

INTERACTIONS

Between Workers' Compensation and Other Employment Laws

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The logo for Sather Byerly & Holloway is located in the bottom left corner. It features the firm's name in a white, serif font on a dark blue rectangular background. The text is arranged in three lines: "SATHER" on the top line, "BYERLY &" on the middle line, and "HOLLOWAY" on the bottom line. To the left of the text, there are faint, white, overlapping circular lines that form a partial globe or sphere.

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LEAVE LAWS

- Family Medical Leave Act (FMLA)
- Oregon Family Leave Act (OFLA)

*No equivalent Washington state law

FMLA Summary

Who Qualifies?

- *All* Employers with
 - 50+ employees (in 20 or more workweeks in current or previous year)
 - Employees
 - 1250 hours in 12 previous months (need not be consecutive)
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FMLA Summary

What Rights does it Provide?

12 weeks unpaid leave for

- Parental Leave: Birth/care of newborn or adoption/foster care
 - Serious Health Condition: To care for self or qualifying family member with serious health condition
 - For qualifying exigencies arising out of child/spouse/parent call to active military duty
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Goal of FMLA

- Allows employee to return to with full benefits/rights of employments as if they never left
 - Allow employee to return to pre-leave job or an equivalent job
 - Allows employee to retain their health benefits during FMLA period (although ee may be asked to pay their share of premiums while on leave).
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OFLA Summary

Who is Covered?

- Employers
 - 25+ employees (FMLA is 50)
 - Employees
 - *Average* of 25 hours per week in the 180 days preceding leave (FMLA is 1250 hours/12 months)
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OFLA Summary

What Rights does it Provide?

12 weeks unpaid leave for

- Parental Leave: Birth, adoption or placement of a child
- To care for self or qualifying family member with serious health condition (more broad than FMLA)
- Pregnancy Disability Leave (prenatal and birth)
- Sick child, no serious health condition

OFLA / FMLA overlap

- Leave counted as FMLA also deducted from OFLA bank
 - However, if EE needs leave under OFLA that is not protected under FMLA (Ex: sick child leave) cannot count time off under FMLA. So possible an EE could get more than 12 weeks off in a year.
 - Employer required to follow law that is most beneficial to employee
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Differences Between OFLA / FMLA

- Unlike FMLA, no duty to continue health care benefits while EE on leave
 - Under OFLA, a woman who exhausts 12 weeks of OFLA is still entitled to an additional 12 weeks of pregnancy dp leave. Moreover, any parent who exhausts 12 weeks of parental leave still entitled to 12 weeks sick child leave.
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Serious Health Condition

- An injury/illness that involves either:
 - (1) in-patient care or
 - (2) continuing treatment by a health care provider which includes:
 - 3 or more days of consecutive incapacity followed by 2 or more med appts or one treatment with continuing regiment of treatment (ex meds, PT)
 - A chronic condition which requires at least 2 visits with health provider per year
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Employee Notice

- No Magic Words Required: just enough for ER to reasonably determine medical leave *may* be required
 - 30 day notice for foreseeable events.
 - As much notice as practicable when need for leave unforeseeable
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Employer Must Provide Notice

- 4 Types of Notice
 - General: Posters, R/R notice at hire
 - Eligibility: (DOL form)
 - Rights & Responsibilities: Request for medical verification
 - Designation: Upon receiving certification must tell the employee whether leave will be counted against OFLA/FMLA bank
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Medical Certification

- If employer requires certification employee must provide within 15 days.
 - FMLA: Employer granted access to employee's physician (sans direct supervisor). Limited inquiry
 - Employer can require second for serious health conditions at own expense.
 - Chronic Conditions: employer entitled to recertification every six months
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Return to Work Certification

- Upon a return to work release, employer can verify from PCP, the EE is fit to return to duty.
 - If PCP approves job description, ER must reinstate EE, no questions asked/no 2nd opinion.
 - Value of strong job description
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Overlap of Med Leave and Wcomp

- Any work injury requiring leave greater than 3 days plus med treatment will almost always meet definition of serious health condition under OFLA/FMLA, but...
 - Cannot count Wcomp absences against OFLA
 - Can count wcomp leave against FMLA
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Overlap Continued

- Under OFLA, only “compensable” w comp injuries cannot be deducted from OFLA bank.
 - Thus, if a claim is denied, “ok” to count it against OFLA. But if denial set aside, may have to refill OFLA bank.
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Exception

