Employment Law Issues for Health Care Professionals

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The presenter has nothing to disclose.
Presentation Outline

Pre-employment Issues
- Drug Testing
- Independent Contractor or Employee?
- Non-Competes
- Pre-employment inquiries
- Credit Histories and criminal background checks
- Employee Handbooks
Issues During Employment

- Leave Laws
- Who is a member of a protected class?
- Sexual Harassment
- ADA Considerations
- Documentation of Employee Performance
Outline Continued

Post Employment Issues
- Final Paychecks and Wage Claims
- References
Oregon is an “at will” state

“We reserve the right to employ at will. This means that employment can be terminated, with or without cause, and with or without notice, at any time, at the option of the company or at the option of the employee.”
Employee Handbooks

Why are they important?

What should be included in employee handbooks?

What should **not** be a part of employee handbooks?

How should employers use employee handbooks?
Employee vs. Independent Contractors

Why does it matter – what happens if I get it wrong?

What really is an “independent contractor?”

Economic Reality Test

“Right to Control” Test
Economic Reality Test

- The degree of control exercised by the alleged employer
- The extent of the relative investments of the worker and alleged employer
- The degree to which the worker’s opportunity for profit and loss is determined by the alleged employer
- The skill and initiative required in performing the job
- The permanency of the relationship

Is the employee, as a matter of economic reality, dependant upon the business to which she renders her services?
Non-Competition Agreements

Probably not enforceable.... Did you either:

a) inform your new employee in writing at least two weeks before his or her first day of work that the non-compete is a requirement of employment; or

b) have your existing employee sign a non-compete as a condition of bona fide advancement (this needs to be something more substantial than just a new title, and if you're uncertain, ask your lawyer)?
Non-Compete Agreements, cont.

- Is the employee engaged in administrative, executive, or professional work; performing predominantly intellectual, managerial or creative tasks; exercising discretion and independent judgment; AND a salaried employee?

- Does the employee have access to competitively sensitive confidential business or professional information that otherwise would not qualify as a trade secret, including product development plans, product launch plans, marketing strategy or sales plans?
Non-Compete Agreements, cont.

- Does the total amount of the employee’s annual gross salary and commissions, calculated on an annual basis at the time of the employee’s termination, exceed the median family income for a four-person family, as determined by the United States Census Bureau for the most recent year available at the time of the employee’s termination?

- If the answer to any of these questions is no, your non-compete won't be enforceable in Oregon.
Drug Testing of Employees

- Have a clear policy
- Articulate your standard for testing
- Apply your stated policy consistently
- Provide advance notice
Pre-employment Inquiries

Questions to Avoid:

- Questions related to an applicant’s race, sex, age, marital status, etc.
- Questions asking for information typically evaluated differently for men and women, such as questions regarding child care arrangements.
- Questions asking for information that could be used to screen out members of a protected class – such as...
  - Marital status, age, race, gender, sex, injured worker, religion, national origin, family relationships,
Pre-employment Inquiries, cont.

- Questions related to a person’s disability.
Credit Checks and Criminal Background Checks

- It is unlawful to obtain or use for employment purposes an applicant’s or employee’s credit history information.

- Social Media

- Criminal Background Checks – Arrests vs. Convictions

- Consideration points for convicted persons
Issues to Consider during employment...

Any questions before we move on?
Leave Laws

- Oregon Family Leave Act
- Family Medical Leave Act (Federal)

Each require employers to provide employees up to 12 weeks of protected leave during a leave year, in certain qualifying situations. Eligible employees have reinstatement and/or reemployment rights after a family leave.
Which employers are covered by OFLA and FMLA?

- Employers covered by OFLA
  - Employers with 25 or more employees in Oregon during each working day of 20 or more calendar work weeks in the year in which leave will be taken or in the preceding year.

- Employers covered by FMLA
  - Employers with 50 or more employees in the country for each working day during each of 20 or more work weeks in the current or preceding calendar year.
Which employees are eligible for leave?

- **Employees Eligible for OFLA**
  - Employee must have worked for a covered employer for a period of 180 days immediately preceding the date leave begins; and
  - Must have worked 25 hours per week during the 180-day period, unless the leave is to care for a new child.

- **Employees Eligible for FMLA**
  - Employee must have worked for a covered employer for a total of at least 12 months (not necessarily consecutive); and
  - Must have worked for at least 1250 hours during the preceding 12 months; and
  - Employer must have at least 50+ employees within 75 miles of the employee’s worksite.
When do employees get family medical leave? (Qualifying Circumstances)

<table>
<thead>
<tr>
<th>OFLA</th>
<th>FMLA</th>
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<td>• Employee’s own serious health condition, including pregnancy related conditions</td>
<td>• Employee’s own serious health condition, including pregnancy related conditions</td>
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<tr>
<td>• Serious health condition of a family member</td>
<td>• Serious health condition of a family member</td>
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<td>• Newborn (parental leave)</td>
<td>• Parental Leave</td>
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<td>• Sick child leave</td>
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How much family leave do employees get?

