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Tacoma is the Third Washington City to Mandate Paid Leave

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Earlier this year, the City Council of Tacoma, Washington approved a Paid Leave Ordinance (“Ordinance”).¹ Starting February 1, 2016, nearly all private sector employers must provide employees who work in Tacoma specified amounts of accrued, job-protected paid leave for personal illness, family care, domestic violence, and bereavement. Tacoma is now the third city in Washington State, joining Seattle and SeaTac, to require that employers provide a paid leave benefit.²

Which Employers and Employees are Covered? Every private sector employer that employs at least one employee is covered by the law.³ All employees who work within the geographic boundaries of Tacoma are covered, including temporary and part-time employees.⁴ Employees who work in Tacoma only occasionally are covered by the Ordinance if they perform more than 80 hours of work in Tacoma in a calendar year.⁵ Employees supplied by an employment or staffing agency are treated as employees of the agency absent a contractual agreement providing otherwise.⁶ The Ordinance excludes from the definition of “employee” persons performing services under a work study agreement or as independent contractors.⁷

What Amounts of Paid Leave Must Employers Provide? Under the Ordinance, all employees, including full-time, part-time and temporary employees, accrue one hour of paid leave for every 40 hours worked within Tacoma (up to 24 hours within a calendar year) and may use up to 40 hours of paid leave in any calendar year.⁸ Overtime-exempt employees need not accrue paid leave for hours worked beyond 40 in a workweek, and if an exempt employee’s normal workweek is fewer

1 ORDINANCE NO. 28275; Chapter 18.10, Tacoma Municipal Code (“TMC”).

2 See Daniel Thieme and Pamela Salgado, *Seattle Paid Sick Time and Paid Safe Time Ordinance Adopted*, Littler Insight (Oct. 3, 2011); Pamela Salgado and Kellie Tabor, *\$15.00 Minimum Wage and Mandatory Paid Sick and Safe Leave for Transportation and Hospitality Workers Take Effect in City of SeaTac*, Littler Insight (Jan. 10, 2014).

3 TMC 18.10.010K. The Ordinance defines the term “employer” broadly as any person with one or more employees, excluding the federal, state, and local government and single-person businesses. TMC 18.10.010K.

4 TMC 18.10.010J.

5 TMC 18.10.010J. The Ordinance defines a “calendar year” to allow employers to select the 12-month period beginning on January 1, the 12-month period beginning on the date of hire, or the fiscal year. TMC 18.10.010C.

6 TMC 18.10.010J.

7 TMC 18.10.010J.

8 TMC 18.10.010A; TMC 18.10.030A.

than 40 hours, paid leave may be accrued based on the employee's normal workweek.⁹ Paid leave must begin to accrue at the commencement of employment, or on the date the Ordinance goes into effect, whichever is later.

Must Employers Permit Employees to Carry Over Unused Leave Into the Following Calendar Year? Employees may carry over up to 24 hours of unused paid leave into the following calendar year.¹⁰

What Amounts of Paid Leave May Employees Use? Employees are entitled to use up to 24 hours of accrued paid leave in any calendar year.¹¹ Employees who have carried over paid leave from a prior year may use a total of 40 hours of paid leave in the calendar year.¹²

For What Purposes May the Paid Leave Be Used? A single bank of paid leave must be made available for the following uses:

- The Employee's Own Illness or Medical Care. An employee is entitled to paid leave for an absence resulting from an employee's mental or physical illness, injury, or health condition; for medical diagnosis, care or treatment; or for preventive medical care.¹³ There is no requirement that the absence involve a "serious health condition" as is required for coverage under the federal Family and Medical Leave Act (FMLA).
- Family Care. An employee is entitled to paid leave to care for a family member who has any of those same medical conditions.¹⁴ There is no requirement that a "serious health condition" be involved, or that the employee's presence be necessary. Covered family members include a child, spouse, registered domestic partner,¹⁵ parent, and grandparent.
- Business Closure. An employee is entitled to paid leave when the employee's place of business has been closed by order of a public official because of an infectious agent, biological toxin or hazardous material.¹⁶
- School Closure. An employee is entitled to paid leave to care for a child whose school or place of care has been closed by order of a public official.¹⁷ There is no specific exclusion for weather-related closures.
- Domestic Violence. An employee is entitled to paid leave attributable to domestic violence, sexual assault or stalking for which unpaid leave must be granted pursuant to the Washington Domestic Violence Leave Law (RCW Chapter 49.76) to seek or obtain, for the employee or the employee's family member, legal or law enforcement assistance, social services, safety planning, relocation, or other actions to increase safety.¹⁸
- Bereavement. An employee is entitled to paid leave for bereavement related to the death of a child, grandparent, parent, or spouse.¹⁹