- Although general rule says can't count wcomp leave against OLFA, is one exception:
 - If an injured worker has been released to light duty by AP and the worker refuses the bona fide job offer, ER can put the EE on OFLA.
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The Problem Claims

- Suspicious Behavior: EE approved for OFLA, absences only occur on Mondays and Fridays

Solutions:

- 1) Be diligent about getting recertification every 30 days / 6 months if chronic conditions
 - 2) Get recertification whenever there is reason to doubt the validity of claimant's need for leave
 - 3) 2nd opinion / IME
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Problem Claims

- The employee who does not provide requested medical information
 - Document, document, document! Document all efforts made to secure certification information from the claimant. Send certified.
 - Take discipline seriously
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Standard of Proof for Work Comp

- Injuries must be materially caused by employment
 - Occupational diseases must be caused in major part (51%+) by work activities
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Employee Rights Workers' Compensation

- Medical services relating to accepted conditions
- Temporary disability compensation
- Permanent disability compensation
- Reinstatement/Reemployment
- Vocational Assistance

Modified Work (Light Duty)

- Temporary disability (time loss)
 - Wage replacement
 - Modified work/light duty
 - approved by attending physician
 - offered to worker
 - if work is refused, no time loss is paid
 - Importance of Return to Work
 - Terminate Time Loss
 - Longer off work = less likely to return
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Importance of Accurate Job Analyses

- Terminate Temporary Total Disability
 - Clarify Factual Discrepancies
 - Reduce Permanent Impairment Awards
 - Decrease Frequency of Vocational Benefits
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Problematic Injured Workers

- Failure to Seek Medical Treatment?
 - Injurious or Unsanitary Acts?
 - Non-Cooperative?
 - Non-Responsive?
 - Refusing Medical Treatment/Voc?
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Vocational Retraining

- If, due to the compensable condition, the employee is unable to return to available and suitable work paying 80% of the wage at injury then the worker is entitled to vocational retraining
 - Insurer typically retains a vocational counselor
 - Possible state funded benefits
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DISABILITY LAWS

- Americans with Disabilities Act (ADA)
 - Oregon ORS 659A.140
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Disability Protections

- Protects otherwise qualified individuals with a disability who are able to perform the essential functions of the job with or without reasonable accommodations.
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Key Components

- Disability
 - Essential Job Functions
 - Reasonable Accommodation
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Disability

- Substantially Limited
- In one or more major life activities

Impact of disability analysis on evaluating obligations?

ADA Amendments Act of 2008 (ADAAA)

- Effective Date: January 1, 2009
 - Stated intent was to “Restore the intent and protections of the Americans with Disabilities Act of 1990”.
 - The ADAAA does not change the definition of a disability. It does require that it be interpreted more broadly.
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ADA Amendments

- Clarifies Meaning of “Disability”
 - Impairment is viewed regardless of corrective measures;
 - Expands definition of major life activity;
 - Lowers standards for substantially limits
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Major Life Activity Defined

- If a disability is an impairment that affects a major life activity, what is a major life activity?
 - Generally, think things such as: walking, talking, seeing, hearing, caring for oneself. Under new changes, definition is more encompassing.
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Major Life Activity Defined

- Pre 2009 Changes: What qualified as a major life activity was very narrow. Only applied to those with substantial “handicap.”
 - Had to be handicapped to such a degree not only unable to perform certain tasks of the job at issue, but handicapped from performing a “variety of tasks central to most people’s lives.”
(*Toyota Manufacturing*)
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Things that did NOT qualify as a disability prior to 2009 Amendments

- Employee had chemotherapy-induced dementia. Court held employee was not disabled because in her subsequent job she performed adequately. Court therefore held she was not restricted in her ability to perform 'work' and thus, not disabled. (Whitney v Greenberg)
- Employee diagnosed with epilepsy. She was given an aggressive medication which prevented her from driving for a number of months. She asked for accommodation. Court held that employer did not have to consider accommodation because driving is not a major life function, therefore, she is not disabled under statute. (Chenoweth)

Not a disability continued...

