. There is no payment for accrued vacation upon voluntary or involuntary termination.

(Option B)
ABC Company encourages employees to take vacation on an annual basis. An employee may not accumulate more than ___ days of vacation. Once an employee reaches the maximum accrual, no additional vacation will be earned until previously accrued vacation time is sued. Upon voluntary termination, employees will be paid for accrued but unused vacation on a pro rata basis. There is no payment for accrued vacation upon involuntary termination.

Vacations will be scheduled so as to provide adequate coverage of jobs and staff requirements. The _____ will make the final determination in this regard.

Employees on unpaid leave do not accrue vacation time. If a holiday occurs during your vacation period, you will be granted one additional day of vacation, to be taken at a time approved in advance by your supervisor.

VACATION POLICY: SAMPLE #3

The company recognizes that every employee needs to take paid vacation time off each year for rest and renewal. Employees are encouraged to use vacation time in one week blocks of time or longer to ensure sufficient time away for renewal. The company encourages the full use of vacation time each year by each employee. To that end, unused vacation time will never be carried over into the next year and will not be paid out at year end or termination, except for employees who have worked for the company for at least five years and who are not terminated for cause.

All use of accrued vacation time must be applied for in writing and pre-approved by the company.

Employees accrue vacation as follows:

- Every full-time employee is given two weeks vacation at the time of hire. After working for the company for three months, an employee may begin to use the first week of vacation time and after working for the company for nine months, an employee may use the remainder of the first year's vacation time. Advanced use of vacation time may be granted in the third or ninth month with written approval of the company.
- Every full-time employee on her/his second anniversary date shall be given two weeks paid vacation.
- Every full-time employee on each of her/his third through sixth anniversary dates shall be given three weeks of paid vacation.
- Part-time employees accrue vacation time pro rata based on the number of hours the part-time employee is normally scheduled to work, as compared to a 2080 hour work year.
- Employees who change from full to part time or vice versa do not lose vacation seniority accrued to date. The benefits will be adjusted pro-rata in the year of the change. For example, a change to full time will increase the benefit, while a change to part time will diminish the benefit pro-rata as described above.

NOTE: Unused vacation will never be carried over and will not be paid out at year end or at the termination of employment relationship, regardless of the circumstances of termination, unless the employee has been working at the company for at least five years and the termination is not for cause.

VACATION (PERSONAL LEAVE) POLICY: SAMPLE #4

In lieu of separate sick, vacation and holiday leaves, *ABC Company* provides three weeks per year of personal time off. Employees may use these days for vacations, desired holidays off, illness, or any other reason.

Employees must obtain approval from their direct supervisor for personal time off. Such time off will be granted at the discretion of management. The factors considered in granting such leave include, but are not limited to:

- General needs of the company
- Other requests for time off
- The employee's workload
- The order in which the request was received.

VACATION (PTO) POLICY: SAMPLE #5

The Company recognizes your need to take time away from work. Therefore, regular employees are eligible to take Paid Time Off ("PTO") to be used for vacation, sick leave, bereavement leave, floating holidays, study days, inclement weather days, and other personal time. It does not include time off for other types of leaves of absence as specified in other leave policies included in this handbook (such as jury duty leave and military leave).

During the year in which they are hired, regular full-time employees may be eligible for PTO on a prorated basis. Eligibility begins on the first day of the month following the eligible employee's hire date. Regular full-time employees are eligible for the number of PTO days based on their hire month as follows:

Hire Month	Number of Days
January	up to 18 days
February	up to 17 days
March	up to 15 days
April	up to 13 days
May	up to 12 days
June	up to 10 days
July	up to 8 days
August	up to 7 days
September	up to 5 days
October	up to 3 days
November	up to 1 day
December	0 days

[[NOTE: For purposes of this program, an employee's hire date must be on or before June 30, in order to receive credit for a full year of service for the year in which the employee is hired. For example, employees hired between January 1 and June 30 may count the year in which they are hired as a full year of service. However, employees hired from July 1 to December 31 must wait until January 1 of the following calendar year in order to have completed one full year of service.**]]**

After regular full time employees have completed a full year of service, they may be allocated on January 1 of each year PTO as follows:

Length of Service	PTO per Calendar Year
First year of employment	Prorated (see chart above)
2-4 years	up to 20 days per year
5-9 years	up to 25 days per year
10 or more years	up to 30 days per year

Regular part-time employees will be allocated PTO on a prorated basis. Temporary and seasonal employees are not eligible for paid time off.

Employees are required to take a minimum of ten days per calendar year. If by the end of the calendar year an employee has not used his/her total allocation of PTO for that year, the employee may carry over the unused PTO beyond the required 10 days. PTO time will only be accumulated to a maximum of 60 days. Once eligible employees reach the maximum allocation of 60 days, they cease being allocated additional PTO time until some of their current allocation is used.

PTO should be taken in half or full-day increments. Each employee is responsible for scheduling his/her PTO in conjunction with his/her manager. For anticipated PTO, employees are to provide written requests for PTO to their department manager/supervisor two weeks prior to the requested start date. For unanticipated PTO, employees must contact their supervisor 30 minutes prior to the start of their shift. Generally, supervisors will schedule anticipated PTO based on PTO requests, work loads and the needs of the Company.

If an employee leaves the service of the Company for any reason, the employee will be paid for all unused PTO time.

VACATION ("PERSONAL LEAVE") POLICY: SAMPLE #6

As a regular full-time employee, you are eligible to earn up to ten days of paid personal leave during each calendar year. Personal leave may be used for non-work related

disabilities (i.e., illness, injury or pregnancy); any emergency affecting a member of the employee's immediate family; doctor, dental and counseling appointments; and inclement weather. You may use your personal leave in units of no less than two hours at any one time. Please advise your manager as soon as possible that you will be absent from work for personal leave. The Company may ask for a doctor's release from work during a personal leave for an illness, injury or pregnancy.

If you have been employed with the Company for less that one full year, upon completion of your introductory period you will be eligible for one day of paid personal leave for each month worked through the end of the calendar year, up to a maximum of ten days.

Accrued personal leave may be used during a disability-related leave of absence. Personal leave will continue to accrue for disability leaves of 30 days or less, but will not accrue for disability leaves beyond 30 days.

FREQUENTLY ASKED QUESTIONS

RELIGIOUS ACCOMMODATION

"FIRST-COME, FIRST SERVED" VACATION RULE IS GENERALLY ENFORCEABLE

QUESTION: ***We have an employee, Bruce, who likes to travel to attend a week-long, annual religious convention – sort of a retreat, where he meets with members of other churches. This year, he submitted a vacation request just two weeks ahead of the convention, and his supervisor denied the request because of our "first come, first served" vacation policy. Four other employees in the same department have already been approved for time off, and as this is a busy time of year for us, we can't spare anyone else. Is it problematic or discriminatory to deny Bruce's request?***

ANSWER: Probably not, because attendance at this event seems to be a matter of personal preference for Bruce and not a tenet of his religion. If Bruce were requesting time off for a religious holiday or for the Sabbath when his religion prohibited him from working, you'd be obligated to make reasonable accommodations for him, provided that his religious belief is sincerely held and that accommodating his request wouldn't pose an undue hardship.

You're not required to make special accommodations when an employee's request is based on mere preference. If Bruce claims attendance at this event is required under his religion, you can require that he provide documentation from his priest or minister. And if Bruce knew about the "first come, first served" policy, you may be able to show that Bruce's late request for leave creates an undue hardship such that you're not obligated to bump another employee from an approved vacation.

SICK LEAVE

As with other types of leave, employers should address whether sick leave will be provided with pay, to whom, the rate at which it is accrued and any conditions placed on its use. Other considerations to be addressed could include:

- Whether sick leave is available for the employee to care for family members or only for the employee's own illness
- The company's reporting requirements for employees using sick leave
- The company's policy on absenteeism, "unexcused" absence, and eligibility for leave without pay for illnesses when sick leave has been exhausted

The company's policy should inform employees about or refer employees to a separate policy on legally protected family and medical leave. See BOLI's *Civil Rights Laws* handbook and *Family Leave Laws* handbook for more information on these obligations.

SICK LEAVE: SAMPLE

All full-time employees will earn four hours of sick leave per month to be paid at the same rate as their regular wage. Any unused sick leave will be carried forward into the next calendar year. Sick leave will not be paid out in cash when the employee leaves the company.

If an employee runs out of sick leave, any additional time missed due to sickness will be automatically deducted from the employee's accrued vacation time. If the employee has no accrued vacation time, the employee will be placed on leave without pay, the length and availability of which are to be determined by the company in its sole discretion.

NOTE: Employees with long-term or serious health conditions may be entitled to time off under the Americans with Disabilities Act, the Oregon Family Leave Act and the federal Family and Medical Leave Act. It is important to be aware that family leave laws allow employees to use any accrued paid sick leave, vacation leave or any paid leave provided in lieu of sick leave, and also allow employers to require employees to exhaust paid leave during family leave, subject to certain notice requirements.

FREQUENTLY ASKED QUESTIONS

REQUIRING MEDICAL INFORMATION

EMPLOYER POLICY CAN PUT STRINGS ON USE OF ACCRUED SICK LEAVE

QUESTION: ***We offer a generous benefits package that allows employees to accrue up to 15 days of paid sick leave per year. What are our legal options when an employee takes advantage of our generosity? We have one employee, Jay, who seems to call in sick every time the sun is shining on a Monday morning. Jay's attitude when we question him about his illness is that it's none of our business. He feels he's entitled to take sick leave since he's earned it. Do we have the right to ask for the specifics on what his illness is or to demand that he bring us a doctor's excuse? Can we discipline or even terminate an employee for using excessive sick leave?***

ANSWER: It's up to your company policy to determine just when and how employees may use paid sick leave. You can authorize or deny the use of sick leave according to your policy, so long as it's applied in a non-discriminatory way. Generally, you can request relevant information and discipline employees for unauthorized use of sick leave. You should, however, be aware of disability and leave laws that regulate medical inquiries, give certain employees the right to take time off and, in some cases, guarantee the right to use accrued paid leave.

Jay may be telling you to "mind your own business," but you do have a business reason and the right to ask questions to determine how to track his absence and whether paid leave is authorized under your policy. Oregon and federal disability laws permit employers to make medical inquiries of employees as long as they are job-related and consistent with business necessity. You can, therefore, inquire about Jay's pattern of absenteeism – especially when the circumstances are suspicious.

Although you can make job-related inquiries, be careful not to overstep your bounds. In most cases, it's inappropriate to demand information about the employee's specific symptoms, prescription medication or medical prognosis, unless you can demonstrate there's a business need to know. You are entitled to general information about the reason for Jay's absence so that you can determine whether to track the absence as family leave and whether the absence qualifies under your paid sick leave plan.

If it's your company policy to do so, you can require that Jay bring a doctor's excuse or fitness for duty release when he returns to work. Many employers require such documentation when an employee has missed three days of work. Keep in mind that if you do require a doctor's note or an evaluation under such a policy, you've made it a condition of employment, and an Oregon civil rights statute (ORS 659A.306) requires you to pay any out-of-pocket costs incurred by the employee.

There are other limitations on requiring medical certification. Under the Oregon Family Leave Act (OFLA), covered employers may only require a doctor's note for "sick child" incidents for non-serious health conditions beginning with the fourth incident or day of sick child leave during the year. With all absences that qualify for family leave, the employer must make any medical certification request in writing and must allow the employee 15 days, absent extenuating circumstances, to return the completed certification.

You can specify in your sick leave policy under what circumstances paid sick leave is authorized. Some employers limit the use of sick leave to situations when the employee is ill. Others allow use of paid sick leave for illness of the employee's spouse or family member. Just keep in mind that during protected family leave absences, employees may be entitled to use paid sick leave regardless of your usual sick leave policy.

You can discipline an employee for unauthorized use of sick leave, but you should be certain that you're not counting any absences legally protected under workers' compensation, disability or family leave laws.

FREQUENTLY ASKED QUESTIONS

ABUSE OF SICK LEAVE

EMPLOYER POLICY MAY SET LIMITS ON USE OF ACCRUED LEAVE

QUESTION: ***If I have an employee that has used a total of 304 hours of sick time since April 2010, would I have grounds for termination based on excessive sick time?***

ANSWER: Oregon's civil rights laws don't define "grounds for termination" or "excessive sick time," so it's your company policy that determines how much sick leave an employee accrues, when the employee may access that sick leave, and what work absences are inappropriate or excessive.

It's legal to terminate someone for calling in sick too often or for "abuse of sick leave," as some employers characterize it, but you have to be certain that the absences in question are not legally protected. Civil rights laws do prohibit you from disciplining or terminating an employee for absences related to a compensable workers' compensation claim, absences related to a disability if the time off would be a reasonable accommodation, and absences for reasons protected under the family leave laws, such as serious health conditions.

But if we're talking about an employee who's used 304 hours of leave by calling in sick with the sniffles, a sore throat, or other routine illnesses, then the absences aren't legally protected, and you can discipline or terminate according to your policy.

HOLIDAY PAY

As with other benefits, paid holidays are not required by law. That means employers are free to set the rules for how paid holidays are handled. The employee handbook should address whether paid holidays are offered, how many are offered (or which days are company-recognized holidays), and how the company handles holidays that fall on a weekend.

Company policy also sets the rules as to which employees are eligible for holiday pay. For example, an employer might offer holidays to full-time but not part-time workers, or alternatively, an employer might prorate the holiday pay for those who work fewer hours. Keep in mind, however, that it is up to company policy to define terms like "full-time" or "part-time" workers. In addition, employer policies might address whether employees who work on a holiday are entitled to premium pay or to another day off with pay in lieu of the holiday.

NOTE: If an employee requests, an employer must provide reasonable accommodation for a sincerely held religious belief, provided this does not create an undue hardship for the employer. This accommodation could include allowing a different day off for a religious holiday.

FREQUENTLY ASKED QUESTIONS

HOLIDAY ON A WEEKEND

JULY 4TH HOLIDAY TRIGGERS EMPLOYER CONCERNS

QUESTION: ***The 4th of July fell on a Sunday this year. Can we simply give employees eight hours of holiday pay, or are we required to provide a different paid day off? Would Monday the 5th be the official government holiday that we're required to honor?***

ANSWER: The law doesn't require employers to offer holidays at all, so it's your company policy that sets the rules for holidays and other fringe benefits like vacation, sick leave and insurance coverage.

It's wise to address the "what if" questions like this one ahead of time. What if a promised paid holiday falls on a weekend? There are a number of possibilities here. You could grant employees holiday pay without a day off, or you could provide a paid day off on the Friday before or the Monday after. Some employers instead offer a certain number of "floating holidays" in the form of a paid time off (PTO) bank so that employees have some flexibility.

HOLIDAY PAY: SAMPLE #1

All full-time employees will receive eight paid holidays per year. The holidays are:

Christmas	Veteran's Day
New Year's Day	Thanksgiving
Memorial Day	Martin Luther King's Birthday
Independence Day	President's Day

These holidays will be observed on the same day as observed by the State of Oregon for its employees

HOLIDAY PAY: SAMPLE #2

The offices of *ABC Company* will be closed in observance of the following holidays:

New Year's Day
Martin Luther King's Birthday
President's Day
Memorial Day
Independence Day
Veteran's Day
Thanksgiving
Christmas

Holidays which fall on a Saturday will be observed the Friday before. Holiday falling on a Sunday will be observed the Monday following.

All employees having completed trial service are eligible for holiday pay and will receive 8 hours pay for the holidays listed above.
Eligible employees required by the company to work on a designated holiday may schedule an alternate paid day off with their immediate supervisor. Alternate paid holidays must be taken with 15 days prior to or 15 days following the designated holiday.

FREQUENTLY ASKED QUESTIONS

HOLIDAY PAY AND OVERTIME

HOLIDAY PAY GENERALLY DOESN'T COUNT AS HOURS WORKED WHEN CALCULATING OVERTIME

QUESTION: ***If an employee works 10 hours per day for four days (Monday through Thursday) and a paid holiday like Independence Day falls on that Friday, do I, the employer, have to pay overtime?***

ANSWER: No. The Oregon wage laws and the federal Fair Labor Standards Act require you to pay overtime only when an employee works more than 40 hours in your designated seven-day workweek. And the laws don't require you to count paid holidays, sick leave, vacation days, or personal time off towards the overtime total.

Of course, you'd have to count paid leave for overtime purposes if you've promised to do so in your personnel manual, or if you're bound to do so by an employment contract or collective bargaining agreement

And if the employee in your example is required to work on the holiday, then that work will push him or her into overtime, and you'll be obligated to pay time-and-one-half the regular hourly rate for those hours. However, if you pay premium pay for time worked on a holiday, that premium pay may be used to offset a corresponding amount of overtime pay.

BEREAVEMENT LEAVE

Neither state nor federal leave laws require bereavement leave, so it is entirely up to company policy to determine whether to offer employees leave for bereavement. Likewise, company policy determines which family members are covered by the policy (e.g., immediate family, grandparents, etc.) and whether the leave is paid or unpaid.

As a practice point, keep in mind that depression due to the loss of a loved one may be a serious health condition entitling an employee to protected time off under family leave laws (see the FAQ below).

BEREAVEMENT LEAVE: SAMPLE

All employees who suffer a death in their immediate family are entitled to up to three days of bereavement leave to be compensated at their normal rate. Immediate family is defined as spouse, parents, parents-in-law, siblings, children and grandchildren.

FREQUENTLY ASKED QUESTIONS

BEREAVEMENT & FAMILY LEAVE LAWS

BEREAVEMENT LEAVE NOT GENERALLY COVERED UNDER OFLA OR FMLA

QUESTION: ***Karen, our office manager, left for Chicago three weeks ago to care for her father, who has been in the terminal stages of cancer. We granted this time off and designated the absence as family leave, because our company is covered by OFLA and FMLA and because Karen has been with us full-time for several years. Karen just notified us that her father passed away this week. She says that she wants to take an additional three weeks off to recover from the emotional strain she's been under, to comfort other grieving family members, and to deal with her father's estate.***

We'd like to help Karen through this difficult time, but we do need her back as soon as possible. What are our legal obligations? Does she have the right to bereavement leave, and would this count as family leave?

ANSWER: Family leave laws usually don't apply after an employee's relative dies, and it's your company policy that determines the employee's right to additional time off.

You indicate that your company is covered by both OFLA, the Oregon Family Leave Act, and FMLA, the federal Family and Medical Leave Act. Employers with 25 or more employees in Oregon are covered by OFLA, and employers with 50 or more employees in the U.S. are also covered by FMLA.

Eligible employees may take up to 12 weeks of family leave per year in qualifying situations, including caring for a family member with a serious health condition. Under both state and federal leave laws, the "serious health condition" definition includes the terminal stages of a disease. And since you've employed Karen full-time for over a year, she is eligible to take up to 12 weeks off during her father's terminal illness.

But neither OFLA nor FMLA covers bereavement leave. Strange as it may sound, death is not a "serious health condition" covered by these laws. This means that although the first three weeks of Karen's absence were covered, family leave and its legal protections ceased when her father died, as there was no longer a qualifying condition.

It's up to your company to decide whether you'll offer bereavement leave, how much you'll offer, and whether the time will be paid. Bereavement leave, like sick or vacation leave, is a fringe benefit, and your company policy sets the rule. Some employers, for instance, allow employees to access sick leave for two or three days of bereavement.

The leave laws don't cover the time Karen spends settling her father's affairs, but you're free to allow such time off under your policy.

Family leave laws do sometimes come into play in bereavement scenarios, but not simply by virtue of a family member's death. For example, Karen herself may qualify if, after her father's death, she is diagnosed with clinical depression that incapacitates her. She would then have the right to use some or all of her remaining nine weeks of family leave for her own serious health condition. Or, if Karen's mother had a similar diagnosis after her husband's death, Karen could take leave to care for her.

MISCELLANEOUS BENEFITS ISSUES

FREQUENTLY ASKED QUESTIONS

EXHAUSTING PAID LEAVE

POLICY MAY REQUIRE EMPLOYEE TO USE ACCRUED PAID LEAVE FIRST

QUESTION: ***Can we require an employee use up all paid leave before going on an unpaid leave?***

ANSWER: Yes. Your policy may state that employees must exhaust their accrued sick leave, vacation, and other paid time off before you'll grant a leave without pay. Oregon wage and hour laws don't provide specific rules on accrual or use of these benefits, so how you administer them is entirely up to your policy. Of course, if your employee handbook is silent on this issue or if your benefits rules are otherwise unclear, disputes can arise.

FREQUENTLY ASKED QUESTIONS

USE OF PERSONAL TIME

'EMPLOYER STRIKES BACK' AT STAR WARS GEEK

QUESTION: ***Our employee Jason is an admitted "Star Wars geek" and has told his supervisor he intends to take the day off Thursday, May 16th to catch the premiere of "Star Wars II: Attack of the Clones." Although Jason has plenty of accrued PTO, are we required to grant his request if we really need him in the office that day?***

ANSWER: An employee's entitlement to use PTO depends on your benefits policy and past practice in granting personal leaves. It's likely that the force would still be with Jason even if you kept him at the office Thursday and made him wait until later to see the movie.

But in doing so, you need to ask yourself whether you would be violating promises you made in your personnel handbook. Does your policy permit employees to schedule personal days at their convenience, as long as they have accrued time and provide advance notice? Or, have you told employees that leave approval will depend on business demands and staffing levels?

Also, what if all of the employees in Jason's department turn out to be Star Wars fans? Do you have rules on assigning priority for vacation or PTO requests? Your policy could give preference based on who requested the leave first or even based on factors like seniority, attendance or job performance. It's advisable to address issues like these in your benefits rules to avoid disputes.

As long as your policy allows for it, you can determine how and when you'll approve personal leave requests. Of course, you don't want to create illusory promises and risk a breach of contract claim. If you promise employees two weeks of paid time off each year, you should be certain that they do get the opportunity to use the earned time at some point.

FREQUENTLY ASKED QUESTIONS

GRANDFATHERED BENEFITS RULES

EMPLOYER POLICIES MAY DIFFER BASED ON A "GRANDFATHER" CLAUSE

QUESTION: ***I've been with my company for eight months, and I just learned that a co-worker of mine receives more vacation time than I do each year as well as a higher level of insurance coverage. My employer explained to me that he is "grandfathered in" under prior policies and that all employees who started with the company in 2001 are on a different insurance plan than the workers with more seniority. Since I perform the same job duties as my co-worker, is it legal for the company to treat us differently, or is this discrimination?***

ANSWER: It's legal for your employer to offer different benefits to different employees, as long as the employer is not distinguishing between you based on age, race, sex, religion, disability or some other class protected under Oregon or federal civil rights laws.

Although the practice of "grandfathering" some employees in under a better benefits plan may not do much for employee morale, it doesn't violate discrimination laws if it's based strictly on seniority or start date with the company.

Similarly, some employers offer different benefits for supervisors than for regular staff. Other companies differentiate based on employees' work duties or job locations. Still others individually negotiate benefits packages with each new-hire according to the employee's prior experience and salary level.

WAGES AND SALARIES

Employees generally have a multitude of questions when they first start a new job. The pay schedule and other issues relating to compensation are often foremost in an employee's mind. A comprehensive employee handbook will either address these issues or advise employees where they can obtain more information.

PAYDAYS

Oregon law requires that employers establish regular paydays that are no more than 35 days apart. Employers must also pay everything that is owed to employees on each payday. The only exception is if there is a written agreement before work begins that is mutually agreeable to both the employer and employee to pay in a different manner. ORS 652.120.

PAYDAY: SAMPLE #1

Paydays will be on the 15th and 30th of every month. Your paychecks will be distributed to you at work. If a payday falls on a weekend or holiday, you will be paid on the working day directly preceding the weekend or holiday.

> **[[TIP:** Employers should set exact paydays. The manual should also tell employees what will happen if a payday falls on a weekend or holiday.**]]**

PAYDAY: SAMPLE #2

Employees who discover a mistake in their pay check, lose their pay check, or have it stolen should notify the Human resources department immediately.

In the case of an underpayment of 5% or more, the error will be remedied within three business days. All other underpayments will be remedied no later than the next regularly scheduled payday.

In the case of loss or theft, the Human resources department will attempt to stop payment on the check and reissue a new one to the employee. However, the employee is solely responsible for the monetary loss, and the Company will not be responsible for the loss or theft of a check if it cannot stop payment on the check. The employee shall promptly reimburse the employer for any bank charges associated with the stop payment order.