May Employers Specify Minimum Increments for Use of Paid Leave? Employers may require a minimum use of accrued paid leave, subject to the federal Fair Labor Standards Act (FLSA).²⁰ If an employer does not establish a minimum use policy for employees who are non-exempt under

9 TMC 18.10.020C.

10 TMC 18.10.030B.

11 TMC 18.10.030B.

12 TMC 18.10.030B.

13 TMC 18.10.030C1.

14 TMC 18.10.030C2.

15 The Tacoma Ordinance is not limited to domestic partnerships registered with the State of Washington and instead encompasses domestic partnerships registered under the City of Seattle Registration of Domestic Partnerships ordinance. Unlike domestic partner registration under Washington State law, Seattle domestic partnership is available to heterosexual couples under the age of 62. Also, individuals may more readily enter and leave Seattle domestic partnerships. Unlike domestic partnership under state law, Seattle domestic partnership status can be dissolved by a simple filing with the City. The City of Seattle's Domestic Partnership Registration Program is summarized at <http://www.seattle.gov/cityclerk/services-and-programs/domestic-partners...>

16 TMC 18.10.030C3.

17 TMC 18.10.030C4.

18 TMC 18.10.030C5-7. While, unlike the Seattle ordinance, the Tacoma Ordinance does not specifically allow employees to access paid leave to seek treatment of injuries caused by domestic violence, sexual assault, or stalking or attend to such treatment for a victim who is the employee's family member (RCW 49.76.030(2)) or to obtain, or assist a family member in obtaining, mental health counseling related to an incident of domestic violence, sexual assault, or stalking in which the employee or the employee's family member was the victim (RCW 49.76.030(4)), such uses would likely fall within an employee's ability to take paid leave for the employee's own illness (TMC 18.10.030C1) or to care for a family member with an illness (TMC 18.10.030C2).

19 TMC 18.10.030C8; TMC 18.10.010M.

20 TMC 18.10.030E.

the FLSA, employees may use accrued time in hourly increments. For employees who are exempt under the FLSA, the employer may deduct paid leave in accordance with the FLSA.²¹

How May Shift Substitutions Be Handled? The employer and employee may mutually agree to the employee working additional hours or shifts within the same or the next pay period in lieu of the employee using available paid leave to cover the missed hours or shifts.²² The employer may not require such a shift substitution, however, and must still comply with applicable laws concerning overtime pay.²³ The Ordinance does not limit an employer's ability to permit employees to voluntarily exchange assigned hours or "trade shifts" or to donate unused paid leave to another employee.²⁴ In eating and drinking establishments only, if the employer offers, and the employee accepts, substitute hours or shifts, the employer may, at its discretion, deduct from the employee's accrued paid leave the smaller of the amount of paid leave that was requested or the amount of time worked during the substitute period.²⁵ The employer is not required to offer such substitute hours or shifts, and the employee is not required to accept such an offer.²⁶

What Pay Rate Applies When Employees Use Paid Leave? Employees using paid leave must be compensated at the same hourly rate and with the same benefits, including health care benefits,²⁷ as the employee would have earned during the time the paid leave is used.²⁸ "Paid leave" does not include compensation for lost tips or commissions, and compensation is required only for hours that an employee was scheduled to have worked.

When May Employees Begin Using Paid Leave? An employee may begin using accrued paid leave beginning on the employee's 180th calendar day of employment.²⁹ Employees who have been employed for at least 180 calendar days as of the effective date of the Ordinance will be eligible to begin accruing and using paid leave upon the Ordinance's effective date.

