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**"Innovative Law  
Firm of the Year"**

# PREPARING FOR 2016:

*MANDATORY SICK LEAVE, BAN THE BOX & OREGON  
EMPLOYMENT LAWS*

**December 8, 2015**

**Webinar Presented by Chrys A. Martin & Christie Totten**

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## PREPARING FOR 2016:

*Mandatory "Sick" Leave, Ban the Box & Oregon Employment Laws*

Webinar Presented By:

**Chrys Martin** | Employment Attorney, Davis Wright Tremaine LLP

**Christie Totten** | Employment Attorney, Davis Wright Tremaine LLP



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## Agenda

- Paid Sick Leave
- Ban the Box
- Social Media
- Health Insurance & OFLA
- Non-Competition Agreements
- Wage Whistleblowers
- Domestic Violence Leave
- Marijuana
- Q&A



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## New Oregon Laws

**Don't Panic.**



**Plan.**



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# OREGON "SICK" LEAVE

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Oregon "Sick" Leave – Who, What, When		
WHO	WHAT	WHEN
<ul style="list-style-type: none"> <li>Employers – With 1 Oregon employee</li> <li>Employees – Part-time, seasonal, and everybody</li> </ul>	<ul style="list-style-type: none"> <li>Protected – Leave for sickness <b>and other purposes</b></li> </ul>	<ul style="list-style-type: none"> <li>January 1</li> </ul>
<p><b>PAID OR UNPAID?</b></p> <p><b>PAID</b> – if enough Oregon Employees</p> <ul style="list-style-type: none"> <li>10 or more (if not Portland location)</li> <li>6 or more (if Portland location)</li> <li>Formula for # of employees</li> </ul> <p><b>UNPAID</b> – otherwise</p>		
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Oregon "Sick" Leave – Joint Employer Warning
<ul style="list-style-type: none"> <li>▪ <b>Current Proposed</b> BOLI regulations:               <ul style="list-style-type: none"> <li>– Expressly call temp/staffing agency and company <u>joint employers</u></li> <li>– Require <b>both "employers"</b> to <b>comply</b> with accrual provisions/rules</li> <li>– Require <b>both "employers"</b> to <b>count</b> the worker when calculating number of employees</li> <li>– Require continued accrual if company hires temp worker</li> <li>– Impose liability on both companies</li> </ul> </li> </ul>
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## Paid "Sick" Leave

### Action Steps:

- ✓ Designate a Year
- ✓ Determine Accrual
- ✓ Revise Policies
- ✓ Implement Recordkeeping
- ✓ Learn the Details...Again and Again
- ✓ Train Supervisors
- ✓ Provide Legally-Required Notification
- ✓ Don't Deny or Retaliate!
- ✓ Watch For Regulations



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## Oregon "Sick" Leave – Setting up Accrual

Designate your 12-month **Year**

Decide – **PTO** or not?

Calculate minimum **Accrual Rate**

- 1:30 hours or 1.33:40 hours
- Presumption for salaried exempt
- Frontloading option

Hours must **accrue from 1<sup>st</sup> day** of employment

May prohibit **use prior to 91<sup>st</sup> day** of employment

(TRAP: current employees in January 2016)

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## Oregon "Sick" Leave – Accrual, Use, and Carry Over

40 hours

- Maximum annual *use*
- Maximum annual *accrual*
- Maximum annual *carry-over*

80 hours

- Maximum total *accrual*

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### Oregon "Sick" Leave – Not Just For Sickness

- **Employee's** health/illness/injury/preventative (broad)
- **Family member's** health/illness/injury/preventative (broad)
- Oregon **Domestic Violence**, Harassment, and Stalking law
- **OFLA reasons**, including new child and bereavement
- **Public health** emergencies



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### Oregon "Sick" Leave – The Nitty Gritty

- **Watch detailed requirements, like:**
  - Allowing **1-hour increments**/narrow 4-hour exception
  - Calculating **rate of pay**
  - Not requiring employee to find **replacement worker** or work **alternative shift** as condition of leave
  - Reinstating accrued leave on **re-hire**
  - Handling **leave requests** with compliant **written policy**
  - **Verifying** legally – only upon 4<sup>th</sup> consecutive day, pay costs, etc.
  - **Recordkeeping**, quarterly **notice**, written notice and postings
  - And more!