FREQUENTLY ASKED QUESTIONS

PAYDAY LANDS ON A WEEKEND

ESTABLISH CLEAR PAYDAY POLICY TO AVOID DISPUTES

QUESTION: ***We pay employees on the first of each month, but because June 1st falls on a Saturday this year, is it OK to pay employees the following Monday?***

ANSWER: The law that addresses pay periods in Oregon, ORS 652.120, simply states that employers must establish and maintain regular paydays that are no more than 35 days apart, at which time employees must receive all wages due to them. The statute doesn't address your payday-on-a-weekend problem.

You'll still be in compliance with the 35-day rule if you pay your employees on Monday the 3rd, but you ought to address this scenario in your policies to prevent disputes. Employees who thought they'd have their money on Friday will likely be unhappy if you've never told them your policy is to pay the following Monday when payday falls on a weekend.

WORK SCHEDULES AND BREAKS

Every employee handbook should address expectations with regard to work schedules, rest breaks and meal periods. What are the expected shift start and end times? Is there a grace period for tardiness? Will the employer permit flexible work schedules or compressed schedules? When and where are employees to take their breaks?

Oregon law requires that employees working shifts of six hours or more be given a meal break of at least one-half hour of uninterrupted time. If this period is completely uninterrupted, the employee need not be paid for that time. In addition, employees working for periods of four hours or the major portion of four hours (anything over two hours) must be given at least a 10-minute paid break during which they are completely relieved of all duty. (The rules differ slightly for minors. See BOLI's *Wage and Hour Laws* handbook for details.)

TIP: A policy should have a provision outlining when lunch and breaks are to be taken. If there is a break room, cafeteria or lounge, those areas should be identified and any rules regarding their use should be described.

WORK SCHEDULE: SAMPLE

All employees who work eight-hour shifts are to take a 30-minute lunch break between the third and sixth hour of their shift. Exact timing may vary according to our workload, so check your weekly schedules and talk with your shift supervisor for the exact time for your lunch period.

In addition, all such employees will receive 10-minute paid rest breaks to be taken between 10 and 11 a.m. each morning, and between 2 and 3 p.m. each afternoon. Check with your supervisor daily for the exact times, as we will stagger these breaks among employees in order to adequately serve our customers.

FREQUENTLY ASKED QUESTIONS

WORK SCHEDULES

OREGON LAW DOESN'T SPECIFY MINIMUM SHIFT LENGTH

QUESTION: ***I manage a bookstore that's part of a national chain. We scheduled an employee for a three-hour shift last week, but he insisted that the minimum shift length under Oregon law is four hours. Is there any truth to this claim?***

ANSWER: No. In fact, there's no law that would prevent you from setting a one-hour shift if you wanted to, though it might not do much for employee morale.

Some companies promise a minimum amount of "show-up pay" to employees who arrive for a scheduled shift, but that's a matter of policy, not law. Unless you have an employee handbook or collective bargaining agreement that promises a minimum shift length, you're free to determine employees' schedules, and you're only required to pay for the actual hours they work.

Oregon's child labor regulations do require that you provide a certain amount of work or show-up pay when an employee under 18 arrives for a scheduled shift. But even these rules wouldn't restrict you from scheduling a minor for a three-hour period. Instead, they require you to provide adequate work, or reasonable compensation in lieu of it, if you send a minor employee home early after she reports for duty.

"Adequate work" is defined as enough work for the minor to earn at least half the amount she would have earned had she worked the hours for which she had been scheduled. And "reasonable compensation" is defined as one hour's pay, or half the pay for the shift the minor was scheduled to work – whichever is greater.

FREQUENTLY ASKED QUESTIONS

COMPRESSED SCHEDULES

WORKING FOUR "TENS" ISN'T A PROBLEM UNDER OREGON LAW

QUESTION: ***Can we allow an employee who requests approval to work four 10-hour days instead of five eight-hour days? If so, can we do that without offering the same option to other employees?***

ANSWER: This isn't a problem under Oregon or federal wage laws, but make sure that you document a legitimate, non-discriminatory reason for distinguishing between employees in approving a compressed schedule. For example, you might allow a "four-10's" schedule for your bookkeeper but not for your receptionist, who needs to be available Monday through Friday during your business hours.

FREQUENTLY ASKED QUESTIONS

FLEX SCHEDULES AND BREAKS

SOME SALARIED EMPLOYEES ARE EXEMPT FROM LUNCH BREAK REQUIREMENT

QUESTION: ***I am the president of a small professional corporation, and all our employees are salaried. Our office hours are 8 a.m. to 5 p.m. with a one-hour lunch period, but our policy manual allows for the possibility of flex hours. Alternative work schedules are an option, with my approval. Two employees have requested to work from 8 a.m. to 4 p.m. with no lunch period. Is this something I could approve, or do I have to provide a one-hour lunch period by law?***

ANSWER: The answer turns on whether these two employees are exempt from minimum wage and overtime laws. If so, then the normal meal period requirement won't apply to them, and you're free to approve the proposed work schedule. If not, these employees are legally required to have at least a 30-minute unpaid meal break whenever their work period is six hours or greater.

You've indicated that these employees are "salaried" but haven't told us whether they are also exempt. It's important not to equate these two categories, because not all salaried employees are exempt. If these two employees are salaried but non-exempt, you're required to track all of their work hours, comply with minimum wage and overtime laws, and provide meal and rest breaks – even if the employees prefer to skip those breaks and leave work early. In other words, it's not their choice whether to take meal and rest breaks. It's the law.

On the other hand, if these two employees are properly classified as salaried,

exempt employees, you can allow them to flex their schedule in any manner you approve. You're not required (but may choose, for management or family leave tracking purposes) to track their work hours or pay overtime, and they're not necessarily required to take meal breaks. Exempt employees include certain executive and administrative employees and also include professional employees such as doctors, lawyers, architects, engineers, and certain computer professionals. In each category, there are a number of criteria you must meet before you may classify an employee as exempt. For more information on correct classification of exempt employees, see BOLI's handbook on *Employee Classification & Wage and Hour Exemptions*, 2012 edition.

FREQUENTLY ASKED QUESTIONS

LUNCH BREAKS

'EAT BUT DON'T LEAVE' POLICY LEGAL FOR EMPLOYEE MEAL PERIOD

QUESTION: ***Can we make our workplace a "closed campus" and require staff to remain on the premises during the lunch break?***

ANSWER: Yes. Federal regulations say it's not necessary to permit employees to leave the premises during the meal period as long as they are otherwise completely freed from duties. 29 C.F.R. § 785.19(b).

This means that any of your non-exempt employees whose work period is six hours or more must receive the uninterrupted 30-minute meal period required under Oregon regulations, even if you require them to remain in the building for lunch.

OVERTIME

An employer has the right to set the work schedule and even to make overtime mandatory. In addition, an employer can generally discipline or terminate an employee for refusing to work the assigned hours. Of course, any overtime actually worked must be properly compensated.

Mandatory overtime is prohibited only in a few narrow situations. For example, OAR 333-510-0045 sets certain limits on mandatory overtime for registered nurses. Another possibility might arise where an employee is entitled to protected intermittent leave for a serious health condition covered under family leave laws or a disability protected under the ADA.

For more information on when daily and/or weekly overtime is required and how to compute it, see BOLI's handbook *Wage and Hour Laws*, 2012 Edition.

OVERTIME: SAMPLE #1

As an employee of *ABC Company*, you may be called upon to perform work in excess of your regularly scheduled shift. Such work is mandatory. Any hours worked in excess of 40 in a given work week will be compensated in accordance with state and federal wage and hour laws.

OVERTIME: SAMPLE #2

Employees of *ABC Company* are generally expected to complete their assigned workload within their scheduled shifts. Work performed outside of the scheduled shift is prohibited, unless authorized in advance by a supervisor or manager. Unauthorized work outside the assigned shift may result in disciplinary action up to and including termination.

OVERTIME: SAMPLE #3

Under state and federal wage and hour laws, all non-exempt weekly or hourly-paid employees, who work more than 40 hours in a workweek, must be paid an overtime rate of one and one-half times his/her regular hourly rate of pay for all time actually worked in excess of 40 hours in the workweek.

For purposes of overtime computations *ABC Company* has defined the following workweek: 12:01 a.m. Sunday through 12:00 midnight Saturday.

When calculating overtime at one and one-half times the regular rate of pay for time worked in excess of 40 hours in a given workweek, only actual time worked is used. Time charged to sick, paid time off and other paid leave balances must not be included in this calculation.

FREQUENTLY ASKED QUESTIONS

OVERTIME AND VOLUNTEERS

WORK PERFORMED AT COMPANY PICNIC COULD RESULT IN OVERTIME

QUESTION: ***If we have an employee picnic put on by a committee of employees who are monitoring the function (manning game booths and sign-in tables), are we required to pay them for that time or would it be considered "volunteer" work? Would it be in the best interest of the company to go ahead and pay those employees for that time, but not count it toward overtime?***

ANSWER: When employees perform work at a company function, they do have to be paid for their time. Although the employees you describe may have "volunteered" for the picnic committee assignment, it's nonetheless a work assignment.

Because you are a private, for-profit employer, you're generally prohibited from having unpaid volunteers. It's normally only public, religious, charitable and humanitarian organizations that can have volunteers who work for no pay.

So, if your employees are hourly, nonexempt workers, they should receive their regular wages for the hours they work at the booths or sign-in tables and for any time they spend on required set-up or clean-up before and after your company event. You could agree with them beforehand to pay a lower hourly rate for the picnic duties, as long as it's at least minimum wage ($8.80 per hour, effective January 1, 2012).

Also, if the work hours at the picnic push employees above 40 hours for the workweek, they must receive overtime pay at time-and-one-half their regular rate. Therefore, you might choose to flex employees' hours within your seven-day workweek so that they don't exceed 40 hours of work for the week and don't incur overtime. For example, you could send the employee home four hours early on Friday if you know he'll be working four hours at the picnic on Saturday.

Here's another option you might choose. Assign your salaried, exempt managers to staff the picnic, because you're not obligated to pay extra wages or overtime to those employees, even if they work long hours.

TRAVEL

Work performed by employees away from their fixed, official duty station or customary worksite can create a number of questions that should be addressed in the employee handbook.

Topics may include:

- **Compensable travel time**

- **Mileage reimbursement**
- **Per diem amounts**
- **Expense reimbursement procedures**
- **Travel expense advances**
- **Travel arrangements**

In general, employers should be aware that in some instances travel time is compensable, even when the employee is a passenger and performs no other work. Employers are not required to reimburse expenses, such as mileage and food and lodging, unless requiring the employee to pay such expenses has the effect of reducing his or her wages below minimum wage. For further details, please consult BOLI's handbook *Wage and Hour Laws*.

TRAVEL: SAMPLE #1

In general, the time spent by *ABC Company* employees going from home to work and from work to home is not compensable work time. There are some instances, however, when travel from home to work is considered work time:

TRAVEL THAT IS ALL IN A DAY'S WORK
Time spent traveling as part of an employee's daily work activity including travel from one job site to another or travel from a designated meeting place to a job site is compensable work time.

SPECIAL ONE-DAY ASSIGNMENTS
If an employee has a special assignment for one day at a site outside a 30-mile radius from that employee's official work station, travel time outside the regular workday to get there and back will be compensated.

TRAVEL AWAY FROM HOME
Travel by an employee who will be away from home overnight is compensable work time only during those periods that coincide with the employee's regular working hours (e.g. 9 a.m.-5 p.m.). Such time is counted as hours worked even if it occurs on a non-working day (e.g. Saturday or Sunday between 9 a.m. and 5 p.m.) Travel outside regular working hours as a passenger in a plane, train, boat, bus, or automobile is not hours worked.

In this case, if the employee uses his or her own car rather than available public transportation for travel away from home, the *ABC Company* will count as hours worked the time that would have been spent on public transportation during regular working hours. An employee riding with the driver would be entitled to pay only for those hours that fall during the passenger's regular working hours (minus meal periods).

TRAVEL: SAMPLE #2

TRAVEL TO AND FROM HOME IN A COMPANY VEHICLE
Authorized use by an employee of an *ABC Company* vehicle for commuting and other incidental travel is not part of the employee's principal activities and is not compensable time if the vehicle is used within the normal commuting area for the employer's business or establishment and its use is subject to an agreement between the employer and the employee.

FREQUENTLY ASKED QUESTIONS

TRAVEL PAY

CLOCK STARTS TICKING AT EMPLOYEE'S FIRST REQUIRED STOP

QUESTION: ***If we instruct an employee to first pick up our company van and equipment before heading to the worksite in the morning, do we have to pay him for that driving time?***

ANSWER: Yes. Oregon and federal wage laws require you to compensate employees for travel between work locations that is "all in a day's work." In your example, the clock starts ticking when the employee picks up the company van or equipment. Similarly, if you require an employee to report to a meeting place to receive instructions before heading to the worksite, the travel from the designated place to the work place is part of the day's work and must be counted as hours worked. This same rule applies to an employee who must shuttle between your different field offices during a single day, or a repairperson that must drive from one customer location to another during the day.

On the other hand, you're not obligated to pay for "portal-to-portal" travel, the employee's home-to-work and work-to-home driving time at the start and end of the day.

FREQUENTLY ASKED QUESTIONS

CELL PHONE USE

EMPLOYEES' CELL PHONE USE RAISES PAY AND LIABILITY ISSUES

QUESTION: ***We issue cell phones to certain employees who travel so that they can contact us when they're on the road or talk to clients when they are in between job sites. If we call a particular employee on his cell phone after hours to ask about the status of a job, does this count as work time? Does it push the employee into overtime? Are there other legal implications?***

ANSWER: Generally, when you call an employee after hours to discuss business, you do need to treat the time as "hours worked" and properly compensate the employee for the time spent on the phone. This means paying the employee at the regular hourly rate and, yes, paying overtime if the employee ends up working more than 40 hours in the seven-day workweek.

The answer may be different if the time involved is "de minimis" – say, a call that lasts just a minute or two. Under the federal and Oregon wage laws, employers needn't compensate employees for insubstantial periods of time spent working. You do, however, need to consider the aggregate amount of time spent by your employee if these calls happen with some regularity.

Of course, if the employee in question is properly classified as a salaried, exempt employee, you don't need to track the time spent on calls, since overtime isn't an issue and you're simply required to pay a regular weekly salary regardless of the number of hours of work.

In addition to wage issues, you should consider other liability you may incur as an employer in connection with employee cell phone use. For example, have you authorized employees to use cell phones while driving? You may want to think twice about such a policy, since you could face increased workers' compensation exposure to an employee involved in an auto accident while using a cell phone and possible negligence claims by others that are injured by such an employee. As of January 1, 2012, it is now unlawful to use a cell phone without a hands-free device, even for work-related calls. You would be wise to develop a policy on employee use of cell phones that addresses which employees are authorized, what types of calls are permitted, and who pays the ticket if a hands-free device is not used.

COMPENSATION ISSUES

Compensation plans vary widely from employer to employer and may vary from employee to employee. Nevertheless, employees will certainly appreciate a basic description as to how the company administers its rates of pay, performance evaluations, promotional opportunities as well as available fringe benefits plans.

COMPENSATION POLICY: SAMPLE

ABC Company is required by state and federal laws to withhold part of your pay for legally required deductions for items such as federal and state income tax and social security, as well as any legally required payroll garnishment.

If you would like *ABC Company* to withhold amounts from your pay for your convenience and/or private benefit, you will need to provide a written authorization to the Payroll Services Department. Written authorizations for payroll deductions must be received by the Payroll Services Department no later than one week prior to payday. Authorization forms for payroll deductions are available from the following departments:

Fitness Center membership fees	Fitness Center
Parking fees	Public Safety
Retirement contributions, Credit Union Group Life, Dental, Medical, AD&D and Long-Term Disability premiums	Human Resource Office
Savings Bonds	Payroll Office
United Way contributions	Payroll Office

FREQUENTLY ASKED QUESTIONS

DIFFERENT PAY FOR DIFFERENT SHIFTS

DIFFERENT PAY RATES LEGAL WHEN THERE'S A BUSINESS REASON

QUESTION: ***Would it be discrimination to pay a higher hourly wage for workers on the graveyard shift, even though they perform the same work as employees on the day shift?***

ANSWER: You certainly can structure your wage agreement with employees to include different pay rates for different hours, duties or job classifications. Your proposed pay differential is discriminatory only in the sense that you're distinguishing between the two shifts, graveyard and day. Discrimination is illegal only when based on an employee's age, race, sex, religion or other classification protected under Oregon or federal civil rights laws.

FREQUENTLY ASKED QUESTIONS

WAGE AGREEMENTS

DECIDING ON WAGE RATE AFTER THE FACT IS RISKY BUSINESS

QUESTION: ***I hired an employee three weeks ago to help out at my tax service. I told him I could pay up to $10 per hour, depending on his experience. I've now had the chance to observe his work and find it to be of poor quality. When I issue his first check, can I pay him at $8 per hour?***

ANSWER: It sounds like a recipe for a wage claim or lawsuit. The wage agreement you struck with this employee was ambiguous, and it's likely he thinks he'll be earning $10 per hour. At this juncture, your most conservative approach would be to pay the employee at the $10 rate and discipline or terminate him if his work is substandard.

You could, of course, argue that you have an agreement to pay a wage that varies depending on the quality or quantity of work produced, but since you didn't set a piece-rate or other benchmarks for determining the wage, it's unlikely that a court would buy that argument.

A better plan would be to screen your job applicants carefully by testing their job skills and checking their references, and then set a definite wage at the time you make your hiring decision. If you want to allow yourself some flexibility, you might choose to start an employee at $8.80 per hour (minimum wage) during a trial service period and then award bonuses or merit increases depending on the work quality.

FREQUENTLY ASKED QUESTIONS

CHANGES IN COMPENSATION

VERBAL NOTICE OF PAY CHANGE ISN'T THE BEST OPTION

QUESTION: ***Is an employer obligated to communicate a change in pay to employees in writing? Can it be done verbally? We switched our sales staff from a fixed hourly rate of pay ($20 per hour) to minimum wage plus commission. We communicated this verbally in a staff meeting when we made the change, yet one employee (who was recently terminated) is claiming we owe him the old rate of pay for hours he worked in the first pay period after the switch was made. Is there a legal basis for his claim?***

ANSWER: It's always better to put important employment decisions and policies in writing, but the wage laws don't mandate written notice when you change an employee's method of compensation.

If you're an at-will employer, as most Oregon businesses are, then you're free to prospectively change the terms and conditions of employment, including the way in which you pay your employees. Of course, if you had promised to continue paying your sales staff at $20 per hour for a definite time period, then employees could claim a breach of contract.

Was this particular employee in attendance at your staff meeting? Can you show that he knew about the switch to minimum wage plus commission and chose to continue working under that plan? Did you make it clear when the new pay system would take effect? An employee who didn't have notice of the change could claim that you retroactively lowered his pay and that he only learned about the change when he received his paycheck.

One way to avoid this kind of dispute in the future would be to issue a memo or an addendum to your personnel manual whenever you make an important change in policy. You can have each staff member sign and date an acknowledgment form indicating that he or she has reviewed and understood the policy.

FREQUENTLY ASKED QUESTIONS

COLA POLICY

WAGE AGREEMENT, NOT LAW, DETERMINES EMPLOYEE RAISES

QUESTION: ***I have worked for a large company for many years. For the last seven years, I have been denied even a cost of living raise although I get good reviews. The company's reasoning is that I'm at the top of the salary range for my job category. Are there specific laws regarding raises? Is it age discrimination if they do provide raises for younger employees?***

ANSWER: Many employers offer cost of living adjustments to keep pace with inflation, to remain competitive and to retain good employees. However, there's no law requiring such increases.

Your employer isn't legally obligated to grant you a raise unless your earnings fall below the minimum wage. Of course, if the company promises salary increases by way of an employment contract or collective bargaining agreement, or even in your employee handbook, it must honor those promises.

It sounds as if your company has created pay ranges for each job category, allowing employees annual merit increases or step increases within their salary ranges. If newer employees are receiving raises simply because they haven't yet reached the top of the salary range, you wouldn't have an age discrimination claim.

On the other hand, it would be discriminatory if your company were using employee age as its criteria and granting cost of living adjustments to younger workers in positions comparable to yours.

MISCELLANEOUS WAGE ISSUES

FREQUENTLY ASKED QUESTIONS

"DON'T DISCUSS WAGES" POLICY?

LABOR LAWS APPLY TO NON-UNION EMPLOYERS, TOO

QUESTION: ***Is it legal to restrict employees from talking about their wages? Could we implement a policy that makes salary levels confidential and tell employees they'll be subject to discipline for discussing their compensation packages?***

ANSWER: A federal court has ruled that this type of policy prohibiting salary discussions violates the National Labor Relations Act (NLRA).

The NLRA provides employees the right to "self-organization" and to engage in "concerted activities" for the purpose of collective bargaining "or other mutual aid or protection." And according to the National Labor Relations Board (NLRB), this means that employers may not forbid workers from discussing wages and other working conditions.

Many employers erroneously believe that the NLRA applies only to unionized workforces with a collective bargaining agreement. In fact, the law applies to all employers, including those with non-union workplaces.

The case that upheld the NLRB interpretation was NLRB v. Main Street Terrace Care Center, decided in 2000 by the U.S. Court of Appeals for the Sixth Circuit.

When the employee, Mary Craig, was hired as a dietary aide at an Ohio nursing home, her supervisor instructed her that management did not want her salary to be known and that she should not discuss wages with anyone because it "caused hard feelings."

Craig later participated in a meeting with the company payroll clerk to discuss problems with a paycheck her daughter (also an employee) had received. She also assisted other employees with pay-related questions. The company subsequently discharged Craig, and she filed an NLRB complaint alleging an unfair labor practice.

The federal court affirmed the NLRB's ruling that the employer's "don't ask, don't tell" policy on wage discussions violated the NLRA, even though it was an unwritten policy.

FREQUENTLY ASKED QUESTIONS

SHOW-UP PAY

POLICY DETERMINES IF YOU OWE PAY FOR WORKER WHO'S SENT HOME

QUESTION: ***My husband and I run a small family business, and we have a few employees that are habitually late to work. The other day, two of our hourly employees walked in late, and my husband, who was sick of it, told them, "Don't bother to take off your coats. Go home and think about it, and come back tomorrow. We start at 8:30 a.m." He essentially suspended these employees without pay for the day. Is that legal? My son was concerned that it could be a violation and that these employees might be entitled to their daily wages or some minimum amount for showing up.***

ANSWER: The disciplinary action your husband took was legal, provided that the employees in question are 18 or over and that you don't have a policy or contract that promises them "show-up pay." Although the Oregon child labor regulations include a rule on adequate work or show-up pay for minors, there's currently no similar law that applies to adult employees who are sent home.

That means that there's no minimum amount of pay that's legally required when you cancel an adult worker's shift or decide on a suspension. You're only required to pay for the actual hours worked, and since your husband sent the two employees home immediately, there are no "hours worked" in this case.

Of course, if your employees were covered by a collective bargaining agreement or a company policy that guaranteed a certain amount of pay in cases like this, you'd be obligated to honor that provision or policy.

FREQUENTLY ASKED QUESTIONS

EARLY HOLIDAY SHUTDOWN

COMPANY'S CHRISTMAS GESTURE LACKS YULETIDE SPIRIT, SAYS EMPLOYEE

QUESTION: ***On Dec. 24, at 11:00 a.m., our department manager came in and said "Merry Christmas" and told us all we could leave early for the day. At the time, we thought this was a great Christmas gift from the company, but we've just received our checks for the pay period and learned that they didn't pay us for the rest of that day. Aren't they legally required to pay us for the full day under these circumstances?***

ANSWER: Not necessarily. If you and your co-workers are hourly or non-exempt employees, your employer is only obligated to pay you for the actual hours you worked on the 24th, even though it was the employer's decision to send you home early.

Since you apparently understood the manager's gesture to mean that you'd get the rest of the day off with pay, it's understandable that you're now viewing the action as more grinch-like than generous. The manager certainly could have been clearer about what you were getting -- the afternoon off as opposed to paid time off.

If the manager had specifically promised the day off with pay, or if the company's policy manual or employee handbook guarantees you a full day's pay in the event of a shutdown, you would have a contract claim against your employer. But under Oregon wage laws, there's no minimum "show-up pay" required for adult employees who are sent home early.

