

Insight

IN-DEPTH DISCUSSION

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City of Tacoma Issues Rules Interpreting Paid Leave Ordinance

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On August 5, 2015, the City of Tacoma, Washington published its final Paid Leave Rules ("Rules") implementing Tacoma's Paid Leave Ordinance ("Ordinance").¹ The Ordinance requires nearly all private sector employers to provide employees who work in Tacoma specified amounts of accrued, job-protected paid leave for personal illness, family care, domestic violence and bereavement starting February 1, 2016.²

Which Employers and Employees are Covered?

The Ordinance applies to all employees who work within the geographical boundaries of the City of Tacoma for more than 80 hours in a calendar year.³ Rule 1.1. If there is a reasonable expectation that an employee will work 80 hours in Tacoma in a calendar year, the employee is immediately covered by the Ordinance even prior to reaching the 80-hour threshold. Rule 1.3. Once an employee is covered by the Ordinance, the employer must provide the amount of paid leave to which the employee would be entitled if the employee had been eligible throughout the calendar year. Rule 1.3. A covered employee remains covered through the next calendar year even if the employee does not meet the 80-hour threshold. Rule 1.2.

How is a "Calendar Year" Defined?

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. Employers must declare and consistently use one defined "calendar year" for all employees and may not change the selected "calendar year" to avoid employees' accrual or use of paid leave. Rule 2.7.

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

2 For additional information about the Ordinance, see Pamela Salgado and Deidra Nguyen, *Tacoma is the Third Washington City to Mandate Paid Leave*, Littler Insight (May 29, 2015).

3 "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. TMC 18.10.010C.

Does the Ordinance Apply to Telecommuting?

An employee who telecommutes is covered for hours of work performed while the employee is physically located in Tacoma, even if the employer is located outside the city. Rule 1.5. Conversely, employees who telecommute and perform work outside the city for an employer located within Tacoma are not covered. Rule 1.6.

Can Employers Frontload Paid Leave?

Neither the Ordinance nor the Rules address whether employers may frontload paid leave in lieu of accrual and carryover. The City of Tacoma's "FAQs for Employers" webpage states that frontloading paid leave does not relieve an employer of the Ordinance's carry over requirements: "Employers who front load hours are still subject to the carry over provision in the Ordinance and must allow carryover of up to 24 hours of Paid Leave at the end of each year."⁴

Does the Ordinance Apply to Traveling in Tacoma?

Traveling through the city or making only incidental stops within city limits is not covered. Rule 1.7. An employee who travels to the city and makes a work-related stop within the city limits (e.g., a pickup or delivery) is covered for all hours worked within the city, including all hours spent traveling within city limits when the travel would typically occur during paid work time. Rule 1.8.

Does the Ordinance Apply to Time Spent at a Conference or Training in the City?

An employee who is within the city limits solely to attend a convention, conference, training, educational class or the like is not covered by the Ordinance. 1.10.⁵

May Employers Estimate Hours Worked Within the City?

Employers may rely upon reasonable estimates of employees' time spent working in the city for determining paid leave accrual and use. Rule 1.9. Such estimates may rely upon dispatch logs, employee logs, delivery addresses and estimated travel times, or historical averages.

May Employers Require Employees to Provide Documentation When Using Paid Leave?

Employers may require written documentation or other verification to support the use of paid leave provided they have a written policy on the subject that is readily available to all employees. Rule 2.2. The policy must clearly describe the forms or types of documentation that the employer may require and the circumstances in which each form or type of documentation may be required; the timeframe in which the employee is required to submit such documentation or verification; and any consequences resulting from an employee's failure or delay in providing the requisite written documentation or other verification. The policy must accept verification in the form of a personal statement signed by the employee affirming that he or she is using paid leave for a qualifying absence. The personal statement must be legible and state the requesting employee's identity, the general purpose for which paid leave is being used, the date(s) and time(s) of the paid leave being taken, and, if applicable, the employee's relationship to the family member for whom the employee is taking paid leave. The personal statement need not be notarized or in the form of an affidavit, and the documentation need not disclose private health information such as the nature of the illness necessitating leave from work.⁶ If an employer has requested written documentation of an employee's use of paid leave consistent with the Ordinance, the employer is not obligated to pay the paid leave until the employee has provided written documentation or other verification that the absence was for a qualifying reason. Rule 13.1.

