

Insight

IN-DEPTH DISCUSSION

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New Minimum Wage and Paid Sick Leave Laws for Washington Employers

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November 2016 was a dynamic month for laws relating to Washington State workers. At the state level, Washington voters approved Initiative Measure No. 1433 (“the Law”), which provides incremental increases of the state minimum wage beginning January 1, 2017 and paid sick leave beginning January 1, 2018. Washington was one of two states—the other being Arizona—to approve ballot measures providing for paid sick leave during the November general election. Washington and Arizona join five other states—California, Connecticut, Massachusetts, Oregon and Vermont and numerous other localities including the Washington cities of Seattle, Tacoma and Spokane—who already require employers to provide employees paid sick leave. Locally, Seattle voters also approved Initiative 124, which imposes new and significant health and safety, healthcare, and hiring requirements on the City’s hotel industry.¹

Additionally, on November 14, 2016, the Spokane City Council approved amendments to the Spokane Earned Sick and Safe Leave Ordinance (“Ordinance”), which was initially passed by the City Council on January 11, 2016. The Amendments fill gaps the original ordinance created and provide for an administrative enforcement system for receiving and resolving complaints.

In this article, we will discuss important developments regarding the new statewide Law and the amendments to the Spokane Ordinance.

¹ See Michael J. Lotito and Daniel Thieme, [Seattle Ballot Initiative Targets Hotel Industry](#), (Littler ASAP Aug. 10, 2016).

Washington's Minimum Wage Increases

For those Washington adult workers who are not otherwise exempt from the state's minimum wage requirements, the Law implements the following incremental increases to the minimum wage:

- \$11.00 per hour beginning January 1, 2017
- \$11.50 per hour beginning January 1, 2018
- \$12.00 per hour beginning January 1, 2019
- \$13.50 per hour beginning January 1, 2020
- Annual adjustment for inflation beginning January 1, 2021

The Law's minimum wage increases apply to all employers, regardless of size.

The Law specifies that employers must pay all tips and gratuities to its employees, and they cannot be counted toward the minimum wage. These requirements are not different than the law as it existed previously, but now they are codified in the Washington Minimum Wage Act. The impact of these changes on mandatory tip pools, if any, is not clear.

The Law also states that employers must pay all automatic service charges (related to food, beverages, entertainment, and portage) to its serving employees, unless the employer specifically discloses in an itemized receipt and on any menu the service charges that are not payable to the serving employee as defined in RCW 49.46.160. Service charges paid to employees also cannot be counted toward the minimum wage.

The Law's minimum wage requirements will not supersede any local law providing greater minimum wage rights than the Law requires, such as the Seattle, Tacoma, and SeaTac minimum wage ordinances. The Law requires the Washington State Department of Labor and Industries to adopt and implement rules to carry out and enforce the provisions of the Law.

Washington's Mandatory Paid Sick Leave

The Law's paid sick leave requirements, which will be codified in Washington's Minimum Wage Act, Chapter 49.46 of the Revised Code of Washington, will not supersede any local law providing greater sick leave rights than the Law requires.

Covered Employers and Employees

The Law's requirement to provide paid sick leave applies to all employers, regardless of the size of the employer.

Because the Law will be codified within Washington's existing Minimum Wage Act (the "Act"), it is possible that the current definition for covered employees under the Act will apply to the new paid sick leave requirements. The Act's definition of employee excludes several categories of workers such as white collar exempt workers and carriers subject to the Interstate Commerce Act.

Accrual, Carryover and Frontloading of Sick Leave

Employers must permit employees to accrue paid sick leave at a rate of one sick leave hour for every 40 hours worked. Additionally, employees must be permitted to carry over at least 40 hours of unused, accrued leave to the next year. Employers can satisfy the law's accrual and carryover requirements by awarding sick leave hours in advance, provided that such frontloading meets or exceeds the Law's requirements for accrual, use and carryover.

Paid Sick Leave Usage

Leave can be used for any of the following reasons:

- The employee, or the employee's family member is ill, injured, or is receiving medical care, treatment, diagnosis or preventative medical care;
- Closure of the employee's place of business and/or the employee's child's school or place of care due to order of a public official for any health-related reason;
- Absences that qualify for leave under Washington's Domestic Violence Leave Act, Chapter 49.76 RCW

An employee may use accrued leave on the 90th calendar day after the commencement of his or her employment. An employer must permit employees to use their accrued leave in hourly increments. For each hour of leave used, an employee must be paid the greater of the minimum hourly wage or his or her normal hourly compensation.

