Insight

IN-DEPTH DISCUSSION

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Wading through the Changing Tide of Paid Sick Leave Laws in Washington State

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2016 may be the most dynamic year yet for paid sick leave developments in Washington State. Two months into the new year we have already seen significant changes to the Seattle sick and safe time law, a new paid leave ordinance taking effect in Tacoma, and a new ordinance enacted in Spokane. At the state level, legislators are considering a bill to mandate paid sick leave statewide. Even if this legislative effort is unsuccessful, voters may be presented with a statewide sick leave ballot initiative this November. In this article, we will discuss important developments at the local and state levels in 2015 and 2016, provide an overview of ongoing enforcement efforts, and highlight compliance challenges and strategies for employers.

Local Developments

Within Washington State, mandatory paid sick leave laws have been adopted in four localities: Seattle, SeaTac, Tacoma, and Spokane. Out of those four, the Seattle Paid Sick and Safe Time Ordinance (the "Seattle Ordinance") saw significant changes in 2015, and the Spokane Earned Safe and Sick Leave Ordinance (the "Spokane Ordinance") was fresh to the scene. Seattle's law has been in effect the longest – since September 1, 2012. The Seattle Ordinance, which set the standard for those that came after it, recently underwent significant amendments at the agency level through revised regulations. The Spokane Ordinance was most recently enacted in 2016, and takes effect on January 1, 2017. The laws in Seattle and Spokane are similar in many respects, but also contain important differences.

Seattle Significantly Amends Paid Sick & Safe Time Ordinance

On December 14, 2015, the Seattle Ordinance was amended. Among other changes, the amendments expand coverage for employees who work

in Seattle on an occasional basis; allow employers to base their benefit year on a 12-month period other than the calendar year; introduce new requirements regarding incremental use of leave; expand retaliation protections; create new obligations for government contractors; impose additional notice requirements; and increase penalties for violations. Perhaps most significant, the amended law also provides a private right of action to complainants alleging violations.

Occasional Employees

With regard to employees who are based outside of Seattle but perform work in Seattle on an occasional basis ("Occasional Employees"), the law already specified that such employees would be covered if they performed 240 hours of work in Seattle within a calendar year. Regulations under the Seattle Ordinance further provided that the coverage for Occasional Employees who reached this threshold would continue through the following calendar year. The amended Seattle Ordinance now provides that, once an employee is covered, all previous hours worked in Seattle during that benefit year count toward the accrual of paid sick and paid safe time. In addition, once the threshold is met, the employee remains covered, not just for the current and subsequent calendar years, but for the duration of employment with the employer in all future benefit years.

It is important to note that the 240-hours requirement may not apply to all employees who are based outside of Seattle. In particular, under the Regulations, an employee does not work in Seattle on an "occasional basis" if there is a reasonable expectation of performing more than 240 hours of work in Seattle in a year. Similarly, the Seattle Office of Labor Standards, which is responsible for administering the paid sick and safe leave ordinance, states in its FAQ publication that "occasional basis" employees are those who work in Seattle on an "ad hoc, irregular basis." It is unclear if the Rules or FAQs will be amended to remove these qualifications for "Occasional Employees." For now, employers should carefully consider whether to apply the 240-hour requirement to employees who are based outside of Seattle.

Reinstatement Rights

The law continues to delay the use of accrued paid sick time until the 180th calendar day after employment. Additionally, employees have the same reinstatement rights on re-hire as they did pre-amendment, except that the total time of employment used to determine whether the 180-day waiting period is met must occur within **three** calendar years, not two.

Benefit Year

As amended, the Seattle Ordinance now defines "benefit year" to include any fixed consecutive 12-month period of time that is normally used by an employer for calculating wages and benefits (e.g., calendar year, tax year, fiscal year, contract year, or anniversary year). Previously, the Seattle Ordinance was administered exclusively on a calendar-year basis. The introduction of the more flexible "benefit year" allows employers to set the 12-month period, which is a beneficial change for many employers.

Employers must provide written notice of their choice of benefit year in their paid sick and safe time policy/procedure. Employers who transition from one type of benefit year to another must ensure they maintain the accrual, use, and carry-over of paid sick and safe time in accordance with the Seattle Ordinance.

