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Final Regulations Clarify Some Provisions of the Oregon Sick Leave Law

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In anticipation of the January 1, 2016, effective date, the Oregon Bureau of Labor and Industries (BOLI) has published administrative rules to implement the Oregon Sick Leave Law. Under the new law, nearly all employers with employees working in Oregon must provide up to 40 hours per year of leave for a variety of uses. Employers with an average of 10 or more workers in Oregon must pay employees for leave at an employee's regular rate of pay. In a nod to the City of Portland, which implemented its own now-preempted sick leave ordinance in 2014,¹ employers that maintain a location in Portland must provide paid leave if they have an average of six or more employees working in Oregon.²

The new rules clarify some issues, but leave a number of key questions unanswered. Below we summarize some of the more significant provisions.

Definition of Family Members Expanded

The new law permits use of sick time to care for and/or help seek diagnosis and treatment (including preventative) of a family member with a mental or physical illness, injury or health condition. In addition, sick leave may be used to deal with the death of a family member. The statute lists spouses, children, parents, grandparents, and grandchildren as covered family members. The regulations provide a definition of spouse, and expand the definitions of child and parent. As a result, the statute and regulations define "family member" broadly as an employee's spouse, same-gender domestic partner, custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent, step-parent, parent-in-law, a parent of an employee's same-gender domestic partner, an employee's grandparent or grandchild, or a person with whom the employee is or was in a relationship of in loco parentis. "Family member" also includes the biological, adopted, foster child or stepchild of an employee or the child of an employee's same-gender domestic partner. An employee's child in any of these categories may be either a minor or an adult at the time qualifying leave pursuant to these rules is taken.

1 The Oregon Sick Leave Law preempts both the City of Portland Ordinance and the Eugene city ordinance.

2 The six-person threshold actually applies to cities in Oregon "with a population exceeding 500,000." However, Portland is the only city that meets this threshold. The next largest, Eugene, has a population of approximately 160,000.

Regular Rate of Pay Further Defined

Employees must be compensated during sick leave at their “regular rate of pay.” For employees with multiple hourly rates and those paid on commission, the regulations lend some clarity. For employees who are paid multiple hourly rates of pay, the regular rate of pay means either:

- The wages the employee would have been paid, if known, for the period of time in which sick time is used; or
- The weighted average of all regular rates of pay during the previous pay period.

Commissioned employees should be compensated for sick leave at the rate of pay agreed upon by the employer and the employee. In the absence of a previously established regular rate of pay, sick time shall be compensated at a rate of no less than the applicable statutory minimum wage.

Consequences for Failure to Provide Notice

The statute allows employers to require advance notice (not to exceed 10 days), using the employer’s usual and customary notice and procedural requirements, for a foreseeable absence, and notice at the start of the shift or (if circumstances prevent such notice) as soon as practicable, for an unforeseeable absence.

An employer may discipline an employee for violating workplace policies and procedures if the employee fails to provide notice as required by these rules or if the employee fails to make a reasonable effort to schedule leave in a manner that does not unduly disrupt the operations of the employer. The employer, however, may not discipline the employee for the use of sick time. Whether the notice was provided “as soon as practicable” depends on all the individual facts and circumstances of the situation. An employer may not, however, deny sick time based on failure to provide notice, unless the employee has been provided a copy of a written policy regarding notice.

Consequences for Failure to Provide Verification

The statute allows employers to require verification with a variety of required return dates depending on the purpose:

- If the need for sick time is foreseeable and projected to last more than three days, an employer may require verification or certification before the sick time commences or as soon as otherwise practicable.
- If prior notice is not provided:
 - Medical certification (for an employee’s or family member’s illness, injury, or health condition or preventative care). An employer may require an employee to provide a medical certification within 15 calendar days of when the employer requests certification if an employee uses sick leave for more than three consecutive scheduled workdays or less than three if the employee is suspected of abusing the benefit.
 - Certification for absence relating to domestic violence, harassment, sexual assault, or stalking. An employee must provide certification within a reasonable time after receiving the covered employer’s request for the certification if an employee uses sick leave for more than three consecutive scheduled workdays.

Under the rules, employers are not required to pay sick time until the employee has provided such documentation or verification. Additionally, the employer may discipline the employee for violating policy and procedures but not for using sick time. However, if an employer chooses to require written documentation or verification of the use of sick time, the employer must include such a requirement as well as the consequences for delay or failure to comply, in its written sick time policies. Employers should note that an employer must pay any reasonable cost for the certification, including lost wages, that are not covered by a health benefit plan.

Conversion from Accrual to Frontloading

The statute and rules allow an employer to frontload 40 hours of sick leave at the beginning of each year. This eliminates the need to track accrual (although use must still be tracked to meet the quarterly reporting requirement). If an employer converts from accruing sick leave on

an hours-worked system to a frontloading system, and the employee has accrued less than 40 hours of sick leave as of the date of the change (or less than 56 hours, if the employer requires sick time to be taken in minimum increments of more than one hour under the undue hardship exception), the employer must frontload the sum of: (a) the amount of hours the employee has accrued under the employee's accrual system; and (b) the difference between 40 hours (or 56 hours) and that amount of accrued hours. In other words, during the transition from accrual based on hours worked to frontloading, an employer must frontload at least 40 hours (or 56 hours).

