

Now You See Them, Now You Don't

Handling Employee Leave Abuse

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Reasons To Be Careful

All the leave laws prohibit employers from interfering, in some way, with the employee's need for leave.

Paid Family Leave

ADA and Oregon Disability Law

These laws create liability for employers who fail to provide reasonable accommodations to qualified individuals with disabilities or discriminate against employees with real or perceived disabilities.

FMLA and OFLA

Federal and state law prohibit an employer from interfering with an employee's ability to exercise use of leave and for retaliating against an employee for attempting to or exercise rights to leave.

Oregon Sick Time

This newer law makes it an unlawful employment practice for an employer to deny, interfere with, restrain or fail to pay for sick time to which an employee is entitled.



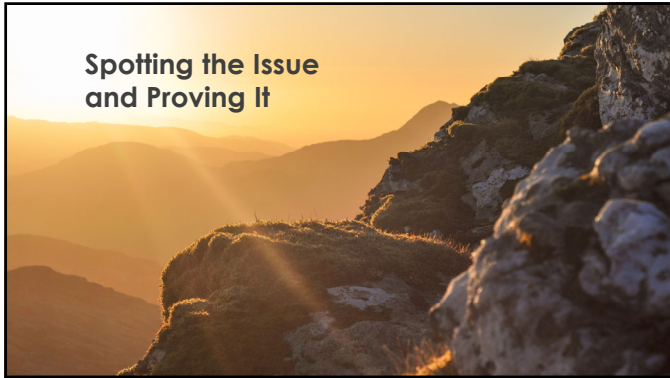
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AGENDA

- Spotting and proving leave abuse.
- Tools for combatting abuse.
- Is it worth it?

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Spotting the Issue and Proving It



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Legitimate Leave Slippery Slope

Sometimes approved protected leave morphs into unauthorized absences. For instance:

- Leave approved for one reason, but absences caused by another
- Approved intermittent leave under FMLA, OFLA, or ADA expands beyond certification
- Protected sick leave that turns into unpaid, unprotected absences

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Before you call it abuse, ask yourself...

How does the medical certification compare to actual absences?

- What was requested initially?
- What does the medical documentation support?
- What did we approve in writing?
- How does the approved leave compare with the actual absences?

This assessment works for leave as an accommodation as well as for intermittent leave under FMLA/OFLA.

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Pre-Loss Call:

Employee is a dispatcher for the City. Attendance is "key" because many of his duties can not wait for his return and must be completed by co-workers. Employee develops auto-immune disorder; certification allows for four hours a day, once or twice a month for flare-ups and appointments.

Over the next year:

- Thirty absences for flare-ups;
- Called in sick for knee injury, sore throat, fever;
- Failing to follow reporting procedure.

Evans v. Cooperative Response Center, (D. Minn. July 16, 2019)

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Outright faking it?

Most employers have encountered a situation where an employee's absences from work seem inauthentic. For these cases, leave abuse presents itself as:

- Excessive absences that create operational problems
- A pattern of sick leave use that becomes predictable
- Expansive definition of covered reasons for leave
- Stated reason for leave does not match time taken

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Pre-Loss Call:

We have an employee who is always absent and we're considering discipline.

Library employee seems to call in sick a lot! Employer questions her need for leave because she doesn't seem like a hard worker. Her reasons for the absences are never very serious - cough or headache. She has accrued sick leave to use, but the unpredictability of her attendance is creating a morale problem.

Employee in Assessor's Office is chronically absent for non-serious illness (cough/stomach bug). He often uses up his accrued leave and goes into unpaid status. He was sick for the whole week of Christmas and again around New Year's Day. When the employer looks closer, he's frequently sick on Friday or Monday.

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Before you call it abuse,
ask yourself...

- Is this just speculation?
- How strong is your proof?
 - Data re: pattern of absences (show me charts, people!)
 - Social media posts
 - Reports from other employees
 - Consider bias, motive, source of employee's knowledge



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Real Life Example

Pregnant employee has severe bouts of lower back pain. Provider says she cannot work desk job because her pregnancy is causing pain when walking and sitting. Employer approves pregnancy disability leave under FMLA/OFLA. But employer thinks that employee attended a wedding 3 hours away, thus abusing leave.

