

**Dealing with Employee
“Fitness For Duty”**
Legal Issues and Practical Problem Solving

Presented by:
The Hungerford Law Firm

March 11, 2016
Clackamas ESD

Overview of Leave Laws

Workers' Comp	ADA/State Disability Laws	OFLA/FMLA
<p>ORS 659A.040 • No discrimination or retaliation for invoking or using workers' comp system</p> <p>ORS 659A.043 • Employee with on-the-job injury + workers' comp claim + full duty release has right to reinstatement</p> <p>ORS 659A.046 • Employee with on-the-job injury + workers' comp claim + partial/light-duty work release has re-employment right to an available, suitable job</p> <p>• Workers comp leave does not count against OFLA leave</p>	<p>• ADA covers employers with 15+ employees, state law covers employers of 6+ employees. Requirements of state/federal generally identical</p> <p>• Disability = physical or mental impairment that substantially limits one or more major life activities</p> <p>• Qualified individual with a disability = person who can perform essential functions of the job with or without reasonable accommodation</p> <p>• Employer must make reasonable accommodations for qualified individual w/ a disability unless employer can show: - undue hardship - direct threat</p>	<p>• FMLA covers employers of 50+ employees; OFLA covers employers of 25+ employees in OR</p> <p>• Are differences between Fed & State law. Most beneficial to employee applies.</p> <p>• Eligible employees are entitled to 12 weeks of protected leave in a leave year for:</p> <ul style="list-style-type: none"> - employee's own serious health condition - Serious health condition of family member - Parental leave - Sick Child leave (OFLA only) <p>*New Paid Sick Leave law also provides up to 5 days of paid leave for any illness/injury of employee or family member</p>

Employee Leave Laws: OFLA & FMLA

- * FMLA is the federal Family Medical Leave Act
- * OFLA is Oregon Family Leave Act
- * Both apply to Oregon School Districts
- * Generally, OFLA and FMLA provide 12 weeks of unpaid leave per year for the following purposes:
 - **Parental leave** - leave taken to care for the employee's newborn, newly adopted or newly placed foster child under 18 years of age or for a newly adopted or newly placed foster child 18 years of age or older who is incapable of self care because of a physical or mental impairment;
 - **Serious Health Condition leave** – leave to care for a family member with a serious health condition or leave taken to recover from or seek treatment for a serious health condition that renders an employee unable to perform at least one essential function of the employee's regular position (includes pregnancy disability leave);
 - **Sick Child leave** - leave taken to care for an employee's child suffering from an illness or injury that requires home care but is not a serious health condition (does not include routine medical or dental appointments). Sick child leave need not be provided to an employee if another family member, including a non-custodial biological parent, is willing and able to care for the child. Provided by OFLA only.

- **Employee Eligibility**

- To be eligible for leave benefits under OFLA, an employee must:
 - have been employed for at least 180 calendar days immediately preceding the date on which OFLA

leave begins; and if the leave is for any leave other than parental leave,

- worked at least 25 hours per week during the last 180 calendar days.
- For parental leave, the employee need only have been employed for 180 calendar days.

- To be eligible under FMLA, employees must:
 - have been employed for the employer for 12 months (need not be consecutive), and
 - have worked a minimum of 1250 hours over the prior 12 months.

- **Length of leave**

- Employees are entitled to up to 12 weeks total of leave for any reason(s) in a 12-month period.
- However, employees can use more than 12 weeks in the following circumstances:
 - A female employee may take up to 12 weeks of pregnancy disability leave in addition to 12 weeks of OFLA leave for any leave purpose; and
 - An employee taking the entire 12 weeks of OFLA leave for parental leave may take an additional 12 weeks of sick child leave within the same leave year. If the employee uses less than 12 weeks of parental leave, however, no additional sick child leave is available, except for the balance of the initial 12 weeks. The employee may also use this balance for any other OFLA leave purpose.

- **Which rule applies?**

- Where leave is covered by both OFLA and FMLA and the rules differ, District must apply rule which is *most beneficial* to the employee
- Typically, OFLA is more beneficial

- **Definition of Serious Health Condition**

- Basic definition: Serious health condition means an illness, injury, impairment or physical or mental condition of an employee or family member that requires inpatient care, constant or continuing care, or a period of incapacity for more than three consecutive calendar days with treatment by a health care provider (either at least 2 treatments or 1 treatment plus regimen of continuing care)

- **Medical Verification**

- An employer's request for medical verification must be in writing.
- When an employee gives 30 days notice for FMLA/OFLA leave, other than for parental leave, the employer may require the employee to provide medical verification of the leave need before the leave starts.
- If an employee's need for FMLA/OFLA leave precludes giving 30 days notice, the employee must provide medical verification within 15 days of the employer's written request for verification.
- Cannot request medical verification for parental leave.
- If an employee requests FMLA/OFLA leave because of the employee's own serious health condition, the employer may require the employee to obtain the opinion of a second health care provider, designated by the employer, at the employer's expense. If the opinion of the second provider conflicts with the medical verification provided by the employee, the employer may require the two providers to designate a third health care provider to provide an opinion at the employer's expense. The opinion of the third provider is binding on both the employer and the employee.
- If an employee has taken sick child leave on all or any part of three separate days during a leave year, the employer may, at its discretion, require medical verification on the fourth day or subsequent occurrence of

sick child leave within that leave year. The employer must pay the cost of the verification not covered by insurance or other benefit plan. The opinion of the health care provider is binding, and the employer may not require the employee to obtain a second opinion.

