A Timely Analysis of Legal Developments

ASAP®

In This Issue:

February 2009

In the past few weeks, Oregon's Bureau of Labor and Industries (BOLI) has adopted an "undue hardship" exception for meal periods, and has sought public comments on possible amendments to the Oregon Family Leave Act. The Oregon legislature also has expanded the types of workplaces that must be smokefree.

Oregon Employment Law Developments: Meal Periods, Family Leave and Smokefree Rules

By Amy R. Alpern and Jennifer L. Mora

Oregon's Bureau of Labor and Industries Amends Meal Period Requirements to Include an "Undue Hardship" Exception

On January 12, 2009, Oregon's Bureau of Labor and Industries (BOLI) clarified meal and rest period requirements in situations where it is an "undue hardship" for an employer to provide a 30-minute, uninterrupted meal period to its employees. Starting on March 16, 2009, if employers wish to rely on the "undue hardship" exception, they must provide written notice on required BOLI forms to affected employees.

Background of Oregon's Meal and Rest Period Rules

Oregon's meal and rest period rules require a basic 30-minute, unpaid meal period for every work period of six hours or more during which time an employee must be relieved of all duties. In addition, employers must provide paid, uninterrupted rest periods of 10 minutes for every four-hour segment of work. Before January 2009, the meal period rule did not require an employee to be relieved of all duties when "the nature or circumstances of the work prevent the employee from being relieved of all duty." Although BOLI never interpreted the "nature or circumstances" exception to apply on a regular on-going basis, the language of the rule did not prohibit such an interpretation.

The "nature and circumstances" language created uncertainty for employers who maintained that certain job functions did not allow for an employee to be "relieved of all duty" and that the nature of the employees' work necessitated that they be on call during their meal period. Employers in the construction, convenience store, trucking, manufacturing and other industries raised concerns that graveyard shifts, perishable materials, or continuous operations made total relief difficult or excessively expensive.

In the fall of 2008, the Commissioner of BOLI convened the Meal and Rest Period Advisory Committee to clarify the exceptions to the meal and rest period requirements. The Commissioner charged the Advisory Committee, which was comprised equally of business and labor representatives, with making a recommendation that would balance

an employee's right to adequate meal and rest periods with accommodating workplace conditions in which complete relief for an uninterrupted period of 30 minutes is not always feasible.

BOLI Implements "Undue Hardship" Exception for Meal Periods

After reviewing public comments and the Advisory Committee's recommendation, the Commissioner implemented an "undue hardship" standard in the final rule to best address the concerns of both employers and employees. In doing so, the new rule offers both increased protections for employees and maintains flexibility for situations where total relief is not feasible.

The revised rule (OAR 839-020-0050) still requires the same basic 30-minute, unpaid meal period in which the employee is relieved of all duties for shifts longer than six hours. However, the revised rule also states that an employer need not provide an employee with a 30-minute uninterrupted meal period if it can demonstrate that:

1. Failure to provide a meal period was caused by unforeseeable equipment failures, acts of nature or other exceptional and unanticipated circumstances that only rarely and temporarily preclude the provision of a meal period;
2. Industry practice or custom has established a paid meal period of less than 30 minutes (but no less than 20 minutes) during which the employee is relieved of all duties; or
3. Providing a 30-minute, unpaid meal period where the employee is relieved of all duties would impose an undue hardship on the operation of the employer's business.

If an employer can demonstrate that providing an employee with a 30-minute, uninterrupted meal period would impose an undue hardship, employees still must be given adequate time to eat their meal, rest, and use the restroom. However, employees must be paid for their time spent eating, resting, and using the restroom, and such time is in addition to all other rest periods required by the rule for the number of hours worked on any given shift.

The rule defines "undue hardship" to mean: "significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business." In determining whether an "undue hardship exists," the following factors may be considered:

1. The employer's cost of complying with the requirement to provide a meal period;
2. The overall financial resources of the employer;
3. The number of people employed at the particular worksite and their qualifications to relieve the employee; the total number of people employed by the employer; and the number, type and geographic separateness of the employer's worksites; and
4. The effect providing the meal period would have on: the start-up or shutdown of machinery in continuous operation; intermittent and unpredictable workflow not in the control of the employer or employee; the perishable nature of the materials used; and the safety and health of the employees, patients, clients, and the general public.

Effective January 12, 2009, employers can no longer rely on the "nature or circumstances" exception to providing uninterrupted meal periods but rather must make an affirmative showing of an "undue hardship." Because this is a more difficult standard to meet, employers who have been limiting the duration of their employees' meal periods or allowing their employees to remain on call during meal periods must discontinue this practice and reevaluate their individual circumstances in light of the factors outlined above to ensure that a defensible undue hardship exists. In addition, starting on March 16, 2009, employers intending to rely on the "undue hardship" exception must provide a copy of a notice to each affected employee on a form prescribed by BOLI and also must maintain a record of that notice.

BOLI Requests Comments on Amendments to Oregon's Family Leave Act

On January 16, 2009, the U.S. Department of Labor implemented amendments to its existing regulations under the Family and Medical

ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.

