



The “Bermuda Triangle” of Claims: ADA, WC, and FMLA/OFLA

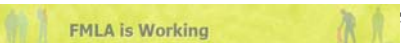
By Tamara E. Jones
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 OREGON
Public Risk
Management Association

Let's Start With a Fun (?) Quote

Per the U.S. Department of Labor's “Family and Medical Leave Act in 2012: Final Report”:

“”

FMLA “continues to make a positive impact on the lives of workers *without imposing an undue burden upon employers, and employers and employees alike find it relatively easy to comply with the law.*”

(February 4, 2013)

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More “Good News” (?) from the DOL



91% of employers report that complying with the FMLA has had either a positive effect or no noticeable effect on employee absenteeism, turnover and morale.

85% of employers report that complying with the FMLA is very easy, somewhat easy, or has no noticeable effect.



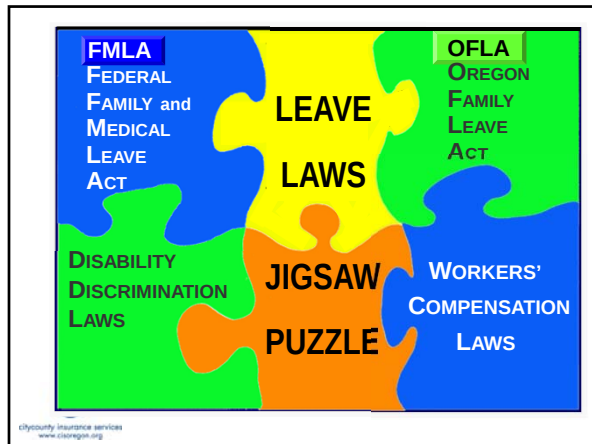
Employers reported the misuse of FMLA is rare.

Fewer than 2% of covered worksites reported confirmed misuse of FMLA.

Fewer than 3% of covered worksites reported suspicion of FMLA misuse.

Source:
<http://www.dol.gov/whd/fmla/survey/>

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AGENDA

- Comparing the key tenets of the ADA, FMLA/OFLA, and workers' compensation law
- The pointy angles of the "Triangle": Medical information
- Tricky "Triangle" issues faced by employers and lessons YOU can learn from them
- A basic checklist for addressing "triangle" issues
- Questions?


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Comparing the Key Tenets of the ADA, FMLA/OFLA and WC


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ADA. FMLA. OFLA. WC.

Name of Law	Covered Employers	Other Issues
Family Medical Leave Act	50 or more employees within 75 mile radius	All public sector employers are covered employers under FMLA, but their employees are not necessarily "eligible"
Oregon Family Leave Act	25 or more employees	
Americans With Disabilities Act	15 or more employees	
Oregon's disability laws	6 or more employees	
Workers' Compensation	1 or more "subject workers"	



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ADA. FMLA. OFLA. WC.

Name of Law	When an Employee Becomes Eligible for Leave or Benefits for His or Her Medical-Related Issue
Family Medical Leave Act	If the employee has worked 1,250 hours within the last 12 months leading up to the leave
Oregon Family Leave Act	If the employee has worked an average of 25 or more hours per week in the 180 days leading up to the leave
- Americans with Disabilities Act; - Oregon's disability laws; and - Workers' Compensation	On day one of employment, including "probationary" periods of employment



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What Employee Medical Conditions Could be Covered

Name of Law	Medical Condition Covered
FMLA/OFLA	"serious health condition"
ADA/Oregon	Disability: A physical or mental impairment that substantially limits one or more major life activities
Workers' Compensation	An injury, incident, syndrome, or disease caused at work that requires medical services



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So is a “disability”
the same thing as
a “serious health condition”?



What Leave Protections Your Ill/Injured Employee Could Have

Name of Law	Leave Protection(s) Afforded
FMLA/OFA	- Up to 12 weeks of unpaid leave within a 12-month period selected by the employer - Leave may be taken intermittently: - Day by day, hour by hour, multiple weeks, consecutive days.
ADA/Oregon	Unpaid leave until it no longer becomes “reasonable” to do so - Leave may be taken intermittently: - Day by day, hour by hour, multiple weeks, consecutive days (but most likely blocks of time)



More discussion to follow!

What Leave Protections Your Ill/Injured Employee Could Have

Name of Law	Leave Protection(s) Afforded
Workers' Compensation	No specific leave <u>limit</u> , but if injury is “disabling,” and time loss authorized, leave continues for as long as attending physician verifies worker’s inability to work (or until claim closes).