4 FAQ No. 8. See also FAQ No. 21 (Q: "I 'front load' and provide 40 hours of Paid Leave to each of my employees at the beginning of each year. Do I have to allow employees to carry over hours that they do not use into the next year?"). A: "Yes, the Ordinance requires employers to allow employees to carry over up to 24 hours of unused Paid Leave into the new benefit year."

5 Time spent attending a convention, conference, training, or educational class may constitute compensable hours worked, however.

6 If an employee does provide an employer with private health information, the employer must take care to treat such information in a confidential manner consistent with medical privacy laws. Rule 2.3. Employers must also treat as confidential information related to domestic violence, harassment, sexual assault, stalking or other safety-related issues. Rule 2.4.

May Employers Discipline or Deny Leave for Employees Who Abuse Paid Leave?

Employers may discipline or take other reasonable action when an employee's use of paid leave is not in good faith, such as when there is a clear instance or pattern of abuse; however, employers may not deduct from an employee's legitimately earned or donated paid leave hours. Rule 2.6.

May Employees Donate Paid Leave to One Another?

Permitting employees to donate paid leave to one another is permissible, not mandatory, and the policy permitting paid leave donation should be in writing. Rule 4.1. An employer who permits donation of leave may count donated leave towards the 40-hour maximum but the employer is not required to do so. Rule 4.2.

What is the Process for Requesting Approval of a "Premium Pay" Program to Comply with the Ordinance?

Employers who wish to use a Premium Pay Program to comply with paid leave requirements must submit an outline of their proposed program at least 90 days before the program is intended to take effect and may do so online. Rule 5.2. The outline submitted must demonstrate that the proposed program meets or exceeds the minimum requirements of the Ordinance. Rule 5.2. The Finance Director of the City of Tacoma ("Director") may request additional information or documentation as needed to make a determination of compliance. Rule 5.2. The Director will issue a written determination regarding the Premium Pay Program within 60 days of receiving the request for review. The determination will state whether the proposed Premium Pay Program is approved and, if it is not, the specific reasons why. Rule 5.3. An employer whose Premium Pay Program is rejected may seek review through the administrative review process. Rule 5.5.

What Must Be Included in a "Premium Pay" Program?

To comply with the Ordinance, a Premium Pay Program must meet or exceed the value of the Paid Leave benefit outlined in the Ordinance; provide for premium pay that is readily available for expenditure,⁷ similar to wages; and either frontload premium pay or provide it at reasonable intervals of not less than once per month. Premium pay may not take the form of goods or services. Rule 5.6. An employer's outline of a proposed Premium Pay Program must demonstrate that it meets or exceeds the minimum requirements of the Ordinance and address the following subjects: (a) the determination of base pay; (b) the calculation of premium pay; (c) whether any other forms of compensation/benefits will be or have recently been changed; (d) the frequency and method for making payments of premium pay to employees; (e) information regarding which employees would receive premium pay under the program (e.g., employees who opt in, all employees, employees working in designated roles); (f) the specific types of records that the employer will maintain to document the premium pay; (g) if the employer is proposing to transition from a paid leave accrual program to a Premium Pay Program, how the employer will address accrued but unused Paid Leave hours; and (h) the anticipated program start date. Rule 5.2.

What Rules Apply to Employers Using an Approved "Premium Pay" Program?

An employer whose Premium Pay Program is approved must document the policy in a written policy made readily available to employees and must maintain documentation of the premium pay provided and other information for a minimum of three years. Rules 5.7, 5.8.⁸ Employers using an approved Premium Pay Program must still comply with other Ordinance requirements, including notice and posting requirements. Rule 5.9.⁹

What Recordkeeping Requirements does the Ordinance Impose?

Employers must maintain records for a minimum of three years documenting the number of hours worked in Tacoma; the amount of paid leave each employee accrued and used; the name and hire date of each employee; the date each employee became eligible to use paid leave; and the dates and times each employee used paid leave. Rule 6.1, 6.2. Employers using a Universal Paid Time Off Program to comply with the

⁷ Premium pay may not be placed in a restricted account, such as a retirement or flexible spending account, unless mutually agreed upon by the employee and employer. Rule 5.6

⁸ Employers must allow the Director access to their Premium Pay Program records. Rule 5.7.

⁹ Although not explicit in the Ordinance, the City's "FAQs for Employers" webpage states that employers "can design [their] Premium Pay to apply only to shifts worked in Tacoma."

