

EMPLOYMENT 2008 SEMINAR: ARE YOU READY?

The seminar was well-attended and well-received (and the food was good, too!). To recap, and for those of you who were unable to attend, the new laws and forms we discussed are listed below.

ATTENDANCE POLICIES: TRY SOMETHING DIFFERENT



Shari L. Lane

Absenteeism is a serious problem for almost every business. Employers need a reliable work force; employees continue to find new and creative reasons for missing work.

During the Employment in 2008 seminar, we discussed the “unholy trinity” of medical leave, workers compensation, and disability. Just to recap, no magic words are required—all an employee needs to do is tell someone with authority, “I’m sick,” or “I’m hurt.” When that happens, you need to determine whether there is:

1. A serious health condition (followed by medical certification forms and calculations of medical leave accrual and usage); and/or
2. A physical or mental impairment that substantially limits one or more major life activities (followed by the interactive process to determine whether an accommodation is needed to allow the employee to perform his or her job); and/or
3. A job-related cause of the illness or injury (followed by assistance filling out the 801 form and reporting the incident to your insurer).

But there is another side to this difficult equation. Many—maybe even most—of the absences that plague employers don’t fall neatly into any one of the three categories above.

For instance, have you ever noticed that the old adage is true, “It never rains but it pours?” Your hot water tank springs a leak, your car breaks down, you get a cavity, your dog needs his rabies shot updated, and your son gets sent home from school for saying a Very Bad Word. And nobody—not the tank repair man, the auto mechanic, the dentist, or the vet—is open on weekends.

And that doesn’t even scratch the surface of our busy lives. We are constantly reminded of the importance of regular exercise, reading instead of watching TV, buying organic local produce, cooking from scratch, eating family meals together, staying involved in our

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LEGISLATIVE UPDATE

- New EEO-1 Reporting Form. Employers with more than 100 employees (lower threshold for federal contractors) must submit an EEO-1 form by September 30 of each year.
- New I-9 Form, effective December 26, 2007.
- State Minimum Wage: \$7.95/hour; Federal Minimum Wage: \$5.85 (effective July 24, 2007, continues to rise annually for two years, to \$7.25 in 2009).
- HB 2372 Requires employers with 25 employees or more to provide nursing mothers with 30 minutes unpaid rest time for every 4 hours worked, to express milk, and to provide, wherever possible, a private place to do so. \$1,000 fine for violation. Undue hardship exception applies.
- HB 2222 Requires all employers to establish a Safety Committee (previously, a safety committee was required only for employers with 10 or more employees).

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ERRATA AND ADDENDA

- **Health Insurance.** The new statutes prohibiting discrimination based on sexual orientation and providing for domestic partnerships took effect on January 1, 2008. Although the statutes specifically note that federal laws relating to benefits pre-empt the state law, the Oregon Insurance Division issued an opinion notifying employers that compliance with the new state statute will require health insurance coverage for domestic partners to the same extent married spouses are covered, as least for policies issued or renewed on or after April 1, 2008.

On its face, the statute also appears to require benefits for same-sex partners (even without a registered domestic partnership) to the same extent unmarried heterosexual “significant others” are covered.

According to Renee Kemnitz of JBL & K Risk Services, most of the major life and health carriers already provide voluntary opposite and/or same-gender domestic partner benefits where

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children's academic and athletic experiences, and volunteering. Most of us work at least 40 hours per week, plus commute time. When, exactly, are we supposed to do all that exercising/reading/shopping/cooking/quality time/volunteering?

Employees may try to achieve the impossible by making these things fit into the narrow categories provided by law. (Some studies indicate as much as 20 percent of absences are due to "personal needs" rather than illness).

Dishonest? Certainly, and such dishonesty is not excusable merely because an employee's life is hectic. But perhaps it is time to call a truce and seek a resolution that works for everyone.

There is no easy answer, but here's one solution that is often overlooked: building some flexibility into your policies may allow for work/life balance while providing a measure of the predictability and reliability necessary to operate a profitable business—and, as a side benefit, can short-cut some of the labyrinthian inquiries required under the FMLA/ADA/Workers Comp vortex.

For instance, some companies have found unexcused absences and attendance battles declined when they provided an unpaid personal day every month (no explanation or "excuse" needed), in addition to paid vacation and sick leave. The ability to work from home one or two days per month can also eliminate some of the problems (though that can create new problems, as well). Some of the sting of such a program can be eliminated by requiring prior authorization for any planned absence, and notifying employees that some requests may be denied if they can't reasonably be accommodated (such as a request for a personal day off for a retail sales manager on the day after Thanksgiving).

(Caveat: absences due to qualifying illness or injuries must still be properly recorded as medical leave or workers' compensation leave).

You may be tempted to dismiss these solutions as "soft" on absenteeism. But consider this: you are already wasting precious time and resources trying to track down every absence to determine whether or not it is legitimate, and whether or not some discipline should follow—and according to most surveys, you're already losing productivity to these kinds of absences.

Maybe it's time to concede the fight and Try Something Different.

LEGISLATIVE UPDATE *(cont.)*

- SB 946 Requires employers with 6 employees or more to allow eligible employees unpaid leave to address issues of domestic violence, sexual assault, or stalking. Eligibility requirements are the same as OFLA eligibility requirements. Undue hardship exception applies. Duty of confidentiality applies.
- ORS 652.120 now states that any undisputed amount of underpayment exceeding 5% of the employee's gross pay must be paid within three days; otherwise the amount must be paid on the next regularly scheduled payday.
- ORS 659A.030 now prohibits employment discrimination against anyone because of "an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth."
- ORS 653.295 now invalidates non-competition agreements in the employment context unless several strict requirements are met, including providing written notice at least two weeks prior to beginning employment.
- ORS 36.620 now invalidates arbitration agreements related to employment disputes unless the prospective employee was notified, in writing, at least two weeks prior to beginning employment, that an arbitration agreement would be required as a condition of employment.
- ORS 659A.150 now includes grandchild, grandparent as "family members." Employees must now be allowed to take paid leave concurrently with unpaid leave. "Family leave" excludes time off for a workers' compensation injury. In a related change, ORS 659A.043 now states that, if an employee who is eligible for medical leave rejects a suitable light duty offer, he/she is automatically on medical leave, and does not have to request medical leave.
- HB 2254 amends ORS 652.750. Employers must provide a copy of a personnel file to the employee within 45 days of receipt of the request. \$1,000 fine for non-compliance.

ERRATA AND ADDENDA *(cont.)*

benefits are provided to married spouses and are ready to fully comply with the same-gender domestic partner insurance mandate for policies renewing on or after April 1, 2008. Carriers vary as to the documentation required for such coverage and most have not yet finalized their forms and procedures nor communicated them to their policyowners. Contact information for Ms. Kemnitz and other risk services specialists can be found at www.jblk.com.

- **Sick Child Care.** Seminar attendees asked when and how often an employer can require medical certification of the need to stay home with a sick child. Pursuant to OAR 839-009-0250, an employer may request such certification only after three absences.

By contrast, an employer may require medical certification in advance for the serious health condition of an employee or his/her family member (so long as such advance notice is possible).

- **Medical Marijuana.** It was erroneously reported at the seminar that SB 294 passed. SB 294 was the bill that would have clarified an employer's right to prohibit the use of medical marijuana. That bill did not pass. Two similar bills were proposed during the legislature's special session, however both died without further action.

ORS 475.340, as unchanged, currently reads: "Nothing in ORS 475.300 to 475.346 shall be construed to require:..."
(2) An employer to accommodate the medical use of marijuana in any workplace."

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