

## Rhode Island's Paid Sick Leave Law Goes into Effect July 1: Are You Ready?

When Rhode Island's Healthy and Safe Families and Workplaces Act goes into effect next month, employers will have to begin providing sick and safe leave benefits. Last month, the state's Department of Labor and Training issued final regulations that provide some clarity regarding the new mandate while placing additional compliance burdens on employers. With an effective date of July 1 looming, employers should determine whether there are steps they may still need to take to ensure compliance.

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### Background

In September 2017, Rhode Island became the eighth state with a statewide paid sick leave mandate. Since then, two more states have enacted similar mandates. When its [Healthy and Safe Families and Workplaces Act](#) (Act) takes effect on July 1, Rhode Island will join neighboring Connecticut and Massachusetts and seven other states — Arizona, California, Maryland, New Jersey, Oregon, Vermont, and Washington — in requiring businesses to provide paid sick leave to their employees. (See our [October 5, 2017 For Your Information](#).)

When fully implemented, the new law will require private employers with 18 or more employees to annually provide up to 40 hours of paid, job-protected sick and safe leave to eligible employees. During a three-year phase-in period, employees will be able to earn and use up to a maximum of 24 hours of paid leave in 2018, 32 hours in 2019, and 40 hours in 2020 and each subsequent year.



## **Key Provisions of the Act**

### **Accrual, Frontloading and Carryover**

Beginning on July 1, 2018, or the commencement of employment if later, employees will accrue a minimum of one hour of leave for every 35 hours worked up to the applicable annual maximum. Accrual for exempt employees will be based on a 40-hour workweek or their normal workweek, if shorter.

Employers will have two options to avoid tracking accruals — frontload the required annual amount of leave at the beginning of each year or provide a monthly lump sum. Employers using the monthly lump sum alternative would base the allotment on how many average hours an employee works per week.

Accrued but unused leave must be carried over to the following year, but employers will not be required to pay it out on termination. However, employers will have to reinstate any previously accrued but unused leave for employees who are rehired within 135 days of their separation.

### **Use**

Paid sick and safe leave time provided under the new law may be used for any of the following reasons:

- An employee's own or covered family member's illness, injury or health condition, or preventive medical care
- Reasons related to domestic violence, sexual assault, or stalking of an employee or covered family members
- Closure of the employee's workplace or child's school due to a public health emergency
- Constraining the employee's or covered family member's presence in the community to prevent the spread of a communicable disease

For these purposes, covered family members include child, parent, spouse, in-laws, grandparents, grandchildren, domestic partners, siblings, care recipients, and members of the employee's household.

Employers may set a minimum increment for using leave of up to four hours per day, and may cap annual usage at the applicable accrual limits. Leave used is compensated at the same hourly rate and with the same benefits (including health care benefits) as the employee normally earns during hours worked.

Employers generally may prevent new hires from using accrued leave until after the 90th day of employment. Seasonal and temporary employees may be prohibited from using leave until after the 150th and 180th day of employment, respectively.

### **Notice**

Although the new law will require employers to provide paid sick and safe leave upon request, they may require employees to advise the expected duration of the leave. Employers may require advance notice of foreseeable leaves, and notice for unforeseeable leave in accordance with their established policies.

For absences that exceed three consecutive days, employers may require reasonable documentation that leave was for an allowable purpose, provided employees had advance notice of the requirement. Additionally, an employer may require written documentation for sick time taken within two weeks of the employee's final scheduled workday prior to termination.

## Final Regulations

Last month, the state Department of Labor and Training issued final paid sick and safe leave [regulations](#), providing important clarifications on the Act's requirements while imposing additional compliance burdens on employers. Highlights are provided below.

### Determining Employer Size

Whether an entity is required to provide paid leave under the Act hinges on the size of its workforce. The regulations instruct employers to take the average of their total Rhode Island employees during the highest two employment quarters of the previous payroll year to determine employer size for that purpose. The determination will remain in effect for the following twelve months, regardless of changes in employer staffing levels. New employers must provide paid sick and safe leave to all employees once they have at least 18 employees on payroll.

### Who is an Employee?

The regulations broadly define employee as “any person suffered or permitted to work by an employer, including those working on a full-time, part-time or per diem basis,” with exceptions for state and municipal employees and certain licensed nurses. Independent contractors, subcontractors, work study participants, apprentices, and interns are not considered employees for these purposes.

The regulations clarify that an employee whose primary place of employment within the last 12 months was in Rhode Island is considered to be a Rhode Island employee for purposes of the Act, regardless of where the employer is located. Employees who spend less than 50% of their working time in Rhode Island will satisfy the primary place criteria — as long as they spend more time working in Rhode Island than in any other state.

While it appears that employers with fewer than 18 employees in Rhode Island will not be required to provide paid or unpaid leave, they still may have to deem time off used for purposes covered under the Act up to the maximums applicable to covered employers (i.e., 24 hours in 2018, 32 hours in 2019, and 40 hours in subsequent years) to be job-protected.

**Seasonal and Temporary Employees.** The regulations define “seasonal employee” as an employee who is hired into a position for which the customary annual employment is six months or less. A “temporary employee” is defined as a person who is employed by an employment agency or temporary staffing company and is placed for assignment with other entities pursuant to an agreement with an employment agency, placement service, or training school or center.

