

## Washington Proposes Paid Sick Leave Rules

Last November, voters in Washington approved a ballot initiative that will require employers throughout the state to provide a new employee benefit — paid sick leave — starting in 2018. On April 7, the state Department of Labor and Industries released proposed regulations to implement the paid sick-leave requirement. Employers will want to familiarize themselves with the proposal and monitor further developments as they prepare for compliance.

### Background

On November 8, 2016, Washington voters approved [Initiative 1433](#) that establishes statewide minimum standards for the accrual, use and carryover of paid sick time, starting in 2018. The statewide initiative is largely modeled after Seattle's Paid Sick and Safe Time Ordinance that took effect in 2012. While both the Seattle and state laws provide paid leave for the same reasons — an employee's own or a family member's illness, injury or medical care, a public health emergency, or qualifying reason under the state's Domestic Violence Leave Act — and offer similar job protections for employees who use leave, they have some notable differences. Where they differ, employers in Washington will have to provide the benefit that is most generous to the employee. (See our [November 18, 2016 For Your Information](#).)



**Comment.** Employers in Seattle, Tacoma and other jurisdictions that have local sick leave ordinances will face increasingly complex compliance challenges, as they seek to formulate and administer policies that satisfy both state and local laws.

### Proposed Rules

On April 7, Washington's Department of Labor and Industries (L&I) released [draft proposed rules](#) to implement the state's new paid sick-leave requirements that are slated to take effect in 2018, with the goal of issuing proposed rules in July 2017 and adopting final rules by mid-October. L&I asked stakeholders to provide initial feedback by April 28. In a [cover letter](#), L&I indicated that, where possible, it tried to align the draft rules with those of Seattle's, Tacoma's, Spokane's and Oregon's to reduce potential compliance challenges for stakeholders.

The draft provides insights into how L&I may enforce the new requirements and contains important clarifications for employers and employees alike. Highlights are set forth below.

## Who's Covered

The new law generally will cover employers in Washington with at least one employee, and non-exempt employees as defined by the Washington Minimum Wage Act.

### Employers

For these purposes, the term "employer" is broadly defined to include any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.

### Employees

"Employee" generally means an individual employed by an employer, subject to certain exceptions. Among those exceptions are workers who are:

- Employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined by the director of L&I
- Engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously
- Carriers subject to regulation by Part 1 of the Interstate Commerce Act
- Required to reside or sleep at their place of employment or who otherwise spend a substantial portion of work time subject to call, and not engaged in performing active duties
- Public elective or appointive officeholders of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature

## Accrual, Usage and Carryover

Under the new state law, employees will be subject to the same accrual rates and carryover limits, regardless of their employer's size.

### Accrual

Employees will accrue paid sick leave at a rate of at least one hour for every 40 hours worked. However, employers will not have to allow any accrual for hours paid when not working, such as for vacation, PTO or paid sick leave. For existing employees, paid sick leave will accrue for all hours worked beginning January 1, 2018. For employees hired after that date, accrual will begin at the commencement of employment.

**Frontloading.** An employer may frontload paid sick leave, provided the employee's frontloaded leave is at least equal to one hour of paid sick leave for every 40 hours worked. An employer that uses this method must have a written policy or collective bargaining agreement (CBA) addressing what happens when a terminating employee has not accrued enough paid sick leave to cover the amount of frontloaded leave the employer advanced and the employee used. As long as the deductions are agreed upon by both parties and satisfy state wage payment laws,

the employer would be able to deduct the equivalent amount of leave used and for which the employee was compensated pre-accrual from the employee's final paycheck.

### **Usage**

An employee may use accrued paid sick leave beginning on the 90<sup>th</sup> calendar day of employment. Thereafter, accrued leave must be made available for use no later than one calendar month after the date of accrual.

Employees would be allowed to use paid sick leave in one-hour increments, unless that would pose an undue hardship on the employer. If so, the employer may require leave to be used in increments of up to four hours pursuant to a written policy or collective bargaining agreement. Factors to consider in determining whether one-hour usage increments impose an undue hardship include: employer size; the number, type and locations of the employer's worksites; the number of persons at the worksite and the availability of relief for the employee using leave; and the effect on the employer's operations.

### **Carryover**

While employers may not limit the number of hours an employee can accrue or use in a year, they will be able to cap carryover to the following year at 40 hours of accrued, unused paid sick leave. Accrual of paid sick leave in that year would be in addition to the hours previously accrued and carried over.

### **Payout and Reinstatement**

Accrued, unused sick leave would not have to be paid out on separation, but it would have to be reinstated for rehires within 12 months. If, however, an employer chooses to cash out all or any portion of accrued, unused leave on separation, it would not have to reinstate any paid out leave on rehire.

### **Notice and Verification Requirements**

Employees may be required to give "reasonable" notice of the need for leave or comply with their employer's notification policies, provided they do not interfere with the employee's use of leave. Employees may be required to request foreseeable leave up to 14 days in advance. Where leave is unforeseeable, employees must give their employer notice as soon as practicable but no later than the end of the first day leave is taken.

Notice for foreseeable leave authorized under the state's Domestic Violence Leave Act must satisfy the requirements of the employer's stated policy or as soon as practicable, if no stated policy. For unforeseeable leave due to domestic violence, sexual assault or stalking, the employee must give oral or written notice to the employer no later than the end of the first day of leave.

Employers will be required to have a written policy or CBA outlining reasonable notice requirements, and make that information readily available to its employees. Employers must give employees notice of the applicable policy or CBA before requiring them to provide reasonable notice of the need for leave.

For absences of more than three days, an employee may be required to provide proof that the use of paid sick leave was for an authorized purpose, provided the employer has a written policy or CBA outlining the requirement. An employer may require verification from a health care provider of the need for leave, but cannot require an explanation of the health condition. Any such information obtained must be maintained confidentially. Verification must be provided within a "reasonable time period" as defined by the employer policy or CBA, which cannot be less than 10 calendar days. For leave authorized under the federal Family and Medical Leave Act (FMLA), employees must satisfy FMLA verification requirements.

## Reporting and Payment of Sick Leave

Employers would be required to provide employees with a written or electronic notice detailing the amount of paid sick leave accrued and used, and their available balance at least monthly. Notice could be included in regular payroll statements. Employers would also have to provide an employee rights notice to existing employees by March 1, 2018 and for new hires on or after January 1, 2018 when they commence employment.

**Timing of Payment.** When employees must be paid for sick leave depends on whether the employer requires verification for absences exceeding three days. If no verification is required, the employer must pay no later than the pay period in which leave was used. If verification is required, the employer must pay no later than the pay period during which the employee provides it.

**Rate of Pay.** The rate of pay used to calculate the payment amount for sick leave used will vary depending on how the employee is normally paid. For example, a tipped employee would be paid at the normal hourly pay that would have been earned absent the leave, but would not be compensated for lost tips, gratuities or service charges. Commission and piece-rate employees would be paid the greater of their normal hourly compensation or minimum wage. Non-exempt salaried employees would receive their normal hourly compensation, determined by dividing earnings per workweek by the total number of hours worked. Employees whose pay fluctuates would receive their normal hourly compensation equal to the scheduled hourly rates of pay applicable had leave not been taken. Employees scheduled to work a shift of indeterminate length would receive their normal hourly compensation based on hours worked by a replacement employee or similarly situated employees who worked the same or similar shift.

## In Closing

Washington's new paid sick leave will add to the administrative burdens and compliance challenges employers already face. Employers, particularly those operating in multiple jurisdictions, will need to formulate policies that satisfy the new state requirements and an increasingly complex patchwork of state and local leave laws.

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