- **Contacting Employee's Doctor**
 - FMLA regulations provide that an employer's health care provider, HR professional, or management rep who does not supervise the employee may contact an employee's health care provider for purposes of clarification and authentication of the employee's medical certification
 - Oregon rules still require that only employer's health care provider can contact employee's doctor. **District cannot contact employee's doctor directly under state law.**

- **Intermittent Leave**
 - New FMLA rule: when it is impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, the entire work period during which the employee is forced to be absent is designated as FMLA leave & counts against the employee's FMLA entitlement
 - OFLA rule: Only period of time employee is absent for OFLA purpose counts against OFLA entitlement but can deduct accrued leave according to uniform policy

- **Transfers While on Intermittent Leave**
 - Under OFLA rule, transfer to alternate position to accommodate intermittent or reduced leave schedule must be voluntary
 - Federal law allows involuntary transfers

- **Fitness for Duty Certification**
 - Federal rule requires employers to notify employee that fitness for duty exam will be required in initial notice

- designating leave as FMLA-qualifying
 - Fitness for duty certification can address employee's ability to perform essential functions of job
 - Include job description with initial notice & fitness for duty certification
 - Under OFLA, District cannot obtain 2nd opinion for fitness for duty certification
 - District must pay any out-of-pocket expense paid to obtain fitness for duty exam
 - Under OFLA rule, fitness for duty certifications must be sought pursuant to uniformly applied policy
- **Notice to Employee of Ineligibility**
 - Under OFLA rule, if employee is not eligible for OFLA, District must notify employee in writing & state the reason employee is not eligible
 - If medical verification is incomplete or insufficient, must notify employee in writing what additional information is required
- **Leave Guaranteed by FMLA/OFLA Is Unpaid***
 - OFLA & FMLA leave is unpaid leave.
 - However, an employee may use accrued paid leave during FMLA/OFLA leave, or an employer may require the use of accrued paid leave during FMLA/OFLA leave (through the CBA or policy), as follows:
 - An employee may use, or an employer may require the employee to use, accrued vacation or personal leave during OFLA leave;
 - An employee may use, or an employer may require the employee to use, accrued sick leave during OFLA leave for any type of OFLA leave, even if the employer's policy specifies that sick leave can only be used for an employee's illness.
 - *As of January 1, 2016 Oregon law also mandates that employees accrue one hour of sick leave for every 30 hours worked (or 1 1/3 hour of sick leave for every 40 hours worked) up to 40 hours (see more detail below)

- **Returning From Leave**

- An employer must restore an employee returning from leave, including intermittent and alternative duty leave, to the employee's former position if the job still exists, even if it has been filled during the employee's leave.

ADA Basics

- * ADA = American with Disabilities Act
- * ADA has 2 main components: no discrimination + requires reasonable accommodation
- * Act was amended in 2009 to greatly expand definition of disabled

• Definition of Disability

- Disabled has 3 meanings under law
- An individual with a disability is a person who:
 - Has a physical or mental impairment that *substantially limits* one or more major life activities;
 - Has a record of such an impairment; or
 - Is regarded as having such an impairment.

• What does “Substantially Limits” mean?

- Prior interpretations of “substantially limits” as meaning “severely” or “significantly” restricts were rejected by amendments to law
- EEOC rule: An impairment is a disability within the meaning of this section if it “substantially limits” the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.

• Major Life Activities

- Expansive, inexhaustive list: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working
- Also includes “major bodily functions:” functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions

- **Major Life Activity of Working**
 - An impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the *type of work at issue*.
 - Type of work at issue includes the job the individual has been performing, or for which the individual is applying, and jobs with similar qualifications or job-related requirements which the individual would be substantially limited in performing because of the impairment.

- **Episodic Impairments Can Be Disabilities**
 - Impairment that is episodic or in remission -- can be a disability if it would substantially limit major activity when active
 - Have to look at limitations that exist during flare-up or when active -- e.g. Crohn's disease

- **Examples of Impairments That Are Typically Disabilities**
 - Deafness, blindness
 - Missing limbs
 - Needing to use wheelchair
 - Autism
 - Cancer
 - Diabetes
 - Cerebral palsy
 - Epilepsy
 - 20 lb. lifting restriction
 - HIV/AIDS
 - MS
 - Muscular dystrophy
 - Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or

- schizophrenia
- Monocular vision

- **Mitigating Measures Not Considered**

- Determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures.
- Mitigating measures include: medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies, the use of assistive technology, reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications.