Paid Sick Leave Requests and Certification

Employers may require employees to give reasonable notice of an absence from work, so long as such notice does not interfere with an employee's lawful use of paid sick leave.

For absences of more than three days, an employer may require that an employee provide verification that their use of paid sick leave is for an authorized purpose. The employer may further require that the verification be provided within a reasonable time period during or after the leave. However, an employer's requirements for verification may not result in an unreasonable burden or expense on the employee and may not exceed privacy or verification requirements otherwise established by law.

An employer may not require, as a condition of an employee taking paid sick leave, that the employee search for or find a replacement worker to cover the hours during which the employee is using paid sick leave.

Notice Requirements

Employers must provide regular notification to employees about the amount of paid sick leave available to each employee.

Separation from Employment and Rehire

Employers are not required to provide financial or other reimbursement for accrued and unused paid sick leave to any employee when a separation of employment occurs. However, if an employer rehires a separated employee within 12 months of separation, whether at the same or a different business location, all leave that

the employee had accrued at the time of his or her separation must be reinstated, and the previous period of the employee's employment shall be counted for purposes of determining the employee's eligibility to use paid sick leave.

Prohibitions & Enforcement

Employers are prohibited from adopting or enforcing any policy that counts paid sick leave absences as absences that may lead to or result in discipline against the employee. Additionally, employers may not discriminate or retaliate against an employee for his or her exercise of any rights provided under the Law, including the use of paid sick leave.

The Law requires the Washington State Department of Labor and Industries to adopt and implement rules to carry out and enforce the provisions of the Law, including but not limited to:

- Procedures for notifying employees about available paid sick leave;
- Protecting employees from retaliation for the lawful use of sick leave;
- Exercising other rights provided by the Law.

Amendments to Spokane Sick and Safe Leave Ordinance

The amended Ordinance includes a "sunset" provision after which the law will no longer be effective. In particular, the law will be effective until December 31, 2017, or until the implementation the Washington state mandatory paid sick leave law, whichever occurs last.

Covered Employers and Employees

While the original law applied to all employers in the City of Spokane, the amended Ordinance limits coverage to employers that have a permanent location in the City of Spokane and at least one employee working in Spokane. All employees who work in the City of Spokane are covered, except for "occasional employees" who work fewer than 240 hours per year in Spokane.

Benefit Year

Under the amendments, the employer can determine the benefit year, as long as it is a "fixed consecutive twelve-month period established by the employer and used in the ordinary course of the employer's business for the purpose of calculating wages and benefits."

Accrual, Carryover and Frontloading of Sick Leave

Under the Ordinance, employees accrue at the rate of one hour of sick leave for every hour worked up to a maximum bank of either 24 hours (for employers with less than 10 employees who work in Spokane), or 40 hours (for employers with 10 or more employees who work in Spokane). In other words, employees accrue sick leave until they reach 24 or 40 hours, at which point they stop accruing more sick time until they use some of that time.

The original law did not address accrual of sick leave for exempt employees, but the amended Ordinance requires accrual of sick leave for exempt employees based on a 40-hour workweek, or the employee's normal workweek if it is less than 40 hours. No accrual is required for hours worked beyond a 40-hour workweek.

Employers may also limit use of sick leave to 24 or 40 hours in a year, depending on the number of employees working in Spokane. While the original law required all employers to carry over 24 hours of sick leave for each employee into the next year, the amendment requires carry-over of 24 or 40 hours (again depending on the size of the employer).

Finally, employers can comply by front-loading leave hours (24 or 40 hours depending on the size of the employer) at the beginning of each year.

Earned Sick Leave Usage

The amendment specifies that the minimum increment for using earned sick leave is one hour.

Earned Sick Leave Requests

The amended Ordinance requires earned sick and safe leave to be provided upon the employee's request. The employee's request should include a reasonable estimate of the expected length of the absence "whenever possible."

Notice Requirements

The original law required employers to provide notice to employees about the accrual of sick leave (including the leave balance and amount of leave used) on a quarterly basis. The amended Ordinance requires this notice to be provided each time wages are paid.

Recordkeeping Requirements

Under the amendments, an employer's failure to maintain the required records will create a rebuttable presumption of a violation.

Enforcement

The Ordinance codifies the enforcement procedures to be followed by the City of Spokane Contract and Business Standards Compliance Office for receiving charges, investigating, and making determinations regarding alleged violations.

