

Insight

IN-DEPTH DISCUSSION

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Vermont Becomes the Fifth State to Pass Paid Sick Leave Legislation

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On March 9, 2016, Vermont Governor Peter Shumlin signed House Bill 187 into law, making Vermont the third state in New England and the fifth state in the United States – after California, Connecticut, Massachusetts, and Oregon – to enact a state-wide paid sick leave law. Beginning on January 1, 2017, Vermont employers must allow employees to accrue and use at least 24 hours (or three days) of earned sick time in a 12-month period. Beginning January 1, 2019, employers must allow employees to accrue and use at least 40 hours (or five days) of earned sick time in a 12-month period.

Purpose of the Law

The stated purpose of the law is to “promote a healthier environment at work, school, and in public by ensuring that employees are provided with paid leave time for purposes of health care and safety.” When passing the law, the Vermont legislature referenced information contained in the Vermont Department of Labor’s 2013 Fringe Benefits Study, which estimated that slightly less than 50 percent of private sector workers employed by companies with fewer than 20 workers had access to paid leave, while approximately 78 percent of workers employed by larger companies had access to paid leave, leaving more than 60,000 working Vermonters lacking access to paid leave.

Covered Employers

The law will go into effect for most employers in Vermont on January 1, 2017. Employers with five or fewer employees who are employed for an average of at least 30 hours per week do not have to comply with the new law until January 1, 2018.

The law applies to any employer doing business in or operating within Vermont. New employers in Vermont will have one year after hiring their

first employee to comply with the law. Importantly, an employer will be presumed to be subject to the law unless the employer proves that a period of no more than one year passed between the date the employer hired its first employee and the date the employer is alleged to have violated the law.

An employer cannot transfer an employee to a second employer with whom it has, at the time of the transfer, common ownership, management or control, in order to claim the new employer exception.

Covered Employees

In general, the law applies to all full-time and certain part-time employees working in Vermont. The law excludes: (a) individuals employed by the federal government; (b) individuals employed by an employer for 20 weeks or fewer in a calendar year in a job scheduled to last 20 weeks or fewer for the purpose of supporting or supplementing the employer's workforce in certain situations, including employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects; (c) certain high-level individuals employed by the state, including the state legislature and court employees; (d) employees of health care facilities who work on a per diem or intermittent basis; (e) certain substitute teachers; (f) guest workers employed pursuant to a federal work visa program or who are exempt from the visa issuance process for specified reasons; (g) individuals who are either sole proprietors or partner owners of an unincorporated business who are excluded from the workers' compensation provisions (independent contractors) or executive officers, managers, or members of a corporation or a limited liability company for whom the state labor department has approved an exclusion from the workers' compensation provisions; (h) individuals who work an average of less than 18 hours per week during a 12-month period; (i) individuals under the age of 18; and (j) individuals that work on a per diem or intermittent basis, work only when they indicate that they are available to work, are under no obligation to work for the employer offering the work, and have no expectation of continuing employment with the employer.

Unionized Workforce

The law does not preempt or override the terms of a collective bargaining agreement that is in effect before January 1, 2017. An employer complies with the law if it is a party to a collective bargaining agreement that provides covered employees with paid time off that may be used for all of the law's covered purposes and that is accrued and may be used at a rate that is at least equal to the rate set forth in the law. If the employer has such a collective bargaining agreement in place, it is not required to provide **additional** earned sick time to an employee.

An employer can agree to a collective bargaining agreement that provides a paid time off policy that is more generous than what the Vermont law requires. Notably, the law does not diminish an employer's obligation to comply with collective bargaining agreement requirements that are more generous than what the law requires. Also, unlike some other jurisdictions, the Vermont law does not allow an employer to **waive** the requirements of the paid sick leave law in a collective bargaining agreement.

Accrual, Caps, and Carry-Over Requirements

Although not expressly stated in the law, it appears that employees begin accruing paid sick time when the law takes effect or when the employee begins working, whichever is later. Employees must accrue at least one hour of earned sick time for every 52 hours worked; certain full-time employees who are overtime-exempt under the FLSA accrue paid sick leave based on a 40-hour workweek. Notably, the accrual rate in Vermont is lower than the rate required by paid sick leave laws in many other jurisdictions. This difference, along with others, makes it difficult, if not impossible, for nationwide employers or employers who are located in several jurisdictions to draft and implement a standard company-wide paid sick leave policy.