- Planned vacation day from before leave?
- Rumor among employees?
- Co-worker attends same wedding and sees her there?
- Social media post with picture and tagging?

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Tools for Combatting Abuse

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Notification Requirements

- Do you have a policy informing employees what is required?
- Is your policy consistently enforced?
- Are your supervisors trained on what they can ask?
 - Basis for leave ("What is the reason you need to be absent?")
 - Foreseeable or unforeseeable leave (Pre-planned appointment vs illness)
 - Timing for leave ("When will it start and when do you expect to return?")

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Setting the Ground Rules

When an employee's leave request is approved, take the opportunity to go over expectations:

- Review call-in and sign out procedures
- Review FMLA/OFLA policy (e.g., use of concurrent paid leave, recertification, outside employment, fraud)
- Specific discussion about planned medical treatment (e.g., appointments should be set up in advance if possible)

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Medical Certification

Sick Leave: Always require certification when consecutive days of absence) and in case of abuse.

FMLA/OFLA: Always require certification if allowed, a renewed certificate is required if the employee has changed significantly or if there is information that casts doubt, and a

All employees require medical documentation to support accommodation unless disability is open and obvious.

Caution:
But what does your policy say?

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Medical Recertification*

Is employee's absences detailed above consistent with his/her serious health condition and need for leave? ____ Yes ____ No

If you answered "Yes," please explain why the employee's absence pattern is consistent with his/her serious health condition and need for leave: _____

If you answered "No," please explain why the employee's absence pattern is not consistent with his/her serious health condition and need for leave: _____

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Second Medical Opinion

Sometimes, employers feel that leave abusers manipulate health care providers to get whatever note they need. FMLA and OFLA explicitly allow for second opinions. Oregon Sick Leave and ADA don't explicitly mention second opinions, but they don't prohibit them, either.

Before you request a second opinion, however, consider the factors.

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Going to the Source

In many cases, it may be best to just ask the employee what's going on. You can approach the conversation:

- With curiosity;
- As a warning;
- As an investigation

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With Curiosity

Approach the employee assuming the best and with the intent to figure out what's truly happening with them. Maybe there are facts you're not aware of? Maybe they don't understand the system?

Maybe best for:

- First time "offenders"
- Employees who have engaged in the interactive process
- Situations where facts would make employee a sympathetic plaintiff

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As a Warning

Approach the employee with the evidence that supports the case for leave misuse. Remind them of your policies regarding notice and attendance, what leave has been approved, and any previous relevant conversations about the requirements for proper use of leave.

Maybe best for:

- Repeat "offenders"
- Sick leave users with uncomplicated circumstances – no disability accommodations or history of serious health condition

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As an Investigation

Informal: Meet with the employee and play dumb. Ask about current status of limitations, then present them with your proof.

Formal: Follow your normal practice for personnel investigations

Maybe best for:

- Situations where you have "hard proof" of abuse (Facebook post, photographic evidence)

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Leave Litigation is Expensive...

Under FMLA , an employer who is found to have violated the law can be held liable for:

- Back wages (and interest)
- Liquidated damages

Under OFLA, damages include back pay, costs, and attorney fees.

And unpredictable.

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Caught on Camera

- Mechanic requested intermittent leave for a heart condition.
- During an approved absence, his co-worker saw him at a fishing trip. He can be heard saying, "I'm not fishing."
- The co-worker showed the video to the employer. The employee was fired for dishonest and misusing leave.
- Employee claimed the firing was inconsistent with his restricted leave from fishing.
- Court ruled that the employer's action was in retaliation for employee using FMLA.

Verdict? For the employer.

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Photo Proof of Abuse

- IT Manager needed leave for surgery to remove a bone spur from his foot. Doctor said he needed 4-6 weeks off and he was on foot after four weeks.
- At four weeks, he requested more time off approved leave, employer found out he was in Mexico.
- Employer provided the documentation that said he had a bone spur and pressure on his foot.
- Employer said "It does not matter where an employee recuperates as long as they follow doctor's orders."

Cost: \$1.2 million jury award

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Questions?

Thank you!
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