

3 Ways to Get Yourself Sued at Work (& 3 Things You Can Do to Avoid It)



Presented by Julie Preciado
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What's at Stake?

- Distraction from mission and goals
- Employee morale, dignity, and mutual respect
- Exposure to direct and indirect litigation costs
- Damage to your company's reputation and relationships
- **Your employment and/or personal liability**



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Why Should Supervisors Care?

Vicarious Liability & Aiding and Abetting

- **Vicarious Liability**
 - Employers are subject to vicarious liability for unlawful harassment by supervisors
- **Aiding and Abetting**
 - Supervisors are Liable for what they do, too, not just the employer/company
- **Why?**
 - An employer is responsible for the acts of its supervisors
 - Employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment



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#3 Way To Get Sued... Misclassification

Two Major Misclassification Problems

- Independent Contractor vs. Employee
 - If not an employee, none of this applies!
- Except vs. Non-exempt
 - Fair Labor Standards Act – subject to Minimum Wage and Overtime ... or not

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Wage & Hour Basics



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Minimum Wage

Date	Standard	Portland Metro	Nonurban Counties
January 1, 2016	\$9.25	\$9.25	\$9.25
July 1, 2016	\$9.75	\$9.75	\$9.50
July 1, 2017	\$10.25	\$11.25	\$10.00
July 1, 2018	\$10.75	\$12.00	\$10.50
July 1, 2019	\$11.25	\$12.50	\$11.00
July 1, 2020	\$12.00	\$13.25	\$11.50
July 1, 2021	\$12.75	\$14.00	\$12.00
July 1, 2022	\$13.50	\$14.75	\$12.50
July 1, 2023	Adjusted annually based on the increase, if any, to the US City average Consumer Price Index for All Urban Consumers	\$1.25 over the standard minimum wage	\$1 less than the standard minimum wage

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Overtime

- Exempt or non-exempt—that is the question
- Non-exempt: time and ½ pay for all hours over 40 in a work-week
- Exempt:
 - Threshold wage requirement (\$684/week);
 - Paid on a salary basis; *and*
 - Duties test
- Misclassification COMMON! (also Independent Contractor vs. Employee Status)

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Final Paychecks

- Strict timelines
- Employer **MUST** make sure employee receives
- May not be mailed unless employee requests
- Must include all amounts owed:
 - All time worked
 - Tuition reimbursement
 - Earned but unused vacation (per policy)
 - Bonus amounts
 - Floating holidays (per policy)
 - Commissions
 - Sick leave if cash out (per policy)
 - Reimbursements

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Meal & Rest Periods

MEAL

- At least 30 minutes unpaid for 6+ hours
 - Paid if employee can't be relieved of duty
- No meal period if less than 6 hours
 - Additional meal periods required for employees who work 14+ hours

REST

- Paid rest period of not less than 10 minutes
- For every segment of 4 hours or major part thereof (2:01-4 hours) worked in one work period
 - In addition to (and separate from) meal periods
 - Cannot add a rest period to a meal period or deduct a rest period from the beginning or end of a work shift

Milk Expression Breaks

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Training, Education, & Meeting Time

Time is paid time UNLESS:

- Attendance is outside of regular work hours; AND
- Attendance is voluntary; AND
- Training is not directly related to job; AND
- Employee does not do productive work

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2 Way To Get Sued... Mismanaging Leave Issues

According to my boss, "Sick of being here" is not a valid reason to go home sick.

What is up with this guy?!