Ordinance must track the amount of leave employees accrue and use but need not track the specific reasons for which employees used paid leave. Rule 6.3.

How Must Employers That Do Not Engage in Business in Tacoma Certify Compliance with the Ordinance?

Employers that do not "engage in business" in Tacoma and are not required to obtain a Tacoma business license must certify their compliance with the Ordinance on a form and with such frequency as determined by the Director. Rule 7.2.

In What Language(s) Must Employers Provide Employees Notice Regarding the Ordinance?

Employers are required to provide notice of the Ordinance in the employee's primary language if the City of Tacoma has created a notice in that language and made it available to employers electronically or in print. Rule 7.3. To date, Tacoma has issued template employee notices in English Spanish, Korean, Russian, Cambodian, and Vietnamese.

What Happens to Employees' Paid Leave Balances if the Business is Sold?

If an employer sells, transfers, or otherwise assigns the business to another employer, an employee who continues to work in Tacoma retains his or her unused paid leave. Rule 8.1.

May Employees Cash Out Unused Paid Leave at the End of the Calendar Year?

Employers may permit (but not require) employees to cash out unused paid leave at the end of the calendar year rather than carry the paid leave over into the following calendar year. Rule 12.6. Such employers must document the policy in an established written policy readily available to employees, and the amount of the payout must be equal to or greater than the value of the accrued paid leave balance.

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. TMC 18.10.030L. If an employer elects to allow employees to cash out unused paid leave upon separation, the employer must have a written policy on the subject, and the amount of the payment must be equal to or greater than the value of the employee's accrued paid leave balance. If an employer rehires an employee who cashed out his or her paid leave balance, the employer is not required to reinstate the cashed out leave. Rule 9.2. Tacoma's "FAQs for Employers" state that employers may offer, but not require, cash-out of accrued, unused paid leave: "If you choose to allow payment at separation, your policy must provide employees the option of either cashing out accrued time or leaving their banked hours to potentially be reinstated if they are rehired within six months within the same benefit year."

What Pay Rate Applies When Employees Use Paid Leave?

Employees using paid leave must be compensated at the same hourly rate as they would have earned during the time the paid leave is used. TMC 18.10.010O.¹⁰ For employees who are paid salary and are exempt from overtime under the Fair Labor Standards Act and/or state wage and hour laws, the hourly rate of pay is the employee's annual salary divided by 52 to get the weekly salary and then divided by either 40 hours, or, the number of hours in the employee's typical work week if less than 40. Rule 10.5. For an employee who is paid on a commission (whether base wage plus commission or commission only), the hourly rate of pay is either the base wage or minimum wage, whichever is greater. For an employee who qualifies as an "outside salesperson" as defined by the Washington State Department of Labor & Industries (WAC 296-128-550), the hourly rate of pay is the amount of commission earned divided by the number of hours worked in the same pay period. Rule 10.3.

¹⁰ If an employee's rate of pay fluctuates, the applicable rate of pay for purposes of the Ordinance is the rate at which the employee would have been paid during the time the employee used the paid leave. 10.4.

How is the Use of Paid Leave Determined for Shifts of Indeterminate Length?

When an employee uses paid leave for a shift of indeterminate length (e.g., a shift that is defined by business needs rather than a predefined number of hours), the employer may determine the length of the paid leave by using the hours worked by a replacement employee working the same shift or a similarly situated employee who worked that same or similar shift in the past. Rule 10.6.

How is the Use of Paid Leave Determined for On-Call Shifts?

When employees are scheduled for on-call shifts for which they are compensated whether or not they are called upon to perform work, employers must permit them to use paid leave. Rule 12.2. Employers may, but are not required to, permit use of paid leave for on-call shifts during which employees are compensated only for work they actually perform.

May Employees Use Paid Leave for Scheduled or Mandatory Overtime Shifts?

Employers are required to permit employees to use paid leave for mandatory or scheduled overtime. Rule 12.3.

May Employees Use Paid Leave for Shifts During Which They are Scheduled to Work Outside the City?

Employers may limit use of paid leave to shifts when an employee is scheduled to work within the City of Tacoma. Rule 12.5.

Does Paid Leave Under the Ordinance Run Concurrently With Other Forms of Leave?

Paid leave under the Ordinance may run concurrently with leave pursuant to other federal, state, or local laws. Rule 12.1.