What Advance Notice Must an Employee Provide When Using Paid Leave? Tacoma paid leave "shall be provided upon the request of an employee, and the request shall include the expected duration of the absence when possible."³⁰ Employees may be required to comply with the employer's usual and customary notice and procedural requirements for absences and/or leave requests, provided they do not conflict with the purposes for which the leave is needed. When the leave is foreseeable, a written request must be provided at least 10 days in advance, or as early as possible, unless the employer's policy requires less advance notice.³¹ The employee must also make reasonable efforts to schedule the foreseeable time off so as not to unduly disrupt the employer's operations.³² When the need for paid leave is unforeseeable, the employee should request paid leave as soon as practical and must generally comply with the employer's established notification or call-in policies and procedures.³³

Must Employers Cash Out Unused Paid Leave Upon Separation of Employment? The Ordinance does not require employers to cash out unused paid leave upon separation from employment.³⁴

21 Employers should also be aware that Washington Department of Labor & Industries has issued guidance that employers may not dock exempt employees' leave banks for absences of less than an hour without jeopardizing the salary basis test required for white collar exemptions.

22 TMC 18.10.030G.

23 TMC 18.10.030G.

24 TMC 18.10.030H, J.

25 TMC 18.10.030H. For example, assume a restaurant employee who was scheduled to work a five-hour shift on Thursday morning requested to miss the shift and take five hours of paid leave under the Ordinance for the missed shift. If the employer offered, and the employee accepted, a substitute shift of four hours on Friday evening, the employer could, at its discretion, deduct four hours (the number of hours worked during the substitute shift, which is smaller than the amount of leave the employee requested for the missed shift) from the employee's paid leave bank. If the employee did not work at an "eating and/or drinking establishment," as defined by the Ordinance, or if the employer did not offer (or the employee did not accept) a substitute shift, the employer could deduct five hours (the amount of paid leave requested) from the employee's paid leave bank.

26 TMC 18.10.030H.

27 The requirement to continue health care benefits is likely preempted by ERISA.

28 TMC 18.10.010O.

29 TMC 18.10.030A. It appears that an employee's total period of employment, both inside and outside of Tacoma, is counted for this purpose.

30 TMC 18.10.030D.

31 TMC 18.10.030D1.

32 TMC 18.10.030F.

33 TMC 18.10.030D2.

34 TMC 18.10.030L.

What if an Employee Is Rehired? If an employee is rehired³⁵ within six months and within the same calendar year as the separation, previously accrued paid leave that had not been used must be reinstated. If at the time of the separation the employee was eligible to use paid leave (i.e., the employee had been employed by the employer for at least 180 calendar days), the employee upon rehire will be immediately eligible to use the reinstated paid leave. If the employment separation lasts more than six months, or if the restatement occurs within six months but not within the same calendar year, the employer is not required to reinstate the employee's paid leave, and the rehired employee is considered to have newly commenced employment for purposes of the Ordinance.³⁶

May an Employer Use an Existing PTO Program to Comply? An employer with a combined or universal paid leave policy, such as PTO, or a "premium pay program," may use such policy to comply with the Ordinance³⁷ so long as the policy qualifies as a "premium pay program" (providing employees extra pay in lieu of benefits) and has been approved by the Finance Director of the City of Tacoma or satisfies the following requirements:

- The policy permits employees to use paid leave for the purposes and under the same conditions specified in the Ordinance;
- Employees accrue at least one hour of paid leave for every 40 hours worked;³⁸ and
- Employees are permitted to use at least 24 hours of paid leave per calendar year.³⁹

Further, although not expressly addressed by the Ordinance, it is reasonable to assume an existing vacation policy or sick leave policy may be similarly modified to comply with the new law.

May Employers Provide More Generous Paid Leave Programs? The Ordinance specifies only the minimum requirements for a paid leave program applicable to employees working in Tacoma and does not prohibit employers from adopting or retaining a more generous paid leave program.⁴⁰

Can Employers Frontload Paid Leave? The Ordinance permits, but does not require, employers to "loan" employees paid leave in advance of accrual. Advancing paid leave is subject to the terms and conditions established by the employer, which must address what happens in the event an employee separates from employment prior to accruing paid leave equivalent to the amount of advanced paid leave used by the employee.⁴¹ The Ordinance does not address whether loaning is equivalent to frontloading or whether employers may frontload in lieu of accrual and carryover.⁴²