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user card



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Leave Law Common Mistakes



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Summary of Leave & Pay

- Employer-Paid Leave
 - Families First Coronavirus Relief Act Optional Tax Credit Extension
 - Oregon Paid Sick Leave
 - Paid Family and Medical Leave Insurance (PFMLI) - Coming soon!
- Unpaid Leave
 - OFLA/FMLA – “Serious Health Condition”
 - OFLA Sick Child Leave & School Closure

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Oregon Sick Leave

- Overview
 - ALL employers must provide employees at least 40 hours of sick time
- Must be paid if over 10 employees (over 6 in Portland)
- 40 hours/year for full-time
 - Employer may permit more



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Family Medical Leave



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Purposes for Leave

- OFLA and FMLA
 1. Parental Leave
 2. Employee's Serious Health Condition
 3. Family Member's Serious Health Condition
- FMLA-only
 1. Call to Active Duty/Qualifying Exigency
 2. Service Member Family Leave
- OFLA-only
 1. Sick Child Leave
 2. Family Military Leave
 3. Bereavement Leave

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OFLA/FMLA: Serious Health Condition & Sick Child

- OFLA/FMLA leave to care for an employee's own or a family member's serious health condition
- BOLI expanded OFLA "sick child leave" to include caring for the employee's child whose school or child care provider is closed due to a statewide public health emergency
 - "Closure" is ongoing, intermittent, or recurring and restricts physical access to the child's school or care provider

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Recognizing a Request for Leave

- No magic words needed
 - But saying FMLA doesn't make it FMLA
- Proper Notice
 - Statement by employee that he was undergoing tests, had a prostate biopsy and that he was worried about cancer were sufficient
- Improper Notice
 - Statement that "I had a nervous breakdown" without anything more
 - Doctor's note stating that employee needed follow-up appointment and medication
 - "I'm sick"

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Reinstatement

- FMLA: Same or equivalent position
- OFLA: Same position, unless...
- Caution regarding replacement workers and restructuring to accommodate leave
- Transfer to alternate position
 - Okay under FMLA
 - Under OFLA, need employee's consent

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#1 Way To Get Sued... Taking Discriminatory Actions



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Employment At-Will



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Forget “At-Will” Employment

- Does not protect you from liability for your decision to discipline or terminate an employee
- “At-will” is an ineffective defense for
 - Contract claims
 - Statutory claims
 - Wrongful discharge contrary to public policy claims
- Juries won’t believe you terminated an employee for no reason at all

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A Cautionary Note: All Employer Actions Are Under a Microscope

- Juries or courts scrutinize employer actions carefully
- The jury gets to decide which side to believe
- The jury cares about FAIRNESS
- Juries have the benefit of hindsight

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Discrimination, Harassment, & Retaliation



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One Organization: Many Perspectives

- Diversity is about perspectives, ideas, experiences
- More than the “regular” categories of sex, race, disability, national origin, etc.
- Cultural, social, generational, socio-economic
- THE KEY IS FAIRNESS AND CONSISTENCY

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Protected Classes

- | | |
|--|---|
| <ul style="list-style-type: none">• Race• Color• National origin• Sex (including pregnancy)• Disability• Religion• Age• Military service• Association with a protected class | <ul style="list-style-type: none">• Use of protected leave (military, family, legislative, jury)• Marital status• Family relationship• Injured worker• Sexual orientation• Opposition of unlawful practices• Expunged juvenile record |
|--|---|

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What Is “Discrimination” & When Is It “Unlawful”?

- Discrimination: treating someone differently on the basis of something other than work performance or merit
- Federal and state law prohibit discrimination in
 - Hiring/promotions/firing
 - Compensation
 - Benefits
 - Terms or conditions of employment
 - Includes trainings, advancement opportunities
 - Discharge/layoffs

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Another Type of Discrimination: Exclusionary Practices

- Exclusionary invitations
 - Business-social invitations that are not inclusive of all employees
 - Work-related social events that are uncomfortable for some
 - Wine tasting
 - Spirit Mountain Casino
 - Strip clubs

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What Is Harassment?

- Harassment violates the law if it involves:
 - Adverse employment action
 - Because of race, color, sex, religion, national origin, age, disability, or any protected class or activity
- Forms of harassment include: “slurs,” “jokes,” comments, nicknames, pictures, e-mails, demonstrations of animosity

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Who Decides if It Was Harassment?