Leave as a "reasonable accommodation"

- Must be an individualized assessment
- Employer concerns about cost or inconvenience rarely survive legal challenge
 - This is particularly true if you have a "medical leave" policy in place



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Leave as a "reasonable accommodation"

- Neither the EEOC nor the courts have set a fixed amount of time that must be provided
- Courts have repeatedly held that indefinite leaves, with no reasonable likelihood of return, are not "reasonable"



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Leave as a "reasonable accommodation"

Employees can "share the burden" of leave as a reasonable accommodation:

- Must communicate with a person designated by the employer;
- Must provide appropriate medical supporting documentation; and
- Comply with the processes set forth by the employer in seeking, taking and returning from these types of leaves.



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What Reinstatement Protections Your Ill/Injured Employee Could Have

Name of Law	Reinstatement Rights Post-Leave
Family Medical Leave Act	An employer must allow the employee to return to the same or an equivalent job (unless he/she is a key employee or other minor exceptions).
Oregon Family Leave Act	- Same position the employee held at the beginning of the leave. - If position was eliminated, "and not merely renamed or reclassified," employer must restore the employee to any available, equivalent position.



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What Reinstatement Protections Your Ill/Injured Employee Could Have

Name of Law	Reinstatement Rights Post-Leave
ADA and Oregon disability law	The employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose undue hardship, or that the employee can no longer perform the essential functions of that job, with or without a reasonable accommodation.
Workers' Compensation	- Right to Re-employment (for employers with 6 or more ees) - Right to Reinstatement (for employers with 21 or more ees at time of injury)



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In what order do the leave laws apply (generally speaking)?

1. WC (Time-Loss) leave and FMLA (subject to proper notice and designation by the employer)
 - WC absences may run concurrently with FMLA
2. OFLA – doesn't run concurrently with WC/Time Loss leave
3. ADA
4. Employer's policy/CBA provision



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Leave Laws – One Possibility re Order

Once the WC leave ends, employee could still have:

1. Twelve (12) weeks of OFLA leave for a “serious health condition” or any other OFLA leave reason, **unless**
 - a. Employee rejected employer’s bona fide offer of light duty employment; “serious health condition” leave begins to run from date of rejection; **and if**
 - b. Employee remains “eligible” for leave (25 hours/180 days; 1,250 hours/1 year) after all of those other leaves have been used



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Leave Laws – One Possibility re Order

Once the WC leave ends, employee could still have:

2. Unpaid leave if the employee has a “disability” (and assuming such an accommodation is reasonable); and/or
3. Leave pursuant to employer’s policy or CBA provision



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Hold on a Minute!



**Just because
you provide leave
to an employee
per an organization policy
does not mean
you are in
“technical compliance”
with OFLA and FMLA**



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What, if anything, runs concurrently when an employee is injured?

- FMLA and WC/Time loss leave
- FMLA and OFLA if no WC injury and if it's a "serious health condition" leave for the employee
- ADA doesn't run concurrently with anything
- Employer policies/CBA provisions typically do not run concurrently
- LTD benefits do not provide leave; therefore, they do not run concurrently



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No Concurrency: OFLA-Only Events

- Definition of "family member" includes registered same-sex domestic partners (including their children, parents and parents-in-law), grandparents, grandchildren and in-laws
- Sick child and bereavement leaves
- Oregon Military Family Leave Act (14 days per deployment)

None of these run concurrently with FMLA or WC leave!



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The Pointy Angles of the "Triangle": Medical Information



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Medical Info Available to an Employer

- **FMLA/OFLA** – Documentation of the need for leave due to “serious health condition”
- **ADA** – Documentation of ability to perform the essential functions of the position with or without reasonable accommodation
- **WC** – Independent medical exam report ordered by insurer (not necessarily available to employer)



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Medical Info Available to an Employer

Bottom Line:

The various forms of medical certification
do not necessarily address
each law's parameters
(or give an employer
the information it needs for each law)



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Medical Info – RTW – FMLA/OFLA

Fitness-for-duty certification as a prerequisite to returning to work after OFLA/FMLA leave, **but only by the employee's doctor.**

- Must tell employee at the beginning of the leave that FFD exam will be required before he/she can return to work (and must provide the job description).
- Scope of FFD is limited to the serious health condition for which the leave was taken.



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Medical Info – RTW - ADA

- FFD exam at end of leave if “job-related and consistent with business necessity”, BUT only if the employer reasonably believes:
 - An employee’s present ability to perform the essential job functions will be impaired by a medical condition; or
 - An employee poses a direct threat due to a medical condition.



