

EMPLOYMENT LAW BASICS - Oregon and Federal Law

Lawyerly Caveat: This guide is not intended to be an exhaustive explanation of all employment laws, and is no substitute for legal advice. Each of the laws summarized below includes many details not listed here. Please discuss specific issues and incidents with an attorney.

PROTECTED CLASSES: Race, Color, National Origin, Age, Religion, Gender (including pregnancy), **Sexual Orientation** (defined by Oregon law as including **gender identity and gender expression**), **Veteran Status, Military Duty**. Other protected classes addressed below: **Disability**; Use of **Family and Medical Leave, Sick Leave**, and/or **Workers Compensation**; **Whistleblowing** or **“Opposing” unlawful activity**.

- Unlawful “discrimination” includes not only failure to hire and termination, but also failure to promote, wage disparity, harsher discipline, etc. *if based on a protected class*.
 - Oregon’s **Equal Pay Act** prohibits disparity in compensation for “comparable work” based on a protected class. All pay distinctions must be based on: seniority; merit; quantity or quality of production; location of work; required travel; education; training; and/or experience.
- “Harassment” includes jokes, posters, emails, and excluding someone from work groups or work-based social activities *if based on a protected class*. A “hostile work environment” exists *only if the harassment is based on a protected class and is severe or pervasive*.
- Religious accommodation: An employer must allow an employee to take breaks, must waive or adjust dress code, time off, and other policies if necessary for religious observances, so long as it is not an “undue hardship” on the employer.

DISABILITY: The federal Americans with Disabilities Act, As Amended (ADAAA) and Oregon disability laws *prohibit discrimination on the basis of disability*, and require employers to provide *reasonable accommodation* that will allow the employee to perform the essential functions of the job, unless the accommodation creates an *undue hardship* on operations. An *interactive process* (i.e. conversation) is required to evaluate potential accommodations. Never assume you can’t provide reasonable accommodation!

- A disability is a medical condition (physical or mental), that “substantially impairs” or “restricts” one or more bodily functions or major life activities. Examples of “major life activities” include: lifting, walking, socializing, eating, sleeping, or working.
- An employer may not discriminate because the employee is *perceived* to have a disability or *is regarded as* disabled, or has a *record of having a disability*.
- *Drug addiction & alcoholism* are disabilities, but an employer is not required to accommodate use at work, showing up hungover, etc.

NOTE: You cannot require an employee to attend counseling, seek medical assistance, take his/her medication to mitigate a condition, or seek treatment for addiction (except as part of a Last Chance Agreement based on a failed drug test or being impaired at work in violation of company policy). *You may require a "fitness for duty" medical examination if the exam is "job related and consistent with business necessity," and you have an "objectively reasonable basis" to believe s/he is currently unable to perform the essential functions of the job.*

Use of or request for **FAMILY AND MEDICAL LEAVE.** The Oregon Family Leave Act (OFLA) covers employees with 25 or more employees; the federal Family and Medical Leave Act (FMLA) applies to employers who have at least 50 employees (total, at all locations).

- Strict rules apply to eligibility, deadlines for responding to a request, communicating with health care provider, covered family members, and other details.
- FMLA and OFLA provide *12 weeks unpaid leave per year.* OFLA provides *additional 12 weeks of unpaid leave* for pregnancy leave, plus an additional 12 weeks' unpaid sick child care leave if taken during the same leave year as the birth, adoption or fostering of a child. *Leave can be taken all at once or intermittently.*
- Covered absences: leave for the *employee's own serious health condition (including pregnancy), for a family member's serious health condition, parental leave (birth, adoption, or placement of foster child); bereavement leave; care for sick child; leave if military spouse is called to duty.*
- Employer must pay for health insurance while on leave, to the same extent as before leave.

SICK LEAVE. Portland employers with 6 or more employees must provide paid leave; Outside Portland: employers with 10 or more employees must provide paid sick leave; all others must provide unpaid leave.

