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Final Regulations Clarify and Expand Portland Sick Leave Law Requirements

By Amy Alpern and Sebastian Chilco

On November 1, 2013, the City Attorney's office published Administrative Rules to help implement Portland's new Sick Leave Ordinance. Under the ordinance, beginning January 1, 2014, private-sector employers doing business in Portland that have six or more employees will be required to provide qualifying employees with a minimum of one hour of paid sick leave for every 30 hours of work performed by the employee. Employers doing business in Portland that have five or fewer employees will be required to provide unpaid sick leave for every 30 hours of work performed by qualifying employees.

The new rules clarify and expand ordinance requirements. Below is a summary of key provisions in the rules.

Covered Employees

The new rules define a covered employee as an individual who renders personal services to an Employer where the employer either pays or agrees to pay for the services, or suffers or permits the individual to perform the services. However, employees must have worked 240 hours in a "year" to be eligible, and employees may not use sick time during the first 90 days of employment (unless the employer chooses to allow otherwise.) ("Year" is defined as any consecutive 12-month period that is normally used by an employer for calculating benefits. Employees do not need to reestablish eligibility in subsequent years unless they change employers.)

Working in the City vs. Just Traveling Through

The new rules help employers determine who in their workforce will be covered by the law.

Employees who perform work for an employer by physically working in Portland via telecommuting are covered for hours that they telecommute in Portland. Additionally, employees who travel through the city and make a stop as a purpose of conducting their work (e.g. to make pickups, deliveries, or sales calls) are covered for the hours worked in Portland.

Employees who perform work outside Portland, even if the employer is Portland-based, are not covered for hours worked outside Portland. Employees who travel through Portland and only make incidental stops (e.g. purchasing gas, eating a meal, or changing a flat tire) are not considered to be making a stop as a purpose of their work.

Accrual of Sick Time

Under the ordinance and as set forth in the rules, employees begin accruing sick time when the law takes effect on January 1, 2014. Regardless of whether an employee accrues unpaid or paid sick time, the accrual rate under the ordinance is the same—one hour for every 30 hours worked within the city. The rules state that salaried employees exempt from overtime under the FLSA will be presumed to work 40 hours each week for accruing sick time, unless their regular work week is less than 40 hours, in which case sick time is earned based on their regular work week. For non-exempt employees, an employee's regular work hours, along with overtime hours, are counted for accrual purposes.

Paid vs. Unpaid Leave Depends on the Number of Employees

Employers with six or more employees must provide paid leave. Employers with fewer than six must provide unpaid leave. The new rules clarify how employee numbers are determined. All employees who work for an employer are counted, including full-time, temporary and part-time employees, along with employees who work inside and outside Oregon. Under the rules, the calculation for determining the number of employees employed is the same calculation method used under Oregon Family Leave Act (OFLA). (The number of employees is calculated based on the number of employees who were employed each working day during each of 20 or more calendar work weeks in the calendar year in which the leave is to be taken or in the prior calendar year.)

Caps on Accrual and Use of Sick Time

The rules allow employees to accrue a maximum of 40 hours sick time in a calendar year. The rules also allow employees to carry over up to 40 hours of unused sick time to the following year regardless of how many hours of unused sick time an employee may have accrued or carried over; employees may only use 40 hours of sick time each year.

Rate of Pay

Sick time hours for *hourly employees* are paid at the employee's regular hourly wage (employers are not required to pay employees at an overtime rate when an employee uses sick time for hours that would have been overtime hours if worked.) Sick time hours for *exempt employees paid an annual salary* are paid at an hourly rate, determined by dividing the employee's annual salary by 52, and then dividing the weekly salary by the number of hours of the employee's normal work week. Employers may, but are not required to, cash out unused sick time upon termination.

Employee Notice & Documentation

When sick time use is *foreseeable*, employees must provide notice of the need to use sick time "as soon as practicable," or in accordance with the employer's established policy or standard. The rules state that if the reason for sick leave is unforeseeable, an employee must provide notice before the start of his or her shift, or as soon as practicable.

Interplay with Other Laws

An employee's sick time use may run concurrently with other leave under federal or state law (e.g., OFLA or the federal Family and Medical Leave Act). Additionally, except for PTO, unless allowed by the employer, an employee cannot use sick time while on any other paid leave, e.g., sick time cannot be used while receiving workers' compensation benefits.

Notice, Posting, Recordkeeping & Penalties

The rules clarify that the notice employers provide to employees must contain notice of an employee's entitlement to sick time; the amount of sick time and terms of use under the ordinance; the prohibition against retaliation for requesting or using sick time; the right to file a complaint if sick time is unlawfully denied or if unlawful retaliation occurs. The rules impose an additional requirement by mandating that employers provide, at a minimum, written quarterly notification concerning the amount of accrued but unused sick time available to each employee.

The rules further state that the written notice must be provided to employees no later than the end of the employer's first pay period in 2014 or, for new employees, the end of the first pay period for those employees. The rules also require employers to post a notice in each building and worksite in an area accessible to, and regularly frequented by, employees.

The rules provide that an employer who fails to provide sick time may be fined equal to three times the dollar amount of sick time the employee was refused, or \$250, whichever is greater.

Recommendations

Before the ordinance takes effect, employers should consider the following:

- Review and revise if necessary, sick leave and/or PTO policies and procedures to ensure they meet the law's requirements.
 - Additionally, ensure that policies and procedure are in place to notify an employee about accrued but unused sick time in writing.
- Ensure timekeeping, payroll, and benefits systems properly calculate, track, and detail accrued and used sick time. If using a third-party payroll processor, ensure the processor is aware of and complies with the requirements of the ordinance.
 - Also, ensure employees are provided quarterly updates concerning accrued and used sick time.
- Monitor the Portland City Attorney's website¹ for template notices, and monitor the Oregon Bureau of Labor and Industries' website² for workplace posters.
 - Employers that want to develop their own notice should consult with knowledgeable employment counsel to ensure the notice satisfies all ordinance requirements. Additionally, employers should consider creating acknowledgment forms to guard against claims that notice was not provided.
- Train supervisory and managerial employees, as well as HR and payroll personnel, on the requirements of the ordinance and accompanying regulations.

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1 <http://www.portlandonline.com/attorney/index.cfm?c=28917>

2 <http://www.oregon.gov/boli/Pages/index.aspx>