If an employee has accrued more than 40 hours of sick leave as of the date that an employer converts from an accrual-based system to a frontloading system, the employer may not frontload an amount of hours that is less than the amount of hours the employee has already accrued.

Exemption for Certain Employees Covered by Collective Bargaining Agreements

The rules require most union employees to accrue sick leave at the statutory rate regardless of the terms of their collective bargaining agreement. The exception to this applies to employees who meet **all** of the following requirements:

1. Employees whose terms and conditions of employment are covered by a collective bargaining agreement; and
2. Who are employed through a hiring hall or similar referral system operated by the labor organization or third party; and
3. Whose employment-related benefits are provided by a joint multi-employer-employee trust or benefit plan.

The regulations state that the existence of a collective bargaining agreement alone is not sufficient to meet the requirements of this limited exemption.

Application of Sick Time Provisions to New Businesses

The rules explain how a new business will determine the number of employees for purposes of determining whether sick leave will be paid or unpaid.

An employer that has been in business for less than 20 weeks must calculate the number of employees employed after it has employed one or more employees for 90 calendar days. If it meets the "threshold" requirement, i.e., it employs 10 or more employees in Oregon or at least six employees in Oregon if operating in Portland, it must pay for sick time accrued and used by an employee unless it has a good-faith belief it will not meet the "average" requirement, in which case the employer is not required to pay for sick time accrued and used.

After 20 workweeks of operation, the employer must calculate the number of employees employed. If it meets the "threshold" requirement, employees must be paid for sick leave accrued and taken thereafter unless the employer ceases to meet the "average" requirement in any year preceding the use of accrued sick leave by any employee. However, if the employer meets the "threshold" and "average" requirements, it must pay any employee not paid for sick time accrued and taken during those 20 workweeks.

Sick Leave and PTO Policies that are Substantially Equivalent

Perhaps the most misunderstood provision of the statute is Section 4, which states an employer's sick leave policy that is "substantially equivalent" or more generous to the employee than the minimum requirements of the statute is deemed to be in compliance. Many employers were hoping that this provision would allow them to avoid the quarterly tracking and reporting requirement, but the rules make it clear that is not the case. The rules clarify that a substantially equivalent policy must provide for at least the same number of sick time hours an employee would earn under the statute, **and** comply with **all other minimum requirements** listed in the statute. "These requirements include but are not limited to provisions related to when employees can use sick time; the rate of accrual; the regular rate of pay; qualifying absences; conditions of notice and documentation; and employment protections."

Employer Notice to Employees

Employers must provide written notice of the new law to all of their employees no later than the end of the first pay period after January 1, 2016, or, for employees hired after January 1, the end of the first pay period for those employees.

Other Relevant Provisions

Some of the other provisions clarified by the rules include:

- **Shifts of indeterminate length.** If an employee uses sick time for a shift of indeterminate length (for example, a shift that is defined by business needs rather than a specified number of hours), the employer may determine the amount of sick time used by the employee based on the number of hours worked by a replacement employee in the same shift or a similarly situated employee who works the same shift or who has worked a similar shift in the past.
- **On-call shifts.** On-call employees are entitled to use sick time for hours they have been scheduled to work.³
- **Employees with both unpaid and paid sick time.** The employee is entitled to use sick time in the manner it was earned. If the employer was required to provide paid leave at the time the sick leave was accrued, the employer must pay the employee upon use of that sick leave regardless of whether the employer is currently required to provide paid leave.
- **Determining accrual for employees whose hours are not tracked.** The employer may establish a reasonable method of calculating the number of hours worked by the employee (see rules for specific examples).
- **Exclusions from regular rate of pay.** The regular rate of pay does not include:
 - Overtime, holiday pay, or other premium rates. However, where an employee's regular rate of pay includes a differential meant to compensate the employee for work performed under differing conditions (for example, a shift differential for working at night), such a differential rate is not considered to be a premium;
 - Bonuses or other types of incentive pay; and
 - Tips.

Employer Considerations

Employers should consider the following:

- Review and revise, if necessary, sick leave and/or paid time off (PTO) policies and procedures to ensure they meet the law's requirements. Additionally, ensure that employees are notified in writing, at least quarterly, about accrued but unused sick time. This requirement can be met by reporting the available sick leave on employees' paystubs.
- Ensure timekeeping, payroll, and benefits systems properly calculate, track, and detail accrued and used sick time.
- Place required posters in work locations accessible to employees, and provide employees with the required notice of the new law (both the poster and a notice template are available on BOLI's website). Employers that want to develop their own notice should consult with knowledgeable employment counsel to ensure the notice satisfies all ordinance requirements.

³ Being "scheduled to work" does not include shifts for which an employee has been asked to be available or on-call, unless the employee is working while on-call.