

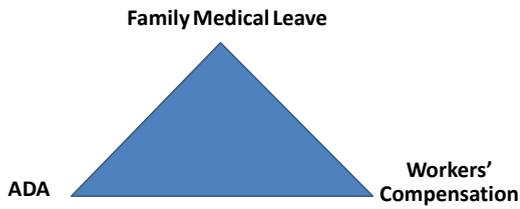
The Black Hole of FMLA/OFLA/WC/ADA (aka the Bermuda Triangle)



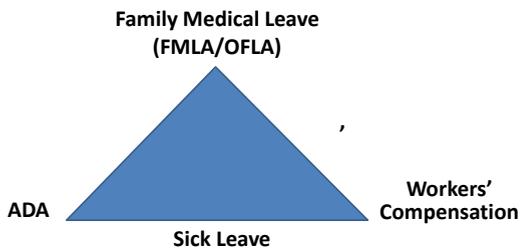
Blerina Kotori
November 15, 2016



The Black Hole of Leave Laws (aka the Bermuda Triangle)



But wait! There's more!



EMPLOYERS MUST

- Understand each law separately
- Understand how each law relates to (and conflicts with) the others
- Be aware of how the laws could be implicated at the same time
- Get policies, procedures and forms in place to handle the abyss



AMERICANS WITH DISABILITIES ACT

A quick overview



Employee Eligibility and Entitlement under the ADA

- 15 or more employees (6 or more in Oregon)
- To qualify under the ADA, an employee must:
 - Be disabled as defined by the ADA, and
 - Be otherwise qualified for the position, and
 - Be able to perform the essential functions of the job with or without an accommodation.
- A person is disabled if he or she has a physical or mental impairment that substantially limits one or more major life activity.
- Eligible employees are entitled to a reasonable accommodation unless it creates undue hardship.
- Coverage begins first day of employment.



Leave as Reasonable Accommodation

- EEOC: "Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability."
- No hard and fast rules under ADA.
 - Engage in interactive process, case by case analysis, guided by policies and practices.
 - Will continued leave be undue hardship?
 - Able to cover duties? Number of other employees who do the same job? Hire temporary employees?
 - Leave of absence may not be reasonable if it is indefinite, particularly after a reasonable time.



FAMILY MEDICAL LEAVE ACT (FMLA) & OREGON FAMILY LEAVE ACT (OFLA)

A quick overview



Employee Eligibility and Entitlement

- Up to 12 weeks of protected leave
- **FMLA:**
 - **50 or more** employees within 75 mile radius;
 - EE worked 12 months in past 7 years; and
 - EE worked at least 1,250 hours (24 hours/week) in 12 months preceding leave.
- **OFLA:**
 - **25 or more** employees in Oregon;
 - EE worked 180 consecutive days; and
 - EE worked at least 25 hours/week average.
 - Exception: parental leave has no minimum hours worked requirement



Reasons for Leave

- Parental Leave
 - Care for newborn, newly adopted, newly placed foster child
- EE's Serious Health Condition
 - Includes childbirth, pregnancy-related illness and prenatal care
- Family Member's Serious Health Condition
 - Includes psychological and physical care
- Sick Child Leave (OFLA only) – under 18
 - Not a serious health condition, but requires home care



Serious Health Condition – Incapacity Plus Treatment

- More than 3 consecutive days of incapacity and:
 - **FMLA:**
 - One in-person treatment by health care provider (w/in 7 days) and continuing treatment; or
 - Two or more in-person treatments by health care provider (w/in 30 days), with first visit within 7 days of first day of incapacity.
 - **OFLA (no time limits):**
 - One treatment plus a regimen of continuing care; or
 - Two or more treatments by health care provider.



Serious Health Condition – Chronic Condition

- Condition that continues over an extended period of time, may cause episodic period of incapacity, and:
 - **FMLA:** requiring treatment by a health care provider at least twice a year
 - **OFLA:** requiring periodic treatment by health care provider (no time limits)



FMLA, OFLA, ADA, Sick Leave Overlap?

	FMLA	OFLA	ADA	SICK LEAVE
Parental Leave	Covered	Covered	Not covered	Covered
EE's Serious Health Condition	Covered	Covered	Maybe - if SHC qualifies as disability	Covered
Care for EE's Family Member with SHC	Covered	Covered	Not covered	Covered
Sick Child	Not covered	Covered	Not covered	Covered



Who is a "Family Member"?

FMLA

- Spouse
- Child
- Parent

OFLA

- Spouse
- Domestic Partners
- Child
- Parent
- Grandparents
- Grandchildren
- Parents-in-law
- Parents of dom. partners
- Children of dom. partners



How Much Leave?

