

BOLI'S FAMILY LEAVE "REALITY" SHOW

Myth: Under the Oregon Family Leave Act, parental leave begins as soon as the baby is born.

Reality: Oregon parental leave and federal parental leave work the same way: Qualifying parents can take parental leave whenever they want to, as long as they complete it within a year of the baby's birth. And of course, the employer can require that parental leave be taken in one continuous period.

It's understandable that this particular myth keeps hanging on, because that actually **was** the Oregon law from 1988 to 1995. But this law was repealed when the Oregon Family Leave Act was enacted in 1995.

Myth: Since family medical leave is for the employee's benefit, the employee can choose not to take it if she doesn't want to. For example, if an employee has a lot of sick leave available, she may choose to use her sick leave and conserve her family medical leave for later use.

Reality: If an employee requests time off and the employer believes that it may be for a condition qualifying for state and/or federal family medical leave, the employer is required to obtain enough information to determine the employee's eligibility for leave. The employee is not required to make a formal request for the leave, nor to even mention the words "family medical leave" in the request.

If the employee is eligible, the employer must then designate the absence as family leave, regardless of the employee's preference.

An employer can certainly require that the employee use any accrued sick or vacation time while they're on family medical leave, as long as that is part of a non-discriminatory policy. The employer can also "provisionally" designate time off as family medical leave, pending receipt of a doctor's verification. If the employee incurs any expense as a result of the employer's request for medical verification, the employer must pay that cost (example: co-pay or deductible).

Myth: To avoid an undue hardship, the employer can require the employee to schedule her medical appointments outside of working hours.

Reality: The law states that, "Where possible, an employee must make a reasonable effort to schedule medical treatment or supervision at times that will minimize disruption of the employer's operation." OAR 839-009-0260(9).

Thus, although the employee must be “reasonable” in her effort to schedule appointments during off-hours, the law does not provide any specific penalty for an employee whom the employer believes was not acting “reasonably” in this regard. Further, unlike the Americans with Disabilities Act (ADA), the family leave laws do not provide an “undue hardship” defense for employers. An employer can, however, require medical verification of the need for leave.

Myth: If an employee is not able to return after he has used his family medical leave, I can fire him.

Reality: Not so fast! An employee on family medical leave may also have a qualifying disability under the ADA. If so, the employer has a continuing obligation to accommodate the employee, unless this would create an undue hardship.

In addition, a family medical leave absence may also be a compensable workers’ compensation claim. If so, the reinstatement obligations may continue long after the initial 12 weeks have passed. (See our website for more information.)

And even if none of these other laws apply, remember that all of the employee’s family leave time is protected, and cannot be used in your evaluation of him as an employee.

Myth: The employer can require medical verification of a “birth” before the employer grants parental leave.

Reality: Parental leave is the only kind of leave where an employer is specifically prohibited from requiring medical verification. And while this probably goes without saying, no “DNA” testing is allowed, either. This is not THAT kind of reality show!

For more information on this and other important issues affecting Oregon employers, please visit our website at www.oregon.gov/boli/ta. You can also call us at 971-673-0824.

HAPPY NEW YEAR! HERE’S TO A HAPPY AND PROSPEROUS 2007.