From January 1, 2017 to December 31, 2017, the enforcement posture will include informing employers and employees of their rights and obligations under this chapter and providing technical assistance to increase compliance.

Topic	Spokane Ordinance	Tacoma Ordinance	Seattle Ordinance	Washington State Ordinance
Accrual Rates	The accrual rate (1/30) is uniform for all employers regardless of employer size.	The accrual rate (1/40) is uniform for all employers regardless of employer size.	The accrual rate (1/30 or 1/40) varies depending upon employer tier size.	The accrual rate (1/40) is uniform for all employers regardless of employer size.
Accrual Caps	40 hour maximum bank.	Accrual is capped at 24 hours per calendar year.	There is no cap on accrual.	There is no cap on accrual.
Usage Caps	Employees who work for businesses with fewer than 10 employees (excluding the immediate family members of business owners) may use up to 24 hours of accrued leave in any given year. Employees who work for businesses with 10 or more employees may use up to 40 hours of accrued leave in any given year.	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).	Employers may impose usage caps depending upon employer tier size. An employee's carryover of paid time from a prior year does not affect the employer's ability to cap usage.	There is no cap on usage.
Increment of Use	Employees must be allowed to use sick leave in one hour increments.	Employees must be allowed to use sick leave in one hour increments, unless an employer establishes a policy specifying a minimum increment of time for paid sick leave.	Employees may use sick and safe leave in the smaller of hourly increments or, if feasible by the employer's payroll system, increments that round to the nearest quarter of an hour.	The Law indicates that leave may be used in one hour increments.

Topic	Spokane Ordinance	Tacoma Ordinance	Seattle Ordinance	Washington State Ordinance
“Year”	“Year” means calendar year, fiscal year, benefit year, employment year, or any other fixed consecutive twelve-month period established by the employer and used in the ordinary course of the employer’s business for the purpose of calculating wages and benefits.	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.	“Benefit year” means any fixed, consecutive 12-month period of time that is normally used by the an employer for calculating benefits, including a calendar year, tax year, fiscal year, contract year, or anniversary year. An employer must provide written notice of the employer’s choice of a benefit year in the employer’s policy and procedures.	The Law does not define this term.
Occasional Work Within Jurisdiction	“Occasional employees” who work 240 or more hours per year within the City of Spokane are covered by the Ordinance.	An employee who performs work in Tacoma on an “occasional basis” is covered only if the employee performs more than 80 hours of work in Tacoma in a calendar year.	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 benefit year, and the employee remains covered for the all future benefit years.	The Law is silent as to whether employees who perform occasional work in Washington are covered.
Rehiring	Employers are not required to reinstate previously accrued, unused paid time balances for employees returning from a separation. Separation is defined as an involuntary discharge of employment, not for cause, including business related or seasonal layoffs.	Previously accrued, unused paid leave must be reinstated for an employee who is rehired within six months and within the same “calendar year.”	Previously accrued, unused paid time must be reinstated for an employee who is rehired within seven months.	Previously accrued, unused paid time must be reinstated for an employee who is rehired within twelve months of separation.

Topic	Spokane Ordinance	Tacoma Ordinance	Seattle Ordinance	Washington State Ordinance
Weather-Related Closures	The law is silent on this issue, and does not expressly permit use of paid time due to inclement weather issues.	There is no exclusion for weather-related closures of a child's school or place of care.	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.	Employees are not entitled to use paid sick time for weather-related closures.
Bereavement	Paid leave may be used for bereavement.	Paid leave may be used for bereavement.	Bereavement is not recognized as a permissible use of paid time.	Bereavement is not recognized as a permissible use of paid sick time.
Premium Pay	There is no premium pay alternative to providing paid sick and safe time.	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.	There is no premium pay alternative to providing paid sick and safe time.	There is no premium pay alternative to providing paid sick time.
Shift Swapping	An employer may comply with the law by allowing shift-swapping for covered leave.	Shift-swapping is permitted upon mutual agreement by the employer and the employee.	Shift-swapping is permitted upon mutual agreement by the employer and the employee.	The Law is silent as to whether shift-swapping is permitted.

Conclusion

Employers with employees in Washington State should consult with legal counsel regarding compliance with the new statewide Law and the amendments to the Spokane Ordinance prior to the initial statewide minimum wage increase, effective January 1, 2017, and the implementation of statewide paid sick leave, effective January 1, 2018.