- FMLA: 12 weeks in 1 year period
- OFLA: 12 weeks in 1 year period
 - Exception 1: Women taking pregnancy disability leave receives an additional 12 weeks for any OFLA purpose
 - Exception 2: Parent who takes a full 12 weeks of parental leave receives an additional 12 weeks for "sick child"



Oregon Sick Leave Act

Haven't you heard enough about this already...



Sick Leave Recap

- Up to 40 hours per year of paid sick leave
- Qualifying reasons:
 - Same reasons covered by OFLA, including Employee's Serious Health Condition, and
 - EE's (or to care for EE's family member's):
 - Mental or physical health condition
 - Need for diagnosis
 - Care or treatment for health condition
 - Preventative care



WORKERS' COMPENSATION



The Basics

- Governed by Oregon law
- Provides benefits to employees injured on the job
 - Lost income
 - Medical/disability benefits
 - Protected leave
- EE may be eligible for FMLA and ADA, but **not** OFLA



Case Study – Kim

Kim is hired on January 1, 2016 as a full-time employee. On July 1, she informs her supervisor that she's pregnant and the baby is due November 1. She plans to take as much parental leave as allowed once the baby arrives. She also tells her supervisor that she has developed gestational diabetes and will require time off for extra doctor appointments (2 hours off for a total of 10 appointments). On September 1, Kim's doctor orders strict bed-rest for the remainder of the pregnancy (8.5 weeks). Baby Northwest is born on November 1.

What laws apply?

What types and how much leave is Kim entitled to?



Kim's Leave

Reason for Leave	FMLA (12 weeks)	OFLA (12 weeks*)	Sick Leave (40 hours)	ADA (no time limits)
Doctor Appts. (20 hours)	Not eligible	20 hours (.5 weeks) (11.5 weeks left)	20 hours (20 hours left)	If for pregnancy disability, covered Reasonable accommodation?
Bed-rest (8.5 weeks)	Not eligible	8.5 weeks (2 weeks left)	20 hours (exhausted after .5 weeks)	Covered Reasonable accommodation?
Parental Leave (12 weeks?)	Not eligible until 1/1/2017, then... 12 weeks (exhausted as of 3/26)	12 weeks (exhausted as of 1/24; +12 weeks left for "sick child")	(exhausted)	Not covered



Case Study - Bruce

Bruce has had a rough year. **First**, he needed two weeks for time off to care for his father-in-law who was diagnosed with cancer. **Second**, he had to stay at home for a week with his 5 year old daughter who had a terrible flu. **Third**, Bruce scheduled a knee replacement surgery for July 1, requiring six weeks off. **Fourth**, four weeks before his surgery, he fell at work and sustains a concussion and broken wrist, requiring an overnight hospital stay, where he acquires a staph infection that prevented him from working for two weeks.

Now, Bruce just informed his supervisor that he is entering a 45-day in-patient alcohol rehab program.

Is the absence covered?



Bruce's Leave

Reason for Leave	FMLA (12 weeks)	OFLA (12 weeks)	Sick Leave (40 hours)	ADA (no specific time)	Workers' Comp
Care for parent-in-law	Not covered	2 weeks (10 weeks left)	40 hours (exhausted after first week)	Not covered	Not covered
Sick child	Not covered	1 week (9 weeks left)	(exhausted)	Not covered	Not covered
Concussion, wrist, staph	2 weeks (10 weeks left)	Not covered	(exhausted)	Not covered	Yes – leave protected
Knee surgery	6 weeks (4 weeks left)	6 weeks (3 weeks left)	(exhausted)	If disability, reasonable accommodation?	Not covered
Alcohol rehab	Only 4 weeks (exhausted)	Only 3 weeks (exhausted)	(exhausted)	Covered Reasonable accommodation?	Not covered



How to avoid problems

- Know the law and analyze each situation under each law.
- Grant the greatest rights provided under all laws.
- Requests for medical leave may put employer on notice of disability and trigger obligation to engage in interactive process.
- Train managers and supervisors in basics of ADA, FMLA/OFLA, Sick Leave and WC so they can identify issues and notify HR.



How to avoid problems

- Create forms that address all potential bases for leave.
- When granting FMLA/OFLA, consider inclusion of the following sentence in memo to employee:
 - “Please also let me know if the company can provide any further accommodations to assist you in performing the essential functions of your job.”
- Be proactive – encourage communication with employee.
- Document, document, document!



Contact



Blerina Kotori
 503-802-2055
 blerina.kotori@tonkon.com