If you or any of your co-workers were salaried, exempt employees, the answer would change. When an exempt employee works part of a day, Oregon and federal "salary basis" rules typically require the employer to pay the employee's full salary for the day. For a discussion of permissible salary reductions for exempt employees, please refer to the BOLI handbook *Wage and Hour Laws*, 2012 edition.

REQUIRING NOTICE OF RESIGNATION

RETROACTIVE PAY CUT CREATES WAGE AND CONTRACT CONCERNS

QUESTION: ***An out-of-state security company has purchased our existing company. Among the policies they're asking us to adopt is the following: "If an employee fails to give two weeks notice when resigning, the company will pay out all final wages at the federal minimum wage of $7.25 for hours worked, regardless of the employee's regular pay rate." Would it be legal for us to implement this policy?***

ANSWER: No. There are several problems with the policy. First, it would violate Oregon's minimum wage law. The state minimum wage for 2012 is $8.80, and although the federal minimum hourly wage is $7.25, Oregon employers are required to pay non-exempt employees at the higher state rate.

Second, even if implemented using the Oregon minimum wage, the policy would retroactively change an employee's pay rate, leaving you vulnerable to a wage claim or breach of contract claim.

Say that your employee John earns $10 per hour under your wage agreement and receives a monthly paycheck on the 15th of each month. What if John gives you notice on the 12th that the 15th will be his last day of work? If you follow the proposed policy and pay him at minimum wage for the entire month, you're essentially taking back half of the wages he's already earned for the pay period under your wage agreement. John could argue that this constitutes an illegal

deduction and a breach of contract.

If you really wanted to change an employee's pay rate as a form of punishment for poor attendance or performance or for giving what you deem to be insufficient notice of resignation, you could prospectively lower the pay rate. In other words, you could tell John on the 12th that he'd be paid at the minimum wage for the remainder of the pay period. John would then have the opportunity to reject that pay change and quit immediately.

The policy raises another concern if you're an at-will employer. Employment-at-will means that either party – employer or employee -- can end the relationship at any time, either with or without notice. The kind of policy your new parent company proposes may weaken your at-will status. It's generally considered good business etiquette for employees to give two weeks notice of their resignation. However, when you explicitly make advance notice a requirement or expectation under your policies, a court might decide you have a reciprocal obligation to give notice before discharging employees.

FREQUENTLY ASKED QUESTIONS

PAYCHECK DEDUCTIONS

WAGE LAW PROHIBITS DEDUCTION FOR SHORTAGES? BINGO!

QUESTION: ***We're a non-profit organization, and our primary source of funding is a bingo game that we operate. The workers who help run the bingo game each receive a $40 personal bank at the start of their shift, and they sell cards for $1 or $2. At the end of the shift, some employee banks are consistently $15 to $20 short. Are we allowed to dock their pay for these shortages?***

ANSWER: No. Under an Oregon wage law, ORS 652.610(3), there are only six scenarios when it's legal to deduct from an employee's paycheck – and this isn't one of them. You can certainly discipline and even terminate employees for problems including till shortages, loss of items, cash-handling violations, and property damage, but it would never be legal to dock their paychecks in such cases.

Although a deduction from wages in this instance would be unlawful, you are not prohibited from requiring an employee to pay you back for such shortages unless to do so would result in the employee receiving less than minimum wage for all hours worked. Stated another way, employers may request that an employee pay for items like till shortages, loss or damage to company equipment (i.e., items which are not for the 'private benefit' of the employee) so long as the repayment is not in the form of a payroll deduction and only to the extent that the repayment still leaves the employee with at least minimum wage for all hours worked.

FREQUENTLY ASKED QUESTIONS

PAYROLL DEDUCTIONS

REQUIRED PAYROLL DONATION FOR PARKING VIOLATION VIOLATES WAGE LAWS

QUESTION: ***I work for a medical clinic, and we have a recurring problem with staff parking in spots designated for patients. Some employees came up with the idea of instituting a $25 penalty for violators that would be taken by payroll deduction and donated for breast cancer research. If the majority of employees are for this, can we do it?***

ANSWER: The motivation is noble, but this kind of payroll deduction wouldn't be allowed under Oregon wage laws. The Oregon statute on wage deductions, ORS 652.610(3), generally doesn't permit deductions from an individual employee's paycheck without a signed, written authorization, and then only in certain situations. The employee being fined $25 under your proposed plan may be very opposed to the idea, and majority vote doesn't make the deduction legal.

The law does allow for a payroll deduction when an employee – without coercion – signs a written authorization for a payroll contribution to an outside charity.

Also, the Bureau's position is that employers may impose required charges for employees who are above the minimum wage, provided that doing so wouldn't reduce them below minimum wage for the pay period. Note that there's a distinction between directly charging an employee and deducting from a paycheck.

Perhaps a better option would be to offer a small bonus to staff that have a perfect parking record for the year, and to simply address parking violations under your discipline rules.

FREQUENTLY ASKED QUESTIONS

PERFORMANCE APPRAISALS

LATE EVALUATION MAY MEAN RETROACTIVE PAY RAISE

QUESTION: ***We have a manager who's late in giving an evaluation and merit raise to an employee. Is there a requirement that we retro the employee's pay increase back to the due date of his evaluation?***

ANSWER: Many employers choose to make pay raises retroactive, as a matter of fairness, when there's some delay in reviewing an employee's performance. But in your case, there may be a contractual obligation as well as a moral one, since your question suggests that you promised this employee a performance appraisal by a particular date, and that he met your company benchmarks for the pay increase.

Note that Oregon and federal employment laws don't specifically require performance reviews or pay raises, so this is really a contract matter that depends on what oral or written guarantees you've made to your employee.

TIME CLOCKS

Both state and federal law require employers to keep track of the working hours of nonexempt employees. (See BOLI's Handbook on Wage and Hour Laws for more information on exempt and nonexempt employees.) An employer can either track hours manually or establish a system for the employees to track their own hours.

TIP: A common method of tracking employee hours is by installing a time clock. While this is a convenient tool, employers should carefully regulate its use.

EXAMPLE: "The time clocks are our way of monitoring the hours you work. Therefore, it is crucial that you do not clock in until you actually begin working. In addition, you must clock in and out when you take your lunch break."

UNAUTHORIZED WORK TIME

Oregon and federal wage laws require employers to pay employees for all work that is "suffered or permitted." In other words, even if the employer did not want or authorize the work to be done, the employer in most cases will still have to pay for it. It is therefore to the employer's advantage to have a specific policy regarding the authorization of overtime, and to monitor employees carefully to assure that unauthorized work is not being performed.

WORK TIME: SAMPLE

Our working schedule is Monday through Friday, 9 a.m. to 5 p.m. Employees are not to work additional hours unless specifically authorized by their supervisor. The working of unauthorized hours can subject the employee to discipline.

FREQUENTLY ASKED QUESTIONS

UNAUTHORIZED OVERTIME

OVERTIME MUST BE PAID -- AUTHORIZED OR NOT

QUESTION: ***To control payroll costs, we implemented a strict policy to limit overtime worked by our employees. We clearly advised our workers that they must obtain a supervisor's approval prior to working any overtime. Now we're having trouble with a certain employee who continually violates the policy by working late into the evening or coming in on weekends without authorization. Are we legally obligated to pay her for these unauthorized hours?***

ANSWER: Your frustration is easy to understand, but don't let it get in the way of your compliance with Oregon and federal wage laws. Though it's not the answer you were hoping for, the bottom line is that you have to pay your employee for all hours worked. And if the extra work pushes the employee over 40 hours in a seven-day workweek, you must pay time-and-one-half the normal rate for the overtime hours.

The federal Fair Labor Standards Act (FLSA) says that hours are compensable any time you "suffer or permit" an employee to work. You're probably saying, "Wait just a minute! We didn't 'permit' the employee to do the overtime. In fact, we told her not to do it without our OK!" But actually, you did "suffer" the employee to work just by virtue of the fact that it happened. It's an employer's duty to see that work isn't performed if the employer doesn't want it to be performed.
So basically, an employee is entitled to wages whenever she spends time performing work for you. That's true whether the employee is doing the work exactly the way you want it done or at the times you prefer. The regulations even say that physical or mental exertion isn't required for the hours to be compensable!

What you have on your hands is a disciplinary issue -- not a wage and hour issue. You can supervise employees more closely to monitor the hours they work, and you can discipline employees who violate your overtime policy. As long as it's consistent with your disciplinary policies, you can give verbal or written warnings to employees who violate your overtime rules -- or even suspend or terminate employees for repeated violations. Enforcing your policy is the way to show your employee you're serious about it. Just don't make the mistake of trying to discipline employees by way of the paycheck. That could land you in costly legal trouble.

EMPLOYEE LEAVE POLICIES

It is important to include a section in the policy manual dealing with the various leaves of absence available to employees. Some of these leaves, such as vacation and sick leave, are not mandatory but are frequently provided in order to attract and maintain good employees. Other leaves are required to be granted in certain situations. (See BOLI's *Civil Rights Laws* and *Family Leave Laws* handbooks for more information.) The following are guidelines for some of the most common mandatory employee leaves.

OREGON FAMILY LEAVE ACT

The Oregon Family Leave Act (OFLA) combined the state's former parental, pregnancy and family medical leave acts into one statute which contains many similarities to the federal Family and Medical Leave Act of 1993 (FMLA).

Under OFLA, employers of 25 or more employees must generally provide up to 12 weeks of protected leave for the following purposes:

- **To care for a family member with a serious health condition or the employee's own serious health condition (serious health condition leave)**
- **For pregnancy disability or prenatal care (pregnancy disability leave)**
- **For the birth, adoption or foster care placement of a child (parental leave)**
- **To care for a sick child who does not have a serious health condition, but requires home care, known as sick child leave (OFLA only)**
- **Because the spouse or same-gender domestic partner of the employee has been called to or is on leave from active military duty (up to 14 days per deployment under the Oregon Military Family Leave Act).**

Note that women who cannot perform their regular duties because of pregnancy or childbirth (pregnancy disability leave) are entitled to additional 12 weeks for any other OFLA covered purpose. In addition, if either parent takes a full 12 weeks to bond with a new child (parental leave), that parent is also entitled to take up to an additional 12 weeks of sick child leave.

Although family leave is unpaid, employees are entitled to use any accrued paid sick leave, vacation leave or any other leave taken in lieu of vacation leave.

Employer policies should include language generally identifying the conditions for leaves and referring the employee to the appropriate department for more information.

OFLA LEAVE: SAMPLE

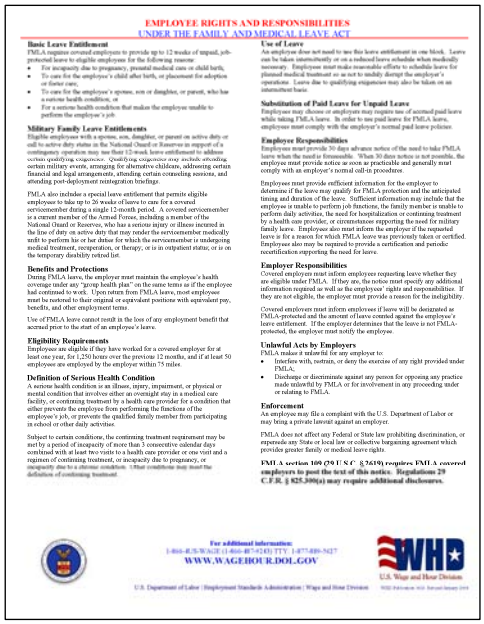
Under specific circumstances, state law allows employees to take up to 12 weeks (and in specific circumstances, up to 36 weeks) of protected time off each year for a variety of purposes, such as personal illness, childbirth, and illness of a family member. Eligible employees have reinstatement and/or reemployment rights after a family leave.

For details regarding eligibility and qualifications for protected leave see the "Protected Leave" tab of the *ABC Company Policy and Procedure Manual*.

If you wish to request leave, please fill out the "PROTECTED LEAVE" form (*see "Forms" directory on the company intranet*) regarding the type of leave you are requesting, and return it to your supervisor.

If you have any questions regarding protected leave, please contact the human resources department.

FAMILY AND MEDICAL LEAVE ACT



EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth,
- To care for the employee's child after birth, or placement for adoption or foster care,
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition, or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements

Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy, or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD
U.S. Wage and Hour Division

Employers who are covered by FMLA (those with 50 or more employees in the United States) are required to include basic information about the federal law in their policies. At 29 CFR § 825.301(a)(1), the FMLA regulations state that if the employer has "any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook …"

This FMLA requirement may be satisfied by including WH Publication 1420, the required FMLA workplace poster, within the employee handbook. The FMLA poster, pictured here, may be downloaded for free from TA's website or from the U.S. Department of Labor's website (http://www.dol.gov/whd/regs/compliance/posters/fmla.htm).

FMLA regulations also require covered employers to provide the information to applicants. This can be satisfied by having the applicant fill out the application in a room where the poster above is conspicuously displayed, giving a paper copy of the information to the applicant or routing online applicants through a webpage that contains the information.

Employers should also be aware that FMLA requires additional protected leave for eligible employees:

- **To care for a seriously ill or injured service member or veteran (up to 26 weeks)**
- **Because of a "qualifying exigency" arising out of a family member being on or called to active military duty**

OFLA / FMLA LEAVE: SAMPLE

State and federal laws allow employees to take protected time off for a variety of purposes, such as personal illness, childbirth, and the illness of a family member.

For details regarding eligibility and qualifications for protected leave see the "Protected Leave" tab of the *ABC Company Policy and Procedure Manual*.

If you wish to request leave, please fill out the "PROTECTED LEAVE" form (*see "Forms" directory on the company intranet*) regarding the type of leave you are requesting, and return it to your supervisor.

If you have any questions regarding protected leave, please contact the human resources department.

FREQUENTLY ASKED QUESTIONS

PREGNANCY LEAVE

SMALL COMPANIES SET THEIR OWN RULES FOR MATERNITY LEAVE

QUESTION: ***Including my husband and myself, our company has a total of 16 employees. One of them, Janelle, is eight months pregnant. Her doctor says she needs bed rest and must begin a maternity leave starting next week. She's a great employee, and we definitely want her to come back to work when she's ready, but we really can't do without someone in her position for more than a few days.***

What laws apply here? Can we hire someone to take over Janelle's position? If she decides to go on an extended absence after giving birth, how long are we legally required to hold her job? Can we bring her back to work in another position, or does she have the right to return to the exact same job? Also, if she only wants to come back on a part-time basis, are we required to accommodate that?

ANSWER: It sounds as though the Oregon and federal family leave laws don't apply to you because you're a smaller company. If that's true, the answers to most of your questions will depend on your own leave of absence policies.

You're covered by the Oregon Family Leave Act (OFLA) only if you have 25 or more employees in Oregon (this year or in the previous calendar year), and you're covered by the federal Family and Medical Leave Act (FMLA) only if you have 50 or more employees in the country, including territories and possessions of the United States (this year or last year). If you have just 16 employees, neither law applies to your company. But if you're an integrated employer, meaning that you and another organization have common ownership, interrelated operations or shared management, you must count all employees of the related entities to determine coverage under the leave laws.

Since it appears that you're not covered by the leave laws, you can set any rules on employee absences that suit your company. But note that you are covered by the Oregon and federal civil rights laws that prohibit discrimination based on race, color, religion, sex and other protected classes. All Oregon employers are covered by the basic state civil rights statutes, and any employer with 15 or more workers is also covered by Title VII of the Civil Rights Act of 1964.

This means that while you can determine your leave policies, you can't discriminate in the way you apply them. For instance, say a male employee, Bob, sprained his ankle and you allowed him three weeks off work while he was temporarily incapacitated. You should provide a similar amount of leave to Janelle when she's incapacitated due to pregnancy. Otherwise, you could be liable for sex discrimination.

You can certainly hire another worker to take over for Janelle during her absence. If you were covered by OFLA or FMLA, an eligible employee would generally have the right to 12 weeks of leave and would have the right to return to the exact same job, meaning that she could bump the replacement worker. But since the leave laws don't apply here, your company policy determines how much leave you provide and whether Janelle has the right to return to the same job.

You're not normally obligated to accommodate a pregnant employee by offering a special work schedule. That's because pregnancy is not a permanent or long-term condition and therefore is not a disability covered under the Oregon or federal disability laws. Therefore, it's up to your company to decide whether to create a special part-time position for Janelle. Just keep in mind that if you are willing to provide such arrangements for other employees in different circumstances, you would want to make similar arrangements for Janelle.

JURY DUTY

Employers are forbidden by law from retaliating against employees on jury duty. ORS 10.090. However, unless the employee is an exempt employee (see BOLI's *Wage and Hour Laws* and *Employee Classification & Wage and Hour Exemptions* handbooks), the employer need not pay for the time the employee spends serving on a jury.

The policy manual should describe the procedure to be followed when an employee is called to jury duty. The manual should also inform employees about compensation while they are gone.

LEGISLATIVE UPDATES: Under Oregon House Bill (HB) 2828 (2011), effective January 1, 2012, employers of 10 or more employees will be required to continue health, disability, life or other insurance coverage for an employee during times when the employee serves or is scheduled to serve as a juror.

HB 3034 (2011) amends ORS 10.055 and 10.090. Effective January 1, 2012, a judge or clerk of the court may defer jury service more than once for good cause ONLY. The amended law would require anyone requesting a second deferral to provide a list of not less than 10 dates within the following six-month period on which the person would be able to commence jury service.

Under the amended law, employers will also be prohibited from requiring that employees use vacation leave, sick leave or other annual leave for time spent in responding to jury summons.

JURY DUTY: SAMPLE #1

ABC Company recognizes the occasional civic obligation of our employees to serve on juries. We will continue to pay the wages of employees on jury duty for up to ___ days of service, and those employees are in turn obligated to turn over to *ABC Company* any reimbursement provided by the court, including mileage cost reimbursement.

When an employee receives a summons for jury duty, he/she should immediately provide a copy to the human resources department.

JURY DUTY: SAMPLE #2

ABC Company does not discriminate against employees called upon to perform jury service.

While *ABC Company* does not compensate hourly employees for time spent on jury service, employees may use any earned and unused vacation hours or may elect to take leave without pay.

In any event *ABC Company* will continue health, disability, life or other insurance coverage for an employee, if the employee is covered at the time of jury service, during times when the employee serves or is scheduled to serve as a juror.

When an employee receives a summons for jury duty, he/she should immediately provide a copy of the summons to the human resources department.

FREQUENTLY ASKED QUESTIONS

JURY DEFERRAL

EMPLOYEES HAVE A LEGAL RIGHT TO PERFORM JURY SERVICE

QUESTION: ***One of my employees just received a summons to jury duty next month. Since this is a critical time for us as seasonal business, is there a hardship exemption that we can claim? Can I require my employee to defer his service?***

ANSWER: A judge or clerk of the court may certainly excuse a person from acting as a juror or defer that service on the basis of an undue hardship or extreme inconvenience to the person, the person's family, the person's employer or even the public served by that person. There are a couple of points to keep in mind, however. The court must balance the public need for juries against the individual circumstances offered as a justification for excuse from jury service; so a request for excusal does not mean the court will necessarily grant that excusal. More importantly, you must not discharge or retaliate against an employee who chooses to perform jury service. Current law (ORS 10.090) prohibits it and you could create liability for yourself in court. In a case ultimately decided by the Oregon Supreme Court (Nees v. Hocks, Or., 536 P2d 512 (1975)) the employer was found liable for compensatory damages for its termination of an employee who had gone on jury duty despite the employer's request that she seek an excusal.

DISABILITY LEAVE

Both state and federal law require that employers provide reasonable accommodation for individuals with disabilities, as long as that accommodation does not create an undue hardship for the employer and so long as the employee does not constitute a direct threat to himself/herself or others (see BOLI's *Civil Rights Laws* handbook). One form of accommodation may include a leave of absence to receive treatment for or recover from the disability.

Unlike some other states, Oregon does not provide a paid disability benefit. However, granting a leave without pay and holding an employee's job is sometimes a form of reasonable accommodation that an employer must make.

Employees who have conditions that do not qualify as "disabilities" may also need to take medical leaves, and a policy manual should provide both a procedure for requesting such leave and a time limit for such absences.

DISABILITY LEAVE: SAMPLE

In addition to our regular sick leave benefits, *ABC Company* provides long-term medical leave for up to six months with medical verification. Contact the human resources department for more information.

MILITARY LEAVE

Oregon law provides protection for employees called to active duty in the Oregon militia (or Oregon National Guard). In addition, a federal law known as the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides protection for any employee called to uniformed military service or periodic training duty.

Under USERRA, employers must generally grant an employee military leave for up to five years and must reinstate the employee at the conclusion of the leave, if the employee has made a timely request for reinstatement, and if the employee was not dishonorably discharged.

Neither the Oregon law nor USERRA requires private employers to pay an employee on military duty, but they do require employers to reinstate such employee upon release from service. As for benefits while on military leave, an employee may not be forced to use accrued vacation pay, but may elect to do so. In addition, employers must continue providing any existing 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 his or her expense, to continue insurance coverage under the company plan for up to 18 months.

Because of the intricacies of military leave and the relatively small percentage of eligible employees, employers may choose to refer employees to the appropriate personnel rather than include details in an employee handbook.

MILITARY LEAVE: SAMPLE #1

ABC Company recognizes and appreciates the contributions of our nation's armed forces.

Employees who serve in the armed forces will be granted leave of absence if called to duty, and will be reinstated in accordance with applicable state and federal laws and regulations. For more information, contact the human resources department.

The Oregon Military Family Leave Act (OMFLA) requires that an employer provide up to 14 days of leave to employees who are spouses or same-gender domestic partners of members of military forces that are on active duty. OMFLA also makes failure to grant such leave, or discrimination or retaliation against a spouse or same-gender domestic partner for requesting or taking such a leave, an unlawful employment practice.

MILITARY LEAVE: SAMPLE #2

ABC Company will provide up to 14 days of leave per deployment to employees who are spouses of active duty members of the military upon notice of an impending call or order to active duty, or impending leave from deployment.

For more information, please contact the human resources department.

LEAVE FOR ON-THE-JOB INJURIES

Most Oregon employers are prohibited from discriminating against employees who are injured on the job. Depending upon the nature of their medical release and the size of the company, employees who are injured on the job have certain reinstatement and reemployment rights that can last for up to three years from the date of injury. (See BOLI's *Civil Rights Laws* handbook for details.)

Disputes often result when employees do not understand how or when to report back to work after an injury. A section in the policy manual that addresses such obligations is thus very useful.

ON-THE-JOB INJURIES: SAMPLE

If you suffer an injury while on-the-job, you must report that injury immediately to your immediate supervisor. If you are unable to contact your supervisor for any reason, you must contact the human resources department. If you are on leave due to an on-the-job injury and then receive medical clearance to return to full or partial duty, you must supply a copy of the release to the human resources department within [X] days.

NOTE: Oregon law allows returning injured workers seven calendar days (extended for mailing) from the date they are informed by their insurance company or self-insured employer by regular and certified mail to notify their employer that their attending physician has released them for employment. OAR 839-006-0130(5)(d).

PRIVACY ISSUES

SEARCHES, MONITORING AND DRUG TESTING

In drafting and enforcing policies, employers must take care not to infringe on employees' privacy rights. There are various workplace actions that can implicate privacy rights, including searching of desks, lockers, or purses; monitoring or recording of phone calls; videotaping in the workplace; checking employee e-mail; monitoring Internet usage; and drug and alcohol testing.

Employees may prevail in tort actions for invasion of privacy if they can show that they had a reasonable expectation of privacy that the employer violated.

To avoid such claims, it is prudent to diminish that expectation of privacy by providing ample notice to employees as to when, where and how they may be subject to searches, monitoring or testing. Employers should first have a legitimate business purpose and second obtain a legal opinion regarding any policy with the potential to invade an employee's perceived right to privacy.

PRIVACY: SAMPLE #1

Please be aware that management may monitor incoming client calls to customer service representatives for quality assurance purposes.

PRIVACY: SAMPLE #2

Please be advised that when you are away from the office, management may need to access your desk drawers and file cabinets so that we can promptly respond to customer account inquiries, among other legitimate business purposes. The desk and its contents are intended to be company property and employees who leave personal belongings in their desks should not have privacy expectations with regard to such items.

