

Charting the Solar System:

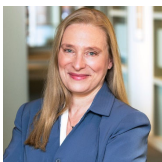
Safely Navigating Through Orbiting Leave Laws

Jennifer Divine and Matthew Tripp

2021 Employment Law Seminar

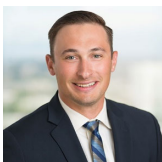


Speaker Introductions



Jennifer Divine

Bar Admission: Washington



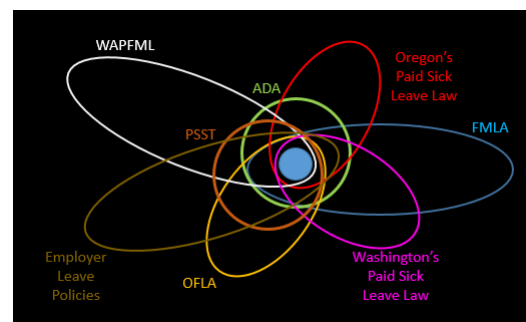
Matthew Tripp

Bar Admission: Oregon

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Overlapping Leave Orbits

- Family and Medical Leave Act (FMLA)
- Oregon Family Leave Act (OFLA)
- Washington Paid Family Medical Leave Act (WAPFML)
- Oregon's Paid Sick Leave Law
- Washington's Paid Sick Leave Law
- Seattle's Paid Sick and Safe Time (PSST) Law
- Americans with Disabilities Act (ADA)
- Employer leave policies



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Space Origin, Inc.



Sarah Steady Goes Missing

January 20, 2021 email from Kelly Cosmos

Hi Matt,

Sarah Steady, an experienced ten-year employee who works as a Portland Call Center Specialist for our private space travel company, did not show up for work. She didn't call in on the 20th, but on the following day, she called her manager to report that she was in a ski accident over the holiday weekend and was hospitalized with a severe concussion and broken arm. Sarah has been completely disoriented for the last few days and just started to come around. She told her manager that her doctor has taken her off of work for couple weeks so that she can recuperate. Please let us know what our legal obligations are regarding this situation. Thank you!

Kelly Cosmos
Human Resources Manager
Space Origin, Inc.

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The Orbit of Leave Laws

Sarah's situation implicates overlapping leave protections:

- Family Medical Leave Act (FMLA) applies if:
 1. the employer has at least 50 employees in the country,
 2. the employee has worked at least 12 months, which need not be consecutive,
 3. the employee has worked at least 1,250 hours in the last 12 months, and
 4. the employee works for employer with at least 50 employees within a 75 mile radius of employee's worksite

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The Orbit of Leave Laws

Sarah's situation implicates overlapping leave protections:

- Oregon Family Leave Act (OFLA) applies if:
 1. the employer has at least 25 employees in Oregon
 2. the employee has worked for a period of 180 calendar days immediately preceding the date on which leave begins, and
 3. the employee has worked an average of 25-hours per week during the 180-day period (unless leave is for care of a newborn child or adoptive child)
- Oregon's Paid Sick Leave Law
 - Applies to all Oregon employers
 - Paid leave for employers with ten or more employees state-wide, or six or more employees in Portland

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A Constellation of Issues

- Proper notice of absence
 - No “magic words” required
 - The employee must simply make the employer aware of the need for qualifying leave, the anticipated timing, and the expected duration of the leave
 - For unforeseeable leave, the employee must provide notice to the employer as soon as practicable

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A Constellation of Issues

- Certification
 - Optional
 - If going to request, generally must do so in writing within five days of leave request
- Designation
 - On receipt of the information requested from the employee, the employer generally has five business days to provide the employee with a notice of eligibility and qualification
- Notice of required release to return to work

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Sarah Steady Returns to Work: Day 21 – July 2021 (Month Six)

- Sarah returns to work with certification that provides for intermittent leave for migraine headaches that she is experiencing because of the concussion
- The migraines come quickly and unexpectedly
- She leaves work in the middle of the day or calls in right before work starts
- Her doctor certifies that she may miss a half-day to a full-day every couple of weeks because of the condition, and that this may last for up to five months

