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Oregon: BOLI Issues Final Rules on Family Leave, Breaks for Nursing Mothers

By Jennifer Bouman-Steagall

The Oregon Bureau of Labor and Industries (BOLI) recently released its final administrative rules relating to employee leaves of absence and rest breaks for nursing mothers. Many of these new regulations, which implement legislative changes from 2007, will have a significant impact on employers.

Employers May Not Run OFLA Leave Concurrently with Comp Absences

Under the Oregon Family Leave Act (OFLA), it used to be that if an employee was absent from work due to an on-the-job injury, the employer was permitted to count the absence as both workers' compensation time off and as OFLA leave for eligible employees (and also as federal Family Medical Leave Act (FMLA) leave, if applicable). However, as of Jan. 1, 2008, this is no longer the case.

BOLI's new regulations specifically state that OFLA leave "does not include leave taken by an eligible employee who is unable to work because of a disabling compensable injury unless the employee has refused a suitable offer of light duty or modified employment." This means that while employers may still run FMLA leave concurrently with any qualifying workers' compensation absence, employers may not also count such absences as OFLA leave unless and until the injured employee refuses an offer of suitable light duty or modified work.

The implementation of these rules may prove to be somewhat tricky given the logistics of tracking the various types of leave and the difficulty in managing employees who have large banks of protected leave available. Employers are advised to ensure that they are keeping accurate records and tracking these three types of leave (OFLA, FMLA and workers' compensation) separately to avoid any inadvertently incorrect classification of absences. For those instances when it is unclear whether a workers' compensation claim will be accepted, the employer may tentatively designate the leave as OFLA leave. If the workers' compensation claim is denied, the leave may properly be counted as OFLA leave. However, if the workers' compensation claim is later accepted, the amount of OFLA leave used for the workplace injury during the pendency of the claim must be restored to the employee's OFLA leave allotment.

On the flip side, these new OFLA regulations affect the rights of injured workers under the reinstatement and re-employment statutes. Prior to Jan. 1, 2008, an injured worker would have lost his or her right to reinstatement or re-employment if he or she refused an offer of suitable light duty or modified work. Now, however, the right to reinstatement or re-employment is not necessarily lost; as long as the injured worker is eligible for OFLA leave,

he or she will automatically commence a period of OFLA leave upon a refusal to accept light duty or modified work.

Use of Paid Leave During OFLA Leave

Under the federal FMLA, an employee's right to use accrued sick leave during an FMLA-protected absence is determined by the employer's sick leave policy for all types of FMLA leave. Oregon law had been similar in most respects to FMLA, with the main exception being that OFLA also allowed employees to use sick leave concurrently with OFLA parental leave (bonding or caring for a new child), regardless of the employer's policies.

The new BOLI regulations have amended and expanded OFLA in this area to allow employees to use accrued sick leave (or any available accrued leave) concurrently with any OFLA-related leave of absence, regardless of the employer's policies. This is a significant difference between OFLA and FMLA and may lead to unusual results where employees exhaust their state and federal leave allotments at different rates.

The bottom line is that, if an absence falls under OFLA, then the employee has a right to concurrently use accrued sick leave. But, if the absence falls under FMLA only, then employer policy dictates whether accrued sick leave may be used.

Changes to OFLA Definitions

Prior to Jan. 1, 2008, to be eligible for domestic partner-related leave under OFLA, an employee had to notify his/her employer of his/her status as a domestic partner and provide a signed affidavit of partnership stating, among other things, that the couple had lived together at least six months, were committed to each other, and were jointly responsible for each other's common welfare and basic living expenses. Beginning Jan. 1, 2008, however, it appears that to be eligible for domestic partner-related leave under the new OFLA definitions the couple must be registered as a "domestic partnership" with the state of Oregon. Consider these new definitions:

- "Domestic partner" means "an individual joined in a domestic partnership."
- "Domestic partnership" means "two individuals of the same sex who have received a Certificate of Registered Domestic Partnership from the State of Oregon in compliance with Oregon laws."