PRIVACY: SAMPLE #3

You are welcome to use your company-issued locker for storage of personal items. However, please understand that we require you to provide us the lock combination or a copy of the key. Your locker is on company premises and may be subject to inspection at management's discretion, for security reasons during the course of a workplace investigation or for other legitimate business reasons.

PRIVACY: SAMPLE #4

ABC Company uses software to monitor employees' use of the Internet, including which websites employees visit and for how long. Therefore, please make use of the Internet only at the times and for the purposes described in our online access policy.

FREQUENTLY ASKED QUESTIONS

PRIVACY AND HAND-SCANS

EMPLOYER HAS RIGHT TO IMPLEMENT NEW TIME-TRACKING POLICY

QUESTION: ***To track our employees' time more accurately, we've decided to use a new hand-punch system provided by our payroll company. The system actually scans the top of each employee's hand and recognizes the hand shape. We have one employee who is claiming "invasion of privacy" and refusing to provide us the required photocopy of his hand. Can we make this a condition of employment and terminate him for refusing to cooperate?***

ANSWER: Yes. There's nothing illegal about your proposed system to scan hand shapes for time tracking and recordkeeping purposes. Since you've articulated a legitimate business reason for requiring these scans, you can discipline or even discharge an employee who isn't willing to lend a hand (so to speak).

Of course, you'll want to be certain that you're not violating any employment contract or collective bargaining agreement by imposing this requirement on employees. But if you, like most Oregon companies, are an "at-will" employer, you're free to set and enforce your policies according to the demands of the business, so long as the proposed action is not in violation of local, state or federal law.

Generally, an employee will only succeed with an "invasion of privacy" claim when he can prove in court that you violated some reasonable expectation of privacy in the workplace. Videotaping, drug testing, searching employee areas, or monitoring employee phone calls can land you in legal hot water if employees don't know these things may happen. In your case, however, it's apparent that you've given advance notice of the new scanning system to all your employees, so they come to work without any expectation of keeping their hand shapes private.

FREQUENTLY ASKED QUESTIONS

EMPLOYEE MONITORING POLICIES

COVERT VIDEOTAPING IN WORKPLACE MAY VIOLATE EMPLOYEE PRIVACY RIGHTS

QUESTION: ***What are the rules on monitoring employees in the workplace? For example, would it be legal for me to videotape my employee work area to see what staff are talking about, to learn whether they are actually working or goofing off, or to determine if they are properly handling cash transactions at the till?***

ANSWER: Many forms of monitoring in the workplace are legal, but you should proceed cautiously when considering videotaping in the workplace to avoid invasions of privacy and violations of the federal law regulating wire-tapping.

Regardless of the type of employee monitoring -- be it videotaping, drug testing, searching work areas, tracking internet use, or reviewing voicemail and e-mail transmissions – it's a good idea to clearly explain your policy to workers.

When employees bring privacy claims in court, the key issue is often whether they have a "reasonable expectation of privacy" in their work areas. Courts have generally ruled that videotaping in common work areas does not violate employee privacy rights, especially when the employer can articulate a legitimate business reason for the monitoring and when employees are aware they are being videotaped.

Keep in mind that government employers are subject to a higher standard. Under the Fourth Amendment, federal government workers have protection against unreasonable search and seizure, even when the government is acting as an employer, rather than as a criminal investigative or law enforcement agency. These greater rights also extend to state government employees under the Fourteenth Amendment. The U.S. Supreme Court has held that monitoring and searches in the public sector must meet a "reasonableness standard."

Juries have found certain workplace monitoring, such as videotaping in company restrooms and locker rooms, sufficiently outrageous as to support a tort claim for "intentional infliction of emotional distress."

In January of 1999, a jury awarded $20 million to four former employees of Wal-Mart in Kentucky. The store manager had secretly installed video cameras in the back of the store, and the four employees were discharged for stealing candy and nuts. The verdict against the employer was reached in part because the videotape included audio that contained very personal conversations of the employees, and in part because the jury found the store had an unwritten policy permitting employees to eat damaged goods.

In an Alaska case, a court ruled that Safeway violated a manager's privacy rights by secretly videotaping him in his office. The store suspected this employee of violating its policy against taking gratuities from vendors and wanted to determine if he was accepting free fishing trips. The court ruled that the manager had a reasonable expectation that he would not be surreptitiously taped while in his office, especially since he could close his office door and be unobservable from the outside. Although the company had a known practice of videotaping cashiers suspected of theft, there was no notice that the company would secretly film a manager in his office.

In St. Louis, Union Pacific agreed to a six-figure settlement in an employee's invasion of privacy case after company investigators videotaped him at home to determine if his injury claim was valid. The employee was filmed while working on his heavily wooded, 80-acre property.

And recently, a federal court found that an employer violated the National Labor Relations Act by videotaping employees engaged in union organizing and protected activities such as distributing literature.

The Federal Wiretapping Act of 1968 and its amendment, the Electronic Communications Privacy Act of 1986, prohibit most audio surveillance in the workplace. One court held a manager liable under the federal wiretap law after he secretly tape-recorded workers' conversations during his absence and then used the contents of the recordings to terminate employees. Because of the federal law, employers who do videotape in the workplace should generally do so without audio recording. Some audio monitoring is legal with employee consent, such as monitoring of phone calls to rate customer service. However, an employer must stop audio monitoring as soon as it determines that an employee conversation is personal in nature.

FREQUENTLY ASKED QUESTIONS

E-MAIL MONITORING

EMPLOYER MONITORING OF E-MAIL RAISES PRIVACY CONCERNS

QUESTION: ***My company has required all staff to sign a policy on e-mail monitoring. The policy states their e-mail will be reviewed to make sure that it's used for business purposes and that there's no inappropriate or harassing content. Are employers allowed to monitor e-mail communications at work, or is this an invasion of privacy?***

ANSWER: Your question raises the common conflict between employee privacy and the employer's right to conduct its business. The right to privacy in the workplace is judged using a "reasonableness" standard. Did the employee have a reasonable expectation of privacy, or did the employer have a legitimate interest in searching, monitoring, videotaping or drug testing?

With respect to e-mail, courts consider factors such as whether the employer notified employees it might review communications and whether the employer had a legitimate business reason justifying the monitoring policy.

Courts addressing this issue have generally held that employee e-mail is not private when there are valid reasons for monitoring. For example, employers can legally intercept e-mail transmissions to the extent necessary to determine if the messages are personal or business-related.

A number of courts have upheld employers' rights to monitor e-mail and even terminate employees for inappropriate or harassing e-mail content.

In fact, some courts have suggested that employers have an obligation to control and monitor e-mail to prevent harassment. In some situations, an employer can be liable for a supervisor's harassment – by e-mail or otherwise -- even if the employer doesn't know the harassment is occurring, so long as the employer should have known of the harassment. Also, employers have a duty to protect employees from harassing e-mail, to the extent possible, even if that e-mail comes from outside the company.

Employers can protect themselves by implementing rules that limit employee expectations of privacy. It's wise to have workers sign policies on e-mail and internet usage and even to have them re-sign periodically so that there are no misunderstandings. Employers are highly insulated from invasion of privacy claims when they clearly notify workers that e-mail can and will be monitored.

Employees can protect themselves by recognizing the common misconceptions that e-mails are private or that they "go away" when deleted. In fact, system administrators commonly have access to communications, and many employers use monitoring software to regulate e-mail and internet use.

Even when you "delete" a message from your computer, it still exists in other places, including on backup tapes and on the recipient's computer, and it may be recoverable for years to come. Experts recommend you think of an e-mail communication as an open postcard that may be (and often is) seen by many others.

E-mail messages now figure prominently in company investigations and in litigation. They are frequently subpoenaed and have become the "smoking gun" evidence in many cases, including the Microsoft antitrust matter. Workers should understand the vulnerability of e-mail communications and should pay careful attention to the employer's monitoring policies.

WORK RULES & PRIVACY ISSUES

EMPLOYEE'S OFF-DUTY CONDUCT MIGHT BE GROUNDS FOR TERMINATION

QUESTION: ***Can my employer legally fire me for what it calls "misconduct" that took place away from the workplace?***

ANSWER: It depends. Your employer is probably on solid ground if the misconduct adversely impacted your job performance or the employer's business. On the other hand, you may have an invasion of privacy claim if the conduct had no effect on the business, or if the employer went too far in investigating or restricting your personal off-duty activities.

Your employment in Oregon is "at-will" unless you have an agreement or contract with your employer that gives you greater rights. Under the "at-will" doctrine, either you or your employer can end the employment relationship at any time, with or without reason. Because there are numerous exceptions to at-will employment, however, employers should proceed very cautiously before disciplining or terminating employees for off-duty conduct. Having said that, it's also true that the courts have upheld such discharges in a number of cases.

For instance, your employer could legally discharge you if you were convicted of a crime that occurred outside of work hours, if that conviction would impact workplace safety, the business reputation, or your qualifications to do the job. Certainly, an employer may discharge a truck driver who loses his driver's license after a DUI conviction. Likewise, your employer could dismiss you from a cashier position if you were convicted of shoplifting.

An employer may also legally terminate employees who test positive for drugs or alcohol under a legitimate, non-discriminatory workplace testing policy – even if the positive screening results from drug or alcohol use that took place outside of work hours.

Some employers discipline or terminate employees under "fraternization" or dating policies. Even if the dating happens away from the office, an employer can legally restrict intimate relationships between co-workers when there's a valid work-related reason. For example, an employer might prohibit supervisors from dating regular staff, to prevent against sexual harassment or perceptions of favoritism or discrimination.

Even if your employer determines you acted inappropriately, it doesn't necessarily mean that the Oregon Employment Department will deny your claim. If the "misconduct" didn't occur in the course and scope of your employment, you may still be eligible for unemployment benefits.

DRUG AND ALCOHOL POLICIES

Because of increased litigation over drug testing, it is particularly important that employers seek legal advice before implementing a drug testing policy. Below are some general guidelines:

- **State in the policy manual that illegal drug and alcohol use or possession is forbidden in the workplace, as is being "under the influence" while at work. Define what you consider to be "under the influence."**

- **State in the policy manual that employees are subject to drug testing, and describe how and when they may be tested. This is a good way to minimize claims of invasion of privacy, because it is harder for employees to argue that they had a reasonable expectation of privacy in the workplace.**

DRUG & ALCOHOL POLICY: SAMPLE #1

ABC Company will not tolerate the use of illegal drugs or alcohol in the workplace. Any employee found to be in possession of illegal drugs or to be under the influence of illegal drugs or alcohol will be subject to immediate termination (see the disciplinary section of this handbook).

DRUG & ALCOHOL POLICY: SAMPLE #2

<u>Alcohol</u>

ABC Company (the Company) prohibits employees from being intoxicated or under the influence of alcohol during working time and from bringing or using alcoholic beverages on Company premises, except as stated in this policy. Moderate consumption of alcohol at Company-sponsored events, customer or vendor events, or other business-related functions on or off Company premises is not prohibited. However, employees are responsible for maintaining appropriate professional behavior at such events. Employees who work during or report to work after any business-related event where alcohol has been served still are required to comply with this policy.

<u>Drugs</u>

It is policy of the Company to promote a drug-free workplace. The manufacture, distribution, dispensation, possession, sale, purchase, offer to buy or sell, or use of an illegal drug or related paraphernalia and the illegal use of any drugs (including the misuse of prescription drugs) in the workplace or while engaged in Company business is strictly prohibited. The Company also prohibits such conduct during non-working time

to the extent that, in the judgment of the Company, it impairs an employee's ability to perform on the job or threatens the reputation or integrity of the Company.

Employees who use prescription drugs should follow the prescribing physician's directions for use. If use of a prescription drug may impair performance or affect safety on the job, you should notify your supervisor immediately so the Company can take whatever action it finds appropriate to protect your safety and that of coworkers.

Testing

An employee may be required to undergo drug or alcohol testing when the Company, in its discretion, determines there is a reasonable basis for testing or to the extent testing is required or permitted by law, including random testing and testing in connection with a workplace accident or injury. The Company also may institute pre-employment drug testing in the future as it considers appropriate. All Company-required drug and alcohol tests will be paid for in full by the Company. An employee may request a re-test at his/her own expense.

Policy Violations

An employee who violates this policy is subject to discipline, including immediate termination. At its discretion, the Company may require an employee who violates this policy to participate in and successfully complete a substance abuse assistance or rehabilitation program and agree in writing to special conditions for continued employment.

DRUG & ALCOHOL POLICY: SAMPLE #3

DRUG AND ALCOHOL ABUSE

ABC Company is concerned about the use of alcohol, illegal drugs and controlled substances as it affects the workplace. Use of these substances, whether on or off the job, can adversely affect an employee's work performance, efficiency, safety and health and therefore seriously impairs the employee's value to *ABC Company*. In addition, the use or possession of these substances on the job constitutes a potential danger to the welfare and safety of employees and exposes *ABC Company* to the risks of property loss or damage or injury to other persons.

Definitions. For the purpose of this policy:

(1) "Alcohol" means ethyl alcohol (ethanol) and includes all beverages and other liquids containing ethyl alcohol, including without limitation, beer, wine and distilled liquors.

(2) "*ABC Company* premises or property" means any and all properties owned, leased, or otherwise in the possession or control of *ABC Company* including, but not limited to, any facilities provided to employees by *ABC Company* such as closets, desks, lockers, vehicles and offices. *ABC Company* reserves the right to search its premises and property as circumstances warrant.

(3) "Drug" means any substance or chemical that has a mind- or function-altering effect on the human body, including prescribed medications and those medications obtainable without prescription, and those whose use is restricted or prohibited by law, including but not limited to, marijuana, cocaine, opiates, amphetamines, and phencyclidines ("PCP").

(4) "Possession" means on one's person, in one's personal effects or vehicle on *ABC Company*'s premises or property, or under one's control.

(5) "Sale" means any sale, exchange, transfer, sharing or offering to sell, exchange, transfer or share whether for money or otherwise.

(6) "Use" means any form of consumption including ingestion, inhaling or injecting.

(7) "Reasonable cause" means an employee's observable actions, appearance or conduct on *ABC Company* time, on or off *ABC Company*'s premises or property which indicates the use of a drug or alcohol.

(8) "Testing positive" means that testing has confirmed the presence of alcohol or drugs to any degree greater than that permitted under this policy.

(9) "Under the Influence" means having alcohol or drugs present in the body to the degree that conduct or judgment is affected and, in the case of alcohol, having a blood alcohol content level above .08 grams per deciliter (*g/dl*) of blood. Use of an authorized prescribed or over-the-counter drug not reported to the supervisor prior to beginning work is also a violation of this policy.

<u>Prohibited Conduct</u>. The following conduct is unacceptable, and will result in discharge from employment:

(a) Alcohol. The possession, use, sale or being under the influence of alcohol while on *ABC Company* property, premises or on *ABC Company* time or in an on-call status, or while operating a vehicle that is owned or leased by *ABC Company* or in other circumstances which may adversely affect operations or safety is strictly prohibited. No employee shall report for work or remain on duty while under the influence of alcohol.

IMPORTANT: The conduct prohibited by this rule includes consumption of any

alcohol before reporting to work, during breaks or lunch periods, or on the job.

(b) Drugs. The possession, use, sale or being under the influence of any drug (except an over-the-counter or prescription drug as discussed below) while on *ABC Company* property, premises or on *ABC Company* time or in an on-call status, or while operating a vehicle that is owned or leased by *ABC Company* or affect operations or safety is strictly prohibited. No employee shall report for work or remain on duty while under the influence of drugs.

IMPORTANT: The conduct prohibited by this rule includes consumption of any amount of drug before reporting to work, during breaks or lunch periods, or on the job.

In order to enforce this policy, *ABC Company* reserves the right to conduct searches of *ABC Company* property including closets, desks, lockers, vehicles and offices and to implement other measures necessary to deter and detect violation of this policy.

An employee's conviction on a charge of illegal sale or possession of any illegal or controlled substance while off *ABC Company* property will not be tolerated because such conduct, even though off duty, reflects adversely on *ABC Company*. In addition to reflecting adversely on *ABC Company*, *ABC Company* must keep people who sell illegal or controlled substances off of *ABC Company*'s premises in order to keep illegal or controlled substances (other than prescription drugs as discussed below) off the premises.

<u>Prescription Drugs</u>. The use of prescription drugs and/or over-the-counter drugs may also adversely affect the employee's job performance and seriously impair the employee's value to *ABC Company*. Any employee who is using prescription or over-the-counter drugs which may impair his or her ability to safely perform the job or may affect the safety or well being of others must notify a supervisor of such use immediately before starting or resuming work.

<u>Employer Assisted Treatment</u>. *ABC Company* will encourage and assist employees with chemical dependencies (alcohol or drugs) to seek treatment and/or rehabilitation. Employees desiring such assistance should request a treatment or rehabilitation leave. *ABC Company's* support for treatment and rehabilitation does not obligate *ABC Company* to employ any person whose job performance is impaired because of drug or alcohol use, nor is *ABC Company* obligated to reemploy any person who has participated in treatment and/or rehabilitation if that person's job performance remains impaired as a result of dependency. Additionally, employees who are given the opportunity to seek treatment and/or rehabilitation, but who fail to successfully overcome their dependency or problem and are involved in a second violation of this policy will not be given a second opportunity to seek treatment and/or rehabilitation. This policy is not intended to limit *ABC Company's* treatment of employees who violate the regulations described above. Rather, rehabilitation is an option for an employee who acknowledges a chemical dependency and voluntarily seeks treatment to end that dependency.

Reasonable Cause Testing. When *ABC Company* believes it has reasonable cause to suspect that an employee's work performance or on-the-job behavior may have been affected in any way by alcohol or drugs, or that an employee has otherwise violated this policy, *ABC Company* may require the employee to submit to appropriate tests for alcohol or prohibited drugs in his/her system, including the giving of urine, blood or other samples. Failure to give written consent, without qualification, to drug and alcohol testing and failure to provide samples for such testing, will be grounds for immediate suspension and probable discharge.

Examples of circumstances which may lead *ABC Company* to exercise its right to test, and search, among other rights, include but are not limited to the following:

- The odor f alcohol on the breath, skin, clothing or around the employee;
- Observable symptoms of being affected by alcohol or drugs;
- Accident investigations involving a fatality, bodily injury, or damage to property;
- Unexplained significant deterioration in individual job performance;
- Unexplained significant changes in behavior (e.g., abusive behavior, repeated disregard of safety rules or procedures, etc.);
- Unexplained or suspicious absenteeism or tardiness;
- Credible reports of individual or group drug or alcohol use in violation of this policy;
- Employee admissions regarding drug or alcohol use in violation of this policy;
- Employee admissions regarding drug or alcohol use;
- Unexplained absences from normal work areas when there is reason to suspect drug or alcohol-related activity in violation of this policy; and
- Inability to respond appropriately to questions.

The employee's consent to submit to testing and/or searches as required under this policy and the employee's agreement to otherwise abide by this policy in all respects is a condition of employment and any refusal to consent, or other violation or noncompliance will be grounds for discharge.

DRUG & ALCOHOL POLICY: SAMPLE #4

POLICY ON ALCOHOL AND DRUGS

_____ has always had a strong commitment to its employees to provide a safe work environment and to promote high standards of employee health. For the protection of all our employees, we have adopted this policy on drug and alcohol use. Our goal is a workplace free from alcohol and illegal drugs (including the abuse of prescription drugs) and their effects.

1. COMPANY ASSISTANCE

If you have a problem involving the use of alcohol or drugs, you may ask a supervisor or any member of management for confidential assistance. The Company will not take any member of management for confidential assistance. The Company will not take any discipline against you for making such a request for help. We will work with you to find an appropriate treatment program and to identify Company benefits that may be available to help deal with the problem, such as leaves of absence, sick or disability pay, and health insurance. Any request for assistance and any later treatment program will be kept as confidential as possible under all the circumstances.

It is your responsibility to seek such assistance BEFORE drug or alcohol problems lead to misconduct, accidents or violations of this policy. After a violation of our policy occurs, or after a drug or alcohol-related accident or misconduct, an employee's willingness to seek help or treatment generally will not "excuse" the violation or reduce the discipline imposed on the employee.

2. PROHIBITED CONDUCT

The possession, transfer, offering, consumption or being under the influence of any intoxicating liquor, narcotic, hallucinogenic, stimulant, sedative or illegal drug while on Company property, Company time (for example, at a customer's premises), or in other circumstances which may adversely affect our operations or safety, is strictly prohibited and will result in discipline up to and including termination.

Limited exception for Company Parties. This rule does not prohibit moderate consumption of alcohol served by the Company to employees at a scheduled Company social function (such as an annual picnic or holiday party.)

Prescription and over-the-counter medications. This policy prohibits the use of prescriptions and over-the-counter drugs which affect an employee's safe and efficient job performance unless the employee advises his/her supervisor in advance that he/she will be using such a drug and (in the case of prescription drugs) the drug is authorized and prescribed by a physician. Employees are not required to disclose to the Company the name of the drug prescribed or the condition being treated; we are only interested in side effects that could adversely affect safety or productivity at work.

IMPORTANT: This rule prohibits consumption of any such substance prior to reporting to work or during breaks or lunch periods. An employee who tests "positive" for any such substance by screening and confirmation tests, including an employee who tests positive as a result of a prescription drug the use of which was not reported to the supervisor prior to beginning work, will be deemed, "under the influence" for the purposes of this rule.

3. TESTING PROCEDURES

To help assure compliance with this drug and alcohol Policy, the Company will use urinalysis testing, which will apply to all employees from the President of the Company down. While all of us want a safe workplace, free from illegal drugs and alcohol, we also have concerns about our individual privacy. In addition, we want to have confidence that test results will be accurate and reliable. These testing rules were designed with these concerns in mind.

Under this Policy, urine specimens will always be given in privacy and will be marked and maintained in accordance with chain of custody procedures which assure accurate identification and preservation of each sample. Testing will be performed by a medical laboratory, and no specimen will be reported as positive unless it registers positive on two independent tests. Test results will not be made available except to those with a need to know. The Company will pay the cost of all testing which it requests. Employees who are asked to submit to a test will be paid for time relating to testing. An employee who is requested to submit to testing because the Company has a reasonable suspicion of violation of this drug and alcohol Policy will be suspended without pay until the test results are received. If the results are negative, the employee will be paid for work time missed as a result of the suspension.

Testing individual employees for reasonable suspicion.

The Company may require that an individual employee be tested if the Company has a reasonable suspicion that the employee is under the influence of drugs or alcohol. Examples of situations where the Company may test for reasonable suspicion include the following:

- Observable symptoms of being under the influence of alcohol or drugs;
- Accident investigations;
- Unexplained significant deterioration in individual job performance; (e.g., abusive behavior, repeated disregard of safety rules or procedures, insubordination, etc.)
- Unexplained or suspicious absenteeism or tardiness;
- Credible reports of individual or group drug or alcohol use in violation of this policy;
- Employee admissions regarding drug or alcohol use; and
- Unexplained absences from normal work areas where there is reason to suspect drug- or alcohol-related activity in violation of our policy.

(a) Testing applicants for employment.

Applicants for employment will be required to pass a drug and alcohol urinalysis before commencing employment.

(b) Employee consent required.

Whenever the Company requires an employee to be tested, the employee must at that time sign, without qualification, the Company's form consenting to the test. (A copy of the current consent form is attached. The Company reserves the right to revise the form from time to time.) Failure to sign the consent form when requested, and without qualification, will be grounds for immediate suspension and discipline up to and including discharge.

4. REENTRY OR "PERFORMANCE" CONTRACTS.

All employees undergoing a treatment program (voluntarily, or with the Company's agreement in order to avoid discipline) will be required as a condition of reemployment to sign a "reentry contract," promising to stay free from the effects of drug or alcohol abuse, and to comply with the treatment program in the future, as a condition of continued employment. This contract is the employee's promise not to use illegal drugs (including the unauthorized use or misuse of prescription drugs) or abuse alcohol in the future. This contract may require "random testing" of the employee to make sure the employee is keeping his/her contractual promises. Violation of a reentry contract will subject an employee to termination.

The employee's willingness to agree to treatment and a performance contract may be one factor used by the Company in determining whether or not to "show leniency" and not terminate the employee for a violation of this policy. However, the Company may terminate the employment of an employee for failure to consent to a test or for failing that test.

ACKNOWLEDGEMENT OF RECEIPT OF *(COMPANY NAME)* **DRUG AND ALCOHOL POLICIES**

I _____ did receive this date _____
(Print Name) *(Insert Date)*
a copy of the Company's Policy on Alcohol and Drugs. I understand that this Policy applies to me and I promise that I will follow this Policy.

