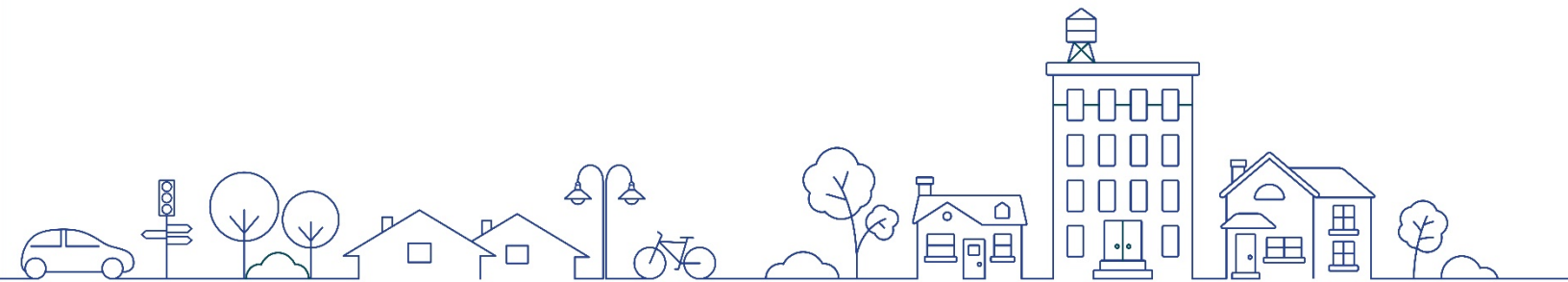


Oregon Municipal Handbook

CHAPTER 5: MUNICIPAL EMPLOYEES & PERSONNEL MATTERS



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Chapter 5:

Municipal Employees and Personnel Matters

This chapter was written and prepared with the generous assistance of CIS Deputy General Counsel Tamara E. Jones and Local Government Law Group Labor Attorney Diana Moffat.

Ms. Jones has practiced employment law for more than 20 years. She oversees the work of CIS' Hire-to-Retire Program, which assists local governments with their hiring processes, disability accommodation processes, termination-related issues, and general employee relations issues (including providing training on a variety of employment law topics). Prior to joining CIS in January 2013, Tamara was a partner at the Portland, Oregon law firms of Barran Liebman LLP and Miller Nash LLP, where she represented and defended public and private sector employers against employment- and labor-related claims in administrative agencies and courts. She has authored six books on employee handbooks, and has been recognized for her work in employment law by Oregon Super Lawyers, Chambers USA, and The Best Lawyers in America. An Oregon native, Tamara graduated with honors from Simmons College (B.A.) and Boston University School of Law (J.D.).

Diana Moffat is a labor relations attorney at Local Government Law Group in Eugene, Ore. She is recognized statewide for her bargaining expertise. Her labor practice includes drafting collective bargaining proposals, researching comparative wages and benefits, presenting all proposals and justifications at the bargaining table as chief spokesperson, and assessing counter proposals. Diana has represented numerous public employers in the mandatory mediation process, as well as in interest arbitrations. She has advised governments regarding disciplinary proceedings and has presented unfair labor practices and unit clarification matter cases to the Oregon Employment Relations Board. Diana is well versed regarding employment issues such as: overtime pay, light duty, medical determination, seniority, annual evaluations, vacation, medical insurance coverage and sexual harassment issues

The LOC sincerely thanks both Tamara and Diana for their expertise and contributions.

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Chapter 5: Municipal Employees and Personnel Matters

I. Introduction

Today's smart city manager or supervisor knows that failing to keep abreast of the many Oregon and federal labor and employment laws that regulate workplaces can have financial and other consequences in the form of claims, lawsuits and unwanted publicity. Complying with these laws, and engaging in "defensive management" whenever possible, should be a priority for all managers and supervisors working for Oregon's cities.

This chapter will touch on the basic requirements of employment and labor laws, including the criteria for which laws apply to city employers. The chapter also includes a discussion about the roles and responsibilities elected officials have over day-to-day personnel matters, and some "best practices" for ensuring that the elected official-employee relationship is a positive one. In sum, this chapter will be your city's personal guide to managing your personnel and minimizing your city's risk of liability under Oregon and federal employment and labor laws.

Because this chapter is meant to provide only an overview, LOC members with specific questions are encouraged to reach out to their city's attorney or labor/employment attorney. LOC members who are also members of CIS are also welcome to contact CIS' Pre-Loss or Hire-to-Retire team members with questions at preloss@cisoregon.org or 503-763-3848. CIS members also have access to almost 100 on-demand video classes and podcasts addressing many of the employment law topics in this chapter – go to www.learn.cisoregon.org (registration required).

Resource:

Citycounty Insurance
Services Pre-Loss and Hire-
to-Retire Team:

Email: preloss@cisoregon.org

Phone: 503-763-3848

LOC members are also encouraged to explore the web sites maintained by the Oregon Bureau of Labor and Industries ([BOLI](#)), the Employment Relations Board ([ERB](#)) and the U.S. Equal Employment Opportunity Commission ([EEOC](#)) for more information about the laws described in here.

II. The Pre-Hire Process

Before you advertise for an open position at your city, consider the following:

A. Are we required to post this job internally before we post externally?

This question can be answered by referring to the collective bargaining agreements (CBA) your organization has entered into with unions and associations, by referring to city policy (if any) and your city's past practice (if any).

B. Have we determined what benefits are available to the employee who is selected for the position?

In order to attract, retain, and motivate qualified employees, employers need to establish and maintain compensation and benefit levels that are: (1) competitive within their labor markets, (2) internally equitable, and (3) consistent with their philosophy. This requires the employer to periodically review data on salary and benefit rates for comparable positions from their labor market in order to stay competitive and pay fairly within the market and within the organization.

Resource:

LOC has provided the following guides to recruiting a city attorney and city administrator:

- [A Guide to Recruiting a City Attorney](#), available in the LOC's online [Reference Library](#).
- [A Guide to Recruiting a City Administrator](#), available in the LOC's online [Reference Library](#).

Benefits include both voluntary and mandated programs. Mandated programs include workers' compensation, unemployment insurance, PERS (if applicable) and various leave of absence provisions. Examples of voluntary programs include additional types of retirement, vacation, holidays, health insurance, employee assistance programs, and educational reimbursement programs. Certain voluntary programs are mandated for police and fire personnel, e.g., retirement and life insurance.

With respect to health insurance, employers with 50 or more employees are required under the federal Affordable Care Act to provide health

insurance (minimum essential coverage) for their full-time employees (i.e., those employees who work 30 or more hours per week). Employers of all sizes may choose to provide some form of health insurance to its employees, either because doing so assists with recruiting and retention efforts, or because the employer is obligated to provide them because of a CBA or employment contract.

Benefits are important to employees and can be costly for the employer. Therefore, the cost of total compensation (including both salary and benefits) should be carefully reviewed before advertising for a position.

C. Have we properly assessed how much we can and should pay this employee?

There are several sources a city employer must consult in order to set a wage or salary for a new employee. First, if the position is represented, review the applicable CBA for a salary scale, band, or calculation method. Second, if the position is not represented, consider any city policies or history that establish a salary level.

Third, and most importantly, consider whether a proposed salary or wage might run afoul of Oregon's expansive Pay Equity Act. The Act requires Oregon employers to, among other things, provide equal pay for equal work unless the salary or wages are based on one or more

“bona fide” categories identified in the law. See BOLI’s discussion on the Equal Pay Act [here](#)¹ and an in-depth article [here](#).²

The Act prohibits discrimination between employees who perform work of comparable character, on a basis of a protected class in the payment of wages or other compensation. Thus, under the Oregon Equal Pay Act, “protected class” includes race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age. Finally, the Act also defines “compensation” to include wages, salary, bonuses, benefits, fringe benefits, and “equity-based compensation.” For those employers without an established, verifiable “system” in place regarding pay practices, they should document the reasons for pay differentials during a hiring process, if these changes are not based on existing pay scales, established policy, etc. Reviewing the compensation for newly-created positions and comparing them to other positions of comparable character will also be a good start.