Incremental Use

Among the more significant changes to the Seattle Ordinance is a reduction in the minimum use increment for non-exempt employees. The amended ordinance now requires that employees be allowed to use paid time off in a minimum of quarter-hour increments where it is feasible to do so within the employer's payroll

system. When using quarter-hour increments, employers must use an employee's available paid sick and safe time to round up or down to the nearest quarter hour if necessary to prevent an employer's absence control policy from counting covered paid sick or safe time as an absence that may lead to or result in any adverse action taken against the employee.

Successor Employers

The amended Seattle Ordinance indicates that, when an employer quits, sells out, exchanges, or disposes of its business, or the employer's business is otherwise acquired by a successor, an employee retains all accrued paid sick and paid safe time and remains entitled to use all paid sick and paid safe time in accordance with the Seattle Ordinance. "Successor" includes a person to whom the employer sells or otherwise conveys in bulk (and not in the ordinary course) a "major part of the property" (real, person, tangible, intangible) of the employer's business.

Government Contractors

There are new provisions in the ordinance that highlight significant complexities for government contractors. In particular, the amendments expressly provide that paid sick and safe time are additional obligations under the federal Service Contract Act, federal Davis-Bacon Act, and the Washington Revised Code chapter 39.12, and contractors may not obtain credit toward prevailing wage and fringe benefit obligations under those Acts. However, existing paid leave policies provided **in addition to** those legal requirements (if applicable) can satisfy the Seattle Ordinance if the following requirements are met:

- Available paid leave may be used for the same purposes and under the same conditions as paid sick and safe time under the Seattle Ordinance;
- Paid leave is accrued at the rate the Seattle Ordinance requires;
- Use of paid leave within any benefit year is limited to no less than the amounts specified in the law; and
- Any accrued but unused paid leave may be carried over to the following benefit year consistent with the law's requirements.

Retaliation

Under the amended ordinance, employees now have more expansive protections from retaliation. The amended ordinance indicates that oral complaints, and complaints or communications that do not make explicit reference to the Seattle Ordinance, are nonetheless considered protected activity. The right to make inquiries about paid sick leave rights, and the right to refuse to participate in an activity that would result in a violation of city, state, or federal law are also considered protected activity. In addition, there is now a rebuttable presumption of retaliation if an employer or any other person takes an adverse action against a person within 90 days of the person's exercise of rights protected in the anti-retaliation statute. In the case of seasonal work that ended before the close of the 90-day period, the presumption also applies if the employer fails to rehire a former employee at the next opportunity for work in the same position. The employer may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

The amendments also expand the definition of "adverse action" to now include: denying a job; failing to rehire after a seasonal interruption of work; threatening; penalizing; retaliating; engaging in unfair immigration-related practices; filing a false report with a government agency; changing an employee's status to nonemployee or otherwise discriminating against any person. An adverse action can involve any aspect of employment, including pay, work hours, responsibilities, or other material changes in the terms and conditions of employment. In addition, employers cannot communicate to individuals exercising rights

protected under the Seattle Ordinance that the employer is willing to or will report the suspected citizenship or immigration status of an employee or the employee's family member.

Notice Requirement of Policy and Procedures

Effective April 1, 2016, employers will be required to provide employees written notice of the company's policy and procedure for meeting Seattle Ordinance requirements, including, but not limited to, the following information:

- The employer's choice of benefit year;
- The employer's tier size;
- Rate of accrual;
- Use and carry-over of paid sick and safe time hours;
- Manner of providing employees with an updated amount of available paid sick and safe time hours each time wages are paid; and
- Notification requirements for absences and requesting leave.

The Seattle Office of Human Rights must create and distribute a model policy.

Posting Requirement

In addition to the written notice of the company's policy and procedure, employers must display a poster giving notice of rights as created by the Agency. Pre-amendment, it appeared that employees could choose to post the Agency's poster, include the poster in employee handbooks, or distribute upon hiring. The amendments require that the poster be displayed in a conspicuous and accessible location where any employees work, and an employer may only provide the poster on an individual basis "if display of the poster is not feasible," such as when the employee works remotely or does not have a regular workplace. The amendments have removed any reference to including the poster in a handbook. The amendments also removed a provision that allowed employers to use another format so long as the information in the poster was, at a minimum, also included. Thus, employers should confirm how they are complying with this requirement and whether they must use posting to comply.