Given that the domestic partnership registry has been temporarily enjoined until at least Feb. 1, 2008, it is not currently a viable option for domestic partners. For that reason, employers should continue to accept an affidavit as evidence of domestic partnership. If the domestic partnership registry becomes an option, employers may want to allow time for any domestic partners to actually register.

These new definitions also raise the question of whether an employer may require an

employee to produce a copy of the domestic partnership registration certificate when such certificates or proof of marriage are not required for a married employee who requests leave. Employers should tread carefully in this area since the Oregon Equality Act now includes sexual orientation under the list of protected classes under Oregon's anti-discrimination laws.

BOLI's new OFLA rules also expand the definition of "family member" to include grandparents and grandchildren of the employee. Although family member includes parents and children of a domestic partner, the amended definition does not extend coverage to the grandparents or grandchildren of same-gender domestic partners. The addition of grandparents and grandchildren to this definition creates yet another type of leave that would not be covered under FMLA for leave tracking purposes.

Leave Related to Domestic Violence, Sexual Assault or Stalking

In conjunction with the Oregon Victims of Certain Crimes Leave Act of 2007 (OVCCCLA), BOLI issued new regulations to provide leave for victims of domestic violence, sexual assault and stalking. The OVCCCLA and its corresponding regulations also prohibit employers from discriminating against employees who inquire about, apply for, or take the leave provided under the act.

OVCCCLA defines "covered employer" and "eligible employee" much like OFLA defines those terms. Specifically, under OVCCCLA, a "covered employer" means an employer who employs six or more individuals in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which leave is taken or the year immediately preceding the year in which the leave is taken. Further, under OVCCCLA, an "eligible employee" is one who is employed in Oregon on the date the leave begins and who have worked an average of more than 25 hours per week for the 180 days immediately preceding the date the employee takes leave.

OVCCCLA leave is unpaid (but employees may use accrued paid leave), and employers may run OVCCCLA leave concurrently with OFLA leave.

Under the OVCCCLA, a covered employer must allow eligible employees to take "reasonable leave" for themselves (or for their minor children and dependants) from employment for any of the following purposes:

- To seek legal or law enforcement assistance (including participating in protective order proceedings) relating to domestic violence, sexual assault or stalking.
- To seek medical treatment, to recover from injuries, or to obtain counseling.
- To obtain services from a victim services provider.

- To relocate for safety purposes (including transition periods and transportation).

There is no limitation or set time period of leave required to be provided under the OVCCLA. The regulations require only “reasonable leave,” which is defined as “any amount of leave that does not cause an undue hardship on a covered employer’s business.” An employee may take this leave in blocks or intermittently, and an employer is permitted to transfer an employee to another position temporarily as long as the employee consents. Further, an employer may request certification for the need for leave and it must keep all records and information confidential.

Rest Breaks for Nursing Mothers

As of Jan. 1, 2008, employers of 25 or more employees (including workers obtained through temporary employment agencies) are required to provide “reasonable rest periods to accommodate an employee who needs to express milk [not to be confused with breastfeeding] for her child 18 months of age or younger,” unless doing so would pose an undue hardship on the company. Employers with fewer than 25 employees are permitted to provide similar rest breaks pursuant to their own policies. All employers may permit employees to breastfeed at work pursuant to their own policies.

A “reasonable rest period” means a rest break of no less than 30 minutes during each four-hour work period, or major part thereof. Ten minutes of the break must be paid, as required by Oregon law, but the other 20 minutes may be unpaid. If the employee takes unpaid rest breaks, the employer may, but is not required to, allow the employee to make up the time before or after her normal shift. An employer may not require an employee to substitute paid leave for the unpaid rest break.

The new rules require employers to make a “reasonable effort” to provide nursing mothers with a private location to express milk. The location must be within close proximity to the employee’s work area and must be somewhere other than a public restroom or toilet stall. This could include a lounge, office, conference room or other location where the employee may express milk concealed from view and without intrusion.

Employers are encouraged to review their policies for compliance with these new regulations.

[Jennifer Bouman-Steagall](#) is an attorney in the Portland, Ore., office of [Bullard Smith Jernstedt Wilson](#). © 2008 Bullard Smith Jernstedt Wilson. All rights reserved.