_____
(Employee Signature)

FREQUENTLY ASKED QUESTIONS

DRUG-TESTING APPLICANTS, EMPLOYEES

DRUG TESTING PERMITTED IF CLEAR POLICY IN PLACE

QUESTION: ***Our corporation employs 1,300 people here in Oregon. Currently, we require all applicants to pass a urinalysis prior to being hired. We have a particular concern that a number of employees in our shipping department may be working under the influence of drugs. Can we conduct random drug tests on just one department, or is it improper to treat one department differently?***

ANSWER: Oregon disability laws and the federal Americans with Disabilities Act prohibit companies from conducting medical examinations or making medical inquiries during the job application process. However, testing for current use of illegal drugs is permitted because, legally, it's not considered a medical exam. Alcoholics and recovering drug addicts are protected under the disability laws, but individuals who currently use illegal drugs are not protected. That means that you can legally screen out applicants – and can legally discipline or terminate employees -- who test positive for marijuana, cocaine, or other illegal substances.

Before a company begins any drug-testing of employees, it should have a clear policy in place and should explain to staff when and how they might be tested. Random testing is permitted if it is truly random, but many companies instead opt to test based on "reasonable suspicion."

As an employer, you may not discriminate in the way you conduct drug tests. Obviously, it would be illegal to test only Hispanic employees, female employees, or Jewish employees. On the other hand, your company can legally differentiate between departments or classifications of employees, if there's a legitimate business reason for doing so. For example, many companies implement more stringent testing procedures for drivers, manual laborers, or others in high-risk or safety-sensitive jobs.

FREQUENTLY ASKED QUESTIONS

DRUG TESTING GUIDELINES

PROCEED CAUTIOUSLY WHEN DRUG TESTING EMPLOYEES

QUESTION: ***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?***

ANSWER: 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 and common law privacy rights.

So how can you conduct drug tests without landing your company on the wrong end of a lawsuit? Here are a few tips:

- **Have 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 to draft a legal policy which advises employees they could be subject to testing in your workplace.

- **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 your Asian employees, or only your female employees, or only your 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, you ought to test all 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. Sufficient advance notice gives fair warning to employees to conform their off-duty conduct to conform to a new policy, and such a policy will appear more reasonable to a court or jury.

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 protected by the ADA or Oregon disability laws.

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.

POLICIES THAT IMPLICATE CIVIL RIGHTS LAWS

Most employers are familiar with the basic state and federal "EEO" protected categories, including age, sex, race, color, religion, and national origin. Of course, it is important to keep these classifications in mind when implementing and enforcing policies, but it is also important for Oregon employers to recognize that state laws afford many additional civil rights protections to employees, as discussed earlier in this handbook.

For example, Oregon's civil rights statutes provide protections related to family relationship, marital status, polygraph and alcohol testing, and off-duty tobacco use, in addition to protection for whistleblowers, employees with expunged juvenile records, and employees who donate bone marrow.

Sometimes, employers operating with good intentions run afoul of the civil rights statutes because of the way they have crafted or applied company policies. Employers should proceed carefully in drafting policies in order to avoid the risk of civil rights complaints or lawsuits. The following frequently asked questions have been set out to illustrate the point; however, employers should seek the advice of an employment law attorney before implementing any policy of that implicates civil rights laws.

FREQUENTLY ASKED QUESTIONS

RELIGIOUS ACCOMMODATION

IF EMPLOYEE OBJECTS, REMOVE HOLIDAY DECORATIONS

QUESTION: ***I run a small insurance agency, and we decorate the whole office every year for Halloween. This year, one of the secretaries has objected to some of the decorations in her work area for religious reasons. She doesn't even want to have a plain pumpkin (not a jack-o-lantern, but just a symbol of fall!) sitting on her desk. We moved the pumpkin to a different part of the office, but we're wondering if we have to take down all our decorations to make her happy. We know that our customers like the decorations and look forward to the bowls of candy we put out at this time of year. Do we have to change the way we've done business for years?***

ANSWER: It's unlikely that a court would require you to go that far to accommodate an employee's religious beliefs. However, you are required to make reasonable accommodations for an employee's sincerely held religious beliefs when it's not an undue hardship for your company.

If the employee is telling you that Halloween decorations are contrary to her religious beliefs, you should certainly not require her to participate in decorating the office. Also, if she says she finds decorations in her workspace offensive, you're right not to require her to keep them in the immediate area, even though you feel they are religiously neutral.

FREQUENTLY ASKED QUESTIONS

RESTRICTING RELIGIOUS SPEECH

WORKPLACE POLICY SHOULDN'T PREFER ONE RELIGION OVER ANOTHER

QUESTION: ***My husband and I own a small business, and our newest salesperson, Wendy, decorated her office with some religious items, including little Buddha statues. We were afraid to say anything about this, but we are Christian and would prefer not to have other kinds of religious displays in our building. Today, I overheard Wendy on the phone with one of our customers. It was apparent that his wife had died, because Wendy was consoling him by saying that she believes in reincarnation and that he might see his wife again. I know Wendy meant well, but that's not the message we want her representing when she's on sales calls with our customers. Can I legally tell her to stop this?***

ANSWER: It depends. If your policy for all employees is that they should stick to business and refrain from religious discussions with customers, then you're probably on solid ground. On the other hand, if you favor one religion over another, you're susceptible to claims of religious discrimination. Had Wendy or another employee told the customer his wife was with Jesus, would you have been OK with that? Suggesting to employees that you tolerate Christian messages only could open the door to a lawsuit.

With respect to religious items at work, it's probably wise for you not to restrict discreet displays in an employee's workspace, if you allow other employees to set out personal items. Issues with religion and the workplace can be tricky, so you may want to consult your employment attorney. You have an obligation to reasonably accommodate an employee with sincerely held religious beliefs, but you don't have to make an accommodation that would pose an undue hardship. You also have an obligation to prevent religious harassment, and that includes restricting employees from preaching or otherwise imposing their religious beliefs on co-workers.

FREQUENTLY ASKED QUESTIONS

INJURED WORKERS

EMPLOYERS MUST APPLY SAFETY RULES IN NON-DISCRIMINATORY MANNER

QUESTION: ***One of our prep cooks, Jake, cut himself while chopping vegetables. He wasn't wearing the reinforced safety gloves we require for all kitchen staff working with knives. Jake's injury required emergency treatment and stitches. This not only disrupted our operations, but also resulted in an increase in our workers' compensation rates. Can we fire an employee who disregards our safety rules and gets hurt on the job?***

ANSWER: Maybe. The answer depends on the way you normally apply your safety rules with other workers. You can discipline or terminate Jake according to your safety glove policy, but you can't discriminate or retaliate against him because he was hurt on the job or because he filed an injury claim.

The Oregon civil rights laws provide protections for workers who are injured on the job. Under ORS 659A.040 (formerly ORS 659.410), if you employ six or more employees, it's illegal to treat an injured worker differently in the terms and conditions of employment.

This doesn't mean that you can never discipline or terminate an injured worker, but it does mean that the employee's injured worker status can't figure into the discipline decision in any way. Jake is in a legally protected category, so you can take disciplinary action only for an independent, legitimate, non-discriminatory reason.

If you always terminate employees for violating the safety glove rule – regardless of whether they suffer injuries or file claims -- then you can also terminate Jake for the policy violation. Similarly, it's legal to terminate a 72-year-old worker, or an African-American employee, or a pregnant woman, so long as the discharge decision is based on factors that have nothing to do with the individual's age, race, gender, or other protected class membership.

However, Jake could prevail on an injured worker discrimination claim if he can show that non-injured prep cooks violated the same policy but weren't disciplined, or were disciplined less harshly than he was. Also, if your company has a pattern of disciplining or terminating other injured workers, Jake's attorney would likely introduce such evidence as part of a discrimination claim. Employees may file such claims in court or with the Bureau of Labor and Industries.

Because timing of events can appear suspicious, it's always risky to discharge a worker soon after some protected activity. You should proceed carefully and assess the risks of terminating an employee who has just been hurt on the job, requested disability accommodation, used family leave, reported workplace

hazards, or engaged in whistleblower actions.

Consult your employment attorney before making termination decisions in these cases, and be certain you have plenty of documentation to show there's a legitimate, non-discriminatory reason for your decision.

If you do decide to terminate Jake for the safety violation, you should be prepared to demonstrate that it wasn't due to the injury. It will help to have documentation that your company did not take adverse action against others that invoked the workers' compensation system. It will also help if your personnel records show that similarly-situated employees – those who violated your safety rules in the same way and the same number of times as Jake – were also disciplined in the same manner, without regard to whether injuries occurred.

FREQUENTLY ASKED QUESTIONS

MEDICAL EXAMINATIONS

MEDICAL EXAM POLICY COULD VIOLATE DISABILITY, AGE LAWS

QUESTION: ***Our insurance company is telling us they want us to send all of our employees over the age of 60 to take an annual physical exam. Our insurance rates could increase significantly if we don't go along with this. Would it be appropriate for us to require these employees to be evaluated annually?***

ANSWER: There are two potential problems with this kind of policy. First, the Oregon and federal disability laws say that an employer may make medical inquiries or require medical examinations only when there is a job-related reason consistent with business necessity, and it's questionable whether you'd meet this standard based only on a potential increase in insurance rates. Second, employers can face age discrimination claims whenever company policies distinguish between employees based on an arbitrary age limit.

You should consult with your employment attorney as to how best to proceed here, and you might even consider switching to a different insurance plan. Annual physical exams are probably a good idea for older individuals, but as an employer, your best bet is to leave it to an employee's doctor to decide when to schedule him or her for evaluations.

FREQUENTLY ASKED QUESTIONS

MEDICAL CERTIFICATION POLICY

LAW REQUIRES EMPLOYERS TO PAY FOR REQUIRED DOCTOR VISITS

QUESTION: ***If an employee is out sick for three days and we then require her to bring us a doctor's note, are we required to pay the cost of the doctor's visit?***

ANSWER: In most cases, yes. An Oregon civil rights law, ORS 659A.306 (formerly ORS 659.330), makes it illegal to require employees to pay the cost of doctor visits or medical certificates required as a condition of employment. It's fine to implement policies requiring a doctor's evaluation or fitness for duty certificate when an employee misses work, if it is authorized by law or job-related and consistent with business necessity. But if you have such a policy, you've made the doctor's visit a condition of employment, and the law requires you to pay any out-of-pocket cost. If the cost is already covered by your insurance plan, you needn't do anything more, but if the employee is charged a deductible or co-pay, you're obligated to reimburse that amount. The law contains exceptions for medical exams required by law and for collective bargaining agreements specifying that the employee must bear the cost of doctor visits. Also, you are not required to pay for any underlying treatment, just the costs associated with the certification.

FREQUENTLY ASKED QUESTIONS

FAMILY RELATIONSHIP

NEPOTISM RULE FINE, BUT EMPLOYER CAN'T SCREEN OUT ALL RELATIVES

QUESTION: ***Can we implement an anti-nepotism policy that says family members of employees may not apply to work at our company?***

ANSWER: No. Your company can decide it won't allow nepotism, the favoring of an individual simply because he or she is related to one of your employees. However, automatically screening out all relatives in your hiring process would be illegal under an Oregon civil rights law. That statute, ORS 659A.309 (formerly ORS 659.340), prohibits an employer from discriminating against an individual "solely because another member of that individual's family works or has worked for that employer."

It would be inappropriate, for example, for you to say in a job interview, "We have a policy against hiring family members. Are you related to any of our employees?"

There is an exception written into this law. Specifically, you're not required to hire an individual if it would involve placing family members in a supervisory-

subordinate relationship. This means you can choose not to hire an individual if he or she would be supervising -- or supervised by -- a family member.

FREQUENTLY ASKED QUESTIONS

LANGUAGE POLICIES

EMPLOYER'S "ENGLISH-ONLY" RULE MAY BE DISCRIMINATORY

QUESTION: ***In the department I manage, we've had problems with a few employees who insist on speaking Spanish at work. Other workers are upset because they feel slighted when they're excluded from conversations, and they suspect the Hispanic employees are gossiping about them. These Hispanic employees are bilingual and do speak perfectly good English. Since morale is suffering, we'd like to set a policy prohibiting employees from speaking any language other than English while at work. Is this a problem?***

ANSWER: Quite possibly. Your proposed "English-only" policy may create even more controversy among employees, and it may also violate discrimination laws.

More employers are faced with language issues today, given the increased diversity in the workforce. But proceed carefully in addressing these issues.

It's illegal to discriminate based on customer preference or co-worker preference. Therefore, it's not wise to discipline employees for speaking a foreign language or set rules restricting their speech simply because other workers are suspicious or uncomfortable. Rather than simply barring all foreign languages in the workplace, you can address individual concerns by insisting that employees treat each other with dignity and respect.

Oregon and federal civil rights laws don't provide a protected class for language, but litigation based on "language discrimination" in the workplace is brought under the category of race or national origin discrimination. The theory supporting such a claim is that there's a strong correlation between a language and its corresponding national origin group, and that one's native language is intrinsic to and the prime symbol of one's ethnic identity.

An employee subject to an English-only rule might also raise constitutional free speech claims, if a company is unduly limiting personal speech, but these rights are primarily applicable in the context of government action

A federal court in Texas recently awarded more than $700,000 to a group of employees of a long-distance phone company who were fired for protesting an English-only policy. The court found that the company's rule served no justifiable business purpose and that its actions constituted disparate treatment of Latino employees based upon their national origin, in violation of Title VII of the Civil

Rights Act.

Complaints against companies based on English-only rules have dramatically increased in the last few years. Within the last year alone, hundreds of these complaints have been filed with the federal Equal Employment Opportunity Commission.

EEOC guidelines prohibit English-only rules unless the employer can demonstrate a clear business necessity. Therefore, if you implement such a policy, you should be able to articulate why it's necessary to running your business – perhaps for reasons of safety, efficiency or communication between key staff members.

Consult your employment attorney before drafting an English-only policy. Be certain the policy is narrowly tailored to address a business purpose. And stay away from highly suspect "blanket policies" which apply not just to regular work time, but also to time when an employee is on a break, in the restroom, on the telephone or in the parking lot.

FREQUENTLY ASKED QUESTIONS

RESTRICTED PREGNANT EMPLOYEE

ACCOMMODATION FOR PREGNANT WORKER
NOT LEGALLY MANDATED

QUESTION: ***I own a service station, and I have a pregnant employee who works as a fueler (filling customers' gas tanks). When the employee first advised us she was pregnant, the station manager offered to train her as a cashier so she could be indoors and keep out of the rain and away from the gas fumes. However, she told us she enjoyed being outside and wanted to remain in her job, and she indicated her doctor agreed she could continue to work in the fueler position. Now she's further along in the pregnancy, and she's brought us a doctor's note stating she needs to be off her feet. We don't have any inside positions available at this time. Are we required to bump one of our current cashiers to accommodate the pregnant employee?***

ANSWER: No. A normal pregnancy is not considered a "disability" under the federal Americans with Disabilities Act or the Oregon disability statutes. That's because disabilities under those laws are defined to be permanent or long-term conditions that substantially affect an individual in one or more major life activities. Since pregnancy incapacity is temporary, it's not a disability you're required to accommodate.

Of course, if you have a company policy of providing light duty work for other employees – say, for a male with a temporary incapacity – you'd have to do the same for this employee or you could face a discrimination claim. But otherwise, you're not obligated to provide modified work or reassign the pregnant employee.

In fact, even if her condition were an ADA-covered disability, you generally wouldn't be obligated to displace another employee in order to accommodate her.

If your company is large enough to be covered under the family and medical leave laws, and if the employee has worked for you long enough to be eligible, you're required to offer her 12 weeks or more of protected "pregnancy disability leave" when she's placed on bed rest or otherwise unable to perform her normal work. Note that the Oregon and federal leave laws use the term "pregnancy disability" to describe such an absence, even though pregnancy is generally not an ADA-covered condition.

WORKPLACE CONDUCT RULES

Work rules establish behavior guidelines for employees, such as safety procedures and attendance standards. The section on work rules should have an introduction that adequately describes the rules but also lets employees know that it is not a complete list, that the rules are guidelines only, and that they may change. In addition, employers should avoid committing themselves to a specific penalty for a work rule violation, but should save the discussion of penalties for the disciplinary section of the policy manual.

EXAMPLE: "The following are the standards and procedures that we expect employees to follow while they are employed at *ABC Company*. Violations of any of these rules can result in disciplinary action (see the disciplinary section of this handbook). However, the company will use these rules as guidelines only and will evaluate each situation individually. In addition, the list below is not a complete list, and we may add, delete or otherwise change these work rules at any time."

ATTENDANCE POLICIES

Employers should also include a provision regarding how absences due to illness will be handled by the company in the employee handbook.

ATTENDANCE: SAMPLE #1

Employees are expected to come to work regularly. Unauthorized absences can subject the employee to discipline (see the disciplinary section of this handbook). If an employee is absent without authorization for two days, we will assume that the employee has voluntarily resigned from *ABC Company*. Contact your immediate supervisor as soon as you know you will be absent. If your supervisor is not available, leave a message with anyone in the human resources department

ATTENDANCE: SAMPLE #2

If employees are unable to come to work because of illness they must inform their supervisor (or in the supervisor's absence, the human resources department) at least one hour before the start of their shift, unless circumstances make this impossible. Employees must also call in one hour ahead of time for every additional day they are sick, unless they have previously informed the supervisor that they will be out for a specified time. In that instance, they will be expected to return at the end of that period, unless subsequent arrangements are made to extend the sick time. For every absence of

more than three days, employees must supply medical verification of their illness.

NOTE: Whenever an employer requires a health certificate as a condition of continuing employment, the employer must pay any out-of-pocket costs associated with obtaining it. ORS 659A.306.

FREQUENTLY ASKED QUESTIONS

DEALING WITH NO-SHOWS

POLICY DICTATES HOW TO HANDLE EMPLOYEE "MISSING IN ACTION"

QUESTION: ***If one of our employees simply disappears and stops showing up for work, how long do we have to wait before we can legally consider this to be job abandonment? What do we do with the employee's final paycheck? Is the employee going to be eligible for unemployment benefits?***

ANSWER: It's your company policy – not the law – that defines what constitutes "job abandonment." A common practice is to state in your work rules or employee handbook that the company will consider the employee to have voluntarily resigned after three consecutive "no call, no shows."

But before you decide on a discharge under this type of policy, you should attempt to contact the employee to determine if there are extenuating circumstances. Is the absence related to a medical condition that prevented the employee from contacting you? Is the absence possibly protected under family leave laws, disability laws, or workers' compensation rules? Gather as much information as possible about the circumstances. It's also a good idea to document that you made reasonable efforts to reach the employee.

If you do decide after a certain number of absences that the employment relationship is over, you have really terminated the employee at that point -- at least for purposes of wage and hour laws.

Even if you characterize the unexcused absence as a "voluntary quit," the employee in this scenario hasn't stated that he or she is resigning. Rather, you're applying your policy to determine that the employee has separated from employment and is no longer welcome to return.

The significance, under Oregon wage rules, is that you must have the employee's final paycheck available by the end of the next business day following the termination. A different rule applies when an employee resigns without giving 48 hours advance notice. In that situation, you must have the paycheck available within five working days, or at the next regular payday, whichever is sooner.

If possible, you should promptly notify the employee of your discharge decision and advise that the final paycheck is available. You're required to mail the final wages to any address designated by the employee if the employee requests that you do so. But otherwise, you should hold the paycheck so that it's available to the employee by the end of the next business day following the termination, since the law says that final wages are "due and payable" no later than this deadline.

Although you should follow the wage and hour rules for a discharge, this doesn't necessarily mean, for purposes of unemployment rules, that you have terminated the employee or that the employee will be eligible for benefits. The Oregon Employment Department will examine the facts and determine on a case-by-case basis whether an employee has voluntarily resigned, and whether to grant or deny unemployment benefits.

To address the problem of the employee "missing in action," consider implementing a reporting policy which requires all employees to check in at regular intervals when absent from work. For instance, your policy might require any employee who is absent for a specified time period to phone in daily at a designated hour and speak personally to the supervisor.

FREQUENTLY ASKED QUESTIONS

ATTENDANCE POLICIES

EMPLOYER MUST BE PREPARED TO MAKE EXCEPTIONS TO "NO-FAULT" RULE

QUESTION: ***Is it legal to have a "no-fault" attendance policy under which we terminate employees who reach a certain number of absences during the year?***

ANSWER: Generally, yes. You could choose, for instance, to discipline or terminate employees once they reach eight "incidents" or "occurrences" of unexcused absence during the year.

However, you must be careful as to how and when you apply your no-fault policy. For example, if an individual is absent because of a disability covered under the Americans with Disabilities Act, you should make an exception to your no-fault policy when granting the time off would be a reasonable accommodation.

Similarly, when your employee misses time for serious health conditions covered under Oregon or federal family leave laws, you may not count these protected absences as a "point" or an "occurrence" that could lead to discipline.

Jury duty and military leave are still more examples of absences that cannot be counted as disciplinary incidents.

DRESS CODES

An employer may establish and enforce a dress code, provided the employer can articulate a business reason (for instance, because employees are in the public eye). That dress code can incorporate the normal differences in standard dress between men and women, but discrimination laws otherwise prohibit treating men and women differently. For example, an employer may require that men wear slacks and that women wear dresses or skirts, but may not require that only women wear uniforms, if in fact the job duties are similar.

TIP: Provide specific examples of what is considered to be acceptable attire in the workplace.

Employers should also be sure that a dress code does not illegally impact an employee's protected class. Policies disallowing beards, for instance, have been successfully challenged based upon race because a significant portion of African-American males have a skin condition that is aggravated by shaving. However, the employer has prevailed where the policy was essential for safety (such as the need to be clean-shaven in order to wear a respirator). Newly enhanced laws protecting an employee's rights to wear a beard or religious garb due to sincerely held religious beliefs, however, must be respected unless an undue hardship would result.

DRESS CODE: SAMPLE #1

Employees are expected to present a professional image in the workplace. Men must wear slacks (no jeans) and blazers or sport coats. Women must wear dresses or skirts and blazers. In general, employees' attire must be clean and free of holes and wrinkles. Let's strive to put ourselves and our company in a positive public light!

DRESS CODE: SAMPLE #2

ABC Company does not have a strict dress code. However, all employees are expected to be presentable and use good judgment in selecting what they wear to work. Remember, the impression you give our customers of yourself is the impression they will have of *ABC Company*.

FREQUENTLY ASKED QUESTIONS

DRESS CODE

WESTERN WEAR WON'T WORK, SAYS EMPLOYER

QUESTION: ***Our company dress code requires that all salesmen wear a tie. We now have an issue with a particular salesman who has started wearing bolo ties to work. Our written policy doesn't specify that this is prohibited, but we really want our sales staff to wear traditional silk -- or at least cloth -- ties. Would it be discriminatory to ban bolos?***

ANSWER: Cowboys haven't attained protected class status under Oregon or federal discrimination laws, so prohibiting the bolo won't infringe on your employee's civil rights. But you might consider amending your policy so that it's more specific.

As an employer, you have the right to determine your own dress code. Just be sure that you have a legitimate business reason for your policy and that you apply it in a non-discriminatory manner.

You can certainly require that receptionists, sales staff and other employees who interact with customers present themselves in a manner consistent with the company image you want to portray. This may include a required uniform, limits on jewelry and visible tattoos, and restrictions on hair length and color ("no purple or green," for instance).

In some cases, you may be obligated to make an exception to your dress code, where it would be a reasonable accommodation for an individual with a sincerely held religious belief.

FREQUENTLY ASKED QUESTIONS

GROOMING RULES: HAIR

EMPLOYER'S RULE REQUIRES HAIR TODAY, GONE TOMORROW

QUESTION: ***Can an employer require a prospective male employee to shave a beard and cut off a neat and clean ponytail as a prerequisite to employment? The job I applied for is not in food service but does involve customer contact.***

ANSWER: If Oregon employment statutes contained a Beard & Ponytail Rights Act, we'd certainly tell you about it. But there is no such law (unless the beard or hairstyle is required as a fundamental tenet of a sincerely held religious belief), so your prospective employer can legally require you to shave and snip before starting work.

In fact, employers can establish any kind of dress and grooming standards, so long

as they have a legitimate business reason and apply their policies in a non-discriminatory manner.