- **Reasonable Accommodation**

- Are adjustments or modifications provided by an employer to enable an individual with a disability to perform the essential functions of the position
- Reasonable Accommodations may include:
 - *Making existing facilities used by employees readily accessible to and usable by persons with disabilities;*
 - *Job restructuring, modifying work schedules, reassignment to a vacant position; or*
 - *Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters*
- Employer must provide reasonable accommodation unless it would impose undue hardship.
- Undue hardship = an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation

- Things to remember about reasonable accommodation obligation:
 - Can choose among effective accommodation options and do not always have to provide the requested accommodation,
 - Do not have to provide accommodations that pose an undue hardship,
 - Do not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job,
 - Do not have to make an accommodation for an individual who is not otherwise qualified for a position, and
 - Do not have to remove essential functions, create new jobs, or lower production standards as an accommodation.

- **Interactive Process**

- When employee requests an accommodation for a disability or an employer otherwise knows an employee needs an accommodation, employer must engage in *interactive process with employee to determine whether a reasonable, effective accommodation exists*.
- Interactive process means a meeting or meetings involving an exchange of information between the employer and employee to determine what potential accommodations exist, are effective and are reasonable.
- Employer need not provide specific accommodation requested by employee if there is another effective accommodation.

- **Obtaining Medical Information From Employees**

- Prior to a conditional job offer, ADA prohibits employer from asking questions about employee's disability or requiring medical examination.

- Can ask if employee is able to perform essential functions of position.
- Can ask questions about employee's past attendance record
- After job offer, employer may ask any disability-related questions and conduct medical examinations as long as you do this for everybody in the same job category.
- Once employee has begun work: questions about disability and medical exams are only permitted where District has a reasonable belief, based on objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition.
- Objective evidence can be based on observation of employee, self-report by employee, or report from third-party.
- All questions and exams must be job-related and consistent with business necessity.

Oregon Sick Leave for School Employees

- Applies only to school employees, not substitutes
- Each district shall allow each school employee at least 10 days sick leave at full pay for each school year or one day per month employed, whichever is greater
- Can be used for employee's only illness, injury or serious illness or injury of a family member, or non-serious illness of a child (or any reason outlined in CBA)
- Can be used as soon as it is accrued
- Sick leave not taken can accumulate for unlimited number of days

Oregon Sick Leave Law (became effective Jan. 1, 2016)

- On 1st day of employment, employees in employers with 10+ people (6 in PDX) accrue PAID sick leave at rate of 1 hour for every 30 hours worked or 1 1/3 hours for every 40 hours worked
- Employees can start using paid sick leave on 91st day of employment and can use as they accrue
- Applies to ALL employees of an employer, including substitutes of a school district
- Employees can carry over up to 40 hours of unused sick time from one year to the next
- Employers may adopt policies that limit employees to accruing no more than 80 hours of sick time or using no more than 40 hours of sick time in a year
- This paid sick leave can be used for:
 - All purposes defined in OFLA;
 - Non-serious illness or injury of employee or family member
 - Preventative care or doctor visits for employee or family member

- To deal with the death and grieving of a family member;
- To see medical treatment, legal assistance, or other services related to sexual assault, domestic violence, harassment, etc. of the employee or employee's minor child; and
- To donate sick time to another employee.
- Employer does not have to pay out this paid sick leave when employee leaves employment
- Employer can require medical verification after 3 consecutive work days missed, or anytime if employer suspects pattern of abuse
- If Employer has an existing PTO or sick leave plan and that plan is "substantially equivalent" or more generous to the employee than the minimums of the law, this policy shall be deemed, "in compliance."

How Do I Discipline An Employee When Also Dealing With An ADA or FMLA/OFLA Issue?

A. Conduct Standards

- The ADA does not protect employees from the consequences of violating conduct requirements even where the misconduct is caused by a disability.
- If the misconduct is caused by a disability, the workplace rule must be job-related and consistent with business necessity.

B. Performance Standards

- An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job.
- Employers are not required to lower or change a production standard as a reasonable accommodation, although employers may be required to provide a reasonable accommodation to enable the employee to meet a production standard.

C. Employee's Request for Reasonable Accommodation Or Leave *After* Poor Performance or Misconduct Occurs

- If an employee requests FMLA/OFLA leave after poor performance or a misconduct issue has been raised with the employee, consider the FMLA/OFLA request as you would for any other employee. You can also move forward on the performance or misconduct issue, even if you have to wait to do so until the employee returns from leave
- If an employee mentions a potential disability after a poor performance or misconduct issue has been raised, you can still move forward based on the performance or misconduct that has occurred. You may have a prospective duty to

accommodate that now-known disability, but it does not need to eliminate any action you were taking based on the performance or misconduct before you were aware of the disability, even if the contemplated action was dismissal. However, there is often an allegation by the employee that the District was aware or should have been aware of the need for accommodation. In such cases, determine whether anyone in the District was aware of the disability or the need for accommodation prior to moving forward with any discipline.