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Sarah Steady Returns to Work: Day 21 – July 2021 (Month Six)

- Sarah is missing an average of one and a half-days per week because of her migraines
- It seems like the half-day always occurs on a Friday and the full day the following Monday
- The attendance records confirm the Friday/Monday absence has been the pattern for all but three weeks during the last five months
- And, once every three weeks, Sarah misses two or three days in a row during a single week

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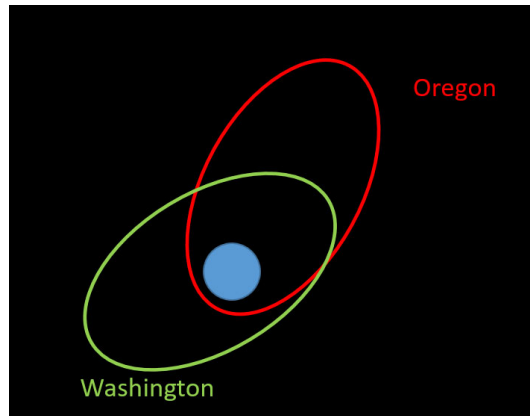
Now What?

- Recertification
 - Generally may not request more often than every 30 days or after expiration of duration of condition, whichever is longer, and then only in connection with the employee's absence
 - Exceptions: (1) circumstances described by the previous medical verification have changed significantly, (2) the employer receives information casting doubt on the employee's stated reason for the absence, or (3) request for extension of the leave
- Second Opinion
 - The provider is designated or approved by the employer, and the cost must be covered by the employer. Even if the second opinion conflicts with the initial certification, the issue will not be resolved. Rather, the employer must pay for yet a third opinion, which is final and binding.

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Oregon

Washington



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Space Origin, Inc. Orbital Path Shift – *WASHINGTON*





Sarah Steady Moves to Washington State

Oct. 1, 2021 email from Kelly Cosmos

Hi Jennifer,

I need your advice on a WA issue. Sarah Steady is working up in Seattle now, and she and her wife are expecting twins in February. Her doctor says there may be complications—Sarah might even need to go on bed rest. Can you help with this? I know about WAPFML, but we haven't had to deal with it yet. Can we set up a call? I have so many questions...

Thanks!

Kelly

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Washington Paid Family Medical Leave Act (WAPFML): Coverage

- Which *employers* are covered?
 - All Washington employers regardless of size
 - Out of state employers with Washington employees
- Which *employees* are covered?
 - Any employee who has worked for any employer in Washington for at least 820 hours during 4-quarter qualifying period
 - No employer-specific tenure requirement

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WAPFML: Notice Obligations

- Employer notices of WAPFML rights
 - Mandatory poster: [WAPFML Employer Roles and Responsibilities](#)
- Written statement of WAPFML rights within five business days of learning of need for leave: [WAPFML Statement of Employee Rights](#)
- Employee notice of need for leave
 - Foreseeable: written notice of need for leave 30 days in advance
 - Unforeseeable: as soon as possible after learning of need for leave

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WAPFML: Permitted Reasons for Leave

- Medical leave benefits for the employee's own serious health condition
 - Includes medical events related to pregnancy or childbirth
- Family leave benefits
 - Bonding leave after the birth, adoption, or foster placement of a child
 - Providing care for a family member with a serious health condition

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WAPFML: Benefits – Amount of Leave

- 12 workweeks
 - Employee's Medical Condition
 - Child Bonding
 - Care of Family Member
 - Military Exigency
- 16 workweeks
 - Employee Medical and Family Leave Combined
- 18 workweeks
 - Serious pregnancy/childbirth complications followed by child bonding

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WAPFML: Benefits – Determined by ESD

- 60-90% of the employee's regular average weekly wage
- Current maximum weekly benefit amount is \$1,206
- 2022: benefits for new leave claims will increase to \$1,327 per week
- Intermittent leave claims—benefits prorated by percentage of hours on leave compared to typical workweek prior to leave