We assume in your case that the employer is trying to convey a particular company image to customers and that this is their justification for the grooming policy.

Presumably, this company doesn't restrict female employees from wearing ponytails or having longer hair. Isn't that a form of illegal sex discrimination – setting different grooming standards based on gender? Not according to the courts.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate based on an individual's race, color, religion, sex, or national origin. But the federal courts have routinely held that grooming and dress codes that distinguish between male and female employees are permissible and do not violate Title VII.

In one fairly recent Oregon federal court case, a male paramedic argued that an ambulance company's "no beard" policy was discriminatory because it had an adverse effect on male employees. But the court found that hair length and grooming standards have only a "de minimis" effect and don't interfere with Title VII's goal of achieving equality of employment opportunities and removing barriers to employment that existed in the past.

In the paramedic case, the employer's rationale for the "no beard" rule was that all paramedics were required to wear a particular type of respirator that can't be used by men with beards.

The Ninth Circuit Court of Appeals (which covers Oregon and several other Western states) has interpreted Title VII not to apply to "hair styles or modes of dress over which the job applicant has complete control," but rather to immutable characteristics that the applicant has "no power to alter."

The Ninth Circuit has held not only that employers may impose different hair length requirements on men and women, but also, for example, that they may require men only to wear neckties.

Employers may be required to make exceptions to their grooming standards when an employee has a sincerely held religious belief and requests reasonable accommodation. Shaving a beard, for instance, would be contrary to the Sikh religion, so an employer might have to allow a Sikh to retain his beard despite its normal grooming policy, if doing so wouldn't cause the employer an undue hardship.

An employer might also have to make an exception to its grooming code when a particular hairstyle is an integral part of an employee's race, ethnicity or heritage. In one federal case, the court found in favor of a Native American employee who

alleged he was fired because of his race and long hair.

Also, because African-American males are more likely than others to suffer from a skin condition called Psuedofollicutis Barbae ("PFB"), which is worsened by shaving, courts have determined that employers in some cases must make an exception to a "no beard" policy so as not to disproportionately exclude African-Americans from employment.

FREQUENTLY ASKED QUESTIONS

GROOMING RULES: PIERCINGS

DRESS CODES A MATTER OF COMPANY POLICY

QUESTION: ***We hired an experienced waitress who seemed very professional during the job interview. She's doing a good job, but our problem is that she's started streaking her hair with unusual colors and now has several visible piercings, including a nose ring and tongue piercing. Since this kind of image is inconsistent with our corporate culture and what our customers expect, can we prohibit it?***

ANSWER: Yes, you can. As long as you have a legitimate, non-discriminatory business reason, you're permitted to establish a dress code and hold employees to it. Your restaurant could, for example, require employees to wear a specific uniform, such as black slacks and a white shirt. You're also free to prohibit green and purple hair, if that kind of appearance doesn't convey the professional image you're trying to create for customers.

Some company policies require that men be clean-shaven, or that women wear their hair no longer than shoulder length. You can also set rules and limits on jewelry, tattoos, and the like. For example, perhaps your policy will be to limit servers to "two holes per head – one in each ear" and to prohibit cartilage or tongue piercings.

Note that although your company has great latitude in setting dress codes, you may be obligated to make exceptions to your rules when required as a reasonable accommodation. For example, if an employee has a sincerely-held religious belief requiring that she wear a particular type of jewelry or a turban, you'd be required to allow it unless you could show it would create an undue hardship.

FREQUENTLY ASKED QUESTIONS

GROOMING RULES: FINGERNAILS

FOR WORRY-FREE WORKPLACE, SCRATCH THE NAILS

QUESTION: ***We have an employee who wears acrylic nails that are very long. She works in a health care facility, helping to care for our clients. We have concerns about infections because artificial nails can trap moisture and carry fungus. Also, the employee inadvertently scratched a client the other day. Can we legally require her to remove the nails, at least while she's at work?***

ANSWER: Yes. You are free to establish dress codes, hygiene rules and grooming standards for your employees, as long as you have a legitimate business reason and apply your policies in a nondiscriminatory manner.

In addition to addressing the fingernail issue, your policies may set rules on visible tattoos, piercings, hair length and color, fragrances in the workplace, and proper hand-washing and other sanitary requirements.

The infection risk you cite would be a valid basis for establishing a natural-nails-only policy, as the Centers for Disease Control has reported that fake nails can be a breeding ground for bacteria. A number of health care facilities and hospitals have prohibited employees from wearing acrylic nails because of studies that show cosmetic nails or extensions can harbor and spread pathogens.

Long nails, whether natural or artificial, are more likely to carry infections, so your policy could also require that employees keep their natural nails short.

ELECTRONIC COMMUNICATIONS SYSTEMS

Nearly all businesses have come to rely upon some form of electronic communications system. Examples of electronic communications systems include: telephone and voicemail systems, e-mail, web-logs, text messaging, internet access and online social media applications. Although the pace of development of these systems makes creating and implementing company policy something of a moving target, an effective employee handbook should not ignore business expectations for employees' use of electronic communication systems.

Acceptable Use

Expectations for the acceptable use of electronic communications systems vary from company to company and worker to worker. A policy on the acceptable use of these systems should address a number of potential questions.

- **Does the company allow non-business use of email and internet?**

- **If so, what limits will apply to safeguard employee productivity, the company's reputation and company information systems security?**
- **Does the company have expectations on how voicemail boxes are maintained?**
- **What can employees expect in terms of enforcement?**

ELECTRONIC COMMUNICATIONS: SAMPLE

ABC Company employees are provided with access to a number of electronic communications and information systems. These systems include telephone and voicemail systems, e-mail, web-logs, text messaging, internet access and online social media applications. These systems and any information stored within them are the property of *ABC Company*. Any use of these systems must conform to the following expectations.

Electronic communications and information systems are provided and maintained to promote the business interests of *ABC Company*.

ABC Company will allow "limited and incidental" personal use of the internet and its computers. Any personal use of electronic communications and information systems must conform to the company's Respectful Workplace Policy and may not interfere with an employee's productivity. *ABC Company* reserves the right to monitor employee use of these systems at any and all times for visits to inappropriate sites and excessive personal use.

ABC Company specifically prohibits the following misuse of its electronic communications and information systems:

- Downloading, installing, or deleting any software application to *ABC Company* information systems without prior authorization from the IT department.
- Providing your *ABC Company* email address or account login to others for any purpose that is not work related.

Productive and secure use of electronic communications and information systems is critical to the success of *ABC Company*. For this reason, misuse of these systems may result in disciplinary actions, which may include termination of employment.

Terms to Know:

"Limited and incidental personal use" means that personal use of electronic communications and information systems must occur only during the employee's scheduled rest and meal periods; though it is not intended that an employee would regularly use all rest and meal period time using the internet for personal reasons. Rest and meal periods are required to give employees time away from their work stations so

they can eat, exercise, spend time outdoors, run errands, and take care of other personal needs. It is established that workers need breaks for ergonomic and health reasons.

"Limited and incidental personal use" does not include personal use of the internet that is visible to members of the public, hosting or operating non-work-related web pages, and postings to non-work-related internet groups, chat rooms, or list serves.

Social Media

Tech savvy businesses have begun to leverage "social media" to promote brand recognition, create event publicity, and increase product sales. Along with these potential benefits, however, it has also become clear that social media present businesses with a whole new set of challenges in their role as employers.

CASE IN POINT: In the aftermath of a recent riot, a Vancouver business received more than a hundred emails regarding offensive comments made by one of its employees on his Facebook page. Because the employee had identified the name of his employer in his user profile, his ill-considered comments related to the riot also had a negative impact on his employer's reputation. Reports like this make it clear that social media has a way of amplifying the impact of employees' use (and misuse) of information technology and blurring the line between personal and professional conduct.

So what do you need to know about social media? "Social media" can refer to any of several web-based applications that are accessed from a computer or a mobile device, like a smart phone or tablet. What tends to set social media apart from other internet content, however, is its interactive nature. Where "traditional" web pages may display content and provide links to other websites, the flow of information is pretty much one way. Social media websites, on the other hand, enable any user (not just a webmaster) to create content, leave comments, or even edit others' content, as well as interact with other internet users in real time. Publishing content to the internet on social media sites does not require hosting a website or editing html code, and as a result, social media sites have dramatically lowered previous barriers to participation on the internet.

The potential problem is that social media applications also have lowered the barriers to inappropriate participation on the internet. This is why it is so critical for employers to develop and implement a social media policy as part of a comprehensive employee handbook. An effective policy on social media will help you to clarify expectations on the use of social media, give guidance to those employees who do participate in social networking sites, and provide a framework for responding to violations of that policy.

- **Be clear on whether the use of social media is allowed at work and if so, under what circumstances.**
- **Be clear that employees who engage in social media should not identify themselves as representatives of the company, unless authorized to do so.**
- **Clearly communicate that even when employees use social media on their own time they may still be associated with their employer. This means that any respectful workplace, anti-harassment or anti-discrimination policy will still apply.**
- **Require that employees' blogs, pages, etc. should bear a disclaimer stating the employee's views are not the views of his or her employer. This may be especially important for the use of social networking sites like LinkedIn where users routinely request and provide professional references or endorsements.**
- **Emphasize the public nature of social networking and social media and the need for employees to exercise discretion and common sense. Once posted, social media content and comments may be impossible to completely retract.**
- **Be careful not to restrict protected "concerted activity" through which employees communicate about wages or working conditions. Even in non-union work environments, restrictions on such discussions are prohibited by the National Labor Relations Act and have resulted in complaints against employers who seek to limit employee use of social media.**

SOCIAL MEDIA: SAMPLE #1

Unless specifically authorized by management, *ABC Company* does not have an internet presence using social media technology (Web 2.0). Social media includes Internet-based tools such as Blogger, Twitter, YouTube, MySpace, Flickr, and Facebook.

Employee use of social media or social networking is considered personal use and it must be limited, incidental use. Unless specifically authorized, *ABC Company* work may not be conducted using social networking tools. This includes checking and using personal e-mail or web chatting. This is personal use and *ABC Company* business is not to be conducted through these means.

SOCIAL MEDIA: SAMPLE #2

Unless specifically authorized by the management of *ABC Company*, the use of social media is considered a strictly personal activity.

"Social media" can refer to any of several web-based applications that are accessed from a computer or a mobile device, like a smart phone or tablet. Examples of social media applications include but are limited to Facebook, LinkedIn, Twitter, and YouTube.

The use of company property or time for use of social media is prohibited.

Employees who use social media outside of work hours are expected to observe the following guidelines:

- **Employees who use social media should not identify themselves as representatives of the company, unless authorized to do so.**
- **Employees who use social media on their own time they may still be associated with their employer. In this capacity, employees must observe the guidelines of *ABC Company's* Respectful Workplace & Anti-harassment policy.**
- **Blogs and web pages hosted by the employee should bear a disclaimer stating that any views expressed there are not the views of *ABC Company*.**
- **Social networking and social media are public by their very nature; employees should exercise discretion and common sense. Once posted, social media content and comments may be impossible to completely retract.**

Nothing in this policy shall be construed to restrict legally protected activity; however, employees should be aware that violations of this policy may result in disciplinary action, up to and including termination.

Telephone

It has become increasingly common for companies to have as much or more contact with their customers, partners and suppliers by indirect methods, such as the telephone, than by direct face-to-face interaction. This means that expectations for employees' use of telephones, cell phones and voicemail systems can have a major impact on the success (or failure) of the company. Depending on the type of business, employers may wish to include policy on the use of these systems within the employee handbook.

VOICEMAIL: SAMPLE #1

It is the policy of *ABC Company* to provide employees with the tools and resources necessary for the productive use of their skills and time.

The intent of voicemail is to provide an additional service to the company's clients and employees by giving callers an opportunity to leave messages when employees are not

available to answer their telephones. *The use of voice mail is to augment, rather than substitute for or replace, human interaction.*

VOICEMAIL: SAMPLE #2

All voicemail greetings will provide the caller with the option to connect with a receptionist or other telephone attendant.

Voicemail greetings convey the image of the *ABC Company* to the caller. Therefore, greetings should reflect a professional demeanor and a current date.

Individual voicemail greetings shall be updated daily or weekly in a manner that indicates the employee's schedule and / or availability. Voicemail greetings should also indicate the employee's work schedule if it is something other than 8:00 a.m. - 5:00 p.m. and that the employee will return all calls. Generally, *calls should be returned within 24 hours*.

The voicemail greetings of employees who are absent for illness or other reasons should indicate that they are out of the office. Alternatively, employees may provide their telephone system passwords to their managers and request that the manager record a voicemail greeting on their behalf, or employees may forward their calls to a receptionist or other telephone attendant.

Employees should access their messages regularly throughout the day.

CELLULAR PHONES: SAMPLE

In the interest of protecting employee productivity, *ABC Company* has prohibited the use of personal cellular phones during working hours. Employees may use personal cellular phones while on break or lunch outside the work area.

Employees with cellular phones that have a camera are expected to exercise good judgment and common sense regarding use of the camera feature. Employees may not use camera features of personal cellular phones in any area of the workplace where individuals have a reasonable expectation of privacy.

Under no circumstances are employees permitted to use cellular telephones while driving on company business. Violation of this policy is grounds for immediate termination.

WORKPLACE SAFETY

Employers have certain legal obligations to maintain a safe working environment and to protect employees from violence, harassment and other dangers, to the extent possible.

Safety Committees

An Oregon Administrative Rule, OAR 437-01-765, requires all employers (including private employers) of 11 or more persons to have safety committees. Safety committees are required to meet regularly and make recommendations for safety of the workplace.

TIP: Employers should have a safety program and describe in the policy where employees can go to get more information about maintaining a safe workplace. There should also be a policy requiring employees to report all accidents and/or injuries, no matter how trivial they may seem.

SAFETY COMMITTEES: SAMPLE

ABC Company strives to keep the workplace as safe as possible for everyone. Our safety committee regularly meets and drafts minutes of their meetings. You are required to familiarize yourself with and follow all recommendations in those minutes, as well as all of the safety procedures posted on the bulletin board. In addition, you must report any injury or accident, no matter how small, to the human resources department.

FREQUENTLY ASKED QUESTIONS

SAFETY RULES

AVOID REGULATING OFF-DUTY CONDUCT

QUESTION: ***We have an employee who commutes to work by bike. Can we insist that she wear a helmet? Is the answer different when she uses her bike during the workday to run an errand for us?***

ANSWER: It makes good sense to wear a helmet whenever riding a bike, but you risk an invasion of privacy claim if you try to regulate what your employee does when she's off the clock. Of course, there's nothing wrong with telling the employee you're concerned about her and making the suggestion that she wear a helmet.

An Oregon law, ORS 814.485, requires individuals under 16 to wear protective headgear when operating a bicycle on public roads. If your employee is under 16, she can be fined up to $25 for violating the law, but if she's riding her bike when off duty, that's between her and the police.

> Regardless of your employee's age, you can require her to comply with your company safety rules when she's on the job. So when she rides her bike on a work-related errand, you can mandate that she wear a helmet.

Workplace Violence

There are at least three areas in which policy language ought to address violence in the workplace. The first of these would include safety threats from outside the workplace. Although the threat of full blown terrorism may not be a primary concern for most employers, managers and supervisors should be vigilant in monitoring your workplace carefully and taking any threats seriously.

Employers should establish an evacuation plan. Including that plan as an appendix to the employee handbook is one way of making sure employees are aware of it. Even if not part of the handbook, employers should also ensure appropriate staff are briefed on company security practices and procedures for reporting behavior that is suspicious, threatening, or out of the ordinary.

TIP: It is a good idea to implement mail-handling guidelines for your staff who open correspondence and packages. Consider establishing sign-in procedures for guests, or at least instructing staff to politely confront strangers in the building or promptly report their presence to management. Employers may choose to have staff wear identification badges to control access to work areas. Some employers even choose to hire consultants to conduct security audits and provide risk assessments.

The second area that workplace violence policies and procedures should address has to do with the far more common forms of workplace violence and harassment that can come from within the workplace. Employers can be held liable for negligent hiring or negligent retention of employees who have a history of violent or criminal behavior. Therefore, employers should screen employees carefully in the hiring process.

Thorough job interviews and reference checks may be part of the solution, but for safety-sensitive positions employers may also want to conduct background checks. Employers that conduct background checks must be sure to comply with the requirements of the federal Fair Credit Reporting Act and be sure that background checks are conducted in a non-discriminatory way. For example, a company may not subject applicants of a certain race or religion to greater scrutiny than others.

Finally, all Oregon employers are required to provide reasonable safety accommodations to employees who are victims of domestic violence, sexual assault, stalking or harassment (DVSASH). It is an unlawful employment practice for any Oregon employer to discriminate against an individual in hiring or any other employment decision because the individual is a victim of DVSASH.

WORKPLACE VIOLENCE: SAMPLE

Employees are a key part of *ABC Company's* efforts to provide a workplace that is as safe as possible for everyone.

ABC Company prohibits any violent, threatening or intimidating behavior by employees, including any unlawful harassment on the basis protected classifications such as race, religion, or gender.

Employees who witness such behavior are required to report it to any member of the management team. Reports of violent, threatening or intimidating behavior, as well as any unlawful harassment, will be thoroughly and promptly investigated.

Employees found to have engaged in violent, threatening or intimidating behavior or any unlawful harassment are subject to disciplinary action up to and including immediate termination.

If you have any concerns regarding your workplace safety, or the safety of other team members or our customers, please contact any management staff immediately.

FREQUENTLY ASKED QUESTIONS

WEAPONS

WORKER WITH WEAPON AT WORKSITE PROVES WORRISOME

QUESTION: ***One of our employees has a permit to carry a concealed weapon. Our current company handbook doesn't address the issue of weapons in the workplace. Are there employment laws that do? Are we within our rights to prohibit this employee from bringing a gun to work? Could we even prohibit the employee from leaving the gun in his locked car in our parking lot?***

ANSWER: There aren't any employment statutes that regulate weapons in the workplace, so it's your policy that dictates an employee's right to carry weapons. As an employer, you do have the right to prohibit guns and other weapons in the workplace and on your company property, including your parking lot.

Although your current policies don't address weapons, you're free to amend your policies prospectively and explicitly prohibit weapons, as long as you're an at-will employer and not violating any contract.

FREQUENTLY ASKED QUESTIONS

VIOLENCE POLICY

TOUGH STANCE ON WORKPLACE VIOLENCE JUSTIFIED DESPITE DISABILITY

QUESTION: ***We recently terminated an employee for violating our workplace violence policy after he threatened to physically harm a co-worker. The terminated employee has since brought us documentation that he's been diagnosed as bipolar, and he claims we're obligated to reinstate him since his behavior was due to his disability. Are we entitled to stick with our discharge decision?***

ANSWER: Yes. Courts have consistently upheld terminations for violent behavior even when the conduct is the result of a disability.

That's because the federal Americans with Disabilities Act (ADA) and the Oregon disability laws don't protect all employees with disabilities – only those who are qualified to perform essential job functions. And many courts have reasoned that an employee who can't control his violent propensities isn't a qualified employee. In addition, employers are not required to accommodate a disability if to do so would constitute a direct threat to the employee or others.

So as long as you applied your policy in a non-discriminatory manner, meaning that you'd terminate any employee for making violent threats, you can defend your decision to terminate.

Bipolar disorder is certainly a condition that can qualify as an ADA disability, since the law covers mental as well as physical conditions that substantially limit an employee in one or more major life activities. But the obligation to make "reasonable accommodations" for an employee with a disability doesn't include overlooking or tolerating bad behavior or poor job performance. You're entitled to hold employees with disabilities to the same standards as other employees.

The analysis might be different had the employee come to you earlier to request an accommodation. For example, a current employee might advise you of his mental condition and request some extra rest breaks in which to "de-stress" or perhaps some time off to seek treatment and determine the best course of medication.

In that scenario, the courts have said, you should enter into the "interactive process" with the employee to explore accommodation options, and you have the right to obtain medical certification when it is job-related and consistent with business necessity.

If it's not an undue hardship, you're obligated to make an accommodation that would allow the employee to perform his job and meet your normal workplace standards.

SMOKING & TOBACCO USE

Oregon's Smokefree Workplace Law became effective January 1, 2002. That law (ORS 433.835-433.990) requires almost all employers to maintain smokefree workplaces and display "No Smoking" signs. There are exceptions for certified smoke shops, cigar bars, tribal casinos and up to 25% of hotel/motel sleeping rooms designated as smoking rooms.

This law does not change the existing protections smokers enjoy under Oregon's civil rights laws. Under ORS 659A.315 (formerly 659.380), employers may not refuse to employ an individual simply because he or she uses lawful tobacco products during off-duty hours. Employer certainly can advise job applicants of its smokefree workplace policy, however, it would not be advisable to ask applicants whether they are smokers.

TOBACCO USE POLICY: SAMPLE

Tobacco-Free Workplace Policy

All areas of the *ABC Company* campus are tobacco-free without exception. The use of tobacco products is not permitted anywhere in the workplace, including all indoor facilities and company vehicles and parking facilities. The use of tobacco products is not permitted in private enclosed offices, conference and meeting rooms, cafeterias, lunchrooms, or employee lounges.

Compliance with *ABC Company's* tobacco-free workplace policy is mandatory for all employees and persons visiting the company, with no exceptions. Employees who violate this policy are subject to disciplinary action.

ABC Company encourages all smoking employees to consider quitting smoking. Smoking cessation information is available from HR. Any questions involving the use of tobacco products should be directed to your immediate supervisor or HR.

FREQUENTLY ASKED QUESTIONS

FRAGRANCE FREE WORKPLACE

PROTECTIONS FOR OFF-DUTY USE OF TOBACCO
NEED NOT CAUSE A STINK AT WORK

QUESTION: ***One of our employees, Jill, has complained that Bob, a heavy smoker, smells so strongly of tobacco that it is causing her a headache. When approached about the issue, Bob told his manager that smoking is his God-given right and that Jill needs to "get over it." So what are our obligations here?***

ANSWER: Bob has a point, but his logic gets fuzzy from there. We won't speak for God, but Oregon civil rights laws do protect him from discrimination for his lawful off-duty use of tobacco products. Under that law, you could not refuse to hire or promote Bob simply because he uses tobacco products on his own time. That said, there are some definite limitations to the protections offered by the law.

With a few exceptions, Oregon workplaces need to be smoke-free. So, Bob does not have the right to light up on the job or within 10 feet of entrances, exits, windows that open, or ventilation intakes that serve an enclosed area.

Beyond that, employers also have the right to implement "fragrance free workplace" policies which prohibit potentially offensive or irritating odors from perfumes, deodorants, and tobacco smoke.

Such rules should be in writing and should prohibit offensive odors if necessary for legitimate business reasons, such as the employees' need to work in close proximity with one another or with clients or customers. Employee who choose to smoke before work or on breaks can be advised to smoke in well-ventilated areas and to wash their hands and faces before returning to work in order to comply with the policy.

CONFIDENTIALITY

Many industries and professions protect trade secrets and client confidences. In such situations, the employee handbook or policy manual should contain a provision specifying this.

CONFIDENTIALITY: SAMPLE

The guarantee of confidentiality is essential to our providing quality services. It is every employee's responsibility to maintain this confidentiality by not sharing information about our clients to anyone outside of the company, and by safeguarding files and other written information. Failure to do so can subject employees to immediate termination (see disciplinary section of this handbook).

MISCELLANEOUS CONDUCT ISSUES

At times, employers are faced with the need to regulate employees' behavior "off the clock." Employers should proceed carefully in this regard in order to avoid the risk of an invasion of privacy claim for going to far in regulating what employees do on personal time. The following frequently asked questions illustrate the point; however, employers should seek the advice of an employment law attorney before implementing any policy of this type.

FREQUENTLY ASKED QUESTIONS

NO-MOONLIGHTING POLICY

EMPLOYERS CAN SOMETIMES JUSTIFY
RESTRICTIONS ON MOONLIGHTING

QUESTION: ***We're revising our employee handbook and wondering about the possibility of including a no-moonlighting policy. What are the legal ramifications if we prohibit our employees from taking any other jobs while working for us? Can we enforce such a policy, or would we be going too far by restricting what employees do when they are off the clock?***

ANSWER: Employer policies that prohibit moonlighting do raise some issues of privacy, fairness, and even discrimination, but in general, the courts have upheld no-moonlighting rules when they are applied uniformly and supported by some business justification.