Other laws that may impact a starting salary include laws dealing with minimum wages, overtime, form of payment, maximum time between payments, and allowable deductions from compensation. See BOLI’s discussion of these laws [here](#).³

D. Is the job description for this position current?

Before beginning the recruiting and hiring process, and before an employer advertises a job opening, an employer should write a job description for the position needing to be filled.

From a non-legal perspective, a job description prepared before the job solicitation process begins gives an employer the opportunity to pinpoint the exact qualifications required for the position and will assist greatly in the hiring process. Other benefits to having job descriptions include providing employers and employees with a basis for performance evaluations, and a benchmark for wage and salary comparisons within an organization or among different job classifications.

Legal issues also dictate the preparation of a job description before the application/job advertising process begins. A thorough, thoughtful job description assists an employer with its obligations under the Americans with Disabilities Act (ADA) and corresponding Oregon disability discrimination law. Although disability law doesn’t require job descriptions, job descriptions will assist an employer who defends against a disability discrimination claim, according to federal regulations: “[I]f an employer has prepared a written description before advertising or interviewing * * * this description shall be considered evidence of the essential functions of the job.” Further, if the employer has identified the essential functions of a position before advertising it, the employer may ask applicants about their ability to perform those essential functions, with or without a reasonable accommodation.

¹ <https://www.oregon.gov/boli/workers/Pages/equal-pay.aspx>.

² <https://law.lclark.edu/live/files/27124-jonespdf>.

³ <https://www.oregon.gov/boli/workers/Pages/your-rights-at-work.aspx>.

Finally, under the Oregon Family Leave Act and the federal Family and Medical Leave Act, employers who wish to have employees returning from a personal “serious health condition” leave present return-to-work paperwork from a health care provider must inform the employee of this requirement and provide the employee with a job description at the beginning of the leave.

For more information about assessing whether a function is “essential” or “marginal,” see the EEOC’s publication available [here](#).⁴ Sample job descriptions are available by request by emailing H2R@cisoregon.org (be sure to mention what job you are seeking a sample of).

E. Is our application in compliance with the law?

Both the EEOC and BOLI have noted that the equal employment opportunity laws they respectively enforce prohibit the use of pre-hire inquiries (including job applications) that screen out members based on protected status when the questions are not justified by some business purpose.

Thus, information obtained through pre-employment inquiries and on job applications should be aimed solely at determining qualifications; inquiries that reveal information bearing no relationship to the qualifications for the job sought (for example, year of graduation from high school, childcare arrangements, country of origin, etc.) should be avoided. If such protected information is provided by an applicant who is not selected for a particular position, the applicant may allege a claim of discrimination based on that protected information. Similarly, information about an applicant’s marital status, family background, race, religion and any other protected class status should not be sought at any point during the screening or interviewing process.

Questions employers are prohibited from asking on a job application:

- Marital status
- Family background
- Race
- Religion
- Any protected class
- Criminal Convictions
- Disability
- Salary history

Some other job application prohibitions:

- Instead of asking, “Are you a United States citizen?” on an application, ask, “Are you lawfully authorized to work in the United States?” Alternatively, let the applicant know that the city requires proof of an employee’s eligibility to work in the United States, and ask, “Are you able to provide proof of your eligibility to work?” Then, if the applicant is hired, the employer can verify the applicant’s eligibility to work by completing the I-9 process and/or using E-Verify, the Internet-based system operated by the federal government that allows participating employers to electronically verify the employment eligibility of their newly hired employees.
- Oregon’s “ban the box” law prohibits employers from asking about criminal convictions on applications. Exceptions: If the candidate is applying to work in law enforcement or

⁴ <https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer>.

in the “criminal justice system”.

- Employers cannot ask an applicant if they are disabled. But, on an application or during an interview, they can ask, “Are you able to perform the essential functions of this job, with or without accommodation?” (This assumes the candidate is given a copy of the job description when the application is received.) Additionally, job candidates can be given information about the schedule the successful candidate must work, and then be asked, “Are you able to meet the attendance requirements of the position?”
- Under Oregon’s Pay Equity Act, employers may not ask an applicant for salary history information either in an application or during an interview.
- It is recommended that applications include, in the area above the line where the applicant signs: (1) a verification that everything in the application is true to the best of their knowledge and that no material omissions were made; and (2) a statement indicating that if the employer discovers any discrepancies, material omissions or false statements in the application or during the interview process, the applicant may not be hired and if hired, may be subject to termination.
- Job candidates should be informed, either on the application or in job announcements, whether there are other pre-hire “tests” or reviews that must be passed. For example, if the position sought is considered “safety sensitive”, let the applicant know that a drug and alcohol screen will be sought (if your organization does pre-hire drug testing). If the position sought will be undergoing a criminal background check or a credit check (limited under Oregon law), the applicant should be informed of that as well. Mass transit positions and positions requiring a Commercial Driver’s License (CDL) also have pre-hire requirements.

F. Is our screening and interviewing process in compliance with the law?

In addition to determining the most effective manner of attracting sufficient numbers of qualified candidates to compete for job openings, the screening of those applicants and selection of the most qualified individual for the available position must be planned. It is essential that this process not discriminate against protected classes of persons, either by intent or impact. Therefore, a city must base selection decisions on job-related criteria that will measure knowledge, skills, abilities and attributes that relate directly to successful job performance for the position at issue.

In addition, when filling vacancies through a competitive process, public entities must provide and document preference for qualified veterans. This preference only applies to those veterans who meet the minimum qualifications for the position sought, or have successfully completed an initial applicant screening or candidate examination. ORS 408.230. Oregon’s Veterans Preference law also has these requirements:

- Public employers are required to interview all veterans who apply for a position who meet the minimum qualifications and whose military experience is directly transferable to the position applied for, subject to a few narrow exceptions. ORS 408.225 to 408.23.
- Disabled veterans, those who have been honorably discharged from the military and rated as disabled by U.S. Department of Veterans Affairs, are entitled to additional preference points when seeking employment with a public body. ORS 408.225.
- See BOLI’s discussion of Veterans’ Preference Law [here](#).⁵

Resource:

- LOC’s [FAQ on Veterans’ Preference](#), available in the LOC’s online [Reference Library](#).

The job interview is a process of candidate screening that is necessary, but one that also is filled with potential legal pitfalls. The purpose of the interview should be to gain information that is essential to determining if the candidate meets the skill requirements of the position. Laws such as the ADA, the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act (Title VII) and corresponding Oregon laws prevent employers from considering certain information about an applicant during the

screening process. To ensure compliance with these laws, employers should not ask any questions or seek information that might solicit information about an applicant’s:

- Race or color
- National origin

⁵ <https://www.oregon.gov/boli/workers/Pages/veterans-preference.aspx>. See also, LOC’s FAQ on Veterans Preference available at: <https://www.orcities.org/application/files/8415/6116/0018/FAQonVeteransPreference9-21-18.pdf>

- Religion
- Garnishments
- Family status, pregnancy, or childcare arrangements.
- Sexual orientation
- Age
- Union participation or history.
- Salary or earnings history (but it’s okay to ask about salary/wage expectations).
- Credit references or indebtedness (Oregon law allows credit checks to be run only on particular positions and only after a conditional job offer is extended. See ORS 659A.320; OAR 839-005-0080.)