- Employee alleged fired because he had Hepatitis B. Court held even if true, employee not disabled because liver function is not a major life activity. (Furnish v SVI)
- Employee had mental retardation, and denied job at Wal-Mart. Court held mental retardation is not a disability. Court argued the employee could read, he graduated high school (special needs degree), he could talk. Thus, he is not disabled even though he functioned at a 5th grade level.

2009 Amendments Eliminate Old ADA Analysis

- Congress believed too many workers were not being accommodated.
 - Congress, maybe rightly, believed employers and their attorneys were spending too much time arguing over whether someone is or isn't disabled *instead* of asking, "is there any reasonable accommodation we can provide to the worker so they can keep working?"
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What Now Qualifies as a Major Life Activity

- Now: ADAAA defines “major life activities” as including, but not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- The ADAAA also provides that “major life activities” includes “the operation of a major bodily function” including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Additional Changes to “Disability”

■ Ameliorative Effects

- Look at the condition *before* the corrective action. It doesn't matter whether the condition is controlled, only matters that they have it.
- Example: diabetes
- Exception: eye glasses

■ Episodic Impairment/Remission

- The ADAAA provides that an episodic impairment or impairment that is in remission may constitute a disability “if it would substantially limit a major life activity when active.”
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Injured workers who do not receive full work releases, or who receive any permanent impairment awards, are much more likely to fit the definition of having a substantial limit in a major life activity.

Essential Job Functions

- Remains the decision of the employer
 - Decision cannot be made retroactively
 - Should be included in job description given to employee and modified/updated as necessary
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Job Analyses

- Purpose of Accurate Job Analyses?
 - Avoid Discrimination Claims
 - Prompt Early Return to Work
 - Avoid Triggering Unnecessary Absences
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Job Analyses Continued

- Review Often
 - Essential versus non-essential functions
 - Significant portion of workforce could qualify as disabled.
 - Can still require medical certification, but focus is no longer on whether person is disabled, but whether accommodation is reasonable
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Triggers for Evaluation Under Disability Laws

- Injured worker without full work release.
 - Injured worker with permanent impairment.
 - Employee indicates inability to perform job because of mental or physical limitations.
 - Employee seeks time off because of chronic condition.
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Now What?

- Employee likely has a disability
 - Accommodations may be required
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Rights & Obligations Under Disability Laws

- Certification of disability
 - Interactive process
 - A discussion with the employee about possible accommodations
 - Reasonable accommodations
 - Modifications, special equipment, policy or schedule changes unless undue hardship
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Interactive Process

- The law requires the employer and employee engage about possible accommodations
 - Amendments place much more focus on this aspect of disability analysis
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Interactive Process Continued

- Consider goal and purpose of the return to work
 - Analyze the job to determine purpose and essential job functions
 - The employer and employee should work together to identify a range of possible accommodations
 - Employer should assess effectiveness of accommodation & preference of employee
 - Assess whether accommodation causes undue hardship
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Reinstatement Rights and Re-employment Rights

- ORS 659A.043 “A worker who has sustained a compensable injury shall be reinstated by the worker’s employer to the worker’s former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position.”
 - Applies to employers with 20+ employees at time of demand.
- ORS 659A.046 “A worker who has sustained a compensable injury and is disabled from performing the duties of the worker’s former regular employment shall, upon demand, be re-employed by the worker’s employer at employment which is available and suitable.”
 - Applies to employers with 6+ employees at time of demand.

Reinstatement Rights

To former position, even if filled by temporary replacement.

Limitations

- A.P. says worker cannot perform job
 - Worker accepts other suitable employment
 - Worker refuses bona fide offer of modified work
 - Worker enters vocational assistance
 - Termination for cause
 - Three years from date of injury
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Reemployment Rights

When worker is disabled from at-injury job, to other available and suitable positions.

Limitations

- A.P. says worker cannot perform any available job
 - Worker accepts other suitable employment
 - Worker refuses bona fide offer of modified work
 - Worker enters vocational assistance
 - Termination for cause
 - Three years from date of injury
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What if compensability is in dispute?

- *Armstrong v. Rogue Federal Credit Union*, 328 Or 154 (1998).
 - While litigation is pending, the employee has the right to reinstatement under the statute.
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RECAP

- An injury may be a serious health condition under FMLA/OFLA.
 - An injured employee has the right to reinstatement and/or re-employment.
 - An injury may be or result in a disability that needs to be accommodated.
 - Using the workers' compensation system is a protected right.
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Questions?

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