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### Oregon "Sick" Leave – No Retaliation

- Law prohibits interfering with leave and retaliating or discriminating against person who requests or takes leave
  - Absence control policies
- Train Supervisors and Managers
- BOLI enforcement delayed but lawsuits can be filed



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## Oregon "Sick" Leave – Wrap Up

- Consider the structure and practices YOU want to implement
- Revise written policies
- Watch for BOLI regulations to be finalized in December
- Get in compliance before January



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# BAN THE BOX

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## Ban the Box (State)

- Unlawful to inquire into or consider an applicant's conviction history:
  - On the application form
  - Prior to conducting an interview
  - Prior to making a conditional offer of employment, if no interview is conducted
- This does not apply:
  - Where state or federal law requires such consideration
  - To law enforcement
  - To employers seeking non-employee volunteers

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### Ban the Box (Portland)

- More stringent than state law
- No asking about convictions before a conditional offer of employment
- Then must do the same individualized assessment
- Exceptions for:
  - Services to children, elderly, persons with disabilities, mental illness, or alcohol/drug dependence/abuse disorders
  - Positions with heightened public safety concerns
  - Government program to encourage employment of those with criminal histories

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### Ban the Box – Practice Tips

- Amend application form to exclude any questions regarding criminal history
- Train recruiters and hiring managers not to seek such information prior to interview (state)/conditional job offer (city)



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**SOCIAL MEDIA**

**NON-COMPETES      OFLA**

**WHISTLEBLOWERS**

**DOMESTIC VIOLENCE LEAVE**

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## Social Media

- **Unlawful to:**
  - Require employees or applicants to establish and maintain personal social media accounts
  - Require employees or applicants to authorize the employer to advertise on their personal social media accounts
  - Provide passwords or "friend" a manager (old law)
- **Practice Tips:**
  - Train all personnel who are involved in interviewing and all managers about this new law
  - Add these new rules to your handbook



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## Health Insurance Required While on OFLA

- Amends OFLA to require an employer to continue group health insurance coverage
- Makes the OFLA consistent with FMLA
- **Practice Tip:** Amend OFLA policies to reference this additional requirement and change benefits continuation practices with your payroll or benefits departments



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## Non-Competition Agreements Limited to 18 Months

- Non-competition agreement entered into after January 1, 2016, must be limited to 18 months
- Current law is 24 months (max) and still applies to existing non-competition agreements
- Other requirements for an enforceable non-competition agreement:
  - Executives, administrative, and professionals only
  - Paid over approximately \$70,000 per year
  - Notice 2 weeks in advance of hire or bona fide advancement

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### Wage Whistleblowers Protected

- Unlawful employment action for an employer to discipline, discriminate, or retaliate against an employee who has inquired, discussed, or initiated any action based on the employee's disclosure of wage information
- *Sample Policy: Personnel or personal information is confidential, absent authority to disclose from the employee*
- **Practice Tip:** Amend or eliminate any policy that defines wage information as confidential or prohibits employees from discussing wage information/terms of employment



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### Domestic Violence Leave Changes

- Allow employees who are victims of domestic violence, harassment, sexual assault, or stalking to use accrued sick leave, vacation, or other available time off
- **Practice Tip:** Leave policies should be amended to authorize this use



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## Marijuana – Employer Rights

- Prohibit
  - Possession, use of, or impairment by marijuana
- Test
  - As required (U.S. DOT's regulated drug testing program or other federally required testing)
  - By choice (own program)
- Discipline or Terminate
  - For violation of drug and alcohol policies or a positive test



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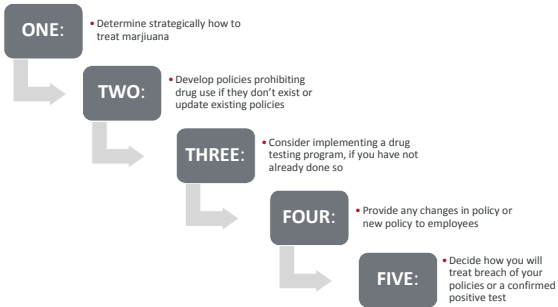
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## Marijuana – Five Steps Employers Should Take



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Questions?



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## About Chrys Martin, Employment Attorney

Chrys Martin focuses her practice on employment law and employee benefits issues. She offers her clients over 34 years of experience in complex employment and ERISA litigation, including class actions. Chrys applies her depth of knowledge in litigation to counseling employers and training management in pragmatic risk avoidance. Her practical approach to difficult employment issues is also grounded in prior hands-on management and human resources experience.



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## About Christie Totten, Employment Attorney

Christie Totten defends employers against claims of retaliation, discrimination, harassment, wrongful termination, and wage and hour violations, including whistleblower claims against executive-level defendants. Christie has helped employers of all sizes obtain dismissals of BOLI and EEOC agency charges and lawsuits. She is experienced in briefing and arguing cases in Oregon's trial and appellate courts, managing and streamlining complex discovery, taking and defending depositions, negotiating favorable settlements, and preparing cases for jury trial.