- The Reasonable Person Standard!
- Objective + Subjective
 - Would a reasonable person,
 - In the employee’s position,
 - Considering all the circumstances,
 - Find working conditions to be:
 - Hostile
 - Offensive
 - Abusive




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Hostile Work Environment

- The conduct must be “so objectively offensive as to alter the ‘conditions’ of the victim’s employment”
 - Tangible employment action
 - Sufficiently severe or pervasive to create a hostile work environment

May you never run out of HR-approved ways to tell coworkers they're stupid.




somecards

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Is it Harassment?


- Harassment is subject to the test of reasonableness
- Objective + Subjective
 - Would a reasonable person,
 - In the employee's position,
 - Considering all the circumstances,
 - Find working conditions to be:
 - Hostile
 - Offensive
 - Abusive
- Reasonable perspectives vary on the basis of ethnicity, religion, age, disability...
 - A reasonable woman's perspective differs from a reasonable man's perspective
- Intimidating behavior provides important context



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Retaliation

- Adverse treatment against a person who has opposed unlawful conduct or who has made use of government processes to oppose unlawful harassment
- The law protects employees from retaliation
- Employer policy prohibits retaliation



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Disability Discrimination

- Failing To Accommodate or Engage in the Interactive Process
- Employer must provide a reasonable accommodation
 - For a known disability
 - Unless it would impose undue hardship on the employer's business



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Which Accommodations Are Reasonable?

- Employer's choice so long as it is "effective"
- No need to eliminate essential functions or lower standards
- Reassignment may be required
- Unpaid leave as an accommodation
 - This is in addition to FMLA leave

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The Interactive Process

- Interactive process is mandatory and must be done in good faith
- 2 triggers:
 - By accommodation request or
 - By employer's recognition of need

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Interactive Process

It is mandatory and must be done in good faith
Triggered by accommodation request OR employer's recognition of need

Step 1: Recognize When An Employee

- Is requesting an accommodation
- No magic words. Can be made by anyone

Step 2: Meet & Confer

- Functional limitations?
- Suggestions from employee

Step 3: Get More Information If You Need It

- May request medical information from employee or healthcare provider if:
 - Need for accommodation is not obvious
 - You have not already gotten the information

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Undue Hardship

- “An action requiring significant difficulty or expense”
- Unduly costly, extensive, substantial, disruptive
- Fundamentally alters the nature of the business
- Affects the financial reality of the employer

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3 Things You Can Do About It! Preventative Measures



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#3 - Hire Right



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No Protected Classes!



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Do's & Don'ts in the Interview

- Don't ask:
 - "Do you have children?"
 - "So where is that accent from?"
 - "Is there anything in your background we should know about?"
 - "How long have you been working?"
 - "How much did you make at your last job?"
 - "What type of discharge did you receive?"
- Do ask:
 - Questions that relate to specific qualifications or experience relevant to the position

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Ban the Box



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Background Checks

- No credit check, unless the information is *substantially related* to the individual's current job for which an applicant is seeking to be hired
- Credit history "substantially job-related" if:
 - Essential function of position at issue requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit
- Cannot discriminate against applicants or employees based on information in their credit histories

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Using a Third Party To Obtain Background Info

- The Fair Credit Reporting Act oversees the collection and use of consumer credit information obtained through a third-party
- FCRA regulations apply to the following types of background checks:
 - Credit check
 - Employment history verification
 - Drug tests
 - Criminal records
 - Academic history verification
 - Driving record



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Using the Background Check Info

- *Before* taking an “adverse action,” give the applicant or employee:

- a notice that includes a copy of the consumer report you relied on to make your decision; and
- a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act”

After an adverse action, you must tell the applicant or employee (orally, in writing, or electronically): that he or she was rejected because of information in the report; and right to dispute

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#2 - Triple D's Document, Discipline, Discharge



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1st D – Document



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What Is a Personnel File?

- Documents that employers collect with information about employees, including hiring or firing info, salary information, letters to clients, and internal memoranda
- Evaluations and disciplinary actions are typically added
- Employer's record of your employment and can negatively/positively affect future employment

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What Should Be in a Personnel File?