As an employer, you are right to be cautious about regulating what your employees do on their own time, as doing so can lead to claims of invasion of privacy. However, there are many scenarios in which you can legitimately address an employee's off-duty conduct, when you can show that the conduct adversely impacts your workplace, damages your business or reputation, or affects an employee's qualifications to work for you.

For example, if your concern is that your employee will go to work for a competitor or share your client lists and proprietary information, you can enforce a non-competition agreement under certain circumstances (see the following FAQ).

If your concern is that a moonlighting employee will be more likely to call in sick or will be less productive at your job, sometimes the best option is to address the attendance or productivity issues if and when they arise, rather than establishing a blanket policy barring all outside employment.

Employees who want to earn extra money at a second job often view no-moonlighting rules as an unfair restraint of trade or limitation of their livelihood, so you should consider the effect the policy may have on employee morale.

If you do decide to implement a policy that prohibits moonlighting, you should

articulate your business reasons for the rule. These reasons might include concerns about scheduling conflicts, employee fatigue, conflicts of interest and divided loyalties, or the need for employees to be available for on-call work and overtime.

There have been numerous litigated cases involving moonlighting policies and claims that employers use them as a pretext to discriminate against employees engaged in protected union activity. These cases often involve employers turning away job applicants who are "salts" – union employees or members seeking to enter the workplace with the goal of organizing the workforce.

In some cases, the National Labor Relations Board has found that employers' no-moonlighting rules violated the National Labor Relations Act because they were adopted with the discriminatory motivation of preventing employees from engaging in protected union activity, or designed to prevent union salts, officials and sympathizers from being hired.

In other cases, the NLRB has upheld no-moonlighting rules. For instance, the agency found that an oil refinery was justified in terminating an employee who took a second job as a bartender. In that case, the employer was able to show the termination was unrelated to the employee's union affiliation and union activity.

Some states, including California, have laws that protect employees from discharge because of their lawful conduct that occurs during non-working hours. Employees have used these laws to challenge no-moonlighting rules, but the courts have generally found that employees engaged in outside employment for remuneration are not protected.

Another area of litigation involves employees with medical conditions who take time off work under the Oregon Family Leave Act or the federal Family and Medical Leave Act. If you discover such an employee has taken a second job with another company during his or her medical leave, think twice before disciplining the employee, because in a number of cases, courts have found that despite being able to work in a second part-time or light duty job, the employee still had a qualifying serious health condition entitling him or her to 12 weeks of protected leave from the original job.

FREQUENTLY ASKED QUESTIONS

NON-COMPETE AGREEMENTS

OREGON LAW ALLOWS NON-COMPETE AGREEMENTS – BUT ONLY WITHIN CERTAIN LIMITS

QUESTION: ***We have just had our third employee in two years lured away by a local competitor. Our training investment in these employees is fairly substantial and when they take their familiarity with our market strategies to other local companies, we feel they place us at an unfair disadvantage. Is there any reason we could not require our employees sign a non-compete agreement prohibiting employment with Oregon competitors or at least within the local market?***

ANSWER: Maybe. While Oregon employers are permitted to require non-competition or non-compete agreements from employees, you should be aware that there are a number of legal restrictions placed on these agreements. More specifically, under ORS 653.295, non-compete agreements are NOT enforceable in Oregon unless:

- **The employee is exempt from minimum wage and overtime as a "white collar" employee (i.e., he or she fits into either the executive, administrative or professional exemption),**
- **At termination, the employee's annual salary and commissions exceed the median family income for a family of four as determined by the U.S. Census Bureau,**
- **The employer has what is called a "protectable" interest. This means that the employee will have access to trade secrets or competitively sensitive confidential business or professional information - such as product development plans, product launch plans, marketing strategy or sales plans,**
- **The agreement is entered into at the beginning of employment (or bona fide advancement), and the employer has provided a written notice to the employee - at least two weeks before employment begins - that a non-competition agreement will be required, AND**
- **The agreement is not effective for longer than two years from the date of the employee's termination.**

In addition, special restrictions apply to non-competes for "on-air talents" in the broadcast industry. That said, the restrictions placed on non-compete agreements do not apply to bona fide bonus restriction agreements, or covenants not to solicit. Your best bet is probably to consult with an employment law attorney to determine (1) whether such agreements would provide an effective deterrent to employee defection, and (2) to ensure that the specific terms of your agreements are enforceable. In addition, if loss of training costs are the issue, courts have recently upheld employment agreements that require the employee to repay all or a portion

of training costs, scaled over time such that the longer an employee stays with the employer, the less he or she has to pay back. See, Gordon v. City of Oakland, --- F.3d ----, 2010 WL 4673695 (9th Cir. November 19, 2010).

FREQUENTLY ASKED QUESTIONS

FRATERNIZATION RULES

PROCEED CAUTIOUSLY IN SETTING DATING POLICY FOR EMPLOYEES

QUESTION: ***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 a customer might prove detrimental to our business if the dating relationship sours. Can we prohibit our employees from dating customers?***

ANSWER: 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. Also, in your case, one of the potential parties to the relationship (the customer) is mostly beyond your control. 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.

Bottom line? Seek advice from your employment law attorney before implementing this type of policy.

FREQUENTLY ASKED QUESTIONS

HOLIDAY PARTY POLICIES

EMPLOYER'S HALLOWEEN PARTY COULD CREATE GHOULISH EMPLOYMENT ISSUES

QUESTION: ***My employer puts on an annual Halloween party, which I think has been excessively rowdy in the past. Some of my co-workers seem to think it's ok to act out if they're wearing a costume or a little bit tipsy from the alcohol that's always served. This year's party is being held off-site at a local hotel, but even so, isn't the company responsible for what goes on there? Am I right to suggest that they tone things down this year?***

ANSWER: Absolutely. Your employer shouldn't be spooked out of holding its annual Halloween party, but the company should take steps to keep the event safe and avoid potential liability. Legal concerns surrounding holiday parties include liability for sexual harassment, workplace violence, alcohol-related accidents, and even religious discrimination.

Employers who put on holiday parties should remind staff that the company's harassment policies apply at company-sponsored events, no matter where they take place. Setting the ground rules for proper behavior is important, especially when costumes and alcohol are involved.

As we all know, drinking alcohol impairs judgment and lowers inhibitions. After one drink too many, even the normally reserved employee may behave in ways that can lead to liability for the company. Hugs, kisses or risqué jokes that some employees view as harmless celebration can be unwelcome and offensive to others. Even if your holiday party is held off-site, let employees know that all of your company policies on dress, behavior and workplace harassment still apply during this company-sponsored event.

Liability for serving alcohol at work-related events extends beyond harassment concerns. The company could also face a workers' compensation claim when an intoxicated employee injures himself at the company party. And some courts have found employers liable when an intoxicated employee gets behind the wheel of a car and suffers injury or harms someone else. If employees at your party do overindulge, be sure to provide them a safe ride home. The cost of a taxi is far less than the possible alternative costs.

Your safest choice, of course, is not to serve alcohol at all at the holiday party. There's no rule that says you have to serve alcohol this year just because you did it last year. If you do serve alcoholic beverages at the party, discourage excessive drinking. Remind employees they'll still have to face their colleagues the next day at work. Make non-alcoholic beverages available, and rethink the open bar with unlimited alcoholic drinks. One alternative is to set a limit by issuing drink tickets to party attendees.

Some companies make the holiday party more of a family event, with less emphasis on drinking. Of course, you should be certain never to serve alcohol to employees or family members who are under 21.

Employers should prohibit sexually explicit or risqué costumes. Staff should be advised that while it's ok to have fun at the company party, the standard for appropriate conduct is the same one that applies at the office. In other words, that Halloween mask won't mask liability for harassment and other misconduct.

Finally, to avoid claims of religious discrimination, the company should make planning for and attendance at the Halloween party entirely voluntary. If you take a few precautions, you can have a party that's both successful and trouble-free.

POLICIES ON DISCIPLINE AND DISCHARGE

EMPLOYEE DISCIPLINE

Although there is no legal requirement to have a disciplinary policy, many employers choose to establish some type of progressive disciplinary system. A progressive disciplinary policy is based on the concept that employees should have an opportunity to be warned about and correct their behavior when they are not meeting company standards.

TIP: Employers should take care to reserve their "employment-at-will" right to skip stages and deviate from the steps of progressive discipline when necessary.

DISCIPLINE POLICY: SAMPLE #1

These disciplinary rules do not constitute a contract, and are guidelines only. *ABC Company* reserves the right to employ at-will and to thus deviate from these rules, skip stages of discipline, and impose any form of discipline it believes is appropriate under the circumstances. Such discipline may include written or verbal reprimands, suspensions, or any other action, up to and including termination.

Verbal Warning
Employees who commit minor infractions will be subject to a verbal warning. Although this is not a formal written warning, it will still be documented in the employee's personnel file.

Examples of infractions which can lead to verbal warnings include, but are not limited to:

- Failure to turn in your time card
- Failure to clean up after your shift
- Tardiness more than once in a one-month period
- Failure to follow the dress code.

Written Warning
After one or more verbal warnings, an employee may receive a written warning for another similar infraction. Some infractions will warrant a written warning without a previous verbal warning. These infractions include, but are not limited to:

- Breaking or losing company property
- Causing an accident in a company vehicle
- Excessive absenteeism
- Two justified customer complaints in a six-month period (to be determined by management).

Suspension

Suspension may be with or without pay at management's discretion. Suspension may occur for the next infraction after one written warning. In addition, certain infractions can subject the employee to suspension after one incident. These infractions may include, but are not limited to:

- Fighting on the job
- Violation of safety rules
- Inadequate job performance.

Termination

Termination can occur at management's discretion, after any combination of warnings or suspensions. There are also some situations that may call for immediate termination. These situations include, but are not limited to:

- Theft
- Falsification of records (including application or time cards)
- Fighting
- Assault or threatening behavior.

DISCIPLINE POLICY: SAMPLE #2

A. At-will Employment Status and Termination

The Company is an at-will employer and reserves the right to terminate an employee at any time for any or no reason, with or without cause or notice just as an employee has the right to terminate employment with the Company at any time for any or no reason with or without cause or notice. ALTHOUGH OTHER TERMS AND CONDITIONS OF EMPLOYMENT MAY CHANGE, THIS AT-WILL EMPLOYMENT RELATIONSHIP WILL REMAIN IN EFFECT THROUGHOUT EMPLOYMENT WITH THE COMPANY UNLESS IT IS SPECIFICALLY MODIFIED BY AN EXPRESS WRITTEN EMPLOYMENT AGREEMENT EXECUTED BY THE CHIEF EXECUTIVE OFFICER OF THE COMPANY. THIS AT-WILL EMPLOYMENT RELATIONSHIP MAY NOT BE MODIFIED BY ANY ORAL OR IMPLIED AGREEMENT OR BY ANY PERSON, STATEMENT, ACT, SERIES OF EVENTS OR PATTERN OF CONDUCT. THIS SECTION ABOUT THE AT-WILL NATURE OF EMPLOYMENT AT THE COMPANY CONSTITUTES THE COMPLETE STATEMENT REGARDING THIS SUBJECT.

B. Elements of Employee Discipline

i. A goal of employee discipline is to develop and maintain long-term, successful employees. One aspect of employee discipline is to emphasize counseling and focus on communicating an expectation of change and improvement when problems occur.

ii. Nothing herein is intended to diminish the Company's right to control its work force but rather is an explanation of a preferred method of dealing with disciplinary or performance problems. The Company expressly reserves the right to determine the method of proceeding in each individual case.

iii. Each option other than termination is designed to explore, on a case by case basis, a performance or behavior problem and determine what needs to be done. Factors such as an employee's training instruction, abilities, job requirements and overall record, as well as the Company procedures and policies, should be considered when analyzing a performance problem.

iv. In considering employee discipline, a Company supervisor has the discretion to consider the following options or can determine that termination is appropriate:

(1) Oral Reminder. An oral reminder is private conversation between a supervisor and an employee aimed at correcting a performance or discipline problem. It is primarily a counseling session, and it generally occurs if informal conversations have failed to correct a problem. The goal is to make certain that the employee understands that his or her behavior or performance is creating a problem and to help the employee produce the desired change.

(2) Written Reminder. A written reminder usually begins with a conversation between the supervisor and employee about the need to correct a behavior or performance problem, that is followed by a written memo that may summarize the conversation and/or the need to improve certain performance or behavior. A copy of the written reminder is filed for future reference in the employee's personnel file, and the ongoing performance is monitored.

v. A disciplinary problem may be minor, serious or major in nature and may involve a performance, attendance or behavior problem. Depending on the Company's interpretation of the "seriousness" of the problem, either of the above options may be implemented or, if warranted in the opinion of the Company, the employee may be terminated.

C. Guidelines for Appropriate Conduct

Employees are expected to adhere to acceptable business principles in matters of personal and business conduct, to accept responsibility for the appropriateness of their own conduct and to exhibit a high degree of personal integrity at all times. It is impossible to list all forms of conduct that might be considered inappropriate. Certain behavior (such as theft, fighting, insubordination, falsification of records, bribery and threats of violence) is clearly unacceptable at any time in any workplace. Other conduct (such as failure to cooperate with other employees, harassing or intimidating others and rudeness to co-workers, members or suppliers), while often more subtle, is equally unacceptable.

The Company expects all employees to observe the highest standards of professionalism at all times, to comply with all laws applicable to the Company business wherever conducted and to treat others (members, suppliers and co-workers) with dignity and respect. Unsatisfactory performance, work habits, overall attitude, conduct or demeanor; violation of Company policies, procedures, guidelines or practices; or any other behavior or conduct deemed inappropriate by the Company may result in disciplinary action up to and including termination.

STANDARDS OF CONDUCT: PROHIBITED CONDUCT

There are many of us working together here at *ABC Company* and we need to guard our security, our personal safety, our welfare and *ABC Company* operations. The following conduct is prohibited and will not be tolerated. This list of prohibited conduct is illustrative only. Other types of conduct detrimental to security, personal safety, employee welfare and *ABC Company*'s interests may also be prohibited.

1. Falsification of employment records, employment information, work time, or any other Company records, or allowing any other employee to record your work time or falsify any other Company records.

2. Theft of, or deliberate or careless damage to any Company, employee or customer property.

3. Removing or borrowing *ABC Company* property without prior authorization.

4. Unauthorized use of *ABC Company* equipment, time, materials, or facilities.

5. Provoking a fight, fighting or causing, creating or participating in a disruption of any kind during working hours or on *ABC Company* property.

6. Participating in horseplay or practical jokes on *ABC Company* time or on *ABC*

Company premises.

7. Carrying firearms or any other dangerous weapons on *ABC Company* premises at any time.

8. Engaging in criminal conduct whether or not related to job performance.

9. Insubordination, including but not limited to failure or refusal to obey the orders or instructions of a supervisor or member of management, or the use of abusive or threatening language toward a supervisor or member of management.

10. Using profane or abusive language at any time on *ABC Company* premises.

11. Failure to notify a supervisor when unable to report to work, unreported absence of three (3) consecutive scheduled workdays or excessive tardiness.

12. Failure to obtain permission to leave work for any reason during normal working hours.

13. Failure to observe working schedules, including rest and meal periods.

14. Abuse of paid or unpaid sick leave.

15. Failure to provide a physicians certificate when requested to do so.

16. Sleeping or wasting time on the job.

17. Making or accepting excessive personal telephone calls.

18. Working overtime without authorization or refusing to work assigned overtime.

19. Wearing extreme, unprofessional or inappropriate styles of dress or hair while working.

20. Violation of any safety, health, security or *ABC Company* policy, rule, or procedure.

21. Committing a fraudulent act or a breach of trust.

22. Using or possessing alcohol or illegal drugs.

This statement of prohibited conduct does not alter *ABC Company*'s policy of employment-at-will. Either you or *ABC Company* may terminate the employment

relationship at any time for any reason, with or without cause or notice.

DISCIPLINE POLICY: SAMPLE #3

DISCIPLINE AND TERMINATION POLICY

All employees are hired for an indefinite period and may resign or be terminated without cause or notice at any time. This is what is meant by 'at-will' employment. Normally, we try to give regular employees (those who have successfully completed the probationary period) an opportunity to correct less serious performance problems before being terminated. In any case, however, we may decide that the nature of the problem and/or the employee's overall record makes immediate termination appropriate. Examples include, but are not limited to theft, dishonesty, violence, violation of our discrimination and anti-harassment policies, and violation of our drug and alcohol policy. If we decide some form of lesser action is appropriate, we may choose suspension, probation, or a verbal or written reprimand.

RESIGNATIONS

Although all employees are 'at-will' and may legally resign at any time, we appreciate at least two weeks notice so that an orderly transition can be made. Employees who do not provide this notice generally will not be considered for reemployment.

HARASSMENT IN THE WORKPLACE

Every employee handbook should include a section on harassment. Some experts suggest making the harassment policy separate from the regular progressive disciplinary system in order to emphasize its importance.

A harassment policy should:

a) Define harassment. Make the definition broad enough to ensure that all complaints are brought to the attention of management.

EXAMPLE: "Harassment is any unwelcome verbal, physical or visual conduct related to a legally protected class or status, including but not limited to sex, race, ethnicity, or religion which impairs the employee's ability to perform his or her job, and/or which creates a hostile, intimidating or offensive work environment. Examples of harassment include: offensive posters, unwelcome comments and touching, jokes, etc."

b) Provide a process for an employee to come forward and make a complaint about harassment. In order to make the policy as user-friendly as possible, management should give an employee more than one person with whom to lodge a complaint.

EXAMPLE: "An employee who wishes to make a complaint of harassment may talk to any management employee. The complaint will then be forwarded for investigation."

c) Provide a wide range of disciplinary action, up to and including termination, for instances of harassment.

EXAMPLE: "Any employee found to have engaged in harassment will be subject to immediate and appropriate disciplinary action, up to and including termination."

HARASSMENT POLICY: SAMPLE #1

Harassment

We will not tolerate unlawful harassment of our employees by anyone -- co-workers, managers, or customers. Any incident of unlawful harassment should be reported immediately to your supervisor or to our Personnel Manager so that we may investigate and take prompt corrective action, up to and including termination of the harasser.

Sexual Harassment

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature if (1) submission to the conduct is in any way made a term or condition of employment; (2) submission (or rejection) is used as the basis for any employment related decisions; or (3) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Other forms of Unlawful Harassment

In addition to our policy prohibiting sexual harassment, we strive to maintain a working environment that is free from all forms of unlawful harassment, whether based upon race, color, religion, national origin, age, disability, marital status, injured worker status, or any other characteristic protected by law. Not only do we not tolerate discrimination based on any of these factors, but we also expect all managers and employees to refrain from any words or conduct -including ethnic jokes, religious slurs, slang terms denoting race, age, national origin, disability, etc., derogatory comments, cartoons, graffiti, etc., - that might create a hostile or offensive working environment.

HARASSMENT POLICY: SAMPLE #2

UNLAWFUL HARASSMENT

ABC Company is committed to providing a work environment free of unlawful harassment. Our policy prohibits sexual harassment and harassment because of race, color, religion, national origin, ancestry, a physical or mental impairment that substantially limits one or more major life activities, marital status, age or any other basis protected by federal, state or local law or ordinance or regulation. All such harassment is unlawful. This anti-harassment policy applies to all persons involved in the operations of *ABC Company* and prohibits unlawful harassment by any employee including supervisors, managers, coworkers or other individuals.

Prohibited unlawful harassment because of race, color, religion, national origin, ancestry, a physical or mental impairment that substantially limits one or more major life activities, marital status, age or any other protected basis may include, but is not limited to:

- Verbal conduct such as epithets, derogatory comments, jokes or slurs;
- Visual conduct such as derogatory posters, photography, cartoons, drawings or gestures;
- Physical conduct such as assault, unwanted touching, blocking normal movement or interfering with work, directed at you because of your race or any other protected basis; and
- Retaliation for having reported or threatened to report harassment.

Sexual harassment may consist of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

a) Submission to such conduct is made a term or condition of an individual's employment;

b) Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual; or

c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Forms of sexual harassment may include, but are not limited to, the following:

- Verbal harassment, such as epithets, derogatory comments, jokes or slurs;

- Physical harassment, such as unnecessary or offensive touching, or impeding or blocking movement;

- Visual harassment, such as derogatory or offensive posters, cards, calendars, cartoons, graffiti, drawings, or gestures; and

- Retaliation for having reported or threatened to report sexual harassment.

Complaint Procedure. If you believe that you have been unlawfully harassed, provide a written complaint to your own or any other *ABC Company* supervisor, or the Personnel Manager or Assistant Personnel Manager as soon as possible after the incident. *ABC Company* encourages all employees to report any incidents of harassment forbidden by this policy immediately so that complaints can be quickly and fairly resolved. Your complaint should include the details of the incident or incidents, the names of the individuals involved and the names of any witnesses. Supervisors will refer all harassment complaints to the Personnel Manager or the Assistant Personnel Manager at *ABC Company*. *ABC Company* will immediately undertake an effective, thorough and objective investigation and attempt to resolve the situation.

If *ABC Company* determines that unlawful harassment has occurred, effective remedial action will be taken, commensurate with the severity of the offense. Appropriate action will also be taken to deter any future unlawful conduct. Whatever action is taken will be made known to you, subject to our obligation to respect the confidentiality of those involved. *ABC Company* will not retaliate against you for filing a complaint and will not knowingly permit retaliation by management employees or your coworkers. Any retaliation should be reported immediately.

Your Pledge. It is every employee's responsibility to read, understand and support the unlawful harassment policy. All employees must report violations if they witness or are victims of such misconduct.

ANTI-HARASSMENT

Prohibited Conduct for Sexual Harassment. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:

a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b. Submission to or rejection of such conduct by an individual influences employment decisions affecting such individual; or

c. Such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

The conduct prohibited may be verbal, visual or physical in nature. It includes unwelcome sexual advances, requests for sexual favors, physical touching or the granting or withholding of benefits (e.g. pay, promotion, time off) in response to sexual contact. More subtle forms of behavior, such as offensive posters, cartoons, caricatures, comments and jokes of a sexual nature, are prohibited because they may constitute sexual harassment when they contribute to a hostile or offensive working environment.

If any employee believes he/she has been discriminated against or has been subjected to sexual or other forms of harassment, the employee must immediately notify his/her supervisor or the Human Resources Department. Complaints will be investigated and corrective action taken as determined appropriate by the Company.

HARASSMENT POLICY: SAMPLE #3

POLICY AGAINST HARASSMENT

Every _____ *(employer name)* employee is entitled to work in an environment that is professional and free of harassment based on race, color, religion, national origin, sex, sexual orientation, age, marital status, source of income, disability, veteran status or other protected clasification. _____ *(employer name)* does not condone such harassment, regardless of whether the conduct is verbal, physical or environmental. Such conduct is illegal and will not be tolerated by any employee, customer or supplier.

Sexual harassment is defined as unwelcome or unwanted conduct of a sexual nature, whether verbal or physical, when:

a) Submission to or rejection of the conduct by an individual is used as a factor in decisions affecting hiring, promotion, transfer, evaluation or other aspects of employment; or

b) The conduct interferes with an individual's employment or creates an intimidating, hostile or offensive work environment.

Some examples of sexual harassment are unwanted sexual advances; demands for sexual favors in exchange for favorable treatment or continued employment; repeated sexual jokes; flirtations; advances or propositions; verbal abuse of a sexual nature; graphic, verbal commentary about an individual's body, sexual prowess or deficiency; leering whistling, touching, assault, sexual acts or suggestive, insulting or obscene comments or gestures; and display in the workplace of sexually suggestive objects or pictures. The foregoing list is not exhaustive

Similar behaviors (e.g., derogatory comments, jokes, cartoons physical aggression, etc.) when based on race, color, religion, age, national origin, disability or other legally protected status, also violate this policy. Employees should keep in mind that conduct which appears to be welcome or tolerated by one employee may be very offensive to another.

Harassment Prohibited. Harassment based on an individual's protected status is a form of illegal discrimination prohibited by *(employer name)*. Sexual harassment, as well as harassment based on any protected status, is unacceptable in the workplace and other work-related setting, such as business trips, deliveries, and business related social functions.

COMPLAINT PROCEDURE

Any employee who believes he/she has witnessed or been subjected to discrimination or harassment in violation of *(employer name)* policy should immediately report the incident to his/her supervisor or the Human Resources Manager. If the supervisor or Human Resources Manager is unavailable or the employee is uncomfortable reporting the incident to his/her supervisor or the Human Resources Manager, the employee may report the incident to *(the President of Employer)* so that corrective action may be taken. The person receiving the complaint should immediately inform the Human Resources Manager.