From January 1, 2017 to December 31, 2018, employers may limit the amount of sick time accrued to a maximum of 24 hours in a 12-month period. Beginning on January 1, 2019, employers may limit the amount of sick time accrued to a maximum of 40 hours in a 12-month period. Employers can choose to allow employees to accrue more sick time than the law requires.

Employers must allow employees to carry over any unused sick time at the end of the year in which it was accrued. However, employers can avoid carry-over requirements by either paying employees for unused earned sick time at the end of each year, or by “frontloading” the full amount of available sick time or other paid time off at the beginning of each 12-month period. If an employer frontloads, it is not required to provide **additional** earned sick time to an employee that chooses to use paid time off that could be used for a covered purpose for a different purpose and the frontloaded paid sick time off does **not** carry over from one annual period to the next.

Use of Paid Sick Leave

Employees may use earned sick time for any of the following purposes:

- The employee is ill or injured;
- The employee requires professional diagnostic, preventive, routine, or therapeutic health care;
- The employee needs to care for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health care;
- Accompanying a parent, grandparent, spouse, or parent-in-law to an appointment related to his or her long-term care;
- The employee needs to arrange for social or legal services or obtain medical care or counseling for the employee or the employee’s parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, who is a victim of domestic violence, sexual assault, or stalking or who is relocating as the result of domestic violence, sexual assault, or stalking; or
- The employee needs to care for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, because the school or business where the individual is normally located during the employee’s workday is closed for public health or safety reasons.

From January 1, 2017 to December 31, 2018, employers may limit the amount of sick time used to a maximum of 24 hours in a 12-month period. Beginning on January 1, 2019, employers may limit the amount of sick time used to a maximum of 40 hours in a 12-month period.

Employers may require that new employees and existing employees on January 1, 2017, wait to use accrued sick time until they have worked for the employer for one year. For employers with five or fewer employees who are employed for 30 hours or more per week, the waiting period begins on January 1, 2018 and ends on December 31, 2018. Employees accrue paid sick time during the one-year waiting period, but may not use earned sick time until after the waiting period has ended.

The law does not provide any specific requirements regarding how and when an employee should notify the employer of his or her need to take sick leave. However, employers **can** require that employees planning to take earned sick time make reasonable efforts to avoid scheduling routine or preventive health care during regular work hours and notify the employer as soon as practicable of the intent to take earned sick time and the expected duration of the absence. Additionally, the law does not provide any restrictions on policies that require employees to provide reasonable documentation confirming the employee’s need to use sick time. Employers should monitor the Vermont Department of Labor’s website to see whether it will issue

administrative regulations or “frequently asked questions” concerning notice and documentation requirements.

If an employee does not need to use a full day of earned sick time, employers must allow employees to use earned sick time in the smallest time increment that the employer’s payroll system uses to account for other absences or that the employer’s paid time off policy permits. Employers are **not** required, however, to permit employees to use earned sick time in increments that are shorter than one hour.

Employers cannot require employees to find a replacement for qualifying absences under the new law. However, employers **can** agree to allow employees who do not want to use earned sick time to make up the time the employee was absent by working an equivalent number of hours during the same pay period or by trading shifts with another employee.

Pay and Benefits During Paid Sick Leave

Employees must be compensated for earned sick time at a rate that is equal to or the greater of either the normal hourly wage rate for the employee or the minimum wage rate under Vermont law. Employers also must continue group insurance benefits during the use of earned sick leave, but may require that employees contribute to the cost of the benefits during the use of earned sick time at the existing rate of employee contribution.

Payout Not Required Upon Termination

Employers are not required to pay employees for unused earned sick time upon separation from employment.

Reinstatement Provisions

Employees who have already completed the initial 12-month waiting period and are rehired by the same employer within 12 months after being discharged from employment shall begin to accrue, and may use, earned sick time without any waiting period, but shall not be entitled to receive back any unused sick time that had accrued before the time of separation unless the employer agrees to do so. Conversely, employees who have already completed the initial 12-month waiting period and are rehired by the same employer within 12 months after voluntarily resigning from employment shall not be entitled to accrue and use paid sick time without a waiting period, unless agreed to by the employer.