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Medical Info – RTW – ADA, *cont'd*

- The exam must be narrowly focused – do not request a general physical or “good health” exam
- The medical examination requirements are applied consistently



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What about 2nd and 3rd opinions?

Name of Law	When You May “Talk”
Family Medical Leave Act (initial medical certification only)	Second Opinion • Employer designates HCP at employer’s expense • Employee must first authorize release of medical records from first HCP Third Opinion Designated or approved jointly by employer and employee
Family Medical Leave Act (FFD upon return to work)	None – must accept report from employee’s physician.



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What about 2nd and 3rd opinions?

Name of Law	When You May "Talk"
OFLA	Second Opinion Employer may require the employee to obtain the opinion of a second health care provider designated by the employer, at the employer's expense. Third Opinion Two HCPs designate a third HCP; that third opinion is binding.
Americans with Disabilities Act/Oregon disability law	Acceptable, but costly, and potentially harmful to an employer.
Workers' compensation	Never, although the attorney representing the employee may choose to get an independent exam



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When can I call the doctor?

When all of this gives you a headache!



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When May I Talk to the Employee's HCP?

Name of Law	When You May "Talk"
Family Medical Leave Act	- Employer may authenticate the HCP signature on the Form WH-380E without employee permission - Employer (not direct supervisor) may speak with the HCP after receiving written permission from employee to cure insufficient or incomplete certification ("clarification") - Employee must be given an opportunity to cure first; employer may deny FMLA leave if the medical certification is incomplete or insufficient and the employee refuses to cooperate.



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When May I Talk to the Employee's HCP?

Name of Law	When You May "Talk"
Oregon Family Leave Act	Sort of, but: (1) Must first tell the employee in writing that the medical information provided is incomplete (and state what you still need); (2) Get permission from employee in writing to discuss medical situation with employee's HCP NOTE: Employer may not directly communicate with the employee's HCP; must hire a HCP of its own to act as messenger.



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When May I Talk to the Employee's HCP?

Name of Law	When You May "Talk"
Americans with Disabilities Act/Oregon disability law	Fitness for duty exam – but limited
Workers' compensation	Never, unless written permission from employee to do so (and then only after getting approval from your workers' compensation attorney)



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Tricky "Triangle" Issues Faced by Employers

What YOU Can Learn From Them



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#1: Intermittent FMLA/OFLA leave as a “reasonable accommodation”

FMLA/OFLA

- **FMLA:** Employers may **require** employees to transfer temporarily to an available position with equivalent pay and benefits if needed to better accommodate intermittent leave.
- **OFLA:** Must be **voluntary** and “only when there is no other reasonable option available that would allow the employee to use intermittent leave or reduced work schedule.”



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#1: Intermittent FMLA/OFLA leave as a “reasonable accommodation”

ADA/Oregon Disability Law

Employee may work part time in current position, or occasionally take time off, as a reasonable accommodation if no undue hardship.

- If (or when) reduced hours create an undue hardship, determine whether there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship while working a reduced schedule.
- If no equivalent position, look for a vacant position at a lower level.



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#2: Not Giving Instruction on Rights

- **ADA:** Failing to engage in the “interactive process” when the employer knows or has reason to believe that an employee’s medical condition is affecting his/her ability to work.
- **FMLA/OFLA:** Failing to let an employee know that they may be eligible for leave
- **WC:** Failing to teach employees what to do if they are injured on the job, *i.e.*, filing a Form 801, or encouraging employees not to file a Form 801.



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#2: Not Giving Instruction on Rights

Bottom Line:

- Employers with notice or a reasonable suspicion are required to notify their employee of the right to leave or a job accommodation.
- This is true even if the employee is unaware that he/she suffers from a specific qualifying serious health condition or that he/she is entitled to an accommodation.



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#3: Not Properly Handling “Light-Duty” Issues

- If the work-related injury is a “disability,” an employer may provide an accommodation that requires the employee to remain on the job performing LD work instead of or in addition to providing leave.
 - If an employee is FMLA eligible, the employee can reject the light duty work, and his/her leave request must be granted.



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#3: Not Properly Handling “Light-Duty” Issues, *cont’d*

- If an employee is offered and rejects light duty work, he/she generally will not receive “temporary total disability” benefits under WC.
- The employee’s OFLA leave bank begins to run as well.



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#3: Not Properly Handling "Light-Duty" Issues, *cont'd*

Bottom Line:

- Employers should evaluate whether offering light duty would allow an individual with a disability to perform the essential functions of his or her job (and otherwise be a reasonable accommodation).