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## New Year, New Laws: What You Need to Know Going Into 2016

By Chrys Martin and Christie Totten

The Oregon Legislature enacted several laws in 2015 that will significantly affect the workplace. The following laws go into effect Jan. 1, 2016:

### Mandatory Sick Leave

Oregon has enacted a mandatory “sick” leave law, creating protected leave for a wide variety of absences beyond employee illness and preventing retaliation. The law and pending regulations impose detailed requirements regarding accrual, terms of use, absence requests, verification of absences, written notice, and many more. The leave may be unpaid for smaller employers (fewer than ten employees in Oregon, or fewer than six employees in Oregon if the business has a Portland location.). The law applies statewide and preempts similar city ordinances such as those previously adopted in Portland and Eugene. **Practice Tip:** Reevaluate your vacation, sick and PTO policies to determine how best to comply with the new law and revise policies before Jan. 1, 2016.

### Social Media

Oregon law now makes it an unlawful employment practice for an employer to require employees or applicants to establish and maintain personal social media accounts or to require employees or applicants to authorize the employer to advertise on their personal social media accounts. Employers are also prohibited from taking, or threatening to take, adverse action against an employee or applicant who refuses to establish or maintain a personal social media account. **Practice Tip:** Train all personnel who are involved in interviewing and all managers about this new law. Add these new rules to your handbook.

### Ban the Box

It is now unlawful for an employer to inquire into or consider an applicant’s conviction history on the application form or prior to conducting an interview or, if no interview is conducted, prior to making a conditional offer of employment. This law does not apply to certain jobs where state or federal law requires such consideration. It also does not apply to law enforcement agency-employers, to criminal justice system employers, or to employers seeking nonemployee volunteers. **Practice Tip:** Amend application form to exclude any questions regarding criminal history and train recruiters and hiring managers not to seek such information prior to conducting an interview or making a conditional job offer.

### Health Insurance Required While on OFLA

The new law amends the OFLA to require an employer to continue group health insurance coverage for employees on family leave on the same terms as when the employee is not on leave. This amendment makes the OFLA consistent with the FMLA’s requirements for health insurance continuation. **Practice Tip:** Amend OFLA policies to reference this additional requirement and change benefits continuation practices with your payroll or benefits departments.

### Non-Competition Agreements Limited to 18 Months

Under the new law, any noncompetition agreement entered into after Jan.1, 2016, must be limited to 18 months maximum. The current law is 24 months and still applies to existing noncompetition agreements. Oregon law has other very specific requirements that must be met in order for a noncompetition agreement to be enforceable. **Practice Tip:** Employers with form agreements must in the future limit them to 18 months at a maximum, not two years. Such forms should be modified in advance of use.

### Wage Whistleblowers Protected

This new law makes it an unlawful employment action for an employer to discipline, discriminate or retaliate against an employee who has inquired, discussed or initiated any action based on the employee’s disclosure of wage information. **Practice Tip:** Amend or eliminate any policy that defines wage information as confidential or prohibits employees from discussing wage information.

## **Domestic Violence Leave**

Employers must allow employees who are victims of domestic violence, harassment, sexual assault or stalking to use accrued sick leave, vacation or other available paid time off for any purpose authorized by the law. **Practice Tip:** Leave policies should be amended to authorize this use.

## **Public Contracts and Discrimination**

All public contracts must include a provision stating that contractors must comply with prohibitions against discrimination in wage payments and compensation and that contractors may not prohibit employees from discussing wages, salary or other compensation or retaliate against employees who engage in such discussions. The law also places requirements on certain contract bidders to certify compliance and acknowledge that a breach is cause for immediate contract termination.

**Practice Tip:** Amend standard contract proposal forms for public entities to include the required language.

## **Domestic Worker Rights**

This new law sets rules for employers of domestic workers. Domestic workers must be paid 1.5x their base rate for time over 40 hours in a workweek, or over 44 hours if the domestic worker lives with the employer. Domestic workers must be provided with 24 consecutive hours of rest per week, and 8 consecutive hours of rest per day if living with the employer. A live-in domestic worker must be allowed to cook their own food. An employer cannot create an intimidating, hostile, or offensive work environment by harassing the worker and cannot retaliate against workers who assert their rights under the law. **Practice Tip:** Help educate your employees who might have domestic workers about this new law so they aren't inadvertently in violation.

### **FOR MORE INFORMATION**

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