CLACKAMAS COUNTY

OFFICI

2051 KAEN ROAD

Stephen L. Madkour
County Counsel

Kathleen Rastetter
Scott C. Ciecko
Amanda Keller
Nathan K. Boderman
Shawn Lillegren
Jeffrey D. Munns
Andrew R. Naylor
Andrew Narus
Sarah Foreman
Assistants

MEMORANDUM

TO: Gary Schmidt, Clackamas County Administrator

FROM: Kathleen Rastetter, Assistant County Counsel KJK

DATE: 3/2/2023

RE: Paid Leave Oregon clarification

Paid Leave Oregon is a new Oregon law that provides paid leave time off for employees for various reasons, which goes into effect September, 2023.

The law overlaps with other leave laws, such as the Family Medical Leave Act (FMLA), Oregon Family Medical Leave Act (OFLA), and others. The City of Portland (the City) asked the Oregon Bureau of Labor and Industries (BOLI) to clarify one aspect of how Paid Leave Oregon will work in conjunction with FMLA/OFLA and perceived conflicts, which gave the City a verbal explanation of the issue. The City intends to write a letter to BOLI and the U.S. Department of Labor Wage and Hour Division (who governs FMLA) to request written clarification of the issues. The City asked other

counties and cities to join the letter to request clarification. County Counsel and Human Resources Leave Administration believe joining the letter and asking both BOLI and the federal government for clarification is in the County's best interest. Therefore, we request permission to add Clackamas County as an entity on the letter.

CITY OF
PORTLAND, OREGON
OFFICE OF THE CITY ATTORNEY

Robert Taylor, City Attorney
1221 S.W. 4th Avenue, Suite 430
Portland, Oregon 97204
Telephone: (503) 823-4047
Fax: (503) 823-3089

March 1, 2023

VIA EMAIL ONLY

Leila Wall
Civil Rights Division Administrator
Bureau of Labor & Industries
800 NE Oregon St., Suite 1045
Portland, OR 97232
leila.wall@boli.oregon.gov

Re: Request for Opinion Letter

Dear _____:

On behalf of the undersigned Oregon local government jurisdictions and public agencies, we respectfully request that the BOLI render an opinion letter addressing an employer's responsibilities and duties at the intersection of the Family and Medical Leave Insurance Program, also known as Paid Leave Oregon ("PLO"), which allows eligible employees to access paid family, medical, and safe leave from work starting in 2023, and the Oregon Family Medical Leave Act ("OFLA"), which allows eligible employees to take unpaid family and medical leave.

Please know that this opinion is not sought by any party, its representative, or any third party acting on its behalf that is currently in an active BOLI investigation related in any way to this query. Additionally, this opinion is not sought by any party, its representative, or any third party acting on its behalf for use in any litigation initiated prior to the submission of this request.

Over the last three years, the undersigned entities have worked diligently to ensure that our organizations were ready for the implementation of PLO and would be in compliance with each unique intersection between the new law and existing leave laws, despite their contradictory compliance obligations. In particular, the undersigned entities have long been aware of the issues related to "stacking" of different protected leave types due to tenure of employment (leave can commence at time of hire for PLO; leave can commence at 30 days/6 months for OFLA depending on the existence of a public health emergency; leave can commence at one year for FMLA), family member type (since each law allows leave for different defined family members), reason for leave (e.g., sick child and bereavement leave's inclusion in OFLA but exclusion from PLO, for instance), and the Employment Department's 52-week "benefit year" versus an employer's calendar, rolling or other OFLA/FMLA year.

Through recent discussions with BOLI Technical Assistance, we learned that earlier this year, internal BOLI conversations have led to the conclusion that there appears to be another

contradiction with extraordinary potential impact on all Oregon employers, but particularly public entities who already have extremely complex payroll obligations due to retroactivity and other complex pay issues that more frequently arise in multi-unionized environments.

Generally, leave should run concurrent under PLO, OFLA, and FMLA to the maximum extent possible, except where the qualifying event, family member, timing, etc. diverge. Under PLO, employers "may permit" an employee to use paid leave accruals to supplement the insurance benefits provided by the Employment Department during a period of leave, but the employer is not required to do so and the law does not (unlike FMLA and OFLA) say that an employer "may require" usage of PTO. ORS 657B.030. Most employers have thus, based on the plain language of the PLO statute, interpreted the "topping off" contemplated in the statute as permissive rather than mandatory. This interpretation is also reflected in the professional literature published to date on this topic by local firms outlining the nuances of the law.