Record Keeping Requirements

Employers have been required to retain records documenting hours worked and paid sick time taken. The retention period, however, has been expanded from two years to three years.

Enforcement – Increased Penalties and New Private Right of Action

The amendments also increase civil penalties for violations of the Seattle Ordinance and create a new private right of action. With regard to the private right of action, any person or class of persons that suffers financial injury as a result of a violation or is the subject of prohibited retaliation may bring a civil action against the employer or other person violating the law. If the individual or class prevails, reasonable attorneys' fees and costs may be awarded, as well as additional appropriate legal and equitable relief, such as: the payment of any unpaid wages plus interest at 12 percent due to the person, liquidated damages in an additional amount of up to twice the unpaid wages and a penalty of up to $5,000 payable to any aggrieved party who was subject to prohibited retaliation.

The amended ordinance also further describes procedures for investigations conducted by the Seattle Office of Civil Rights, including a requirement that employers provide notice to employees of any ongoing investigation.

Effective Dates

The new private right of action becomes available on April 1, 2016, for claims against employers that employ 50 or more employees. It becomes available on April 1, 2017, for claims against employers that employ fewer than 50 employees. The requirement regarding the provision of a written policy to employees also takes effect April 1, 2016. Beginning January 1, 2017, the amounts of all civil penalties, fines and penalties payable to aggrieved parties under the Seattle Ordinance will be increased annually to reflect the rate of inflation. The remaining changes have already taken effect January 16, 2016.

Spokane Adopts Paid Sick Time Ordinance

Following in the footsteps of Seattle, Tacoma, and SeaTac, the City of Spokane has become the fourth local jurisdiction in the State of Washington to adopt a mandated sick leave policy for covered workers. The ordinance originally passed by a 6-to-1 vote of the Spokane City Council on January 11, 2016. It was vetoed by Mayor David Condon, but on January 22, 2016, the Spokane City Council voted 5-to-1 to override the Mayor's veto. The Spokane sick leave ordinance will go into effect January 1, 2017. In the interim, the ordinance mandates that the City Council must work with the Administration on fine-tuning the enforcement mechanisms of the ordinance by October 1, 2016. The City has also indicated that it intends to educate businesses on the details of the new policy.

Employers with employees who perform work in Spokane should begin their compliance planning now, keeping an eye towards additional guidance and clarifications that are expected to follow from the City by October 1.

Covered Employers and Employees

Every private sector employer that employs at least one employee who performs more than 240 hours of work within the City of Spokane is covered by the law, except that newly licensed businesses have a grace period of one year following the issuance of their first City of Spokane business license before the law applies to them. In addition, federal, state and local governments are excluded, as is a business owned and operated by one person (including the person's spouse) with zero employees. All employees who perform more than 240 hours of work in Spokane in a calendar year for a covered employer are covered, with a number of specified exclusions, including seasonal workers, domestic workers, independent contractors, state or federal work study students, and individuals employed by a firm engage in certain types of construction work (defined as excavation, construction, erection, alteration, repair, demolition, and dismantling, of buildings and other structures and all operations in connection therewith; the excavation, construction, alteration and repair of sewers, trenches, caissons, conduits, pipe lines, roads and all operations pertaining thereto; the moving of buildings and other structures, and to the construction, alteration, repair, or removal of wharfs, docks, bridges, culverts, trestles, piers, abutments or any other construction, alteration, repair or removal work related thereto). Employers may implement a probationary period before employees can use accrued leave, but the probationary period must not be longer than 90 days.