Avoid questions that might solicit information about an applicant’s:

- Race or color.
- National origin.
- Religion.
- Garnishments.
- Family status, pregnancy, or childcare arrangements.
- Sexual orientation.
- Age.
- Union participation or history.
- Salary or earnings history.
- Credit references or indebtedness.
- Number of sick days at former job.
- Workers’ compensation history.

- Number of sick days at former job (or questions about sick leave use “philosophy”).
- Workers’ compensation history.

This is not a complete list; a candidate may fall into a protected class status for any number of reasons, and questions that might solicit information about any protected class should be avoided at all costs. If a candidate begins providing such unsolicited information, the interviewer needs to refocus the interview into job-related areas.

G. Pre-employment Drug/Alcohol Screens

Public sector employers may not do drug and alcohol screens on all applicants, or even all applicants who are given conditional offers of employment. Instead, due to federal Constitutional privacy rights, only those applicants who are being considered for “safety sensitive” jobs may be subject to a drug/alcohol screen, and then only after being given a conditional offer of employment. Because “safety sensitive” is defined by courts on a case-by-case basis, cities should consult with legal counsel before requiring a drug or alcohol screen of a new hire to determine whether such a screen is legal.

Some positions, like those requiring a CDL, require pre-employment drug and alcohol testing. A discussion about U.S. Department of Transportation drug/alcohol testing regulations applicable to CDL holders can be found [here](#).⁶

H. Other Background Check Issues

Background checks are typically more involved than a simple reference check. Their importance, however, cannot be understated. Employees in public safety positions are required by law to undergo extensive background checks, including physical and psychological screenings. Smart city employers know, however, that even “regular” positions may need background checks, due to the fact that the employee would be working with “vulnerable” populations (such as the elderly or children), because driving is an essential function, or because the employee would be handling financial transactions on behalf of the city. Cities should consult with their legal counsel about what background checks are required by law for its applicants and what background checks would be recommended.

Note: If an employer uses an outside agency or otherwise pays an individual or entity to conduct a background check, the employer must follow the requirements of the Fair Credit Reporting Act (FCRA). FCRA has detailed written notice and authorization requirements that must be completed before the background check is completed. The Federal Trade Commission’s in-depth discussion about FCRA can be found [here](#)⁷; sample FCRA forms can be provided upon request by emailing H2R@cisoregon.org.

I. Ethics and Nepotism in Hiring and Employment

Oregon has several laws impacting the ability of a manager or supervisor to hire a relative or close relation: ORS 244.179 (ethics – “Supervision of Relative or Member of Household”) and ORS 659A.309 (“Discrimination solely because of employment of another family member prohibited”).

ORS 244.179 prohibits a “public official” from “directly supervis[ing]” a relative. ORS 659A.309 makes it unlawful for an employer to refuse to hire someone who is a “member of an [employee’s] family” unless the applicant/relative would be subject to a family member who is “in a position of exercising supervisory * * * authority” over that applicant/relative. Because of the complexity of these laws, cities are encouraged to consult with legal counsel about the legality of hiring a family member.

J. Extending a Conditional Offer of Employment

A written conditional offer letter advises a potential hire of any remaining steps that must be taken or any obligations that must be met before employment can begin (such as drug testing

⁶ <https://www.fmcsa.dot.gov/regulations/title49/section/382.103>.

⁷ <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf>.

if allowed by law, criminal background checks, or other background checks). It is recommended that cities extend conditional offer letters of employment to a successful candidate before beginning background checks of any kind, and before conducting a drug/alcohol screen. This practice allows the employer to demonstrate that the conditional offer was extended before it learned about any potentially protected activity or class of the applicant, which can be used to defend against unlawful failure to hire claims.

III. Labor Relations at the Local Government Level

In 1973, the Oregon Legislative Assembly enacted the Public Employee Collective Bargaining Act (PECBA). With this law, the Legislature gave public employees the legal right to form, join and participate in the activities of labor organizations. Therefore, if city employees are in a recognized or certified bargaining unit, there is a legal obligation for the city to negotiate matters concerning “employment relations” with those employees’ exclusive representative.

The legislative policy statement embodied in the state’s collective bargaining statute provides, in part:

“The people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees;

“Recognition by public employers of the right of public employees to organize and full acceptance of the principle and procedure of collective negotiation between public employers and public employee organizations can alleviate various forms of strife and unrest. * * *

“* * * * *

“It is the purpose of [the statute] to obligate public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreement resulting from such negotiations.”

ORS 243.656(1) to (3).

A. Bargaining Rights

Most public employees are guaranteed the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations. Collective bargaining includes the mutual obligation of public employees and their employers to meet at reasonable times and to bargain in good faith. However, this obligation does not compel either party to agree to a proposal or require making a concession.

B. Exclusive Employee Representation

Employees are free to select representation of their own choice. During the period in which employees are contemplating the options of union representation, the city is restricted in what it can and cannot do. An exclusive bargaining representative can be voluntarily recognized by the employer or certified through a petition filed with the ERB or through an election held by the ERB.

C. Unit Determination

Oregon law establishes the criteria to be considered in the formation of an appropriate bargaining unit: community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. Questions of representation and appropriateness of bargaining units, and their composition, will ultimately be resolved by the ERB upon petition by the employer, employee group or labor organization. The content and description of the bargaining unit are very important matters. A poorly considered bargaining unit description may lead to future problems and litigation. Whether to include or exclude such groups as temporaries, seasonals, casuals, and part-timers, the definition of each of those groups, and an agreement as to which employees are excluded as supervisors and confidential employees are of great importance.

D. Bargaining Impasse Procedures

In the event that parties to the public employment negotiations are unable to resolve their differences at the bargaining table, Oregon law provides for ERB supervision of mediation, binding interest arbitration, fact finding and strike activity. Under the present law, if negotiations fail to bring the parties to agreement, mediation is required. Mediation is followed by binding interest arbitration with any bargaining unit that includes one or more employees who are prohibited from striking. Employees prohibited from striking under present Oregon law are: emergency telephone worker, parole or probation officer who supervises adult offenders, police officer, firefighter, guard at a correctional institution or mental hospital, and deputy district attorneys. In addition, employees of a mass transit district, transportation district or municipal

Common Local Government Unions

- American Federation of State, County and Municipal Employees
- Service Employees International Union
- International Association of Fire Fighters
- Oregon State Police Officers Association Inc.
- Laborers' International Union of North America

bus system are also prohibited from striking. Fact-finding is an additional voluntary dispute resolution process that can be used by mutual agreement of the city and the employees' exclusive representative.

E. Strike Policy

Many public employees who are represented by certified bargaining agents are granted a qualified right to strike. Statutory provisions and administrative rulings by the ERB define the conditions that must be satisfied before a bargaining unit is allowed to strike.

F. Scope of Bargaining

Employment relations matters over which cities must bargain are frequently referred to as scope of bargaining or mandatory subjects of bargaining. These matters include, but are not limited to: monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment. Current Oregon law specifies that these matters do not include: (1) subjects determined to be non-mandatory by the ERB prior to June 6, 1995; (b) subjects the ERB determines to have a greater impact on city management's prerogative than on employee wages, hours, or other terms and conditions of employment; (3) subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other conditions of employment; and (4) some staffing levels and safety issues, scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work. When the city and the employees' exclusive representative disagree about whether a particular proposal is a mandatory or non-mandatory subject of bargaining, the dispute is submitted to the ERB for resolution.

G. Unfair Labor Practices

Certain actions on the part of an employer, employee group or labor organization are prohibited in order to protect the rights of the other party and to promote cooperation and harmonious relations. For example, it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in, or because of, the exercise of the guaranteed rights of public employees to form, join or participate in labor organizations. Another example would be for a union, or an employer, to engage in bad faith bargaining. Unfair labor practices can be committed by either the union or the employer.