- Employees begin accruing sick leave on the first day of employment, and must be allowed to use sick leave after 90 days on the payroll. The minimum accrual is 1 hour of sick leave/30 hours worked. Employees must be allowed to earn up to at least 40 hours per year of sick leave, and must be allowed to roll over unused sick leave from year to year, unless you front load the full 40 hours for all employees (even part-time). Employees must receive written notification of their accrual of, eligibility to use, and use of sick leave, no less than quarterly.
- Qualifying absences: *All OFLA absences – regardless of whether the employer is covered by OFLA, or the employee is eligible for OFLA leave; non-serious health condition or preventative care of the employee or employee's family member; domestic violence/sexual assault/harassment/stalking leave (under Oregon law); public health emergency/medical determination that it's unsafe for employee to come to work).*

Use of the **WORKERS COMPENSATION** system. All employers must provide workers compensation coverage, (and must assist the employee in filling out the paperwork, getting medical attention, and filing a claim), unless a statutory exemption applies.

- Employers with at least 6 employees must refrain from discriminating against an employee who has reported an on-the-job injury.
 - “Discrimination” includes harassing or making fun of an employee, demoting the employee upon return to work, excessively scrutinizing the employee’s work, etc.
- Employers with at least 6 employees must provide light duty if there is any available (but employers do not have to create a light duty position). Employers with at least 21 employees must reinstate employee to the same job, once the employee is released to work. Light duty and reinstatement rights last for 3 years from the date of injury, unless one of the events outlined by law occurs first.
- Under Oregon law, an employer may not count medical leave under OFLA concurrently with workers’ compensation leave, but may count FMLA leave. Also, an employee who refuses a bona fide offer of light duty, who is eligible for OFLA, is automatically on OFLA.

A NOTE ABOUT ILLNESS, INJURIES, AND DISABILITIES: No “magic words” are required— a comment like “I’m hurt,” or “I’m sick,” should prompt a quick analysis (with additional questions if necessary - though you don’t have to initiate the interactive process every time someone calls in sick!). The goal is to determine whether sick leave, medical leave, disability accommodation, and/or workers compensation are implicated.

OSHA: All employers must have either a safety committee or safety meetings. <https://osha.oregon.gov/OSHApubs/0989.pdf>. Employers with 10 or more employees must maintain a record of serious injuries and accidents in the workplace on the OSHA 300 Log (certain employers are exempt), and must report electronically annually.

WHISTLEBLOWING; COMPLAINTS: Most complaints against the company are protected by law - even if they are incorrect! Filing a lawsuit or government agency complaint against the company is protected; filing an unemployment claim, or testifying at someone else’s lawsuit, or for someone else’s unemployment claim; reporting illegal activity ; (internally) reporting acts that the employee reasonably believes are a violation of local, state, or federal law (wage shortages/overtime problems, safety hazards, etc.); “opposing” unlawful activity, (reporting harassment or discrimination). Also see the NLRA section below.

WAGE AND HOUR ISSUES: Damages for wage claims (misclassifying a non-exempt position as exempt, failure to pay wages, failure to pay final wages on time) include: back wages for 2-3 years; penalties of 100% of the wages; up to 30 calendar days’ wages; interest; the employee’s attorney fees - so it is critical to pay attention to these details!

- Review your positions regularly and identify each as “exempt” or “non-exempt” from overtime. There are many details and exceptions, so consult with your attorney.
- Exempt employees: must earn the threshold amount (\$455/week under Federal law - slated to go up soon; Oregon minimum wage x 40 hours under Oregon law); most common exemptions must meet duties test for executive, administrative, or professional exemption and be paid on a salary basis (no reduction for poor work, missing partial-days, or partial-week absences caused by employer, such as holidays, temporary layoffs, or snow-closures).
- Non-exempt employees must record their time, and must take all breaks required by law; must be paid overtime (1.5 x the “regular rate” – which will include non-discretionary bonuses, most shift differential, commissions, etc.) for all hours worked over 40 in any work week. (Special rules apply to manufacturing and related industries).
 - Required by law: 10-minute paid break for every four hours worked, a half-hour unpaid meal period for every shift of at least 6 hours (if lunch is interrupted, entire period must be paid). Some exceptions apply.
- No deductions from wages (other than taxes or other amounts required by law) unless (a) the deduction is for the employee’s benefit (such as repaying a payroll draw or a charitable donation) and (b) the employee authorizes the deduction in writing. If an employee owes you money or steals from you, send him/her an invoice, file criminal charges, and/or file a lawsuit - no “self-help” deducting from paychecks.
- New Predictive Scheduling rules apply to large enterprises in hospitality, lodging, and restaurant businesses.

SOCIAL MEDIA, BUSINESS REPUTATION, AND CONFIDENTIALITY Under the National Labor Relations Act (NLRA), employers may not prohibit non-supervisory employees from publicly criticizing their employer if the criticism can be characterized as “concerted activity,” that is, working together with others to improve the terms and conditions of employment. Oregon law protects the right of all employees (including management) to disclose compensation information, except employees who obtain wage information as part of their jobs.