Amounts of Paid Time Off that Must Be Provided

Beginning on January 1, 2017, or the first day of employment (whichever occurs later), all employees accrue leave at the rate of at least one hour for every 30 hours worked. The ordinance does not appear to have an

accrual cap. Employees who work for businesses with fewer than 10 employees (excluding the immediate family members of business owners[1]) 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. As the term "employee" is defined as a person who performs more than 240 hours of work in Spokane, it would seem that these two tiers are based on the number of employees who work in Spokane. Employers are permitted to "front-load" leave at the beginning of each year. All employees must be permitted to carry over up to 24 hours of unused accrued sick leave to the next year. It is unclear if employers may avoid carryover by frontloading the maximum amount the employees may use within a year.

Purposes for Which Paid Time Off Can Be Used

An employee may use accrued earned sick and safe leave for: (1) diagnosis, care, or treatment of the employee's mental or physical illness, injury, or health condition; (2) diagnosis, care, or treatment for the employee's family member's mental or physical illness, injury, or health condition; (3) to seek protection or safety from domestic violence as defined by state or Spokane city law; (4) any period in which the employer's business or the employee's child's school or place of care is closed by order of a public official to limit exposure to an infectious agent, biological toxin, or hazardous material; or (5) bereavement leave in connection with the death of a family member of the employee. Family members include spouses, domestic partners, children under 18 years of age or who are older than 17 and incapable of self-care due to a mental or physical disability, parents or guardians, grandparents, and grandchildren.

Utilizing PTO Policies to Comply with Paid Sick Leave Requirements

Employers may utilize paid time off policies to comply with the ordinance, so long as the policies permit use of paid time off for the same covered purposes, and in the same amounts, as the ordinance requires. Paid time off is defined as leave that accrues at a regular rate and can be used by an employee for any purpose.

Notice & Posting Requirements

By January 1, 2017, employers must post, in a place commonly accessible to employees, a notice provided by the City that summarizes employees' and employers' rights and obligations concerning earned sick and safe leave as provided under the ordinance. In addition, no less frequently than once per quarter, and upon request by any employee, each employer must provide information concerning an employee's accrued earned sick and safe leave, including without limitation the employee's leave balance and the amount of leave used by the employee during the current fiscal year.

Recordkeeping Requirements

Employers are also required to keep records of employees' accrual and use of leave time under the ordinance and maintain such records for three years.

Employer Certification Requirements

When applying for a new business registration or renewing an existing business registration, employers must certify compliance with Spokane paid sick leave ordinance.

1 The term "immediate family members" is not defined. Presumably it is something narrower than "family member," which is defined by the ordinance.

Missing Pieces to Watch Out For

The ordinance is silent on a number of issues, which may be covered through the City of Spokane's additional guidance, which must be published by October 2016:

- The law is silent as to the minimum increment of use of accrued leave time under the ordinance.
- Although the ordinance generally indicates that an employer may comply with the law by allowing shift-swapping for covered leave, there are no further details regarding how such shift-swapping would work.
- The law does not specify how or when employees must provide notice to employers in relation to their use of accrued leave under the ordinance, including in instances when covered leave may be unforeseeable.
- The law does not specify how or when employees must provide documentation or verification to employers regarding their use of leave.
- The law does not address whether employers who frontload sick leave on hire and at the start of each year can avoid carryover of sick leave.

Local Compliance Challenges

There are both similarities and differences among the Seattle, Tacoma, and Spokane ordinances, and additional distinctions may emerge once the Spokane City Council works with the Administration to further delineate enforcement of the law.

The table below identifies important aspects of each of the three ordinances. As the table makes clear, it may be difficult for Washington employers with employees in more than one covered locality to adopt a "one-size-fits-all" sick leave policy. For example, while Spokane and Tacoma impose a uniform accrual rate for all covered employers, the accrual rate required in Seattle differs by employer size. Of the three laws, only Tacoma allows employers to place a cap on accrual amounts. The intricacies of usage caps also differ significantly across jurisdictions, with the cap levels dependent upon employer size in Spokane and Seattle and dependent upon carryover of previously accrued leave in Tacoma. The ordinances also differ in terms of the minimum increment of leave time allowed and the extent to which paid leave can be used for bereavement. These and other differences in the laws pose significant challenges for employers across all aspects of compliance and implementation.