- When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:

- tolerate or excuse the poor performance;
- withhold disciplinary action (including termination) warranted by the poor performance;
- raise a performance rating; or
- give an evaluation that does not reflect the employee's actual performance

Action on Attendance

- In evaluating attendance, you cannot consider absences covered by OFLA/FMLA
- Leave beyond OFLA/FMLA leave (or where employee does not qualify for OFLA/FMLA) may be a reasonable accommodation for a disability and so required by ADA
- Attendance is typically seen as an essential job function so tolerating erratic and unpredictable attendance would rarely be viewed as a reasonable accommodation under ADA

Even in light of FMLA/OFLA and the ADA, school district can still enforce attendance policies:

1. Adopt a policy and administrative rule that define attendance expectations.
2. After adoption, the policy and regulation should be reviewed with all employees and a copy to them should be provided.
3. Include attendance in every job description as a job duty or requirement.
4. Have a supervisor/principal review the attendance of each staff member annually.
5. Have supervisors monitor employee attendance continually throughout the year.
6. Have supervisors do a monthly review of the attendance of each employee where concerns about absences have been discussed.

• Responding to Unsatisfactory Attendance

1. Using corrective discipline
 - a. Warning
 - b. No sustained improvement after warning: meet with employee (with rep) about attendance and if no information mitigates absences, write written reprimand with warning that continued unsatisfactory

attendance will result in additional discipline,
including dismissal

2. Using a plan of assistance: can be fairly short and no assistance need be provided other than monitoring of attendance
 - a. Meeting at the end of the plan: Meet to review pattern of attendance over period of plan; extend plan if necessary to determine whether employee can sustain satisfactory attendance
 - b. Recommending dismissal: If pattern of absenteeism persists despite warning of consequences, then at end of plan (or extended plan), supervisor can recommend dismissal to superintendent or designee

Oregon Military Family Leave Act:

- An employee with a spouse that is a member of the Armed Forces or National Guard is entitled to a total of 14 days of unpaid leave per deployment before deployment and/or during leave from deployment.
- Must provide notice within five business days of receiving official notice of an impending call or order to active duty or of a leave from deployment.
- Employee may elect to substitute any accrued leave to which the employee is entitled for any part of the leave.
- Military family leave counts against an employee's general OFLA leave entitlement

Federal Military Family Leave:

(1) Exigency Leave – Employees may use their 12 weeks of FMLA leave for “exigency leave. It may be taken for any qualifying exigency arising out of the fact that a covered military member is on active duty or call to active duty status. The military member must be a member of the National Guard or Reserves, not the regular Armed Forces.

Covered Exigencies:

- Issues arising from a covered military member's short notice deployment (i.e., deployment on seven or less days of notice);
- Military events and related activities, such as official ceremonies or programs
- Certain childcare and related activities arising from the active duty or call to active duty status of a covered military member;
- Making or updating financial and legal arrangements to address a covered military member's absence;
- Attending counseling;
- Taking up to five days of leave to spend time with a covered military member who is on short-term temporary, rest and recuperation leave during deployment
- Attending to certain post-deployment activities, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status, and addressing issues arising from the death of a covered military member; and
- Any other event that the employee and employer agree is a qualifying exigency.

(2) Military Caregiver Leave: Allows up to 26 weeks of leave to care for injured servicemember in National Guard, Reserves, or Regular Armed Forces.

Drug & Alcohol Issues in Employment

1. When Can a Public Employer Drug Test Its Employees?

All drug tested by a government actor (school district or any public employer) is subject to scrutiny under Fourth Amendment

a. Pre-Employment

- i. Cannot be applied in an across the board manner
- ii. 9th Circuit requires employer to identify legitimate need

b. Random Drug Testing for Safety-Sensitive Positions

- i. Safety sensitive position is one which involves duties where there is “such a great risk of injury to others that even a momentary lapse of attention can have disastrous consequences”
- ii. Very limited
- iii. In school setting, probably only bus drivers qualify, potentially groundskeepers

c. Testing Based on Reasonable Suspicion

- i. Standard is lower to determine that there is reasonable suspicion than for law enforcement to determine that there is probable cause
- ii. Supervisor must identify specific, objective facts and be able to articulate rational inference from those facts in light of their experience
- iii. Criteria that courts have found to be sufficient for reasonable suspicion: direct observation of drug use or possession; direct observation of physical symptoms such as impairment of motor functions and speech; pattern of abnormal conduct or erratic behavior
- iv. Can require the employee to immediately report to test

d. Post-Accident Testing

e. Employee Consents to Test

- 2. When Can an Employer Take Action Based on Employee's Drug or Alcohol Use?**
- a. Have clear policy that prohibits possession, use, being under the influence of alcohol and all drugs, including legal drugs that may impair
 - b. Proving employee is under influence may be difficult
 - c. Discipline or dismissal still must meet just cause test (if applicable)
 - d. Off-duty use or possession must demonstrate nexus between behavior and job duties