The ERB has the authority to order an employer, employee group or labor organization to stop committing an unfair labor practice and to penalize parties found to have committed such acts.

H. Union Security

State and federal law currently provide that an employee whose position is part of a bargaining unit, need not be a member of the union even though they are still covered by the applicable CBA. An employee may, therefore, opt-out of union membership. The laws surrounding the administration of such an election are currently evolving, so a city is well advised to consult with their management labor counsel regarding such matters.

Sample Employer Unfair Labor Practices

- Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.
- Dominate, interfere with or assist in the formation, existence or administration of any employee organization.
- Attempt to influence an employee to resign from or decline to obtain membership in a labor organization.

Sample Employee Unfair Labor Practices

- Refuse to bargain collectively in good faith with the public employee if the labor organization is an exclusive representative.
- Violate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them.
- Picket or cause, induce, or encourage to be picketed, or threaten to engage in such activity, at the residence or business premises of any individual who is a member of the governing body of a public employer, with respect to a dispute over a collective bargaining agreement or negotiations over employment relations, if an objective or effect of such picketing is to induce another person to cease doing business with the governing body member's business or to cease handling, transporting or dealing in goods or services produced at the governing body's business.

See ORS 243.672 for more unfair labor practices.

IV. Other Employment Law Issues (During Employment)

A. Workplace Safety

The Oregon Safe Employment Act (OSEA) requires all cities, as employers, to provide a “safe and healthful” workplace for its employees and comply with various recordkeeping obligations. The law and its corresponding regulations provide a broad range of mandates covering the use of workplace safety devices, the condition of workplace equipment, safety training for employees and other topics dealing with work procedures, the work facility and the work environment. The OSEA also gives the Oregon Occupational Safety & Health Administration (OSHA) the authority to inspect Oregon workplaces for safety or health hazards.

LOC Members who are also CIS members should consult with their assigned Risk Management Consultant for more information about this law and Oregon OSHA. Additional information can be found at Oregon OSHA’s website, located [here](#).⁸

B. Employee Handbooks

Every city with employees should have an employee handbook or policy manual. Although no state or federal law requires an employer to issue a handbook or manual to its employees, but the benefits of doing so strongly favor the practice.

In a non-union environment, for example, employees often do not have one definitive source of information about the terms and conditions of employment, such as work rules, disciplinary procedures, or other employer expectations of employee conduct. Handbooks and manuals, however, allow employers to provide a consistent, uniform statement about such issues. They can help maintain consistency among departments, locations, and employee classifications because everyone operates from the same set of expectations. Employers use handbooks and manuals to communicate values and visions. In sum, everyone benefits from an environment where the expectations, rules, and policies are predictable, clear, and published.

Well-written and widely distributed handbooks also serve a legal purpose. Consistency and uniformity in applying policies, for example, reduces the risk of a discrimination or “disparate treatment” claim. Further, jurors like to see policies in writing. Even if an employer has a well-established practice, a typical juror tends to favor and believe the written policy versus the intangible “practice.” For jurors who believe the other “F” word – fairness – is the benchmark for analyzing and valuing an employment law claim, a well-written and publicized policy known to the plaintiff-employee, yet not followed by the plaintiff-employee, could make the difference between a costly plaintiff’s verdict and a verdict for the defendant-employer.

Handbooks and manuals are not, however, without risk or responsibilities. If, for example, a city issues a handbook but does not update it, or neglects to follow the policies as written, that city could find itself facing claims of discrimination or other types of employment-

⁸ <https://osha.oregon.gov/essentials/toolkit/Pages/why-here.aspx>.

related claims. Even a well-written handbook serves little value if it is left on a shelf to collect dust.

Employers who use handbooks also must be mindful to ensure that the handbook does not use any language stating or implying that a contractual basis for any benefit (including continued employment) exists. An employee's at-will status of employment can be voided if language in the handbook implies a promise or creates an expectation of a benefit or continued employment.

Finally, in organizations where employees are represented by unions, it is important to note in the handbook that any inconsistencies between the policies in the handbook and the policies in a CBA will be resolved in favor of the CBA (for represented employees only). In addition, if you have unionized employees you will be required to bargain, in most circumstances, regarding inclusion of mandatory subjects of bargaining that are included in the handbook, even if not covered by the applicable CBA.

C. Performance Appraisals

While required by some CBAs, there is no law requiring employers to provide performance reviews. It is simply a good management practice, and most employers conduct periodic performance reviews of their employees. Employers should adopt a policy advising employees how often they will be reviewed, and on what basis. An effective review tells an employee whether they are meeting or exceeding performance goals, identifies any performance problems, and encourages employees to improve their performance. A performance review should not be the only feedback that an employee receives, however – it is simply one tool that an employer has to manage its employees. Finally, accurate and thoughtful documentation regarding an individual employee's performance is invaluable in litigation, whether defending against claims based upon discrimination, wrongful termination, or any other disparate treatment theory.

The employer should attempt to consistently follow the procedures outlined in its performance review policy. Employees should be required to date and sign the evaluation form - not to indicate agreement with its contents, but rather to acknowledge that they have received and reviewed the contents of the evaluation form. Employees should also be encouraged to present a response (or rebuttal) to the evaluation, which will be included in the employee's personnel file. If the employee does not respond to the evaluation form in writing, a court or jury may consider this decision an acquiescence or agreement to the contents of the review.

Resource:

CIS issues a sample employee handbook each year for its members.

Go to:

www.cisoregon.org/Member/RiskManagement/H2RToolbox for the latest edition (account registration is required).

Performance reviews must accurately document not only an employee’s strengths and skills, but also any unsatisfactory work performance or disciplinary problems. An inaccurate review is worse than no review in many circumstances. A court or jury may not believe that an employee’s poor performance led to a termination decision when the performance reviews rate the employee as an “average” or “meets expectations” performer. Finally, all performance reviews should be reviewed by Human Resources for consistency and any legal issues prior to being communicated to the employee. Each employer should decide on whether additional approvals of the performance evaluations are appropriate (for example, what managers or department heads should sign off on the reviews).

Resource:

CIS provides sample performance evaluations for its members.

Go to:
www.cisoregon.org/Member/RiskManagement/H2RToolbox
(account registration is required).

D. Leave of Absence Laws and Issues

i. Vacation

Employers are not required by federal or state law to provide vacation benefits to their employees. There are no laws that require an employer to give an employee a specific amount of vacation time, and there are no laws that specify how vacation time is accrued. But if your organization offers vacation benefits, ensure that your handbook clearly states the employee’s eligibility for vacations and vacation pay, and note any inconsistencies with vacation provisions in an applicable CBA.