Topic	Spokane	Tacoma	Seattle
Accrual Rates	The accrual rate is uniform for all employers regardless of employer size.	The accrual rate is uniform for all employers regardless of employer size.	The accrual rate varies depending upon employer tier size.
Accrual Caps	There is no cap on accrual.	Accrual is capped at 24 hours per calendar year.	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.

Increment of Use	The ordinance is silent as to permitted increment of use.	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.
"Year"	The law does not define this term.	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.
Occasional Work Within City	An employee who works more than 240 hours in a year within the City of Spokane must be provided with paid time under the law.	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.
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.
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.
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.
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.
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.

State Developments

Unsurprisingly, this local paid sick leave activity is having an effect at the state level. The state legislature is examining two competing measures: one would ban local laws, while the other would impose a statewide requirement and permit local laws that provide greater benefits. Additionally, at least seven potential ballot initiatives have been filed with the Secretary of State. If enough signatures are collected, one or more initiatives may appear on the November 8, 2016 ballot.

Both of the proposed bills currently before the state legislature are similar to the current draft ballot initiatives in that all of them would permit leave to be used for "sick" and "safe" time purposes, including absences connected to an employee's place of business, or a child's place of care, being closed due to a public health emergency. Also, each current proposal would impose notice and recordkeeping obligations.

Differences between the proposed legislative and ballot measures are important. For example, the possible ballot measures would cover all employees, whereas the legislative proposal would allow unionized workforces to waive the law's requirements via a collective bargaining agreement. Under the state bill, the wait time before leave can be used would be 180 days – twice as long as the proposed 90 days contained in the ballot initiatives. Employees' rights to reinstated leave hours if they leave employment and are rehired are also much stronger in the ballot initiatives, with provisions applying if rehiring occurs within 12 months, compared to seven months in the state bill. The ballot initiatives would also allow leave to be used to care for siblings, an option that is not available under the state bills. The state proposals would use a three-tier system, whereas all employers would be subject to the same standards under the ballot proposals. The state proposals also essentially create a 24-month grace period in which new Tier 1 and 2 employers would not be subject to administrative and private enforcement provisions, whereas no such staging is contemplated in the ballot proposals.

While both the legislative measures and the ballot proposals would have significant impacts statewide if any are enacted, comparatively speaking, the measures being considered at the state level would appear to provide more flexibility for employers and employees. The ballot proposals, although they treat all employers the same, may have a harsher impact on employment relationships in Washington State, although they would take effect one year later than the proposed legislation, allowing more time for employers to comply with the new requirements.

Enforcement Efforts

Seattle is the only city with publicly available enforcement statistics.[2] Based on the most recent data – through January 2016 – the city has awarded and collected 100% of monetary remedies for employees ($49,069.37) and civil penalties ($1,000).

From the law's effective date through 2013, the agency only "sent advisory letters to employers that facilitated informal resolutions of complaints" and "[e]mployees could elect to file a charge" if the process was unsuccessful, which rarely occurred; the agency sent 141 letters, closed 138, and only six charges were filed. However, in 2014, the agency "revised its enforcement strategies to give employees the choice of filing a formal charge or using the advisory letter process," which saw letters decrease from 103 in 2013 to 45 in 2014, and charges increase from 6 to 38 for the same years. In 2015, the agency launched 82 new paid sick and safe time investigations, and in January 2016, the agency has launched three new investigations.

2 Enforcement data is generally available via the Seattle Office for Civil Rights' Labor Standards Dashboard, http://www.seattle.gov/laborstandards/enforcement-data.

Despite this historical data, last year Seattle's Office of Labor Standards awarded $1 million to organizations "to provide outreach, education and technical assistance to Seattle's workers about their rights" under the city's laws.[3] Moreover, the city recently advertised to hire another full-time investigator. This, in turn, may expedite how long it takes to resolve an investigation, which is currently averaging 149 days. Accordingly, signs suggest there may be an uptick in enforcement, so employers should not rely on the comparatively minimal amounts recovered, or penalties imposed, when weighing the compliance risks.

3 Press Release, Office of the Mayor, Murray announces recipients of $1 million Community Fund to support Seattle workers (Sept. 30, 2015), http://www.seattle.gov/documents/departments/civilrights/ols-pr-093015.pdf