What Notice Must Employers Provide Employees Under the Ordinance? The Ordinance requires Employers to provide their employees with notice of their rights under the new law. This notice may be provided by displaying a poster that will be developed by the Finance Director of the City of Tacoma, by including the notice in an employee handbook or other written guidance to employees regarding employee benefits or leave rights, or by distributing a copy of the notice to new employees upon hiring. Employers may also distribute the notice electronically.⁴³ Employers must provide a written statement of paid leave available to each employee each time wages are paid. This information may be provided using any reasonable system, including electronically, but many employers will find it administratively desirable to include this information on employee paystubs.⁴⁴

Can Employees Waive Their Rights Under the Ordinance? The requirements of the law may be waived in a collective bargaining agreement, provided the waiver is express, clear and unambiguous.⁴⁵ Any other waiver of rights under the law is likely void.

35 This provision of the Ordinance would apply to an employee rehired to work for the same employer but at a different business location.

36 TMC 18.10.020F.

37 TMC 18.10.020E.

38 The Ordinance does not address whether a combined or universal paid leave policy may frontload paid leave.

39 The Ordinance does specify whether a combined or universal paid leave policy must permit employees who have carried over paid leave from a prior year to use a total of 40 hours of paid leave in the calendar year.

40 TMC 18.10.020B.

41 TMC 18.10.0210G.

42 In most jurisdictions, employers that frontload paid leave do not have to comply with accrual and carryover provisions.

43 TMC 18.10.050.

44 TMC 18.10.030K.

45 TMC 18.10.090.

How Must Employers Certify and Document Compliance? The City of Tacoma will require businesses to certify on their business license applications and annual renewals that they have a paid leave policy that complies with the Paid Leave Ordinance.⁴⁶ Employers must also retain paid leave records⁴⁷ for a period of three years, and such records will be subject to inspection by the Finance Director of the City of Tacoma upon at least five business days' notice. Employers must also make copies of such records available to employees upon request within a reasonable period of time. Where such records relate to medical information of employees or their family members, such records must be maintained separately from employee personnel files.

How Will the Ordinance Be Enforced? Complaints of alleged violations of the Ordinance may be made by submitting a written charge to the City of Tacoma. The Finance Director of the City of Tacoma may also file a charge alleging violation of the Ordinance.⁴⁸ To resolve any such complaints, the City of Tacoma will first attempt conciliation between the employer and employee.⁴⁹ If conciliation efforts fail, within 60 of days⁵⁰ of receipt of the charge, the City of Tacoma will issue either a Determination of Compliance or a Notice of Assessment and Citation. Employers that violate the Paid Leave Ordinance may be ordered to credit paid leave to the aggrieved employee, make a payment of paid leave to the aggrieved employee,⁵¹ and/or pay a civil penalty in the amount of \$250. The civil penalty may be waived if the employer comes into compliance within 10 calendar days of the notice or demonstrates that its failure to comply with the Ordinance was due to reasonable cause and not willful neglect.⁵² If the citation and notice of assessment resulted from the employer's willful violation of the Ordinance, the Director may issue a civil penalty of \$250 or twice the total value of unpaid leave the employer failed to credit or pay to the employee, whichever is greater.⁵³ Such civil penalty may be waived if the employer has not previously been found to be in willful violation of the Ordinance and provides payment or credit, as applicable, to the employee within 10 business days of receipt of the Citation and Notice of Assessment.⁵⁴ The Ordinance does not create a private cause of action for employees to file suit against an employer.⁵⁵ An aggrieved party may request that the City of Tacoma conduct an administrative review of a Determination of Compliance or a Notice of Assessment and Citation, and the administrative review decision may thereafter be appealed to the Hearings Examiner for the City of Tacoma.⁵⁶

Are Employees Protected Against Retaliation? It is a violation of the Ordinance for any person to interfere with any attempt to exercise a right under the Ordinance, or for an employer to take adverse action against an employee because the employee has in good faith, mistakenly or not, exercised rights protected by or alleged violations of the Ordinance.⁵⁷

What's Next? The City of Tacoma has issued draft rules and a notice to employers and employees for public review and comment and is conducting public meetings during the spring and summer of 2015 as part of an outreach and education campaign expected to extend through the fall of 2015. Final rules are expected prior to the Ordinance's February 1, 2016, effective date.