Under Oregon law, an employer is required to honor any established policy or agreement relating to the payment of accrued vacation upon termination. If an employee qualifies for payment of vacation pay under the employer’s policy, the employee should be paid for these upon termination. Oregon law also recognizes, however, an employer’s right to specify when vacation pay will not be paid upon termination, such as when an employee is terminated for gross misconduct or if an employee fails to provide notice before resigning.

ii. Sick Leave

Under Oregon law, employers of all sizes are required to provide sick leave to their employees. Employers with 10 or more employees must provide paid sick leave; employers with nine or fewer employees must provide unpaid sick leave. The law includes requirements for accrual (no less than one hour of sick leave for every 30 hours worked, starting on day one of employment), use (available starting the 91st day of employment), accrual caps (40 hours per year) and carry-over. The law also requires the issuance of a policy and periodic information to

employees about sick leave accrual. BOLI has provided extensive information about the sick leave law [here](#).⁹

Note that the law provides a “floor” in terms of the basic minimums of what an employer must provide its employees. Employers can be more generous with its sick leave benefits than what is provided here, *e.g.*, providing paid leave when only unpaid leave is required; making the accrual cap 80 hours per year instead of 40. Finally, nothing in the law requires an employer to pay a departing employee accrued but unused sick leave.

iii. PTO

In lieu of offering separate vacation and sick leave benefits, some employers choose to provide a fixed sum of paid time off or PTO. Cities offering PTO must ensure that their benefits are the same or more generous than what Oregon law requires for sick time (but they are not obligated to give employees additional leave for paid or unpaid sick time if they meet the legal minimums for sick time through their combined PTO policy).

iv. FMLA/OFLA

A covered employer under the Family and Medical Leave Act (FMLA) has at least 50 employees within 75 miles of an employee’s work site. Eligible employees must be employed for at least 12 months (which may be based on separate stints of employment) and have worked at least 1,250 hours during the 12 months preceding the date leave is to begin. Under FMLA, an eligible employee may take up to 12 weeks of unpaid leave within a 12-month period for the following purposes:

- To care for a newborn, newly adopted, or newly fostered child;
- To care for a spouse, child, or parent with a serious health condition;
- To care for the employee’s own serious health condition, including an illness, injury or condition related to pregnancy or child birth that disables the employee;
- Because the employee’s spouse, son, daughter or parent is on active duty or was called to active duty status in the Armed Services, National Guard or Reserves in support of a contingency operation to address certain “qualifying exigencies”; or
- To care for a “covered servicemember” with a serious injury or illness incurred in the line of duty on active duty (up to 26 weeks).

⁹ <https://www.oregon.gov/boli/workers/pages/sick-time.aspx>.

An employee may take FMLA leave for the following:

- To care for a newborn, newly adopted, or newly fostered child;
- To care for a spouse, child, or parent with a serious health condition;
- To care for the employee's own serious health condition, including an illness, injury or condition related to pregnancy or childbirth that disables the employee;
- Because the employee's spouse, son, daughter or parent is on active duty or was called to active duty status in the Armed Services, National Guard or Reserves in support of a contingency operation to address certain "qualifying exigencies"; or
- To care for a "covered servicemember" with a serious injury or illness incurred in the line of duty on active duty (up to 26 weeks).

FMLA is fraught with extensive regulations regarding an employer's obligations under the law, which include providing notice to employees regarding the law and notices regarding eligibility and an employee's "rights and responsibilities", requirements for seeking medical certification in support of certain types of leave, discussions with health care providers certifying the leave in question, and many more. The U.S. Department of Labor has devoted part of its website to FMLA, and provides sample forms/notices, which can be found [here](#).¹⁰

Cities who are subject to FMLA must also be aware of their responsibilities under the Oregon Family Leave Act (OFLA), which applies to employers with 25 or more employees. Although the laws are similar in many respects, any discrepancies between the

two laws are resolved by applying the law that is most generous to the employee.

Under OFLA, an eligible employee may take up to 12 weeks of unpaid leave within a 12-month period (and sometimes more, under certain circumstances) for the following purposes:

- **Parental leave** (either parent can take time off for the birth, adoption, or foster placement of a child). *If the employee uses all 12 weeks on this, the employee can take up to 12 more weeks for sick child leave.
- **Serious health condition** (the employee's own, or to care for the employee's spouse, parent, parent-in-law, or child)
- **Pregnancy disability leave** (before or after birth of child or for prenatal care). *The employee can take up to 12 weeks of this in addition to 12 weeks for any reason listed here.
- **Sick child leave** (for the employee's child with an illness or injury that requires home care but is not a "serious health condition").
- **School closure leave** – If the employee's child's school or childcare provider is closed due to a public health emergency, such as the COVID-19 pandemic school closures (at press time, this leave is available through March 12, 2021).

¹⁰ <https://www.dol.gov/agencies/whd/fmla>.

- **Military family leave** (up to 14 days if the employee’s spouse is a service member who has been called to active duty or is on leave from active duty).
- **Bereavement leave** (up to two weeks of leave after the death of a family member).

Employees are eligible to take OFLA-protected leave if they have been employed for the preceding 180 calendar days and for an average of at least 25 hours per week. However, employees need not meet the hourly requirement to be eligible for parental leave and an employee taking Oregon Military Family Leave Act leave need have only worked 20 hours per week (no minimum length of employment required).

An employee may take OFLA Leave for the following:

- Parental leave
- Serious health condition
- Pregnancy disability leave
- Sick child leave
- School closure Leave
- Military family leave
- Bereavement leave

Like FMLA, OFLA is a regulation-heavy law that imposes significant requirements on employers, including notification requirements, tracking requirements, and other administrative tasks. BOLI’s website, located [here](#),¹¹ has extensive information on the law, including a sample medical certification form.¹² CIS’ Sample Handbook also has sample policies for FMLA/OFLA-covered employers, for OFLA-only covered employers, and a sample statement for those cities who do not have 25 or more employees. The handbook can be found in CIS’ HR Toolbox, located [here](#)¹³ (registration required).

v. Paid Holidays

There is no obligation under either federal or Oregon law to pay employees extra for working on holidays or to pay them premiums for work performed on holidays. Nor does the law require an employer to recognize one holiday versus another. If the employer does choose to provide the benefit to employees, or if it agrees to do so pursuant to a CBA or employment contract, it makes good practical sense to put the policy in writing to avoid confusion and enhance employee morale.

E. Disability Law

Cities with six or more employees are subject to Oregon’s disability discrimination and accommodation law. Cities with 15 or more employees are also subject to federal disability and discrimination law, known as the ADA.

Under both Oregon and federal disability law, with respect to employment (Title I of the ADA), cities are required to provide “qualified” individuals with “disabilities” equal employment opportunities. This includes providing reasonable accommodations to help

¹¹ <https://www.oregon.gov/boli/workers/Pages/oregon-family-leave.aspx>.
¹² BOLI’s sample medical certification form is available in Appendix A.
¹³ <https://cisoregon.org/Account?returnUrl=%2FMember%2FRiskManagement%2FH2RToolbox>.

employees perform the essential functions of their job, and ensuring that employees with “disabilities” are not discriminated against in all areas of the employment relationship, from hiring to retiring (or firing).

Both laws define “disability” as a “physical or mental impairment that substantially limits one or more major life activities.” To receive protection under the law, the employee must be a “qualified individual with a disability.” Among other obligations, an employer must engage in an “interactive process” with an employee with a disability in an effort to come to an agreement about accommodations the employer can provide to assist the employee perform their essential job functions. Nothing under the ADA or Oregon law requires an employer to remove essential job functions, however.

For more information about what constitutes a “disability”, or information about an employer’s obligations under these laws, please refer to the EEOC’s website [here](#),¹⁴ or BOLI’s web site [here](#).¹⁵ CIS also provides its members with a sample Disability Accommodation Policy, found in the HR Toolbox ([here](#))¹⁶ – registration required).

F. Whistleblower Law

Various federal and Oregon laws protect employees who report, in good faith, their employer’s violation of the law or other issues. The Oregon laws apply to public sector employers of all sizes; the federal laws most germane to public sector employers apply to those with 15 or more employees. Here are some examples:

- Opposing discrimination or retaliation in violation of Oregon or federal civil rights law (ORS 659A.030; Title VII);
- Disclosing information that the employee believes is evidence of: (1) a violation of any federal, state or local law, rule or regulation by the public employer; or (2) mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the public employer (ORS 659A.199 and 659A.200 et seq.);
- Reporting criminal activity, has caused a complaint to be filed, has cooperated with law enforcement, has brought a civil action against an employer, or has testified at a civil proceeding or criminal trial (ORS 659A.230); and
- Many more!

¹⁴ <https://www.eeoc.gov/publications/ada-your-responsibilities-employer>.