Notice, Posting and Recordkeeping Requirements

Employers must post a notice setting out the provisions of the law in a place conspicuous to employees. The Commissioner of Vermont’s Department of Labor must publish the required notice before the law becomes operative, so employers should monitor the Department of Labor’s website. Employers also must notify employees of the provisions of the paid sick leave law upon hire. Given that both the poster and the notice may be less detailed than the employer’s actual paid sick leave policy, it is important that all employers either develop a paid sick leave policy or revise their current paid sick leave or paid time off policy to comply with the law and explain the policy to employees before the law takes effect.

Additionally, employers must calculate the amount of sick time an employee has accrued as the leave accrues during each pay period or on a quarterly basis.

Prohibitions, Penalties, and Enforcement

Employers cannot retaliate against employees for using paid sick leave under the law, complaining about a violation of the law, cooperating with the Vermont Labor Department in investigating a violation of the law, or because the employer believes the employee may complain or cooperate in an investigation of a violation of the law. Employers who violate the law are subject to penalties of up to \$5,000. Where the employer is a corporation, the president or other officers who have control of the payment operations of the corporation are considered employers and liable to the employee for actual wages due when the officer has willfully and without good cause participated in knowing violations of the law.

Any person who believes that he or she has been retaliated against in violation of the law may bring a civil action seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or benefits, reinstatement, costs, reasonable attorneys' fees, and other appropriate relief.

Vermont's Department of Labor is responsible for enforcing the paid sick leave law. An employee or the Department may file a complaint, not later than two years from the date the violation occurred. If after an investigation a violation is determined to have occurred, the Department must attempt to settle the matter between the employer and employee. If the settlement attempt fails, the Department must issue a written determination and order for collection, which must specify the facts and conclusions upon which the determination is based. The Department must collect from the employer the amounts due and remit them to the employee. If the Department determines that the violation was willful, the order for collection may provide that the employer is liable to pay an additional amount not to exceed twice the amount of unpaid wages, one-half of which will be remitted to the employee and one-half of which shall be retained by the Department to offset administrative and collection costs.

Assistance for Smaller Employers

During the passage of the law, many groups criticized the impact it may have on small businesses. Perhaps in recognition of these criticisms, the law includes a provision that requires assistance from the state for employers with five or fewer employees, as well as a provision requiring that the Department of Labor and the Agency of Commerce and Community Development develop and conduct a survey and report back to the General Assembly about the potential impacts the law may have on employers with five or fewer employees.

Specifically, on or before November 15, 2017, the Commissioner of Labor and the Secretary of Commerce and Community Development must develop and implement a program to provide employers that have five or fewer employees who are employed for an average of 30 or more hours per week during a year with assistance related to developing time off policies and business plans necessary to implement the law's requirements.

Also, the Department of Labor and the Agency of Commerce and Community Development must conduct a survey of Vermont employers with five or fewer employees regarding the number of employees employed by each employer, the hourly wages paid by each employer to its employees, and whether each employer provides its employees with paid time off from work that satisfies the requirements of the law. On or before January 1, 2017, these entities must report to the General Assembly regarding the results of the survey and provide an estimate of the total additional cost to employers with five or fewer employees of providing paid sick time pursuant to the requirements of the law.

Vermont Department of Labor's Reporting Requirements

The Department of Labor, on or before January 15, 2019, must report to the House committee on General, Housing and Military Affairs and the Senate Committee on Economic Development, Housing and General Affairs regarding the number of inquiries and complaints submitted to the Department in relation to the law

and the number of investigations and enforcement actions undertaken by the Department in relation to the law during the first two years after its effective date.

Employers with Current Paid Time Off (“PTO”) Policies

Employers with a current PTO policy that provides employees with paid time off for the same reasons as the Vermont paid sick leave law, and under which employees accrue and may use the paid time off at a rate that is equal to or greater than the rates required by the paid sick leave law, are not required to change their PTO policy or offer additional paid leave. An employer is free to provide PTO that is more generous than what the law requires.

Employers with PTO policies in place should review those policies to ensure that the policy complies with *all* of the detailed requirements of the law prior to the effective date, including the accrual, use, and reinstatement provisions. Employers with PTO policies may also want to consider whether they will go forward with PTO policies or, instead, separate out paid sick leave into an individual leave bank and, for the remaining time, either use a modified PTO policy or convert to a vacation policy.