We learned recently through a conversation with BOLI TA that the Bureau is advising that "topping off" PLO benefits is not permissive but rather is mandatory to the extent that any PLO runs concurrent with OFLA or FMLA, because under OFLA and FMLA, an employee is "entitled" to use any accrued paid time off during any period of OFLA or FMLA leave, for "any part" of the leave. *See* 29 USC §2612(D)(2)(a) ("An eligible **employee may elect**, … to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee … **for any part** of the 12-week period of such leave under such subsection.")(emphasis added); ORS 659A.174(2) ("An employee taking family leave is **entitled to use any paid accrued sick leave or any paid accrued vacation leave during the period of family leave**, **or** to use **any other paid leave** that is offered by the employer in lieu of vacation leave during the period of family leave.")(emphasis added); OAR 839-009-0280 ("An **employee eligible to take OFLA leave is entitled to use** accrued paid sick leave, personal leave, vacation leave or **any other paid leave** that is offered in lieu of vacation leave, **during the period of OFLA leave**.")(emphasis added).

We note that while the Bureau does not have enforcement jurisdiction over FMLA claims, as original jurisdiction resides with the U.S. Department of Labor Wage and Hour Division rather than the U.S. Equal Employment Opportunity Commission and thus jurisdiction cannot be delegated by the EEOC/BOLI workshare agreement, we do appreciate the BOLI TA advisor's analysis of the conflict of law seen at the intersection of PLO, OFLA, and FMLA.

The undersigned entities are requesting assistance in the form of an opinion letter so that we can confirm the orally stated position of BOLI as it relates to the permissive vs. mandatory "topping off" of PLO benefits, to the extent the PLO is also OFLA qualifying. We want to ensure our forthcoming PLO policies and practices are in compliance with OFLA ideally no later than three months before PLO benefits begin to be adjudicated by the Employment Department on September 3, 2023, i.e., June 2, 2023.

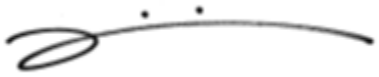
Furthermore, we would like to take this opportunity to direct the Bureau to 29 C.F.R. 825.207(d)-(e), Substitution of Paid Leave. While the undersigned entities are separately seeking an opinion letter from the DOL WHD on the issue of topping off under the FMLA, it appears that 29 C.F.R. 825.207 contemplates a situation similar to the one presented by PLO, in that where FMLA leave is partially paid by disability insurance coverage or workers compensation, the statutory provision allowing an employee to substitute paid leave accruals for any unpaid time "is inapplicable, and neither the employee nor the employer may require the substitution of paid leave." *Id.*

In addition to or as an alternative to issuing an opinion letter, the Bureau could consider promulgating an administrative rule interpreting OFLA that would make the employer's OFLA/FMLA obligations parallel and honor the Legislature's expression of intent at ORS 657B.030 that topping off PLO benefits would be optional. The administrative rule would clarify that where leave is partially paid by any program or plan, including but not limited to Paid Leave Oregon, the statutory provision allowing an employee to substitute paid leave accruals for any unpaid time is inapplicable, and neither the employee nor the employer may require the substitution of paid leave.

Such a rule would also avoid unintended wage and hour/timely paycheck issues as employers struggle to ascertain whether employees were approved for leave by the State, the amount of the benefit paid to the employee without notice to the employer, the amount of the top off required to bring an employee up to 100% of their average weekly wages, and the duration of benefits (implicating how long topping off with PTO would need to continue to occur). As of our last contact with the PLO Outreach Team, the program has no plans or protocols in place as to how employers will receive notice, if at all, of benefit amount, a necessary minimum prerequisite to timely supplementation of employer-paid PTO to the state-run PLO benefit.

Any guidance BOLI is willing to provide as an official position would be of great value to the undersigned jurisdictions in our compliance efforts. We appreciate your consideration of our request.

Sincerely,



Anne Milligan
Deputy City Attorney

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