- Pre-Employment Documents
 - job descriptions; job applications, resumes; offer letters
- Employment Documents
 - job performance, promotions; warnings and any formal discipline
- Separation Documents
 - Exit interview; notes about reason for separation



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Employee Access to Personnel File?

- Oregon law requires an employer to provide a reasonable opportunity for the employee to inspect his/her personnel files
- Personnel records do not include: records relating to the conviction, arrest, or investigation of conduct constituting a violation of criminal laws; or confidential reports from previous employers
- Personnel records must be presented for inspection or provided to the employee (certified copy) within 45 days of request

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Records To Be Maintained Separate From a Personnel File

- Medical records
- Credit information
- Immigration forms
- Documents related to complaints and investigation



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Record Retention

- Unless there is a litigation hold on the records, retention of records should be determined based on federal and state laws governing retention of employment records
- A 7-year rule typically covers both federal and state statutes of limitations
 - Wage claims (OR) – 6 years
 - Workplace Fairness Act – 5 years



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2nd D – Discipline



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Performance Monitoring

- If someone is not meeting your company's standards, counsel or discipline as needed
- Do not talk about one employee's performance in front of his/her co-workers
- Consult your supervisor or HR as needed
- Letting poor performer get by without a conversation is not a good idea

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What Kind of Discipline Should You Follow?



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Use Progressive Discipline

- Progressive discipline is a process in which the penalty becomes greater for each succeeding infraction
- Typical process could be:
 - Verbal warning
 - Written warning
 - Suspension
 - Termination (last resort)



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Follow the Smell Test

- Employment may be at-will, but juries (and employees) expect there to be a reason for termination
- Be careful about generalizations that do not say enough
 - “bad attitude”
 - “insubordination”
 - “not a good fit”
 - “personality conflict”
- If the excuse sounds or smells funny, think twice

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Your Worst Enemy: Email

- Casual emails are just as important as the language of the discipline itself
- Emails written by HR or supervisors will likely be used by the disgruntled employee in court
- Don't be too casual
- Don't make inappropriate jokes
- Don't reference the employee's protected class or activity when considering discipline
- Think before you send

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3rd D – Discharge



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Timing the Decision

- Proximity of termination to protected event may be sufficient evidence to let claim go to jury
- When decision is made but termination may be delayed, document the timing of the decision
- Don't ask for trouble (unless you really have to)
 - Terminations during family leave
 - Terminations while on injured worker status

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What To Tell Others?

Coworkers

- Ask employee what they would like to have said
- Consider whether to explain that no reasons will be provided because of the individual's privacy
- Avoid bad mouthing (and defamation claims!)

Job References

- Dates of employment, job title, rate of pay
- Avoid:
 - Defamation
 - Negligent referral



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Employee Rights on Termination



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Final Paychecks

- Strict timelines
- Employer **MUST** make sure employee receives by the end of the next business day (in OR)
- May not be mailed unless employee requests
- Must include all amounts owed
 - All time worked
 - Tuition reimbursement
 - Bonus amounts
 - Commissions
 - Reimbursements
 - If Per Policy ("Cash Out")
 - Earned but unused vacation
 - Floating holidays
 - Sick leave



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Vacation Pay

- Whether owed depends on agreement with employee
- Vacation is often "earned" or "accrued"
- Absent clear language, it can be part of wages



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... and Training & EPLI!



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Thank You!



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COVID—Masks, Vaccines, Oh My!



Presented by Natalie Pattison
June 4, 2021

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CDC Guidance

- Fully vaccinated people can resume activities without wearing a mask or physically distancing, **except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance**

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CDC Guidance

- Fully vaccinated people in non-healthcare setting can do the following:
 - Resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance;
 - Resume domestic travel and refrain from testing before or after travel or self-quarantine after travel;
 - Refrain from testing before leaving the U.S. for international travel (unless required by the destination) and refrain from self-quarantine when returning to the U.S.;
 - Refrain from testing following a known exposure, if asymptomatic, with some exceptions for specific settings;
 - Refrain from quarantining (or be restricted from work) following a known exposure if asymptomatic; and
 - Refrain from routine screening testing, if feasible.
- Continue to
 - Get tested and isolate from others if experiencing COVID-19 symptoms; and
 - Follow CDC and health department travel requirements and recommendations.