¹⁵ https://www.oregon.gov/boli/civil-rights/Pages/disability-rights.aspx?utm_source=BOLI&utm_medium=FAQ%20Typeahead&utm_campaign=Disability%20Rights.

¹⁶ <https://cisoregon.org/Account?returnUrl=%2FMember%2FRiskManagement%2FH2RToolbox>

Oregon law requires that public sector employers publish a policy on Oregon’s whistleblower laws; a sample copy is available on request by emailing H2R@cisoregon.org.

For more information, see BOLI’s publication about these whistleblower laws in its “Uniform Standards and Procedures Manual”, which can be found [here](#).¹⁷ EEOC staff also wrote [an article](#)¹⁸ on federal retaliation claims that provides a thorough discussion about retaliation claims and how to avoid them.

G. Drug and Alcohol Issues

When Oregon voters decided to legalize recreational marijuana sales and use in Oregon (effective July 1, 2015), Oregon employers were required to think about how they viewed employee marijuana use. One big factor: Oregon’s recreational and medical marijuana laws have no impact on federal laws that classify marijuana as an illegal drug listed in Schedule I of the Controlled Substances Act. That means that while marijuana use is legal under Oregon law (with some restrictions), it is illegal under federal law.

With this contrast in mind, employers need to think about whether: (1) They want to institute a drug and alcohol testing program; and (2) if so, whether they want to be a “zero tolerance” employer or a “no impairment” employer (defined below). For cities with represented employees, the choice about whether to provide drug/alcohol testing and what the standard for that testing will be is made only through mandatory bargaining. For unrepresented employees, however, the employer is free to choose.

Federal law imposes some restrictions:

- If a city receives federal funds through a grant, the city will need to scrutinize the grant’s terms for information about drug testing expectations (if any). Note: The federal Drug Free Workplace Act does not require drug or alcohol testing.
- If a city employs employees who are CDL holders, U.S. Department of Transportation (DOT) drug testing regulations prohibit the CDL holder from using marijuana, even if such use is otherwise allowed under Oregon law or the employer’s “no impairment” policy. Currently, the DOT does not allow for the use of marijuana by employees in safety sensitive positions subject to federal testing guidelines. See discussion [here](#)¹⁹.
- Employees subject to the drug testing regulations issued by the Federal Aviation Administration or any other federal agency must continue to be complied with as well.

A “**zero tolerance**” policy is just that: It tells employees that not only are they prohibited from reporting to work under the influence of any intoxicating substance (regardless of whether

¹⁷ <https://www.oregon.gov/boli/civil-rights/Documents/whistleblower-protections.pdf>

¹⁸ <https://www.eeoc.gov/retaliation-making-it-personal>.

¹⁹ <https://www.transportation.gov/odapc>.

the substance is legal under Oregon law), employees can't show up to work with any marijuana metabolites in their system, regardless of whether they are impaired at the time of testing. Under this kind of a policy, the definition of "reasonable suspicion" testing can be broader. This is because whether an employee shows signs of intoxication or impairment is only one basis for an employer to demonstrate "reasonable suspicion"; an employee's admission of marijuana use (or any other drug) could trigger the employer's right to conduct a drug/alcohol test as well.

A "**no impairment**" policy tells employees that as long as they don't show up for work under the influence of drugs or alcohol, the employee will not be disciplined if marijuana metabolites show up in their drug/alcohol test. Under this kind of policy, an employer is typically allowed to require a drug and alcohol screen when the employee shows the typical signs of impairment while in the workplace, such as glassy eyes, slurred speech, stumbling, etc. Although an employer can include employee admission of drug/alcohol use in a "no impairment" policy, the likelihood of "catching" an employee who admits to weekend drug use is low, particularly because there is no recognized test for marijuana impairment.

CIS provides sample drug and alcohol testing policies in its Sample Employee Handbook, found [here](#)²⁰ (registration required).

H. Harassment in the Workplace

Employers of all sizes are required by Oregon and federal law to ensure that employees are not subject to harassment on the basis of sex, gender, race, religion, national origin, disability, veterans status, sexual orientation, and any other protected class recognized by Oregon or federal law. This obligation includes a responsibility to ensure that complaints of harassment are promptly investigated and acted upon (where warranted).

Sexual harassment is defined as unwelcome, or unwanted conduct of sexual nature, whether it is verbal or physical when: (1) submission to or rejection of the individual's conduct is used as a factor in decisions affecting the hiring, promotion, transfer, evaluation, financial status, or other aspects of employment; or (2) the conduct interferes with an individual's employment or creates an intimidating, hostile, or offensive work environment.

Harassment on the basis of a protected class or protected activity may include verbal, written or physical conduct that denigrates, makes fun of, or shows hostility towards an individual because of that individual's protected class or protected activity, and can include:

- Jokes, pictures (including drawings), epithets, or slurs;
- Negative stereotyping;
- Displaying racist symbols anywhere on an employer's property;

²⁰ <https://cisoregon.org/Account?returnUrl=%2FMember%2FRiskManagement%2FH2RToolbox>.

- “Teasing” or mimicking the characteristics of someone with a physical or mental disability;
- Criticizing or making fun of another person’s religious beliefs, or “pushing” religious beliefs on someone who doesn’t have them;
- Threatening, intimidating, or hostile acts that relate to a protected class or protected activity; or
- Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of the protected status.

An employer can be liable for any harassment caused by a nonsupervisory or non-managerial employee, or non-employees, only if the employer knew or had reason to know of the harassment and failed to remedy it. In one case, the court stated that an employer is liable for a co-worker’s sexual harassment only if, after learning of the alleged conduct, the employer “fails to take adequate remedial measures.” These measures must include immediate and corrective action reasonably calculated to end the current harassment and to deter future harassment from the same offender or others.

If an employee alleges that a supervisor/managerial employee caused the harassment, the employer may be liable (regardless of whether anyone other than the alleged harasser knew about the conduct) unless it can prove what is called an affirmative defense. If there is no evidence of a tangible adverse employment action resulting from the alleged hostile environment, the employer must prove two things: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior prohibited under the law; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Whether the employer has an anti-harassment policy is relevant to the first element of the defense. And an employee’s failure to use a complaint procedure provided by the employer will normally be enough to satisfy the employer’s burden under the second element of the defense. The Civil Rights Act of 1991 and Oregon law have exposed employers to punitive and compensatory damages and jury trials for unlawful harassment. Additionally, courts have found that when sexual harassment has a physical component, the employer may be liable for not only statutory civil rights claims but also for physical torts such as battery. Therefore, it is imperative that employers identify and eliminate acts of harassment in the workplace.

A written harassment policy staunchly condemning sexual and other forms of harassment is a necessary first step. It should also contain a clear statement that the employer will not retaliate or tolerate retaliation against any employee making a good-faith claim of harassment or for cooperating with any harassment investigation. Oregon law, in fact, requires employers to have a published harassment policy that includes specific provisions identified in the law. For more information about Oregon’s law and the Oregon legal requirements for a policy, see

BOLI's web site [here](#)²¹. CIS also has a sample harassment policy written to conform with the law's requirements, available in the HR Toolbox ([here](#)²² - registration required).

When facing specific complaints of harassment, employers must consider each claim with the utmost seriousness. Complaints should be investigated and resolved promptly, thoroughly and, to the greatest extent possible, confidentially. Obviously, confidentiality may be difficult if not impossible to maintain in many situations. If the employer concludes that improper conduct has occurred, then the alleged harasser should be disciplined accordingly or fired.

The EEOC also has helpful information available on federal harassment laws, found at <https://www.eeoc.gov/harassment>.

I. Discipline and Discharge

All employers must deal with employee discipline and terminations. Unfortunately, and despite the fact that a poorly-handled termination can result in expensive litigation or claim settlement, employers continue to make some avoidable mistakes in handling the discipline and termination processes.

i. Use a Thoughtful (not a Rushed) Process for the Termination.

