

Oregon Employment Law Update


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FEDERAL STATUTORY CHANGES

FMLA

Leave to Care for Adult Children With Disabilities

- FMLA allows employee to take leave to care for an adult child who is incapable of self-care due to a disability.
- DOL clarified that:
 - The age at which the child became disabled is irrelevant.
 - FMLA uses the ADA definition of disability.
- A parent may be needed to care for his or her son or daughter if, for example, the adult child is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, because of the serious health condition. They may also be needed to provide psychological comfort and reassurance that would be beneficial to an adult child with a serious health condition who is receiving inpatient or home care.

FMLA (Cont.)

Exigency Leave For Deployment of Family Members

- Expanded to include family members in all branches of the military, the National Guard, and Reserves.
- Now requires deployment to a foreign country.
- Eligible employees may now take leave to care for a military member's parent who is incapable of self-care when the care is necessitated by the member's covered active duty.
- Rest and Recuperation leave is expanded from 5 to 15 calendar days.
- The list of required information for certification for Rest and Recuperation leave is expanded to include rest and recuperation leave orders, or other documentation issued by the military showing the dates of leave.

FMLA (Cont.)

Military Caregiver Leave

- Expanded from caring for *current* servicemembers to include veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness.
- The veteran must have been discharged under conditions other than dishonorable at any time during the five-year period before the first day of leave taken to care for the veteran.

FMLA (Cont.)

Military Caregiver Leave (cont.)

- Serious injury or illness for covered veterans includes:
 1. Continuation of serious injury or illness from active duty that rendered him/her unable to perform duties of office, grade, rank or rating;
 2. Physical or mental disability ranked 50 percent or greater by VA rating system (VASRD);
 3. Physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
 4. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

FMLA (Cont.)

Military Caregiver Leave (cont.)

- Any healthcare provider authorized to certify FMLA leave in general can now certify military caregiver leave.
 - Employers can require 2nd and 3rd opinions for healthcare providers not affiliated with DOD, VA, or TRICARE .
- Enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers is sufficient certification of the covered veteran's serious injury or illness.
 - The employer can require the employee to provide additional information, such as confirmation of the familial relationship to the enrolled servicemember or documentation of the veteran's discharge date and status.
- Employers may require the employee to certify that the military member is a veteran, the date of separation, and whether the separation was other than dishonorable.

FMLA (Cont.)

USERRA and FMLA Leave Eligibility

The protections afforded by USERRA extend to all military members (active duty and reserve), and *all* periods of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee's eligibility for FMLA leave.

FMLA (Cont.)

Intermittent Leave (some clarification)

- FMLA defines the minimum amount of FMLA time that can be taken intermittently or on a reduced schedule as an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, but not greater than one hour.
- Rule clarified to add that the employer may not require the employee to take more leave than necessary to address the circumstances that precipitated the need for leave, and
- FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer.

FMLA (Cont.)

Physical Impossibility (some clarification)

- Where it is physically impossible for an employee to start or end work mid-way through a shift, the entire period the employee is forced to be absent is counted against the employee's FMLA leave entitlement.
- Rule clarified to note that the physical impossibility provision is to be applied in only the most limited circumstances, and the employer bears the responsibility to restore the employee to the same or equivalent position as soon as possible.

FMLA (Cont.)

New Poster

DOL issued a revised FMLA notice poster that covered employers were to begin displaying on March 8, 2013.

Immigration

New I-9 Form

- The US Customs and Immigration Services issued a revised I-9 form that employers were to begin using by May 7, 2013.
- New form can be completed by the employer and employee on-line at USCIS website.
- Other option is to use E-Verify system.

Background Checks

Fair Credit Reporting Act

- New “A Summary of Your Rights Under the Fair Credit Reporting Act” form.
 - Should have been using January 1, 2013.
- Give to applicants and employees as part of pre-adverse action notice
- For investigative consumer reports (includes personal interviews), give to applicants and employees with notice that a background check will be performed.

Background Checks (Cont.)