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“Fully Vaccinated”

- Two weeks after their second dose in a two-dose series (such as the Pfizer or Moderna vaccines), or two weeks after a single-dose vaccine (such as the Johnson & Johnson vaccine)
- Anyone who does not meet these requirements, regardless of age, is NOT fully vaccinated and should continue to follow guidance for unvaccinated people, including wearing a mask, maintaining six feet from others outside their household, and getting vaccinated

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What Does Oregon Say?

- Governor Brown
- Oregon Health Authority (OHA)
- Oregon Occupational Safety and Health (OR OSHA)

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Oregon Health Authority Guidance

- Updated its Statewide Guidance on Masks and issued Interim Guidance for Fully Vaccinated Individuals
- OHA requires all businesses, employers, and faith institutions to continue to apply and enforce mask and physical distancing requirements unless it:
 - Has a policy for checking for proof of vaccination status of individuals;
 - Requests proof of vaccination status from each individual; and
 - Reviews each individual's proof of vaccination prior to entry or admission.

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Oregon Health Authority Guidance

- Businesses, employers, and faith institutions may, at their discretion, continue to apply and enforce mask and physical distancing requirements to all individuals, regardless of vaccination status, and are REQUIRED to do so if they do not have a policy and process as described in the guidance or if the individual has declined to provide proof of vaccination

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Proof of Vaccination Status

- Documentation provided by a tribal, federal, state or local government, or a health care provider, that includes an individual's name, date of birth, type of COVID-19 vaccination given, date or dates given, depending on whether it is a one-dose or two-dose vaccine, and the name/location of the HCP or site where administered
- Documentation may include, but is not limited to, COVID-19 vaccination record card, or a copy or digital picture of the vaccination record card

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Exceptions

- New "vaccine exemption" does **not** apply in:
 - any setting where the owner or operator continues to require masks, face coverings, or face shields;
 - health care settings;
 - adult jails and correctional facilities;
 - youth detention and correctional facilities;
 - shelters and transitional housing;
 - K-12 schools (fully vaccinated individuals must comply with Ready School, Safe Learners (RSSL) guidance face covering requirements);
 - Planes, buses, trains, and other forms of public transportation traveling into, within, or out of the United States;
 - U.S. transportation hubs such as airports and bus stations.

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Oregon OSHA

- "An employer who requests and reviews verification of vaccination may permit fully vaccinated individuals with such proof of vaccination to go without a mask, face covering, or face shield, and does not need to enforce physical distancing requirements for such individuals"
- Verification is key
- All other OR OSHA requirements remain in place

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Confidentiality of Vaccination Status

- Who can know an employee's vaccination status?
 - General public?
 - All employees?
 - Supervisors and managers?

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Confidentiality of Vaccination Status

- ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination
- Employers may require employees to bring in documentation or other confirmation of vaccination, but this information, like all medical information, must be kept confidential and stored separately from personnel file

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Confidentiality of Vaccination Status

- Who can know an employee's vaccination status?
 - General public?
 - All employees?
 - Supervisors and managers?
 - May disclose to supervisors or managers with a legitimate business need to know the information

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Best Practices

- Develop a policy describing the process for verifying vaccination status
- Businesses:
 - Use signage and post updates on website to alert customers and other visitors about policy
 - Don't keep copies of documents of vaccination status of customers and visitors
- Employers:
 - Share with employees the policy for fully vaccinated employees and customers
 - Invite employees to submit proof of vaccination if they wish to be exempt from mask and physical distancing requirements
 - Avoid asking why an employee is not vaccinated
 - Record who verified the employee's vaccination status and the date on which the employee is fully vaccinated (fourteen days after the date of their last shot). Do not need to keep a copy of the proof of vaccination.
- Evaluate any obligations under a collective bargaining agreement and discuss with union the effects of implementing a vaccine exemption

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Thank You!



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