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#3: Not Properly Handling "Light-Duty" Issues, *part 2*

Avoid implementing policies or practices stating/indicating that:

- Light duty is only offered for workplace-related injuries (or that employees who injure themselves outside of the workplace won't receive light-duty work);
- Employees who can't return to work after a particular period of time will be administratively dismissed.



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E.E.O.C. v. United Parcel Serv., Inc.

- E.E.O.C.: UPS has an inflexible 12-month leave policy that tells employees they will be "administratively separated from employment" after 12 months of leave.
 - This policy, per the E.E.O.C., limits the ability of "qualified individuals with a disability" to return to work, and violates the Americans with Disabilities Act.



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E.E.O.C. v. United Parcel Serv., Inc.

- UPS' response: The ability to regularly attend work and not miss multiple months is an "essential job function" and not a "qualification standard."
- UPS filed a motion at the very beginning of the lawsuit asking the court to dismiss the complaint.



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E.E.O.C. v. United Parcel Serv., Inc.

- **Outcome:** Motion denied. Case would proceed to discovery, and possibly trial.
- The E.E.O.C.'s claim was not premised on attendance, "but rather on UPS' imposition of 100% healed requirement on those seeking to return to work."



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E.E.O.C. v. United Parcel Serv., Inc.

Bottom Line: *Some things are better left unsaid when it comes to policies.*

- Review your policies for inflexible deadlines that might run afoul of the ADA or other discrimination laws.
- If you have a policy that either guarantees or suggests the likelihood of unpaid leave for medical conditions, you will likely be held very strictly to that policy.
- There is still no answer for employers wondering how long they have to keep ill or injured employees on unpaid leave after an OFLA/FMLA leave of absence.



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#4: Not following the “right” rule re health benefits continuation

ADA/Oregon Disability Law

- Silent on issue of benefits continuation but be careful of discrimination issues.
- Check the language of your health plan: Employees out of work that are not on FMLA/OFLA leave may become ineligible for benefits and instead have to continue their coverage under COBRA.



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#4: Not following the “right” rule re health benefits continuation

- **OFLA:** Benefits an employee was entitled to prior to starting OFLA leave must be restored in full upon the employee's return to work.
 - If you continue health or other insurance coverage for an employee on OFLA leave, you may require that the employee pay the same share of health insurance premium during the leave that the employee paid prior to the leave.
- **FMLA:** The employer must maintain the employee's existing level of coverage under a group health plan during the leave period.



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Can't I just be a nice employer and let the employee “stay on the books”?



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A Checklist for Addressing “Triangle” Issues



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Checklist – The Basics

- Which law(s) apply?
- Is the employee **eligible** for the type of leave he/she seeks at the time he/she seeks it?
 - What information do I need to answer that question? (Info from ee, medical info, etc.)
- If he/she is eligible, **how much leave is available?**



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Checklist – The Basics

- What **benefits** (if any) are available during the period(s) of leave?
- What **reinstatement right(s)**, if any, does the employee have?
- What **return-to-work information** am I entitled to receive from the employee?
- What, if anything, should I do to ensure that the employee **isn't retaliated against?**

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Questions?

“Take the attitude of a student:
“Never be too big to ask questions,
“Never know too much to learn something new.”

- Og Mandino
(Author of The Greatest Salesman in the World)


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A Quick Comment About *Escriba v. Foster Poultry Farms, Inc.* (Feb 2014 9th Circuit)

- Facts
- The quote that appears to have been heard around the world:

“We thus conclude that an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection.”


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A Quick Comment About *Escriba v. Foster Poultry Farms, Inc.* (Feb 2014 9th Circuit)

Problematic: *Escriba* relies on pre-2009 regulations, which didn't include this **very** helpful provision:

"Once the employer has acquired knowledge that the leave is being taken for an FMLA-qualifying reason, the employer must [designate the absence as FMLA leave]." (29 C.F.R. 825.301(a).)


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Oak Harbor Freight Lines, Inc. v. Antti

To curb FMLA leave abuse, employer instituted a policy requiring an employee taking intermittent leave to submit a doctor's note for each absence.

- The employee was not required to actually see a doctor; rather, the employee only needed to ask the doctor's office to provide a brief note confirming the reason for the absence.



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Oak Harbor
Freight Lines, Inc.

Oak Harbor Freight Lines, Inc. v. Antti

Court's Opinion: Oak Harbor was effectively treating each absence as a separate period of FMLA leave and requiring its employees to reestablish eligibility for each absence.

- Oak Harbor's policy directly conflicted with the FMLA's explicit recertification procedure designed to prevent abuse.



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Oak Harbor
Freight Lines, Inc.

Thank you, OR-PRIMA!



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