3. When Does An Employer Have to Accommodate or Allow Drug/Alcohol Use and/or Abuse?

a. FMLA/OFLA

- i. Employees entitled to leave under FMLA for “treatment for substance abuse by health care provider”
- ii. Leave may only be taken for treatment provided by a health care provider or by a provider of health care services on referral by a health care provider
- iii. Employer may have a policy prohibiting the use of drugs and may discipline an employee for violating that policy; simply cannot discipline for taking leave for treatment
- iv. Example: Employee fails a drug test, then tells the employer, “I have a problem and I am starting treatment tomorrow.” Employer can move forward with terminating employee and does not have to wait and allow employee to take leave.

b. ADA

- i. ADA draws a distinction between alcoholism and addiction to illegal drugs. The former is considered a disability under the law but the latter is not.
- ii. Employees suffering from alcoholism entitled to reasonable accommodation such as a leave of absence to

- attend a rehabilitation program or modified work schedule to attend AA meetings.
- iii. Employees can still be disciplined for work-related issues stemming from their alcoholism. Employers can enforce same performance expectations for all employees.
 - iv. An employee's current use of illegal drugs is not protected under ADA. However, employees with a history of drug addiction can be protected under ADA's "safe harbor" protection – employees are protected if they have successfully completed or are actively participating in a rehab program and are no longer using drugs.
 - v. EEOC defines current drug use as "the illegal use of drugs that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem."
 - vi. An employee's poor performance or conduct that is attributable to current drug use is not protected by ADA. An employee whose poor performance or conduct is attributable to alcoholism may be entitled to a reasonable accommodation.
 - vii. Example: An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating one more late arrival will result in termination. The employee tells the employer that she is an alcoholic, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment. The employer does not have to rescind the written warning and does not have to grant an accommodation that supports the employee's drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night. However, absent undue hardship, the employer must grant the employee's request to take leave for the next month to enter rehab.
 - viii. ADA also protects an applicant or employee whose prescription medication causes a positive drug test if the medication is related to a disability. Some drugs that would otherwise be illegal are prescribed for medical

reasons and therefore an employee cannot be treated negatively for testing positive. Employer can still prohibit the employee from being under the influence of these drugs at work if they cause impairment.

POLICY _____: FITNESS FOR DUTY/ATTENDANCE

1. Each employee shall accept employment only if he/she is able to perform all of the essential requirements of the job, as stated on the job description and vacancy announcement, with or without reasonable accommodation.
2. All employees shall maintain satisfactory attendance, which shall mean reporting for duty and staying at duty during all assigned times, with no absences greater than one day per month, on the average, for sick leave and any other leave time provided by contract or agreement. Employees who will not be able to maintain attendance at this level due to a disability or medical condition that qualifies under the Americans with Disabilities Act or the Family Medical Leave Acts shall inform their supervisor so that appropriate arrangements can be made for substitutes; in such situations, the qualifying leave shall not be counted against satisfactory attendance.
3. Each employee must report to work for all scheduled workdays at the assigned time, fit for duty. This means that the employee shall be mentally and physically fit and ready to perform the job duties assigned.
4. Employees who are not fit for duty, either because of illness or injury or because of incapacitating conditions or use of drugs or alcohol, shall report immediately to their supervisor and to obtain permission for leave for that day and subsequent days, if necessary. The employee may qualify for paid leave benefits and/or Workers Compensation benefits. Unless other vacation time or personnel leave is available under an applicable collective bargaining agreement or individual employment agreement or applicable statute(s), the employee shall not be paid for time he/she is absent from work because of unfitness for duty.
5. The District has the right to require an employee to provide information from his/her medical treatment provider and/or to require an independent medical examination if observation and other information available to the supervisor suggest that the employee may not be fit for duty and/or the employee may present a danger to himself or others.
6. Disciplinary action or dismissal action may be taken by the District as a result of the employee's failure to report fit for duty.

REFERENCES: Americans with Disabilities Act, Oregon Family Medical Leave Act (OFLA), Family Medical Leave Act (FMLA)

**SAMPLE FITNESS FOR DUTY CERTIFICATION TO BE USED
UPON RETURN FROM FMLA/OFLA**

Remember: In order to condition an employee's return to work for the employee's own serious health condition on a fitness-for-duty certificate, the agency must have notified the employee in the designation notice that a fitness-for-duty certification would be required before returning to work. If the District did not require a fitness for duty certification in the designation letter, once an employee comes back, if the District has concerns (based on evidence, not speculation) about the employee's ability to perform the job, the District can get a fitness for duty certification based on the Americans with Disabilities Act Amendments Act (ADAAA), rather than FMLA and OFLA.