Leave Act (FMLA), which applies to employers with 50 or more employees. The purpose of the new regulations was to clarify or change preexisting regulations on a wide range of topics, including clarifying the definition of "serious health condition," modifying the procedures required for employers to obtain medical certification in connection with an employee's serious health condition, clarifying the extent to which light-duty positions may be included in an employee's leave allotment, implementing military emergency leave, clarifying the regulations governingmilitary caregiver leave. For a more detailed discussion about the specific changes to the FMLA regulations, see *Relief in Sight? DOL Issues Final FMLA Regulations* and *Department of Labor Clarifies FMLA Amendments Related to Servicemember Care and Other Military-Related Exigencies*

As Oregon employers are aware, the Oregon Family Leave Act (OFLA) is a separate family and medical leave statute that applies to employers with 25 or more employees. However, employers that have more than 50 employees are required to comply with both the FMLA and OFLA, which has created challenges for employers in the past given that in several respects, the OFLA provides more protections to employees than the FMLA. For example, in its definition of "family member," OFLA includes parents-in-law, grandparents, and grandchildren whereas FMLA does not contain such a broad definition of "family member." OFLA also requires employers to allow their employees to use sick leave to care for sick children even if the child's illness does not qualify as a serious health condition.

One important change to the FMLA regulations provides for additional leave for members of the military and their families, which is a benefit currently not contained in the OFLA. Moreover, as BOLI recently recognized, "[s]everal other amendments [to FMLA's regulations] create new inconsistencies between OFLA and FMLA."[1] Because employers are required to follow the regulation that provides the most benefit to their employees, BOLI analyzed the amendments to the FMLA regulations and concluded that "although many of the new FMLA regulations do not conflict with the OFLA regulations, several areas merit further consideration regarding whether the OFLA regulations should be amended to conform to the new FMLA regulations." As a result, BOLI's Commissioner recently announced that he intends to hold informational hearings in February 2009 to gather public comment on possible changes to the OFLA in order to eliminate the inconsistencies between the OFLA and the new FMLA regulations. According to the Commissioner, "it doesn't help workers if employers covered by both OFLA and FMLA get bogged down in differing rules."[2]

According to BOLI, the primary areas on which the Commissioner will seek comments are:

- The new definition of serious health condition under the FMLA and the extent to which the OFLA's definition should be changed;
- Whether the OFLA should be amended on the issue of calculation of average hours worked for determining whether an employee is entitled to leave;
- Whether the OFLA should follow the FMLA by allowing an employer to deny a perfect attendance bonus to an employee if the employee failed to meet the goal due to FMLA leave;
- The extent to which an employer can directly contact an employee's health care provider for purposes of clarifying and authenticating an employee's medical certification;
- The appropriate method for calculating intermittent leave;
- The new FMLA regulation allowing for the electronic posting of the required notice of FMLA rights and whether the OFLA should be amended to allow similar electronic postings;
- The type of information and notice that an employee must provide to an employer when requesting leave; and
- Whether the OFLA's "medical verification" regulations should be amended to be more consistent with the amendments to the FMLA's "medical certification" regulations.

Employers have every reason to be interested in a reconciliation of the differences between the amended FMLA regulations and existing requirements under the OFLA. In the meantime, however, unless and until the OFLA's regulations are amended to be more consistent with the new FMLA regulations, Oregon employers with 50 or more employees must continue to follow whichever regulation is most beneficial to a given employee's individual circumstances.

ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.

Oregon Expands Its "Smokefree Workplace Law"

Oregon's Smokefree Workplace Law, which was enacted in 2002, mandated that most, but not all, workplaces be smokefree. However, effective January 1, 2009, the law was amended to expand the number of workplaces that must be smokefree. It also was amended to prohibit smoking within 10 feet of exits, entrances, windows that open, and ventilation systems that serve enclosed areas at places of employment and other public areas. The new workplaces and other public areas that are now also required to be smokefree include, but are not limited to, private offices, restaurants, bars, and taverns, fraternal and private organizations, movie theaters and other indoor entertainment venues, bowling centers, and work vehicles that are not operated by only one employee. Although smoking is now prohibited in hotels and motels, those types of establishments are permitted to designate up to 25% of the guest rooms as rooms where smoking is permitted provided that all smoking rooms on the same floor are contiguous, the owner notifies the client as to the smoking status of the rooms, and all rooms are designated as being either smoking or nonsmoking on the room's exterior door. The new law does not apply to cigar bars and certified smoke shops, nor does it prohibit the smoking of non-commercial tobacco for American Indian ceremonial purposes.

In addition to providing a smokefree environment in these workplaces and public establishments, employers are required to post signs regarding the smoking prohibition, which includes posting "No Smoking within 10 feet" signs at all building entrances and exits. Employers also must remove ashtrays and any other receptacle used for smoking or discarding cigarette debris from the workplace and all areas within 10 feet of any entrance that is designated as a "no-smoking" area. Penalties for violating Oregon's Smokefree Workplace Law can include a fine of $500 per day (not to exceed $2,000 in any 30-day period) and further administrative action for continued noncompliance.

Amy R. Alpern is a Shareholder and Jennifer L. Mora is an Associate in Littler Mendelson's Portland office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Alpern at aalpern@littler.com, or Ms. Mora at jmora@littler.com.

[1] *BOLI Brief: Implementing OFLA Under New FMLA Rules* at http://www.oregon.gov/BOLI/CRD/docs/BOLI_Brief_%20FMLA_Rules_011609.pdf. To learn more about these inconsistencies, BOLI recently posted on its website an "OFLA and New FMLA Comparison Chart."

[2] *Announcement of Public Comments on FMLA*.

ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.