EEOC Enforcement

- EEOC bringing disparate impact suits claiming the use of criminal records as an automatic bar to employment discriminates against minority groups with higher rates of criminal convictions.
- EEOC wants employers to conduct individualized assessments of criminal records before making an employment decision.
 - (1) consider the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the job in question;
 - (2) give the applicant or employee the opportunity to explain why he or she should not be excluded; and
 - (3) consider whether the explanation shows that the policy as applied is not job related and consistent with business necessity.
- *EEOC v. Freeman*, Case No. RWT 09cv2573 (D. Md. Aug. 9, 2013)
 - Court rejected EEOC's arguments and its statistical evidence as plagued with errors and unreliable.

OSHA

OSHA revised its Hazard Communication Standard (HCS) to conform to the United Nations Globally Harmonized System of Classification and Labeling of Chemicals (GHS).

- All employers with hazardous chemicals in their workplaces must have labels and safety data sheets for their exposed workers, and train them to handle the chemicals appropriately.
- Chemical manufacturers and importers will be required to provide a label that includes a harmonized signal word, pictogram, and hazard statement for each hazard class and category. Precautionary statements must also be provided.
- Safety Data Sheets will have a specified 16-section format.
- Employers are required to train workers by December 1, 2013 on the new labels elements and safety data sheets format to facilitate recognition and understanding.



OREGON STATUTORY CHANGES

Military Family Leave

Oregon Military Family Leave Act

- New BOLI rule clarifies that an employee eligible for OMFLA leave does not have to be eligible for OFLA leave.
- Eligible employees are entitled to 14 days of leave per deployment.

Domestic Violence Leave

Oregon Eliminates Eligibility Criteria for Employees

- Currently, an employee is eligible to take domestic violence leave only if he or she has worked an average of more than 25 hours per week for the 180 days before the date the employee would begin the leave.
- Starting January 1, 2014, this criteria is eliminated. Employees will be eligible for qualifying leave the minute they start working.
- The qualifying purposes for the leave remains unchanged.
- Employers also will need to display a poster.

Bereavement Leave

OFLA Expanded to Include Bereavement Leave

- OFLA eligible employees can take up to 2 weeks leave per death of a family member, up to a maximum of 12 weeks per leave year, to:
 1. Attend the funeral (or funeral alternative) of a family member;
 2. Making arrangements necessitated by the death of a family member; or
 3. Grieve the death of a family member.

- Bereavement leave counts against the employee's 12 weeks of OFLA leave.

Bereavement Leave (cont.)

- The leave must be taken within 60 days after the employee receives notice of the death.
- Employees do not need to give notice before taking leave.
- Employers can require oral notice within 24 hours after taking leave, and written notice within 3 days of returning to work.
- Unlike other OFLA leave, employers cannot shorten the amount of leave available if notice is not given.
- Employers cannot require leave to be taken consecutively for multiple deaths.
- Employers must allow employees with the same family member to take leave at the same time.

Veterans Day

Oregon Gives Veterans Veterans Day Off

- Employees are eligible if they served on active duty in the Armed Forces for at least 6 months and received a discharge under honorable conditions, or if they served in the Reserve or National Guard and were deployed or served on active duty for at least 6 months.
- Employers may request documents establishing veteran status.
- Time off can be paid or unpaid at the employer's discretion.

Veterans Day (cont.)

- Eligible employees must request the day off at least 21 days in advance.
- Employers must respond to a request within 14 days, indicating whether it is granted and paid or unpaid.
- A request can be denied only if granting the request would cause a significant economic or operational disruption or an undue hardship to the company.
- If a request is denied, the employer must provide the employee an alternative day off, additional to other time off already allowed, before the next Veterans Day.

Interns

Oregon Expands Discrimination and Retaliation Protections to Interns

- Interns are now “considered to be in an employment relationship with an employer” for purposes of Oregon’s laws protecting against:
 - Discrimination and harassment (including sexual harassment) based on race, color, religion, gender, sexual orientation, national origin, marital status or age.
 - Discrimination based on military service.
 - Disability discrimination, including impermissible medical inquiries and examinations.
 - Whistleblower retaliation.
 - Requiring breathalyzer, polygraph, psychological stress or brain-wave tests.
 - Misuse of Genetic information.
 - Discrimination based on tobacco use during non-work hours.

