

## Auld Lang Syne

Happy New Year! Let's kick off 2006 by reviewing the top three questions we received last year on BOLI's Technical Assistance hotline:

*QUESTION: If an employee quits, when do I have to give them their final paycheck?*

**ANSWER:** The rules for timely payment of final paychecks depend on the nature of the employment separation and whether the employee provides notice to the employer.

If an employee provides 48 hours or more notice, the final paycheck is due on the final day of work, except for weekends and holidays, in which case it is due on the next business day.

If an employee quits without notice, the final check is due within five days, excluding weekends and holidays, or the next regular payday, whichever occurs first. When an employee is terminated, the final paycheck is due by the end of the first business day after termination.

An employer who fails to pay final paychecks within the legally established timelines may be liable to pay a penalty amount of up to 30 days' pay, at a rate of 8 hours per day (regardless of the employee's former regular work schedule).

If the employee fails to provide the employer with written notice that wages are due, the penalty amount is limited to an additional amount equal to the actual unpaid wages. The penalty is also limited to an amount equal to 100% of unpaid wages if the employer responds to an employee's notice by giving the employee the final paycheck within 12 days of the notice.

There are additional state and federal penalties that may apply. For further information, check our website - <http://www.oregon.gov/BOLI/>

*QUESTION: When am I obligated to "accommodate" a disabled employee?*

**ANSWER:** Employers have an obligation to provide a reasonable accommodation to qualified individuals with a disability when an employee needs it to perform the essential functions of their job.

An employer's obligation to provide reasonable accommodation is triggered once the employer learns of the employee's disability and the need for accommodation. Although this usually occurs when an employee requests an accommodation, the employee's request need not be in writing or contain any special wording. For example, the employee does not have to use the term "accommodation" at all; the employee just needs to inform the employer that he or she has a condition and needs modifications to the job in order for him or her to perform the duties of the position.

Once the employee requests an accommodation, the employer works with employee by engaging in an “interactive process” to determine whether the employee’s condition constitutes a disability and, if so, what types of modifications to the job would enable the disabled employee to perform the essential functions of the position.

Under state and federal disability anti-discrimination laws, “disability” is defined as a physical or mental impairment that substantially limits one or more major life activities. In determining whether an employee’s condition satisfies this statutory definition, an employer may ask the employee to provide medical information from the employee’s medical provider(s). Under Oregon law, any cost for this information must be paid by the employer.

*QUESTION: Do we have to keep track of an employee’s use of family leave? What if we’re not sure whether an employee’s absences are family leave-related?*

ANSWER: If you want an employee’s absence to be counted towards their family leave “bank,” you should track it as such. Although such designation and tracking is required under the federal Family and Medical Leave Act (FMLA), it is not required under the Oregon Family Leave Act (OFLA.) However, there is realistically no way to know how much “OFLA” an employee has used unless you track it, right?

As mentioned, FMLA requires that the employer inform the employee that the absence will be designated as family medical leave. This notice is required as soon as is practicable (usually within two business days) after the employer has knowledge that an absence is for a family leave purpose. Verbal notices must be confirmed in writing by the next payday that occurs at least one week after the verbal notice.

In answer to your second question, the employer may request enough information to determine if an absence qualifies as FMLA. This can include medical verification. If the employer is not sure whether an absence qualifies, the employer should “provisionally” designate the leave as FMLA, pending medical verification. Then, if the medical information fails to confirm the need for FMLA, the designation can be withdrawn. Please note that a "serious health condition" is defined at OAR 839-009-0210(14), and employers should read the rule before deciding whether or not to designate leave as covered or not.

Employers must provide employees with individual notices that designate FMLA-qualifying leave and notify employees of additional rights and responsibilities. The notification must address the following points related to employees’ use of FMLA:

- 1) whether leave will be counted as FMLA leave;
- 2) what the medical certification requirements are;
- 3) whether the employee has the right or is required to use accrued paid leave;
- 4) describe any issues related to insurance premium payments due to the absence, including potential liability for insurance premiums paid by employer if employee does not return to work;
- 5) indicate whether a fitness-for-duty certificate will be required prior

to reinstatement; 6) describe any “key employee” status issues and the potential effects based on such status (Note: since OFLA does not have a provision limiting the reinstatement rights of “key employees,” this provision is of little value to Oregon employers); and 7) describe employee’s reinstatement rights.

The U.S. Department of Labor provides a form (WH 301) that meets the above requirements and that employers can use for designation purposes.

Finally, please remember that you should NOT count protected OFLA-related absences against an employee as part of your firm’s absenteeism policy.

Have a Happy and Productive New Year! We hope you continue using our services, including our website at [www.oregon.gov/boli/faqs](http://www.oregon.gov/boli/faqs).