DATE:

TO:

FROM:

SUBJECT: Fitness for Duty Certification

Family and Medical Leave for your own serious health condition ends on (date) _____. Prior to returning to work you must provide a Fitness for Duty Certification verifying whether you are able to return to work, if you have any job-related restrictions and the duration of any restrictions. Please take this Fitness for Duty Certification to your healthcare provider for completion. The District will use this Fitness for Duty Certification to determine if you are able to return to work after your leave.

Return the completed Fitness for Duty Certification to the District prior to the end of your Family and Medical Leave or by (date) _____.

FITNESS FOR DUTY CERTIFICATION

Health Care Provider Completes this Section: Instructions: Please complete all sections in order for the agency to determine if the employee is able to return to duty. The employee's position description or a list of essential duties (***District specifies which***) is attached to this form.

yes no The employee is able to return to work full-time without restrictions. If yes, list the effective date _____.

If no, complete the following:

The employee will be able to return to work with no limitation on (date) _____
I certify that from (date) _____ to (date) _____ the above named employee will be:

- unable to perform the physical requirements of their work or
- is medically incapacitated: totally **partially

****If partially medically incapacitated, complete the following:**

Number of hours per day employee is able to work _____

Number of days per week employee is able to work _____

List any restrictions on the employee's work: _____

PRINTED Name of Health Care Provider

Type of Practice

Signature –Health Care Provider

Date

Please return the completed form to the employee/patient.

Attached: position description/description of essential duties (**District specifies which**)

**SAMPLE LETTER REQUESTING FITNESS FOR DUTY
INFORMATION**

*Would be used in potential ADA situation where District has observed issues
with employee's performance

[Date] __, 201__

To: Dr. _____ [Treating Physician]:

I have been asked by my employer, the _____ School District, to provide them with up-to-date information regarding my medical condition so that the District can determine my fitness for duty. Please respond directly to the District at P.O. ____, _____, OR 97____ with the answers to the questions below.

Employee's signature: _____
Ann _____ /Date _____

FROM THE DISTRICT:

Ann _____ is employed as an special education teacher by the _____ School District. Ann has informed the District that she has medical issue(s) that may impact her job performance. It is important to determine whether she is mentally and physically fit for duty and able to perform her job duties, with or without reasonable accommodation. To assist us in making this determination, the District has requested that she have her treating physician complete the attached questionnaire to adequately assess her ability to perform her job duties and the need for reasonable accommodation, if any. Please review the following information regarding Ann's job duties, then complete the attached questionnaire and return it directly to the District at [address] or [email].

A **job description** is attached to provide you with information about Ann's duties. Essential duties include:

1. Ann's position of teacher in a "special needs" classroom requires an eight-hour work day, five days per week. She has a 30-minute duty-free lunch and break periods _____. During an average day, she is required to spend ____ hours per day working with disabled students aged ____ years old. *This may include assisting students in the bathroom, lifting students (with another adult) weighing 40 to 140 pounds*. She is responsible for planning and delivering specialized instruction in behavior and academic subjects, and supervising students requiring close monitoring in the classroom, on the playground or in the lunchroom. **See the attached daily schedule.**
2. Ann is also responsible for ensuring that legal requirement for the education of disabled students are met. She needs to organize a caseload of about ____ students, meet deadlines for assessment of students, convene multi-disciplinary

- teams to determine program needs of the child, work cooperatively with parents and with service providers such as nurses, speech therapists, etc. She must complete detailed paperwork and reports and keep her supervisor informed of new developments and problems.
3. Ann is also responsible for supervising ____ instructional assistants, including organizing their schedules, providing training and direction, and monitoring their work with students.
 4. Ann must maintain emotional composure, deal with emergencies that could be life-threatening for students, work cooperatively with parents and other staff, multi-task during the school day by supervising and instructing students at the same time as she must observe the whole classroom and provide assistance if students are out of control of the assistant.

I have attached a list of questions, the answers to which would be very helpful in assisting the District in determining whether Ann is physically and mentally capable of fulfilling her job duties and what assistance and accommodations, if any, Ann requires. Please feel free to provide any additional information that you believe would be informative or helpful to the parties in this matter.

Thank you for your assistance.

Sincerely,

Human Resources Director

QUESTIONNAIRE FOR DOCTOR/MEDICAL SPECIALIST

1. Describe your area of medical specialty, if any, or the nature of your practice.

1a. In developing this opinion, I have examined:

- _____ Job Description
- _____ Information about patient's job performance in cover letter
- _____ Records from treatment I/my office has provided since _____, 201__.
- _____ Records from past treatment providers or specialists
- _____ Physical/mental examination of Employee on _____, 201__.
- _____ Other (specify) _____

2. As of _____, 201__ [list current date] do you find Employee mentally and physically fit to perform all of the duties listed in the cover letter, as well as those listed on the job description? Yes _____ No _____

IF THE ANSWER IS "NO," PLEASE ANSWER THE REMAINDER OF THESE QUESTIONS:

3 Does Employee have a physical or mental impairment that substantially impacts a major life activity, including working?