What are the Key Differences Between the Seattle Paid Sick and Safe Time Ordinance⁵⁸ and the Tacoma Paid Leave Ordinance? Although the Tacoma Ordinance was modeled after the Seattle Ordinance, there are key differences between the ordinances, and additional distinctions may emerge once the City of Tacoma completes the rulemaking process.

46 TMC 18.10.060.

47 Such records must document hours worked by employees in the City of Tacoma, accrued paid leave, and used paid leave. TMC 18.10.060B.

48 TMC 18.10.070.

49 TMC 18.10.070.

50 The Director may extend the response date by providing written notice to the parties of the extension. TMC 18.10.070C1.

51 The assessment of paid leave to be paid to the aggrieved employee may not include any amounts owed more than three years before the filing date of the charge but shall include interest assessed at 1% per month. TMC 18.10.070C3.

52 TMC 18.10.070C4.

53 TMC 18.10.070C4.

54 TMC 18.10.070C4.

55 TMC 18.10.070C6.

56 TMC 18.10.070D.

57 TMC 18.10.040.

58 Chapter 14.16, Seattle Municipal Code.

Topic	Tacoma Ordinance	Seattle Ordinance
Accrual Rates	The accrual rate is uniform for all employers regardless of employer size. ⁵⁹	The accrual rate varies depending upon employer tier size. ⁶⁰
Accrual Caps	Accrual is capped at 24 hours per calendar year. ⁶¹	There is no cap on accrual. ⁶²
Usage Caps	Employers may impose usage caps depending upon whether an employee has carried over unused paid leave from a prior year (usage may be capped at 40 hours in a calendar year) or not (usage may be capped at 24 hours in a calendar year). ⁶³	Employers may impose usage caps depending upon employer tier size. ⁶⁴ An employee's carryover of paid time from a prior year does not affect the employer's ability to cap usage.
"Calendar Year"	Employers may define the "calendar year" to use for purposes of complying with the Ordinance. "Calendar year" means the 12-month period beginning January 1; the 12-month period beginning on the date of hire; or the fiscal year, as elected by the employer. ⁶⁵	"Calendar year" means the period of a year beginning January 1 and ending December 31 and is not interchangeable with a fiscal year or rolling year that is different than this definition. ⁶⁶
Occasional Work Within City	An employee who performs work in Tacoma on an "occasional basis" ⁶⁷ is covered only if the employee performs more than 80 hours of work in Tacoma in a calendar year. ⁶⁸	An employee who is based outside of Seattle and performs work in Seattle on an "occasional" basis is covered only if the employee performs more than 240 hours of work in Seattle within a calendar year. ⁶⁹
Rehiring	Previously accrued, unused paid leave must be reinstated for an employee who is rehired within six months and within the same "calendar year." ⁷⁰	Previously accrued, unused paid time must be reinstated for an employee who is rehired within seven months. ⁷¹

59 TMC 18.10.020A.

60 SMC 14.16.020B.

61 TMC 18.10.020A.

62 Frequently Asked Questions: City of Seattle Paid Sick Time and Safe Time Ordinance, No. 6.

63 TMC 18.10.030B.

64 SMC 14.16.020C.

65 TMC 18.10.010C.

66 SHRR 70-010(3).

67 The Ordinance does not define "occasional basis." If the Ordinance were interpreted to follow the Seattle Sick and Safe Time Ordinance, an "occasional basis" employee would mean an employee based outside of Tacoma.

68 TMC 18.10.010J.

69 SMC 14.16.010.

70 TMC 18.10.020F.

71 SMC 14.16.020L.

Topic	Tacoma Ordinance	Seattle Ordinance
Weather-Related Closures	There is no exclusion for weather-related closures of a child’s school or place of care. ⁷²	Employees are not entitled to use paid safe time for closure of an employee’s place of business or a child’s school or place of care due to inclement weather. ⁷³
Bereavement	Paid leave may be used for bereavement. ⁷⁴	Bereavement is not recognized as a permissible use of paid time.
Premium	Employers may comply with the Ordinance by offering a “premium pay program” to provide extra pay in lieu of paid leave if the Finance Director of the City of Tacoma has approved the program. ⁷⁵	There is no alternative to providing paid sick and safe time.

72 TMC 18.10.030C4

73 SHRR 70-210(2).

74 TMC 18.10.030C8.

75 TMC 10.10.020E.