In this litigious era, when few gatekeepers exist to screen out the frivolous lawsuits, and few tools exist to deter underemployed lawyers from filing marginally credible (or simply frivolous) lawsuits against employers, employers should expect that any termination could result in a lawsuit or a claim for damages. If the employer hasn't thoroughly planned that termination, which includes demonstrating a history of attempting to work with the employee on their shortcomings and articulating a reason for the termination, the employer may be left without an adequate defense or left with an undesirable defense against a claim of discrimination or retaliation. In sum, an employer's best defense to a claim of discrimination or retaliation is a well-documented, thoughtful and legal basis for a termination, one that is clearly expressed and explained to the departing employee.

ii. Avoid Unfortunate Timing

Employers should avoid incidents of unfortunate timing such as terminating an employee after they return from OFLA-protected leave for an event that occurred prior to the employee's leave of absence. Oregon and federal law say that timing alone is insufficient to prove a discriminatory motivation. Prudent employers understand, however, that incidents of unfortunate timing may be sufficient to raise an inference of discrimination and get the employee past a couple of hurdles and possibly even in front of a jury. It is not always possible to avoid incidents

²¹ https://www.oregon.gov/boli/workers/Pages/sexual-harassment.aspx?utm_source=BOLI&utm_medium=FAQ%20Typeahead&utm_campaign=Sexual%20harassment.

²² <https://cisoregon.org/Account?returnUrl=%2FMember%2FRiskManagement%2FH2RToolbox>.

of unfortunate timing. It is, however, possible to avoid delay. If an offense is sufficient grounds for discipline or termination, then employers should act promptly. Failure to do so always creates a question in the mind of a jury: if this offense was so bad, why did the employer wait six weeks to terminate for it?

iii. Make sure there is a record of progressive discipline, in writing

Reminders about creating a written record are nothing new. A written record of progressive discipline for offenses is particularly important in defending claims that termination was in retaliation for taking protected leave, or in violation of the ADA (among other reasons). By its very nature, terminations for “just cause” pursuant to a CBA require progressive discipline except for very limited circumstances.

For public sector employers, employees who are represented by unions are in most situations required to receive progressive discipline before a termination can occur – this establishes a “just cause” basis for termination. Your city’s labor counsel can address this requirement with you.

iv. Is Due Process Required Before Termination?

Under due process principles, a public sector employee is entitled to “notice and a meaningful opportunity to be heard” before their employer can fire them (or before receiving discipline that has an economic consequence, like a suspension without pay). Employees represented by a union must receive due process (also known as a “Loudermill” hearing²³). Other employees must receive due process because the city’s policies require it, or because their employment contract with the city specifies that due process must be provided. In some cases, providing due process to those employees who are not legally entitled to it can be helpful to an employer facing a potential claim from that employee.

v. Consult with Your City’s Trusted Legal Counsel

There are no such things as “slam-dunk” terminations. In this “day and age” of litigation, every termination decision could be subject to a claim or a lawsuit. For that reason, conferring with the city’s trusted legal counsel about a proposed termination before issuing a notice of potential (or actual) termination is a wise use of funds and time. Why would your city terminate someone’s employment if that termination wasn’t as defensible as it could be? This is why “defensive management” should be a part of your city’s day-to-day personnel administration.

²³ For additional information on Loudermill hearings, please see LOC’s publication “*Loudermill* FAQ: Public Employee Rights to a Hearing Prior to Termination, June 2017”, accessible at: <https://www.orcities.org/application/files/1515/6036/1601/FAQLoudermill-PublicEmployeeRightstoHearingPriortoTermination6-30-17.pdf>.

vi. Other Termination-Related Matters

a. COBRA

With any termination, the employer (or its health insurance carrier) needs to be sure to notify the employee and/or their qualified beneficiaries of their rights to continued health insurance coverage under COBRA. For more information about COBRA, including sample COBRA forms, visit the U.S. Department of Labor’s website [here](#).²⁴

b. Timing of Final Paychecks

It is required by Oregon law to pay a departing employee’s final paycheck on time. Failure to do so can result in an employer paying the employee “penalty wages” in addition to the employee’s final wages and attorney fees if the employee hires an attorney. Under Oregon law, the following “final paycheck” deadlines apply:

- If an employee quits with less than 48 hours’ notice, excluding weekends and holidays, the paycheck is due within five days, excluding weekends and holidays, or on the next regular payday, whichever comes first.
- If an employee quits with notice of at least 48 hours, the final check is due on the final day worked, unless the last day falls on a weekend or holiday (in that case, the check is due on the next business day).
- If an employee is discharged, the final paycheck is due not later than the end of the next business day.
- When an employer and employee mutually agree to terminate the relationship, the check is due by the end of the following business day, as in the case of discharge.

J. Posting Requirements

Numerous Oregon and federal laws require employers to post notices in the workplace in a location where they are accessible to employees (and easily visible). Failure to post such notices is itself can be a violation of the particular law.

BOLI has published an extensive list of the posters employers must use in their workplaces. The posters are also available for downloading: [here](#).²⁵

²⁴ <https://www.dol.gov/general/topic/health-plans/cobra>.

²⁵ <https://www.oregon.gov/boli/employers/Pages/required-worksite-postings.aspx>

K. Personnel Recordkeeping Obligations

i. Oregon’s Public Records Law

Because cities are subject to Oregon’s public records laws, questions about the impact of those laws on a city’s personnel recordkeeping obligations and practices should be directed to the city’s attorney. More information about Oregon’s public record (and meeting) laws can be found [here](#).²⁶

ii. Secretary of State Record Retention Schedules

The Oregon Secretary of State has published record retention schedules instructing cities as to how long they should keep records, including records relating to employees. Per the Secretary of State’s website, the schedules provide “state and local agencies with the lawful authority to destroy or otherwise dispose of commonly occurring public records.”

The record retention schedules for cities are found [here](#).²⁷

iii. Personnel Records (ORS 652.750)

Oregon law defines “personnel records” to include records that are used to determine an employee’s “qualifications for employment, promotion, additional compensation, termination or other disciplinary actions”, as well as “time and pay records.”

According to BOLI, examples of “personnel records” include:

- Job announcements;
- Applications;
- Resumes;
- Records of promotion;
- Pay increase documentation;
- Performance reviews;
- Supervisor notes pertaining to named personnel actions;
- Disciplinary actions; records of verbal and written warnings; and

²⁶ <https://www.doj.state.or.us/oregon-department-of-justice/public-records/public-records-and-meetings-law/>

²⁷ <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=590>.

- Notices of termination.

Oregon law requires employers to provide an employee with the opportunity, upon request, to view or receive a copy of their personnel records within 45 days of receiving an employee's request. Failure to do so could result in penalties or other fines. Personnel records should be kept for a period of no less than three years, although six years is desirable (or longer, if ordered in the secretary of state's record retention schedules).

Employers are strongly advised to protect the confidential nature of an employee's personnel records by limiting access to those individuals with a need to know (such as a supervisor or manager), and by keeping the personnel records in a safe place with limited access (such as a locked filing cabinet).

A Note About Form I-9s: Form I-9s should not be kept in an employee's personnel file. If your city is audited, and the U.S. Citizenship and Immigration Services asks to see your I-9 forms, you will be preserving the confidentiality of your employee's personnel records if you keep the Form I-9s separate from the personnel files.

V. Council Roles and Responsibilities Over Personnel

While most city councilors consider the formulation of city policy to be their primary responsibility, they may also be concerned with the way in which policy is administered. The extent of an individual councilor's involvement in administration depends on the city's size and form of government.