IF SO:

a. List the specific duty(ies) which Employee cannot perform or may need modifications and/or accommodations to perform.

What is the expected duration of any limitations noted?

b. If you have noted any area where Employee cannot perform a specific job duty, please comment on the type of job accommodation that would enable her to perform the duty (if any such accommodation is possible).

4. Is ___'s ability to perform her job responsibilities impaired or improved by medication(s) or other treatment? If so, what is the prognosis for continued medication/treatment at this level? (*The District does not need to know what kind of medication is currently being used, but only its effects on job performance*).

5. Would Employee's ability to perform job duties be improved by any plan of treatment, including any physical therapy, which you have prescribed? If so, specify any accommodation needed from her employer during the course of treatment, and specify the length of time needed.

The above opinion is my professional opinion as of [date] _____
Medical provider's signature _____

Fitness for Duty: Questions for Medical Professionals

Date: Dec. 29, 201____
To: Treating medical professional(s) for _____
From: _____ Superintendent, _____ School District
Re: Fitness for Duty information

Ms. _____'s employer, the _____ School District, seeks the following information in order to assess her fitness for duty beginning in January, 2015:

Background Information

1. Describe your area of medical specialty, if any, or the nature of your practice.

2. Please verify that you have reviewed the following before giving this opinion:
 - a. Medical files provided by all medical personnel treating the Ms. _____ in the past five years, including records of hospitalizations, records of counseling and treatment, records of prescribed medications and/or other therapy.

 - b. Enclosed job description and cover letter describing specific expectations for her particular teaching job.**

3. Please state your medical opinion as to whether Ms. _____ can perform all of the essential requirements of this position on a consistent and regular basis (**as described in the job description and cover letter**).

4. Recognizing that teaching students is a challenging profession, please comment on any of the following where you have information and/or concern regarding Ms. _____'s ability to meet these requirements:
 - a. Deal with stressful situations, often involving staff, students, parents or community members with problems or complaints;

 - b. Maintain emotional control at all times, even in situations where others are behaving inappropriately, and to model respect and problem-solving even in such trying circumstances;

 - c. To be mentally alert and focused, able to listen and communicate clearly, succinctly, and appropriately on point at all times;

 - d. To respond appropriately in case of emergency, where she will need to demonstrate good judgment and direction to others;

- e. To inspire trust and confidence from parents, students, and co-workers, and,
 - f. To have sufficient physical stamina to perform these duties during work days that may involve early morning and/or evening activities and meetings.
5. If applicable, describe any duties Ms. _____ cannot perform and list any accommodations that would enable her to perform the specific duty:
6. Is it your opinion that Ms. _____'s ability to perform the requirements of teaching social studies for seven periods each day is **contingent upon** her engaging in any course of treatment, including treatment by a doctor and/or therapy by a psychiatrist, psychologist or counselor? If so, describe the necessary treatment **and duration**:
7. In particular, Ms. _____ made her supervisors aware during early December that she was hospitalized for _____ and was on leave awaiting entry into a 30-day in-patient treatment program for drug addiction. However, on Dec. __, 201__, she contacted the District and indicated that she would be returning immediately after winter break, on Jan. 5, 201__, without (apparently) having completed any such treatment program. Is she able to perform the duties of her position consistently and effectively without having completed such a treatment program?
8. Ms. _____ has asked for a specific medication (_____) to be available in her classroom for her to access and use if she is feeling anxious or _____. If she takes this medication, is she thereafter able to perform the duties of her position without any effect of the drug on her ability to focus on her students and teaching and deal with any emergency situations?
9. Ms. _____ has asked for a specific medication (_____) to be available in the school office for a friend to obtain and provide to her for use if she is feeling anxious or _____ and the medication listed in #8 above is not effective or adequate. If she takes this medication from the office storage, is she thereafter able to perform the duties of her position without any effect of the drug on her ability to focus on her students and teaching and deal with any emergency situations?

10. Since Ms. _____'s departure from work on Dec. 8 201_ her supervisors have learned that she has not been answering school voicemail, left her medications unsecured in the classroom, stored personal medications in the school vault with multiple mixed medications in the same bottle. Can Ms. _____ provide and secure medications in a competent fashion such that the school can be assured that medications she brings to school will not pose a risk for students or other staff ?

The above answers represent my medical opinion based upon a review of the information listed in #1 above and my experience in treating Ms. _____ for the past ____ years, including my most recent appointment with her on _____, 201__.