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Space Origin, Inc. WAPFML Orbit Trajectory



Sarah Steady: Leave Planning Questions

Dec. 7, 2021 email from Jennifer's legal assistant

Jennifer, here are the notes from my phone call with Kelly Cosmos this morning:
Sarah's pregnancy has been uncomplicated so far—she may not need bed rest after all.
She wants to take 4 weeks of leave when the twins are born in February and save the rest to use later in the year.
Kelly wants to know how that works with WAPFML benefits—can you call her back today?

K. Clark, Legal Assistant



WAPFML: Leave Coordination

Coordination with other leave—employee given maximum flexibility

- Employee cannot be required to take employer-provided leave concurrently with WAPFML benefits or before using WAPFML leave

Supplemental benefits

- Employers may allow (but not require) employees to use employer-paid leave benefits to supplement or “gross up” WAPFML benefits
- Should be clearly designated as “supplemental benefits”

FMLA leave runs concurrently

- *UNLESS* employee delays filing for WAPFML benefits and uses unpaid FMLA leave first

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WAPFML: Job-Protection Rights

- Small employers (fewer than 50 employees) are not covered
- Larger employers must restore employee’s job after WAPFML leave
 - Previous position or an equivalent position with equivalent pay and benefits
 - Limited exception for certain highly paid employees
- Employee keeps seniority and benefits accrued prior to leave
 - Benefits don’t continue to accrue during leave

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Sarah Steady: Leave Exhaustion Questions

Dec. 1, 2022 email from Kelly Cosmos

Hey Jennifer,

Sorry to bother you, but I have another Sarah Steady situation. Her twins were born in February, and Sarah spread out her family leave over the next 8 months. She's been back to work full-time since October. But now her mother-in-law is sick, and Sarah thinks she should be able to get more leave to help care for her.

That can't be right, can it? 😞

Help!

Kelly

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WAPFML: Family Member Defined Broadly

- Immediate family members
 - Spouse, domestic partner
 - Children: biological, adopted, foster child, stepchild, including *in loco parentis* or *de facto* parental relationships, regardless of age or dependency status
 - Parents: similar broad definition
- Extended family
 - Grandchildren and grandparents
 - Siblings
 - In-laws
 - *De facto* family—nature of relationship creates expectation of providing care

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WAPFML: Other Considerations

- Leave stacking
 - Claim year starts with first WAPFML application and runs for 52 weeks
 - Employee's leave allowance restarts each claim year
- Strong anti-retaliation provisions
 - Employers may not interfere with, restrain, or deny an employee's rights to leave or benefits, or discharge, discriminate or retaliate against an employee for exercising WAPFML rights or filing a complaint
 - Private right of action for lost wages or other damages, attorneys' fees, and potential double damages for willful violations

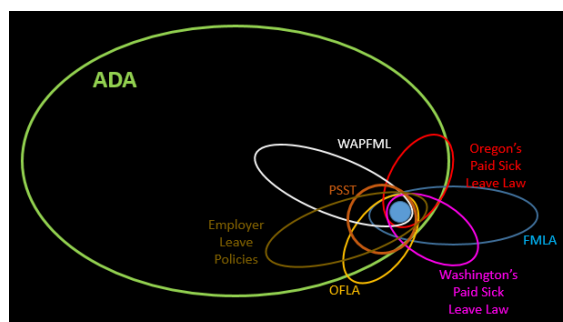
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Americans with Disabilities Act (ADA)

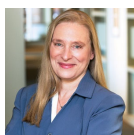
Don't Forget About the ADA

- Leave may not end with FMLA/WAPFML
- Reasonable accommodation for a disability may require additional leave



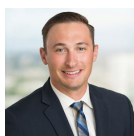
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Thank You!



Jennifer Divine

jennifer.divine@millernash.com
206.777.7447



Matthew Tripp

matthew.tripp@millernash.com
503.205.2437



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