### Existing PTO Policies

The Act exempts employers that already provide the minimum amount of paid leave required by the new law under a paid time off (PTO) or other policy from its accrual and carryover requirements. However, it does not make clear whether the exemption is equally available to employers whose PTO policy frontloads paid leave or is accrual-based. The regulations confirm the exemption for a PTO policy that frontloads, but only implies it would apply when PTO is accrued.

Regardless of which method the PTO policy uses, the employer must provide the minimum amount of paid leave required by the Act to full-time employees who work a full year. The regulations permit employers to prorate paid leave for other employees based on their start dates and hours worked.

## Accruing Paid Leave

While the Act provides that eligible employees will accrue paid sick and safe leave based on hours worked, the regulations state that Rhode Island employees will accrue paid leave for all hours worked (regardless of where) as well as all hours paid by the employer. Thus, in addition to all hours actually worked, employers will have to include paid holidays, sick, vacation, personal, and any other form of PTO when calculating accruals.

**Comment.** Existing paid sick leave laws generally restrict accruals to time actually worked rather than time paid. Multi-state employers that are already subject to paid sick leave requirements outside Rhode Island should re-evaluate and update their accrual tracking protocols to ensure they will be able to satisfy the new requirements.

The regulations further clarify that all hours worked by eligible employees, and all hours they are paid for, are counted for accrual purposes, regardless of the location of the work or the employer. Thus, a Rhode Island employee would earn sick and safe leave for work performed, for example, in neighboring Connecticut or Massachusetts.

## Using Leave

Paid time off provided under the new law may be used for reasons related to the employee’s own or a covered family member’s need as specified in the Act. For these purposes, covered family members include child, parent, spouse, in-laws, grandparents, grandchildren, domestic partners, siblings, care recipients, and “members of the employee’s household.”

While the Act did not define a “member of employee’s household,” the regulations do. Despite earlier objections from the business community, the final regulations define a member of the employee’s household as “a person that resides at the same physical address as the employee or a person that is claimed as a dependent by the employee for federal income tax purposes.”

## Waiting Period

Employers may establish a waiting period for the use — but not the accrual — of paid leave. Employer policy may prevent new hires from using accrued leave until their 91st day of employment or the end of the employer’s waiting period, whichever is sooner. The regulations require employers to notify new employees of a waiting period “in writing.”

## Written Notice

The regulations define “written notice” or “in writing” as “any printed or printable communication that is provided in a physical or electronic format, including communications that are transmitted through electronic mail, a computer system or is otherwise sent and stored electronically.” They also confirm that employers must provide such notice in hard copy on request.

## Determining the Applicable Hourly Rate

The regulations clarify what constitutes the “same hourly rate” for purposes of compensating employees in the following classifications for used leave:

- Hourly employees — Regular hourly rate
- Employees who receive different rates for hourly work from the same employer — either (i) the rate that would have been paid had the employee worked; or (ii) a blended rate, whichever the employer elects to use for the entire benefit year

- Salaried employees — Total earnings in the previous pay period divided by total hours worked during the period (Note: Exempt employees are assumed to work 40-hour weeks, but rate should be calculated based on their normal work week if shorter)
- Piece workers — A reasonable calculation of wages that would have been paid had the employee worked
- Commissioned employees — Base wage or the effective minimum wage, whichever is greater
- Tipped employees — At least minimum wage

Commissions, drawing accounts, bonuses, incentive pay based on sales or production, sums excluded under 29 U.S.C. §207(e), overtime pay, holiday pay, and other premium rates are not included in calculating the same hourly rate.

## Notice Requirements

The regulations clarify that a qualifying absence is foreseeable when it is planned at least 24 hours in advance of when leave is required, and provide that employees should request foreseeable leave within a reasonable timeframe.

For absences of more than three consecutive days, employers may seek reasonable documentation that leave was used for a covered purpose. The regulations make clear that employers must notify employees in writing of this requirement in their employee handbook or employment policy. While also making clear that employers must accept such documentation within a reasonable timeframe, the regulations do not define what that timeframe is.

The Act allows an employer to request certification of an employee's absence, as long as it does not cause an unreasonable burden or expense to the employee. The regulations define the employee's total cost to obtain documentation (including administrative, governmental or medical fees, and transportation costs) as "unreasonable" if it exceeds two times their hourly rate of pay. When the total cost is unreasonable, employers may require the employee to submit a signed statement indicating the use of earned leave was for permissible reasons.

### Special Rules for Food Employees

The regulations provide special rules for individuals who work with unpackaged food, food equipment or utensil, or food-contact surfaces ("food employees") who notify their employer of their intent to use earned sick time. In such circumstances, employers may ask food employees whether the reason for leave would trigger any employer obligations under the Rhode Island Food Code. If the answer is yes, the employer may seek additional information and take certain further actions needed to comply with the Food Code.

## Recovering Advanced or Loaned Paid Leave

Employers that loan paid sick and safe leave to employees will be permitted to recover monies owed to the employer for that time from a terminating employee's final paycheck, provided they have written permission to do so. Employer policies should make clear that as a condition of receiving such an advance or loan, employees must agree in writing that any outstanding amounts owed from such an advance or loan at the time of termination will be deducted from their final paycheck.

## In Closing

When Rhode Island's Healthy and Safe Families and Workplaces Act goes into effect on July 1, employers will have to begin providing sick and safe leave benefits. Employers should determine whether there are any steps they may still need to take to ensure compliance.

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