Signed: _____ Date _____

ADDITIONAL POSSIBLE QUESTIONS

11. Is Ms. _____ taking any prescription or non-prescription medications or using any controlled substances that would in any way impair her ability to meet the job performance expectations of the District? (You do not need to give the specific medications or substances – just describe what limitations, under what circumstances, apply).

12. If you find there are currently limitations or an inability to perform any requirements of the job, please give your prognosis as to the length of time these limitations or inability to perform will continue. Please explain if your opinion is based on Ms. _____ continuing with any course of treatment:

IF YOU DO NOT FIND MS. _____ MENTALLY AND PHYSICALLY FIT TO PERFORM ALL OF THE DUTIES LISTED IN THE JOB DESCRIPTION AND COVER LETTER, PLEASE ANSWER THE REMAINDER OF THESE QUESTIONS:

13. Does Ms. _____ have a physical or mental impairment that substantially impacts a major life activity, including working?

14. IF SO:
 - a. List the specific duty(ies) which Ms. _____ cannot perform or may need modifications and/or accommodations to perform. Please specify what is the expected duration of any limitations noted.

 - b. If you have noted any area where Ms. _____ cannot perform a specific job duty, please comment on the type of job accommodation that would enable her to perform the duty (if any such accommodation is possible).

15. Is Ms. _____'s ability to perform his job responsibilities impaired or improved by medication(s)? If so, what is the prognosis for continued medication at this level and what are the side effects of said medication? (The District does not

need to know what kind of medication is currently being used, but only its effects on job performance).

16. Could Ms. _____'s ability to perform his job duties be improved by any plan of treatment, including any physical therapy? If so, describe the kind of treatment or therapy you would prescribe. Could she meet all of the requirements of the job if she engaged in such treatment or therapy? Specify the length of time needed.

17. Do you recommend further assessment by any other medical care professional?

I certify that the above information is correct, in my professional judgment, as of _____, 201__.

Physician / Date

May __, 201__

To: Dr. _____

Re: Return to work /Fitness for Duty assessment

The _____ Education Service District is seeking your assessment as to whether _____ can return to work and perform all of her responsibilities as an Instructional Assistant (IA), with or without accommodations. We are aware that she has experienced recent difficulties in performing required duties and even in physically being able to report to work [**see attached pages of information**], and need to know if there are any accommodations that you consider necessary in order for her to be able to perform her duties on a regular basis, without risk to herself or to students and staff at the work site.

Attached is a job description for an IA for the ESD. In addition, you should be aware that IAs are required to

- deal with stressful situations, involving students and/or parent contact
- to maintain emotional control at all times
- to be mentally alert, able at all times to perform multiple tasks including student supervision
- to be able to respond appropriately in case of emergency, including using physical control to prevent a child from injury herself or others or to block a child from leaving the building, or, in special circumstances, to participate in a restraint of a child.
- to have sufficient physical stamina to perform duties that involving standing as well as sitting, plus interacting with students and adults over a period of about _____ daily, with ____ breaks (10-15 minutes) and one lunch period (30 minutes) spaced throughout the day.

Please answer the following questions:

Please check the information you have reviewed before giving this opinion:

_____ Medical files provided by all medical personnel treating the teacher in the past .

_____ Enclosed job description and the description of recent incidents causing concern.

_____ Examination of the patient (Date: _____)

_____ Other (describe) _____

Yes ____ No ____ Please state your medical opinion as to whether Employee can perform all of the requirements of this position on a consistent and regular basis (and, if applicable, describe any duties she cannot perform and list any accommodations that would enable her to perform the specific duty):

COMMENT:

Is Employee taking any medications that would impair her ability to meet the job performance expectations of the District? (You do not need to give the specific medication – just describe what limitations, under what circumstances, apply).

If you find there are currently limitations or an inability to perform any requirements of the job, please give your prognosis as to the length of time these limitations or inability to perform will continue. Please explain if your opinion is based on Employee continuing with any course of treatment:

Do you recommend any additional assessment?

The above answers reflect my medical opinion as of _____, 201__.

Dr.

Medical training/specialty _____

GRANTS PASS SCHOOL DISTRICT 7

Americans with Disabilities Act (ADA)

Interactive Meeting Summary

Employee Name: Position: Has Unpaid Medical Leave been granted <input type="checkbox"/> Yes <input type="checkbox"/> No Date from _____ to _____
Type of Disability/Medical circumstances:
Date of Inter-Active Meeting: Administrator(s) present: Others present: Items discussed:
Reasonable Accommodation requested: <input type="checkbox"/> Yes <input type="checkbox"/> No Describe: Undue hardship determination: <input type="checkbox"/> Yes <input type="checkbox"/> No Explanation:
Recommended action: Former position with accommodations- <input type="checkbox"/> Alternate position as an accommodation- <input type="checkbox"/> Termination- <input type="checkbox"/> Effective date:
Signed by Administrator _____ Date: _____

Signed by Employee _____ **Date:** _____

Prepared by

Interactive mtg sum 12/08

Date