OFLA
- 12 weeks per year
- Exception #1: A female who takes leave for a pregnancy related disability, including routine prenatal care, may take up to 12 additional weeks for any OFLA qualifying purpose.

FMLA
- 12 weeks per year
- Exception #2: An employee who uses a full 12 weeks of parental leave may use up to 12 additional weeks in the same leave year for sick child leave.
When are employees entitled to take Family Leave intermittently?

- **Parental Leave**: Must be taken in one continuous block unless employer allows otherwise.
- **Serious Health Condition of employee or a family member**: Intermittent leave or reduced schedules must be permitted when medically necessary.
- **Pregnancy disability or prenatal care**: Intermittent leave or reduced schedules must be permitted when necessary for pregnancy disability or prenatal care.
- **Sick child leave (OFLA only)**: The nature of sick child leave requires time as needed rather than a continuous block of time.
Other important points to consider...

- What are serious health conditions?
- What are not serious health conditions?
- Employees have to give employers notice of an upcoming leave.
- Employers need to give employees information regarding the use of family leave.
- Generally, OFLA and FMLA leaves are unpaid. However, employees are entitled to utilize certain paid leave balances and benefits during a family leave. Employers may also require the use of certain accrued leave balances and dictate the order of usage.
- There are posting requirements for employers.
What reinstatement rights do employees have after leave?

OFLA
- Employee must be reinstated to the position held when leave began.
- If the job has been eliminated, the employee must be restored to any available equivalent position.
- Employer must be prepared to show business reasons for elimination of job.

FMLA
- Employee must be reinstated to either the same position held when leave began or to an equivalent position.
- An equivalent position is one that is virtually identical to the former in terms of pay, benefits and working conditions, and must involve the same or substantially similar duties and responsibilities.
OFLA and FMLA can be confusing. Get advice from an attorney or the Oregon Bureau of Labor and Industries with any questions.
Documentation of Performance

When to Document:

- Every time you meet with an employee for significant work-related reasons;
- Every time you discipline an employee (even if you merely give a verbal warning);
- Every time a personnel action is taken;
- Every time you discuss policies and procedures;
- Every time an employee has a grievance;
- Every time an investigation is conducted, even if the complaint is ultimately unfounded; and
- Every time significant events or discussions occur
How to document

- Document in a neutral, objection fashion
- Use specific language
What is required to terminate an employee?

- Remember at will status
- Progressive discipline?
- Look to employee handbook
- Document early and often
- Be very aware of who is and is not a member of a protected class
Employers cannot make employment decisions based on any of the following...

- Race
- Color
- National Origin
- Sex (including pregnancy related conditions)
- Religion
- Association with a protected class
- Age
- Veteran status
- Leave to serve in the military
Employers cannot make employment decisions based on any of the following...

- Physical or mental disability*
- Leave under the leave laws
- Credit records
- Expunged Juvenile records*
- Injured workers
- Lawful use of tobacco on off duty hours
- Leave to donate bone marrow
- Leave to serve in the State Legislature
- Marital status
Employers cannot make employment decisions based on any of the following...

- Opposition to health or safety conditions
- Right to file a lawsuit, testify in criminal or civil proceedings or report criminal activities*
- Right to report health care violations*
- Right to testify at employment division hearings
- Right to testify before the state legislature
- Sexual orientation
- Victims of domestic violence, harassment, sexual assault or stalking, including leave provisions.*
Sexual Harassment

- What is it?
- Examples of Conduct that could be considered sexual harassment
- Quid pro quo
- Hostile work environment
- Employer liability
  - Supervisor
  - Co-worker
  - Harassment by a non-employee
Sexual Harassment cont.

- Written Policies
- Prevention
- What to do upon a complaint of sexual harassment
- Employer steps upon finding that sexual harassment has occurred
Post Employment Issues
Final Paychecks

Employees who quit:
- With less than 48 hours notice
  - Within 5 days not including weekends or holidays
- With at least 48 hours notice
  - On the final day worked

Employees who are discharged:
- No later than the end of the next business day

Employees who mutually separate from their employer:
- No later than the end of the next business day
Wage payments in case of dispute

- Employer must pay all money that employer agrees is due
- Wage laws are drafted to protect the employees
- Defending a wage claim will cost more than paying wages – treat this as a business decision
- Civil penalties for withholding wages
References - Providing

- Risk of defamation claims and “qualified privilege”
- References are not required
- Written references are better than verbal
- Avoid opinions, limit comments to documented observations, never repeat rumors, gossip, or info from anonymous sources
- Adopt a consistent policy; let one person provide references
References - Gathering

- References are important to avoid claims of negligent hiring or retention
- Steps to reduce liability for negligent hiring or retention
Thank you

Additional Questions?