Interns (cont.)

- Interns are defined as a person who performs work for an employer for the purpose of training if:
 1. The employer is not committed to hire the person performing the work at the conclusion of the training period;
 2. The employer and the person performing the work agree in writing that the person performing the work is not entitled to wages for the work performed; and
 3. The work performed:
 - a. Supplements training given in an educational environment that may enhance the employability of the intern;
 - b. Provides experience for the benefit of the person performing the work;
 - c. Does not displace regular employees;
 - d. Is performed under the close supervision of existing staff; and
 - e. Provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer.

Direct Deposit Payroll

Employers Will Be Able To Use Direct Deposit for Payroll Without Employee Consent

- Starting January 1, 2014, employee must opt out of direct deposit instead of opting in.
- Employee must still agree in writing before being paid via ATM card, payroll card or other method of electronic payment.
- Employers are still prohibited from charging the employee a fee to process payment through direct deposit.

Social Media

Employers Restricted On Accessing Employee “Social Media” Accounts

- “Social media” is broadly defined as any “electronic medium that allows users to create, share and view user-generated content, including, but not limited to, uploading or downloading videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail or Internet website profiles or locations.”
- This definition includes email accounts, standard social media sites such as Facebook, Twitter and LinkedIn, and bulletin board-type sites like Pinterest and Instagram.

Social Media (cont.)

Prohibitions

- Employers are prohibited from requiring or requesting that an employee, or an applicant for employment, disclose their user name, password, or other information that provides access to a personal social media account.
- Employers cannot compel an employee or applicant to access their personal social media account in the presence of the employer.
- Employers cannot compel an employee or applicant to add the employer to the employee's list of contacts associated with a social media account.
- Employers cannot retaliate or threaten to retaliate against employees or applicants for refusing to provide access to a social media site.

Social Media (cont.)

Exceptions

- Employers do not violate the law if they were complying with state or federal laws, rules and regulations, or the rules of self-regulatory organizations.
- If the employer provided the social media account, or if the account was provided on behalf of the employer to be used for the benefit of the employer, then the employee can be required to disclose his or her user name and password.
- If an employer inadvertently gains knowledge of an employee's access information by monitoring usage of the employer's network or employer-provided electronic devices, the employer is not liable for having the information so long as the information is not used to access the employee's social media account.

Social Media (cont.)

Workplace Investigations

- When conducting an investigation to ensure compliance with laws, regulatory requirements or prohibitions against work-related employee misconduct, employers can require an employee to share content from a social media site that has (a) been reported to the employer and (b) is necessary for the employer to make a factual determination about the matter.
- The employer still cannot require an employee to disclose a username and/or password, or otherwise allow access to his or her social media accounts.



JUDICIAL DECISIONS

U.S. Supreme Court

***Vance v. Ball State University*, 133 S.Ct. 2434 (2013)**

Issue: Who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment?

Holding: An employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim.

U.S. Supreme Court (Cont.)

University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013)

Issue: What is the standard for proving a retaliation claim under Title VII?

Holding: Employee retaliation claims filed under Title VII must be proved according to traditional principles of but-for causation; meaning the employees protected activity was the reason for the adverse action.

U.S. Supreme Court (Cont.)

***U.S. v. Windsor*, 133 S.Ct. 2675 (2013)**

Issue: Whether the federal Defense of Marriage Act (DOMA) violates the Fifth Amendment Equal Protection Clause?

Holding: DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. It is the providence of states to legislate marriage, not the federal government.

U.S. Supreme Court (Cont.)

***Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013)**

Issue: Whether university's consideration of race in its admissions process violated Caucasian students right to equal protection?