- Employers may not require applicants or employees to: give the password to the employee’s personal social media account; allow the employer to access the employee’s personal social media account; post anything about their employer on the employee’s personal social media accounts (*i.e.* require the employee to essentially advertise for the employer).
- Employers *may* prohibit employees from disclosing trade secrets, copyrighted information, other confidential financial or business information. However, a broad prohibition on taking pictures or recording conversation violates the NLRA.

LESSER-KNOWN PROTECTED CLASSES AND PROHIBITED ACTIVITIES

- **Protected classes: Marital Status; Employment Status** (You may not refuse to hire someone who is currently unemployed); Discrimination based *solely* on **family relationship** is prohibited (but nepotism is not prohibited, and you may prohibit a family member from working in a position of supervisory authority over another family member); academic degree in theology or religious occupation; expunged juvenile record; garnishment.
- **Leave Laws: Crime Victim Leave; Domestic violence, harassment, sexual assault, or stalking leave** (You must allow leave to seek counseling and/or legal help or other assistance. You must also provide "reasonable safety accommodation"); **Oregon Military Family Leave; FMLA Exigency Leave, Military Caregiver Leave; breaks to express milk for nursing mothers.**
- **Jury duty.** No discrimination or interference, may not require use of paid leave for jury duty. Insurance continuation rules apply in some situations.
- **Religious or political meetings.** Employers may not require attendance at a meeting if the "primary purpose" is to discuss religious or political matters (including unionization).
- Onsite automated **external defibrillators** ("AEDs") required in some facilities.
- **Credit History:** Under Oregon law, employers may not require a credit report as a condition of hire or continued employment, unless the individual's credit history is "substantially job-related"—and must notify, in writing, of the requirement and the reason.
- **Criminal history.** Employers may not inquire about or require an applicant to disclose criminal history until after an interview or, if no interview is conducted, after a conditional job offer. Criminal background checks must be authorized by the applicant or employee, using a form and procedure that complies with the Fair Credit Reporting Act.
- **Hiring.** Use of False advertising of wages or other terms of employment is prohibited, as is Use of a breathalyzer, polygraph, psychological stress or brain-wave test or genetic test in hiring process. You must allow employees to sign up with OregonSaves if you don't offer a retirement program.
- **Post-Termination.** Blacklisting is prohibited, also "the use of force or misrepresentation" to keep employee from getting a new job. Under Oregon law, an employer who gives a reference "is presumed to be acting in good faith." Oregon law provides continuation of insurance for those not eligible under COBRA.

RECORD-KEEPING. Have an employee handbook - your first line of defense for many claims is that you had a policy and you followed it. *All medical records must be kept separately from other personnel records.* You must protect electronic records containing sensitive information (such as employee social security numbers) from disclosure.

- Payroll records must be maintained for at least 3 years. Paystubs must include detailed information, and paystubs may only be delivered electronically if the employee expressly agrees to it. Best practice is to keep all employment records (except I-9s) for at least 6 years. Employees have the right to see their personnel files.

TERMINATION. It is advisable to explain reason for termination (unless the employee is resigning), and conduct an exit interview. During the meeting, remind the employee about any ongoing confidentiality and/or non-compete obligations after termination. If you will be providing a severance in exchange for a release of claims (optional), consult an attorney. Legal language and timelines must be met or the release will not be valid. Provide or arrange to provide COBRA (20 or more employees) or Oregon insurance continuation notice. Consider how you will respond to any claim for unemployment benefits, and reference checks.

- Final paycheck includes earned commissions, unused vacation pay (unless you have a written "use it or lose it" vacation or PTO policy). Final paycheck is due on the schedule below.
 - Termination or "mutual agreement": Due by the end of next business day
 - Quit with 48 hours notice: Due immediately (on the last day of work)
 - Quit without 48 hours notice: Due within 5 business days (excluding weekends, holidays)

Failure to pay final paycheck on time will subject you to penalties and attorney fees.

OTHER RESOURCES

- BOLI: https://www.oregon.gov/boli/TA/Pages/T_FAQ_Tafaq.aspx
- EEOC: <https://www.eeoc.gov/employers/index.cfm>
- Department of Labor: <https://webapps.dol.gov/dolfaq/>

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