Reports and complaints of discrimination and harassment will be promptly investigated by the Human Resources Manager [and/or the company President]. At a minimum, the individual making the report or complaint and the individual identified as the perpetrator will be separately interviewed to determine the facts. If the investigator determines that the behavior violated *(employer name)*'s EEO or harassment policy, appropriate corrective action will be taken, up to and including discharge.

Protection Against Retaliation. *(Employer name)* will not retaliate in any way against an employee who reports discrimination or harassment, nor will *(employer name)* permit any other employee to do so. Any person who is found to have retaliated against another employee for reporting discrimination or harassment will be subject to the disciplinary action, up to and including termination of employment.

Confidentiality. All complaints of discrimination or harassment brought to the attention of the Human Resources Manager will be treated as confidential, so as to protect the privacy of the persons involved. Employees who report discrimination or harassment or become aware of a complaint are also expected to maintain confidentiality. Investigations will be kept confidential to the extent practicable and appropriate under the circumstances.

HARASSMENT POLICY: SAMPLE #4

(1) Policy: It is the policy of _____ to provide a work environment free from behavior, action, or language which may be perceived by others as hostile, intimidating, violent or abusive.

(a) Workplace harassment is a form of discrimination that is illegal, unacceptable conduct and is prohibited

(b) An agency head shall adopt a written harassment policy which includes a complaint process for an employee who alleges discrimination or harassment in the workplace. The policy shall:

(A) Specifically prohibit harassment by both internal and external parties involved with the organization;

(B) Clearly assign responsibility to both employees and supervisors for reporting incidents

(C) Strictly prohibit retaliation for reporting harassment or cooperating in an investigation;

(D) Include a clear procedure that allows employees to report incidents to a person other than the immediate supervisor;

(E) Be disseminated to all employees and supervisors.

(c) Training on all aspects of discrimination and harassment shall be provided

(d) The Discrimination and Workplace Harassment Policy model, an addendum to this policy, shall serve as the agency's policy and complaint process unless the agency has adopted an alternative process.

(2) Policy Clarification:

(a) Workplace harassment is a form of offensive treatment or behavior which to a reasonable person creates an intimidating, hostile or abusive work environment. It may be sexual, racial, religious, or based on a person's age, disability, national origin or status as a member of any protected class. It may also encompass violent acts for which employers could be held liable.

(b) The employer is liable for workplace harassment regardless of whether the employer knew or should have known of the offensive conduct, unless the employer proves:

(A) The employer exercised reasonable care to prevent and promptly correct any harassing behavior; and

(B) The complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

(c) Sexual harassment is any unwelcome sexual advance, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(A) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(B) Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or

(C) Such conduct interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment, as judged by the reasonable person standard.

(c) When an investigation substantiates the complaint, the supervisor of the employee(s) involved initiates an appropriate level of disciplinary action up to and including termination. If the complaint involves persons outside the agency, appropriate measures are taken to remedy the problem.

HARASSMENT POLICY: SAMPLE #5

DISCRIMINATION AND WORKPLACE HARASSMENT POLICY

(1) Purpose and Scope:

To reaffirm that it is the policy of [agency] to prohibit discrimination and all forms of workplace harassment; to clarify conduct that constitutes workplace harassment; and to provide an effective complaint procedure for employees who believe they have been the victims of prohibited conduct. This policy is intended to protect employees of whatever stature, customers or clients of the agency, contractors and visitors of the work site.

(2) Policy:

(a) Discrimination. It is the policy of the [agency] to provide a work environment free from unlawful discrimination on the basis of race, color, religion, sex, marital status, national origin, disability, age, union membership and activity, or any

other factor that an employer is prohibited by law from considering when making employment decisions. For purposes of this policy, prohibited discrimination includes discrimination on the basis of sexual orientation. This policy applies to all matters related to hiring, firing, transfer, promotion, benefits, compensation, and other terms and conditions of employment.

(b) Workplace Harassment. It is also the policy of the [agency] that all employees, customers, clients, contractors and visitors to the work site enjoy a positive, respectful and productive work environment, free from behavior, actions or language which constitutes workplace harassment.

(c) Penalties. Discriminatory conduct in violation of this policy and workplace harassment will not be tolerated. Any member of the staff found to have engaged in discriminatory conduct or workplace harassment will be subject to disciplinary action up to and including dismissal. Managers and supervisors who know or should have known of workplace harassment behavior and who fail to report such behavior, or fail to take prompt, appropriate, corrective action, will be subject to disciplinary action up to and including dismissal.

(3) Guidelines for Workplace Harassment Policy:

(a) Workplace harassment is a form of treatment or behavior, which to a reasonable person is intimidating, hostile, threatening, violent, abusive or offensive. It may, but need not always be, based on national origin, age, sex, race, disability, religion or a person's sexual orientation. It may also encompass other forms of hostile, intimidating, threatening, humiliating, or violent behavior which is not necessarily illegal, but is nonetheless prohibited by this policy. If a reasonable person would consider the conduct intimidating, hostile, threatening, violent, abusive or offensive, and the conduct occurs at work, or in the workplace, the conduct is prohibited by this policy.

(b) Sexual harassment is a form of workplace harassment. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical behavior of a sexual nature when:

(A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or is used as a basis for any employment decision (granting leave request, promotion, favorable performance appraisal, etc.); or

(B) such conduct is unwelcome and has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

(c) Workplace harassment can sometimes be a violation of law as well as a violation

of this policy. Unlawful workplace harassment may consist of verbal or physical behavior which relates to such factors as an individual's race, sex (such as sexual harassment or gender discrimination), color, national origin, religion, age and/or disability, or any other legally protected category, when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

(d) Workplace harassment can also be verbal or physical behavior which is derogatory, abusive, disparaging, "bullying," threatening or disrespectful, even if unrelated to a legally protected status.

(e) To aid employees in identifying prohibited behavior, the following specific examples of workplace harassment are provided (it should be understood that the examples are not meant to be all-inclusive):

(A) unwelcome touching of a personal nature, which can encompass leaning over, cornering or pinching;

(B) sexual innuendoes, teasing and other sexual talk such as jokes, personal inquiries, persistent unwanted courting and sexist put-downs or insults;

(C) slurs and jokes about a class of persons who have disabilities, who are homosexual, or are based on race or religion;

(D) displays of explicit or offensive calendars, posters, pictures, drawings or cartoons which reflect disparagingly upon a class of persons or a particular person;

(E) derogatory remarks about a person's national origin, race, religion, language or accent, or other protected class status;

(F) disparaging or disrespectful comments even if unrelated to a person's race, color, sex, national origin, religion, age, disability or sexual orientation or other protected class status; or

(G) loud, angry outbursts or obscenities directed toward another employee, a customer contractor, or visitor in the workplace.

(4) Nonretaliation:

This policy prohibits retaliation against employees who bring harassment charges or assist in investigating charges, or who report harassing behavior directed at persons other than the employee. This policy also prohibits retaliation against employees who complain that they are victims of employment related

discrimination. Any employee found to have engaged in retaliatory action or behavior will be subject to discipline, up to and including dismissal.

(5) Grievance/Complaint Procedure:

(a) For workplace harassment. Any employee who is subject to or is aware of harassment in the workplace should report that information immediately to agency management. The report may be made orally or in writing to the employee's immediate supervisor, or to a higher management staff member if the employee prefers. In the alternative, the report may be given to the agency's human resource office. (Note: Incidents involving violence or threats of violence should always be reported immediately to [identify officer or official]). Employees may report to any of the persons listed above and need not observe any particular chain of command.

(b) For discrimination complaints. Any employee who believes that employment-related discrimination was directed toward him/her by a member or representative of agency management may file a complaint with the Human Resource Manager. The complaint should be written unless the complainant, due to disability, is unable to file written complaint. The complaint should be filed with the agency within 30 calendar days of the alleged act. Complaints should include the name of the complainant, the name of the persons alleged to have engaged in the prohibited conduct and any witnesses, a specific and detailed description of the conduct that the employee believes is discriminatory, and a description of the relief the employee desires.

(c) Investigation. The recipient of the complaint shall promptly forward it to the appropriate Human Resource official for investigation. All staff can be assured that such complaints will be taken seriously and will be investigated and dealt with as discreetly as possible. The complainant will be provided a written response outlining the results of the investigation within 15 calendar days of receiving the complaint, absent extenuating circumstances. If additional time is needed for investigating the allegations or to issue a report of the findings, the complainant shall be notified in writing.

Nothing in this process precludes any person from filing a formal grievance in accordance with a collective bargaining agreement or with the Bureau of Labor and Industries or the Equal Employment Opportunity Commission.

RESPECTFUL WORKPLACE POLICY

MANAGER'S RUDE BEHAVIOR NOT HARASSMENT BUT WORTH ADDRESSING

QUESTION: ***I work in human resources for a large corporation, and we're not sure how to handle a particular problem situation. Cindy, a customer service representative, continually complains that her manager, Jeff, is harassing her. We've investigated Cindy's complaints, but we don't think there's any merit to them. Cindy says that she and Jeff "never clicked" and that Jeff "has had it out for her from day one." She says that he's impolite, that he's abrupt with her when reviewing her work, and that he "snubs" her by failing to greet her in the morning. Other employees have also mentioned that Jeff is somewhat lacking in social graces and not very patient with staff members, but is that harassment?***

ANSWER: Based on your descriptions, it's unlikely that Jeff's behavior meets the legal definition of "harassment," but there are still reasons to take the staff's concerns seriously.

Workplace harassment, a form of discrimination, is language or behavior directed at an employee because of that person's membership in a protected class. In order to constitute harassment, the actor's conduct must be so severe or pervasive that it creates a hostile work environment for the victim.

The problem situation you've described appears to involve rudeness and a conflict of personalities, but it doesn't appear to be unlawful harassment since Cindy isn't claiming the behavior is linked to her age, race, sex, religion, disability or other classification protected under civil rights laws. Even if she were to make such a claim, Jeff's alleged conduct is probably not sufficiently severe or pervasive to meet the legal threshold for harassment.

Though simple rudeness or unprofessional conduct isn't harassment, that doesn't mean you ought to ignore it. On the contrary, such behavior is something you should address when it's brought to your attention. Many employers have workplace conduct policies requiring all supervisors and staff to treat each other with dignity and respect.

Enforcing such a policy is important, because even where bad conduct doesn't fit the definition of harassment, there can be other legal liability. For instance, an employee may prevail on a workers' compensation stress claim where a supervisor acts in a particularly outrageous or intimidating manner. In extreme cases, workers can also file tort claims in court, such as actions for intentional infliction of emotional distress. In such cases, courts can award damages for back pay and mental suffering.

Employees may also claim a "constructive discharge" when they can show

conditions in the workplace were so intolerable that they had no reasonable option but to resign and that a reasonable person in the same or similar circumstances would resign. These employees may qualify for unemployment benefits.

Putting aside the legal concerns, there are other practical reasons to foster a workplace where staff members conduct themselves courteously. A professional environment is good for morale, productivity, and employee retention.

GRIEVANCE PROCEDURES

Many employers establish grievance procedures that allow an employee to take a complaint about work assignments, a supervisor or other issues to a person or persons in the company for review.

GRIEVANCE POLICY: SAMPLE

ABC Company recognizes that from time to time, all of us face difficulty in dealing with our supervisors, co-workers, workload or similar issues. We encourage you to use our grievance procedure so that we can try to resolve these problems as quickly and effectively as possible.

Employees wishing to use the company's grievance procedure should contact the human resources department and fill out our employee grievance form. Your grievance will be heard by our grievance committee which will issue a recommendation as soon as possible after gathering all the information. However, the committee's authority is advisory only, and management will still make the final decision.

LAYOFF ISSUES

There are few employment laws that speak to layoff and recall criteria, other than the general prohibitions on discrimination and retaliation. This means that it is up to each individual company to determine how it selects workers for layoff and recall.

While not a topic for the employee handbook, the company policy and procedure manual should address how the company handles layoffs and any recall criteria.

A company may base its decisions on seniority, attendance, performance, production rate, job description, or some combination of these factors.

In the absence of a collective bargaining agreement or other employment contract, an at-will employer could bring in a new employee rather than recalling a laid off worker. However, a company that does this should maintain good documentation of its recall criteria to show that it was not discriminating.

FREQUENTLY ASKED QUESTIONS

CRITERIA FOR LAYOFFS?

EMPLOYEE LAYOFFS RAISE CIVIL RIGHTS, WAGE ISSUES

QUESTION: ***Our revenues are sharply lower, and we're faced with the need to lay off several employees. What are the legal requirements for conducting layoffs? We're concerned because a gentleman who has been with the company nearly 20 years holds one of the jobs we've slated for elimination. Are we required to keep him instead of others with less seniority, even though his performance in recent years has been lackluster?***

ANSWER: How you conduct layoffs is largely a matter of your company policy. Employment laws don't provide a prescribed method or "legal way" to conduct layoffs. Instead, Oregon and federal civil rights laws tell you what you can't do as an employer.

You can't make employment determinations -- including layoff decisions -- that are based on an employee's age, race or other protected classification. That's why it's important to clearly document the reasons for your layoff decisions to show you haven't violated discrimination laws.

If you're an at-will employer and don't have a collective bargaining agreement or other employment contracts with workers, you're not required to retain a long-term employee simply because he has greater seniority.

Still, you do risk an age discrimination claim if you lay off your 20-year employee while retaining younger, less experienced workers. If the job performed by the more senior employee is now obsolete or unnecessary, that could be a legitimate, non-discriminatory reason for eliminating the position. But if you are selecting this individual for layoff based on job performance, have you clearly documented the performance problems and given the employee a fair opportunity to correct them?

It would help to have a policy that sets forth criteria on how your company selects individuals for layoff. In screening employees for layoff, some companies simply look at actual job duties performed and eliminate those positions that are no longer necessary (or jobs that are the least critical). Other companies make layoff decisions based on seniority, attendance records, job performance, or some combination of these factors.

If you're an at-will employer, you're generally not obligated to provide advance notice to employees that they'll be laid off. Of course, most employers strive to break the news gently and provide as much notice as possible when layoffs are imminent. If you have 100 or more employees and are closing an entire plant or conducting a mass layoff, the federal Worker Adjustment and Retraining Notification Act in some cases requires you to provide notice to employees 60 days in advance. See www.doleta.gov/programs/factsht/warn.htm for more information on the WARN Act.

Also note that Oregon wage laws provide special rules for paying employees who are laid off. If you're conducting a temporary layoff and the employee will return to work within 35 days, the wage laws allow you to consider the worker a continuing employee. Therefore, there isn't a special "final paycheck" deadline, and you can simply issue a paycheck on the next regular payday. On the other hand, if have no reasonable expectation the employee will return to work, the layoff is considered to be a termination of employment, and all wages earned become due and payable by the end of the next business day after the layoff. In order to avoid defending the reasonableness of your expectation to bring employees back, take the safe approach and treat the layoff as a termination and pay final wages by the next business day.

SEPARATION TERMINOLOGY

LAYOFF VERSUS DISCHARGE DISTINCTION CAN BE MURKY

QUESTION: ***Is there a legal difference between the terms "laid off" and "fired"?***

ANSWER: When you're laid off, you're out of a job, and when you're fired, you're really out of a job. How's that for a legal answer?

In one sense, there's not much difference between the two terms, and whether an employer uses "laid off" or "fired" to describe the employment action is a matter of semantics. But there are some subtle differences, and it depends to some extent on which laws you look at.

Of course, a "firing" or "termination" usually has a worse connotation, and it typically means the action is permanent. On the other hand, some companies who terminate workers may still categorize them as "eligible for rehire" under some circumstances.

A "layoff" is often associated with a restructuring, a reduction in force, or simply a lack of work, and it may or may not have anything to do with the employee's job performance or productivity. Then again, many layoffs are in fact based on such criteria, and many layoffs are permanent.

Employers sometimes take the “easy way out” and label a separation a “layoff” when they’re really terminating an employee for poor performance. They may do this to avoid confrontation, documentation, discipline and hurt feelings. Oregon is an employment-at-will state, so at-will employers who use this strategy aren’t necessarily breaking the law.

Still, it’s a risky approach that may be a recipe for a lawsuit, because the so-called layoff gives the impression that the employee will be returning when the economy recovers or when revenues rise. In fact, the employer may have no intention of ever reinstating the person. When this “laid off” worker -- who was never counseled about performance issues -- learns that a replacement worker has taken his place, he quickly figures out that he was fired, and he may conclude that the employer had a discriminatory motive.

There are a few legal distinctions between layoffs and terminations. An employee who is laid off for lack of work will often be eligible for unemployment benefits, but the Oregon Employment Department will deny benefits when it determines that an employee was discharged for “willful misconduct.”

Oregon’s wage and hour regulations make another distinction. When an employer terminates an employee, the employer must pay all final wages by the end of the next business day. But when an employee is laid off and the employee returns to work within 35 days, the layoff is not considered to be a termination under the wage rules, and the employee’s wages are simply due at the next regularly scheduled payday following the layoff.

When an employee is laid off with no reasonable expectation that he will return to work, the employer must treat the layoff as a termination, and all wages are due by the end of the next business day following the layoff.

FREQUENTLY ASKED QUESTIONS

RECALL AFTER LAYOFF

COMPANY RULES DETERMINE RECALL RIGHTS AFTER LAYOFF

QUESTION: ***My company, an at-will employer, recently laid off 600 workers, including myself. They say this is a six-month temporary shutdown designed to cut costs. The company indicates it will likely recall employees to work after that time. When they do this, are they required to offer me the same job with the same pay and benefits? Can they legally bring me back to a lower-classification, lower-paying job?***

ANSWER: You indicate your company is an at-will employer, and this means that you don't have an employment contract or collective bargaining agreement guaranteeing you specific recall rights.

You might have the right to reinstatement if you can prove that management made a promise or verbal agreement to return you to the same job following the layoff. Alternatively, you can challenge a decision to reassign you if you have evidence that it's discriminatory and based on your age, race, sex or some other protected classification.

Otherwise, your employer does have the right to reorganize, and the company could choose to offer you a different job due to restructuring, reduction-in-force, or budget limitations.

RESIGNATIONS

Even the most productive employment relationships can end and end suddenly. While not a topic for the employee manual, an established procedure can curb the confusion and reduce the potential for mistakes by managers handling the various obligations that arise when an employee resigns.

Employers should be careful, however, about setting a policy that requires employees to provide advance notice before quitting, because it may weaken your company's at-will employment status. Courts may find that such a policy imposes a reciprocal duty on the employer to provide advance notice before terminating an employee.

EMPLOYEE RESIGNATIONS

EMPLOYERS MAY CHOOSE TO ACCELERATE WORKER'S RESIGNATION

QUESTION: ***If one of our employees tells us today that he's resigning and gives us two weeks notice, do we have to wait the two weeks? Can we legally tell the employee that we're going to make today his last day? If we speed up the resignation, does the law require us to pay the employee for the balance of the two-week notice period?***

ANSWER: You don't have to adhere to the employee's proposed timetable for departure. Oregon is an at-will employment state, so you can end the employment relationship earlier than the worker's planned resignation date – as long as you're not violating an employment contract or your company policies.

Of course, it would be illegal to accelerate a resignation for discriminatory reasons, but it's an employer's right to do so when there's a legitimate business purpose. Some employers choose this route in an attempt to limit extended gossip sessions at the water cooler about the worker's reasons for leaving. Some employers believe that the departing employee is less likely to be productive during the final weeks of work, and they prefer to immediately begin training a new individual in the position.

As for the employee's compensation, federal and state wage laws only require you to pay for the hours an employee works. Therefore, if you expedite the worker's departure, there's no obligation to pay wages for the balance of the two-week notice period. Even if the employee is exempt and paid on a salary basis, the wage regulations permit you to prorate the weekly salary in the employee's final workweek to reflect payment only for the days worked.

Some companies choose to offer severance pay to departing employees, but such pay is optional if it's not something you've already promised.

Note that you generally do have to cash out all wages, including any accrued vacation pay, to the departing employee, unless your benefits plan clearly provides otherwise.

Be sure that you make the employee's final paycheck available by the legal deadline. If you choose to accept the employee's original resignation date, the final paycheck will be due on that final day of work. But when you choose to move up the separation date, you are – insofar as the wage and hour laws are concerned – terminating the employee. This means that the final paycheck is due on the next business day after the "termination."

Although you must follow the wage and hour rule for a termination, this doesn't necessarily mean that the Oregon Employment Department will view the

separation that way. Depending on the facts and the reasons for the employee's departure, the employee might only be eligible for unemployment benefits during the period in which he had planned to work.

REFERENCES

Although not a likely topic for an employee handbook, the topic of whether and to what extent job references will be provided regarding employees and ex-employees should be addressed by a company policy or procedure.

In general, employers have no obligation to provide a job reference. Only in special circumstances have courts held that a company has a duty to warn a prospective employer, such as when the employee has demonstrated a propensity for dangerous or violent behavior. Whatever an employer's stance here, the best practice is to consistently follow an established company policy.

Employers have three basic policy options for handling reference requests. The first option is the "say nothing" approach, i.e. providing no references at all for any former employees. A second option is to say just a little. Many organizations have adopted the "name, rank and serial number" approach, that is, to simply give the dates of employment and the position held. A third option is to provide full, substantive references, in which the specifics of the individual's job performance are given full disclosure.

Many employment attorneys recommend giving out little or no information on former employees, in order to avoid claims of defamation. There is, however, an Oregon statute that provides some protection to employers who choose to provide references. That law, ORS 30.178, provides that an employer who discloses information about a former employee's job performance to a prospective employer is presumed to be acting in good faith.

If an employer provides a reference upon request of the prospective employer or the former employee, the employer is immune from civil liability, unless the employee can prove the employer discriminated or knowingly gave false or deliberately misleading information with a malicious purpose.

Employers are liable for defamation only when they make an unprivileged, false statement about a former employee to a third party, if that statement damages the individual's reputation.

So contrary to popular belief, it is not illegal to give a bad reference. If company policy permits a substantive reference, an employer can give job-related, documented, truthful information about a former employee to a prospective employer – even if it's negative information.

The key is to be consistent when responding to reference requests. Deviating from the policy and providing substantive references for some employees but not others, arguably

creates exposure to claims of discrimination or retaliation. It is advisable to make sure that reference requests are made by a prospective employer. Often a former employee will pretend to be an employer or have a friend do so, just to determine what kind of reference will be given. It is permissible to ask the party requesting the reference to fax over a written request, on company letterhead, with a release of liability from the former employee attached.

If employers do provide references, they may, in rare situations, have a duty to warn a prospective employer about a dangerous employee, and they may be liable for "negligent referral" if they do not. Some courts have held that if any positive information is given about an employee, there is also an obligation to reveal that the individual may be dangerous. This rule could apply if the employee engaged in harassment, fighting, violence or other threatening behavior in the workplace.

CASE IN POINT: In one case, an insurance company employee engaged in bizarre and threatening behavior at work and was found carrying a gun in his briefcase. The company terminated him. Despite a policy not to write recommendation letters for former employees, the company wrote this employee a recommendation letter stating he had voluntarily resigned because of a restructuring. The company failed to mention any of his threatening activities. Relying on the letter, another insurance company hired him, and after that second company fired him, he shot five supervisors, killing three of them. Their families sued the first company for negligently failing to disclose all of the facts.

CONCLUSION

Unfortunately, when it comes to crafting an employee handbook, there is no “one-size-fits-all” prototype. Every handbook should be customized to reflect the organization’s culture, mission, and special workplace rules.

Creating and updating an employee handbook can be a daunting task, but when it is done well, the benefits far outweigh the costs.

Employees depend upon a policy manual to provide vital information about the company, their responsibilities, and the nuts and bolts of daily workplace life. A thoughtful and well-written manual makes a significant statement to employees about their value to the company, as well as management’s expectations of them.

Employers, too, derive many benefits from clear and consistently applied policies, because they help to demonstrate fairness in the workplace, and because they often serve as the key to a legal defense.

A good policy manual will change with the times and with new legal developments, allowing the company to evolve to meet new challenges and try new techniques.

Finally, clear policies help minimize the time and energy taken up with confusion and misunderstandings. That energy can be channeled into developing and maintaining a more enjoyable and productive workplace.

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