Holding: Any racial classification is subject to strict scrutiny. Deference will not be given to the government's assertion of a legitimate purpose for the classification. The classification must be narrowly tailored to further a compelling government interest. Specified percentages of a particular group are never permissible. Not only must the goal meet strict scrutiny standard, but also the implementation – meaning the means chosen to attain diversity are narrowly tailored to that goal. Each applicant must be evaluated as an individual and not in a way that makes race or ethnicity a defining characteristic. The government must have considered workable race-neutral alternatives, but that is not enough. The court will still determine whether no workable race-neutral alternative exists.

Ninth Circuit (Cont.)

***Blantz v. California Dept. of Corrections and Rehabilitation*, -- F.3d. -- (9th Cir. 2013)**

Issue: Whether an independent contractor is entitled to a due process hearing before his or her contract is terminated?

Holding: Independent contractor does not have an entitlement to a position, and thus does not have a property interest requiring a due process hearing before the contract can be terminated.

Ninth Circuit (Cont.)

***Blantz v. California Dept. of Corrections and Rehabilitation*, -- F.3d. -- (9th Cir. 2013)**

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Holding: Independent contractor does not have an entitlement to a position, and thus does not have a property interest requiring a due process hearing before the contract can be terminated.

Ninth Circuit (Cont.)

***Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d. 525 (9th Cir. 2013)**

Issue: Whether employees were owed wages for time undergoing a security screening at the end of each shift and for walking to the lunch room?

Holding: Employees stated an FLSA claim for unpaid wages for time spend undergoing a security screening at the end of each shift for purpose of preventing employee theft. Employer was not obligated to compensate employees for time spent walking to the lunch room.

Ninth Circuit (Cont.)

***Ellins v. City of Sierra Madre*, 710 F.3d. 1049 (9th Cir. 2013)**

Issue: Whether police officer was retaliated against for exercising his First Amendment Rights by speaking in favor of a vote of no confidence against police chief?

Holding: If police officer made speech in his role as head of the police officers' union, then he was speaking as a private citizen and not in his role as a public employee. Police chief's delay in authorizing pay raise could qualify as an adverse action. Denial of a minor financial benefit can qualify as an adverse action.

Ninth Circuit (Cont.)

***Demers v. Austin*, -- F.3d. -- (9th Cir. 2013)**

Issue: Whether academic writings produced by a professor were protected by the First Amendment?

Holding: Teaching and academic writing performed pursuant to official duties of a teacher or professor are protected speech that can form the basis of a First Amendment retaliation claim, if the speech involves a matter of public concern. Speech involves a matter of public concern when it can fairly be considered to relate to any matter of political, social, or other concern to the community.

Oregon Court Decisions

***Koller v. Schmaing*, 254 Or.App. 115 (2013)**

Issue: Whether vet tech's termination for preparing to report to the veterinary board her good-faith allegations of her employer's mistreatment of animals in his care was a wrongful discharge?

Holding: Yes. Employee is fulfilling an important public policy when they make a good-faith report of health professional misconduct to the appropriate health professionals regulatory board.

Oregon Court Decisions

(Cont.)

***Doyle v. City of Medford*, 256 Or.App. 625 (2013)**

Issue: Whether city was required by state law to provide employees with health insurance?

Holding: Statute requiring local municipalities to make health care insurance available to retired municipal employees (ORS 243.303(2)) does not create private right of action for tort damages.

Health plan handbook did not become part of employment agreement between city and its employees; there was no indication handbook was intended to become part of employment agreement, and employment agreement stated that description of insurance benefits could be changed at any time without consent of any employee.

Oregon Court Decisions

(Cont.)

***Cocchiara v. Lithia Motors, Inc.*, 353 Or. 282 (2013)**

Issue: Whether employee could bring claims for promissory estoppel and fraudulent misrepresentation based on promise of at-will employment?

Holding: Fact that an employer has the right to fire an at-will employee does not mean that a prospective employee can never reasonably rely on a promise of at-will employment, as an element of a promissory estoppel or fraudulent misrepresentation claim. Reasonableness of a plaintiff's reliance is an issue for the jury, considering all the relevant circumstances. Employee can recover lost future lost pay by proving the likely duration of employment had he been hired as promised and allowed to start work.



Any Questions?