Most cities in Oregon follow the council-manager form of government. Under this form, the city council directs the policy of the city while an appointed city manager or administrator oversees the daily supervision of the city's operations and personnel. The city council typically only oversees the city manager or administrator and seldom retains any significant involvement in the day-to-day supervision of city employees and departments. Larger cities may have numerous fulltime employees and departments. In contrast, some of the smallest cities have no full-time employees and rely on contracted legal and engineering services and volunteer and/or part-time help. In these smaller cities, city councilors may be deeply involved in personnel administration.

Further information on the various forms of city government is discussed in [Chapter 3: Municipal Officials](#).

Regardless the size of the city, communication between a council and city employees must be made with the following understanding:

- City employees are responsible to their immediate supervisor and cannot "take orders" from a city councilor; and

- Each councilor has authority in administrative matters only to the extent delegated by the council as a whole. This delegation is often formally contained in an ordinance or charter provision.

Misunderstandings may arise when a councilor intends only to ask for information. The employee receiving the request directly from a councilor can easily jump to the erroneous conclusion or misinterpret the councilor's intent. In turn, a councilor who acts outside of their authority may be at risk for a legal claim brought by the impacted employee. The best way for councilors to get information about administrative matters is to request it through the city manager or administrator, or if appropriate, make the request during a regular council meeting.

Appendix A: Health Care Provider Certification for Serious Health Condition Template

HEALTH CARE PROVIDER CERTIFICATION FOR SERIOUS HEALTH CONDITION

This optional form is designed to help determine if an employee is eligible for leave under either or both the federal **Family and Medical Leave Act (FMLA)** and/or the **Oregon Family Leave Act (OFLA)**.

▲ Indicates that an affirmative answer to this question is *not required* for OFLA or concurrent OFLA & FMLA leave.

* Indicates categories that qualify as OFLA leave *only*.

Employers are *not required* to use this form in order to designate leave as OFLA or FMLA protected.

Information sought on this form relates only to the condition for which the employee is taking leave.

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) *and the Oregon Family Leave Act (OFLA)* provide that an employer may require an employee seeking FMLA/OFLA protections because of a need for leave to care for a covered family member with a serious health condition or *because of a need for leave due to employee's own serious health condition* to submit a medical certification issued by the health care provider of the covered family member *or a medical certification issued by the employee's own health care provider, whichever is appropriate*. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as **CONFIDENTIAL** medical records in separate files/records from the usual personnel files, 29 C.F.R. § 825.500(g), and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies. This also applies to OFLA. ORS 659A.186(2); ORS 659A.136.

Employer name: _____

Employer contact: _____

If this form is being completed for employee's own serious health condition, please also provide the following information:

Employee's job title: _____

Regular work schedule: _____

Employee's essential job functions:

Check if job description is attached:

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to *patient's (your own or your covered family member's)* health care provider. FMLA/OFLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA/OFLA leave due to your own *or your covered family member's* serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA/OFLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in delay or denial of FMLA protection. 29 C.F.R. § 825.313. Your employer must give you 15 calendar days to return this form. 29 C.F.R. § 825.305(b), OAR 839-009-0260(4).

Employee's Name: _____

Patient's Name (if different from employee): _____

If patient is a child, date of birth (mm/dd/yyyy): ___/___/_____

Patient's Relationship to Employee (if employee is not the patient):

- Spouse, or (*OFLA only) Same-gender Domestic Partner

- Parent, or (*OFLA only) Parent-in-law, or
 (*OFLA only) Parent of employee's same-gender Domestic Partner

- Child, or (*OFLA only) Child of employee's same-gender Domestic Partner

- Employee is currently *in loco parentis* (see definition below) to patient who is under age 18 or incapable of self-care due to disability. (Employee has financial or day-to-day responsibility for care of the patient – covered by OFLA and FMLA)

- (*OFLA only) Employee was *in loco parentis* to patient. (Employee had financial or day-to-day responsibility for care of the patient when the patient was under 18 – OFLA only)

- Patient was *in loco parentis* to employee (Patient had financial or day-to-day responsibility for care of the employee *when employee was under 18*)

- Grandparent (*OFLA only)

- Grandchild (*OFLA only)

“*In loco parentis*” means in the place of a parent, having financial or day-to-day responsibility for the care of a child. A legal or biological relationship is not required.

(*OFLA only) Check here if requesting “Sick Child Leave”, which is available under OFLA for a child's non-serious health condition. (Completion of this form is only necessary *after* a 3rd occurrence of using Sick Child Leave during a “leave year”.)

Employee Signature: _____

SECTION III : For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Either your patient has requested leave under the FMLA/OFLA *or the employee listed above has requested leave under the FMLA/OFLA to care for your patient.* Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA/OFLA coverage. Limit your responses to the condition for which the employee is seeking leave.

_____	_____
Printed Name of Physician/ Practitioner	Date Signed
_____	_____
Signature of Physician/ Practitioner	Type of Practice/ Field of Specialization
_____	_____
Address	Phone Number

PART A: MEDICAL FACTS

Note: *If this form is being used for the purposes of filing for the certification of OFLA’s non-serious health condition of a child, only complete # 1*.*

- 1) Approximate date condition commenced: _____
 - a) Probable duration of condition: _____
 - b) Was the patient admitted for inpatient care in a hospital, hospice, or residential medical care facility?
No- **Yes-** If “yes”, dates of admission: _____
 - c) Date(s) you treated the patient for the condition: _____
 - d) Was medication, other than over-the-counter medication, prescribed? **No-** **Yes-**
 - e) Will the patient need to have treatment visits at least twice per year due to the condition?
No- **Yes-**
 - f) Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? **No-** **Yes-** If “yes”, state the nature of such treatments and expected duration of treatment:

2) Is the medical condition pregnancy? No- Yes- If "yes", expected delivery date: _____

3) If patient is EMPLOYEE: Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

a) Is the employee unable to perform any of his/her job functions due to the condition?

No- Yes-

If "yes", identify the job functions the employee is unable to perform:

4) Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

PART B: AMOUNT OF CARE NEEDED When answering these questions, keep in mind that your patient's need for care may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

5) Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? No- Yes-

If "yes", estimate the beginning and end dates for any period of incapacity: _____

If this certification relates to the employee's seriously ill family member(s), also complete the following:

a) Does the patient require assistance for basic medical or personal needs or safety, or for transportation? No- Yes-

b) Would the employee's presence to provide psychological comfort be beneficial or assist in the patient's recovery? No- Yes-

c) If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration and frequency of this need: _____.

Please explain the care needed by the patient: _____

▲ Affirmative answer to the following question is not required for OFLA or concurrent OFLA/FMLA leave.

↳ Is this care medically necessary? No- Yes-

6) Will the patient require follow-up treatments, including any time for recovery? No- Yes-

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

▲ Affirmative answer to the following question is not required for OFLA or concurrent OFLA/FMLA leave.

↳ Is this care medically necessary? No- Yes-

7) Will it be necessary for the employee to take leave only intermittently or to work on a less than full-time schedule basis because of the condition or treatment? No- Yes-

If "yes", expected duration: _____

Frequency (Check One):

- One (1) to two (2) days per month
- Two (2) to three (3) days per month
- Three (3) to four (4) days per month
- Other - Explain: _____

Please explain how employee will use leave intermittently, being as specific as possible including frequency and duration of absences: _____

8) Will the patient require a regimen of treatment? No- Yes-

If "yes", describe the nature of the treatments: _____

Estimated number of treatments: _____

Estimated interval between treatments: _____

Estimated or actual dates of treatments: _____

What is the duration (and any period required for recovery) for a treatment?

▲ Affirmative answer to the following question is not required for OFLA or concurrent OFLA/FMLA leave.

↳ Is this care medically necessary? No- Yes-

