BUCK

US

Celebrating 40 years of FYI®

FYI®
For Your Information®

Nevada releases guidance on paid leave mandate

Volume 42

Issue 101

November 22, 2019

Authors
Nancy Vary, JD
Abe Dubin, JD

Nevada's labor commissioner has released an advisory opinion that provides important clarifications on the state's mandatory PTO law, slated to take effect on January 1, 2020. Employers with workers in Nevada will want to familiarize themselves with their new leave obligations and consider how best to integrate them into existing benefit programs.

Background

On June 12, 2019, Nevada became the second state — following Maine — to enact a mandatory paid leave law. Effective January 1, 2020, the new law (SB 312) will require private employers with at least 50 employees in Nevada to provide paid time off (PTO) leave that may be used for any reason. (See our October 9, 2019 *FYI*.)

Under the new law, employers have two options: (1) allow employees to accrue paid leave at the rate of at least 0.01923 hours for each hour of work performed and carry over up to 40 hours of unused, accrued leave to the following benefit year; or (2) on the first day of each benefit year, frontload the total number of hours of paid leave that the employee is entitled to accrue in a benefit year with no carryover requirement. Employers that already provide an equivalent or greater amount of paid leave will not have to provide additional time.

Employers will be permitted to cap an employee's usage at 40 hours per benefit year and set a minimum increment of use not to exceed four hours. While there is no requirement for the payout of unused, accrued paid leave at termination, any such leave that is not paid out must be reinstated if the employee is rehired within 90 days of termination — unless the employee voluntarily quit.

Guidance released

Last month, Nevada's labor commissioner released Advisory Opinion 2019-02 (AO) regarding the interpretation, implementation, and enforcement of SB 312. Highlights of the guidance follow.

Covered employers

Whether a private-sector employer is subject to the new mandate depends on whether it employs 50 or more employees working in Nevada in 20 or more workweeks in the current preceding calendar year, including employees of a joint employer or successor in interest. Full- and part-time — but not temporary, seasonal, or on-call — employees are counted toward the 50-employee threshold.

Whether multiple companies, franchises, or entities that have different locations, LLCs, Tax Identification Numbers, or other business structures count together towards the 50-employee threshold will depend on their structure, legal and tax formation, and other relevant information.

Exemptions from coverage

The requirements of SB 312 do not apply to the following:

- An employer during the first two years of operation
- An employer that already matches or exceeds the 0.01923 hours of paid leave per hour of work performed pursuant to a contract, policy, collective bargaining, or other agreements

Employee handbooks. The AO confirms that an employee handbook would qualify as a policy or agreement provided it includes language about the paid leave policy and paid leave is provided that meets or exceeds the requirements of the new law.

Existing policies. The AO also confirms that employers may continue to enforce existing notice requirements, call-out-policies, and/or request for leave policies/provisions that are set forth in their contracts, policies, handbooks, collective bargaining, or other agreements, but they should not "discourage" the use of paid leave. Existing policies that have a waiting period to use leave but otherwise match or exceed the requirements of SB 312 would qualify for the exemption. Similarly, employers that already offer sick leave or other types of paid leave before 90 days of employment or after 90 days of employment that match or exceed the requirements of SB 312 would qualify for the exemption.

Collective bargaining agreements. Collective bargaining agreements that have been — or are being — negotiated that offer leave that matches or exceeds the new law's requirements are also exempt, even if they have been modified to provide for a vacation bank/fund, savings plan, vacation plan/vacation savings plan, or other leave plan, or instead offer the leave to be paid as part of the collective bargaining agreement.

Eligible employees

The new law does not apply to temporary, seasonal, on-call, or per-diem employees. The AO defines those terms as follows:

- “Temporary” — an employee who works less than 90 days on an occasional or temporary basis, regardless of whether paid by the employer or a private/temporary employment agency, training school, or training center
- “Seasonal” — an employee who typically works less than 90 days and/or who is hired for a specific season
- “On-call” or “per-diem” — an employee who is called out to work on an hourly or daily basis based on employer need

The AO cautions that employers intentionally misclassifying employees as temporary, seasonal, or on-call/per-diem to avoid providing paid leave could face an administrative penalty of up to $5,000.00 per violation. It also warns that temporary, seasonal, or on-call/per-diem assignments that exceed 90 days may trigger a presumption that the employee has assumed part- or full-time status and is eligible for paid leave.

Accrual and frontloading

Under the new law, employers must allow employees to accrue paid leave during the benefit year or they can frontload the employee’s total leave accrual on the first day of each benefit year. Notably, the AO indicated that an employer’s “benefit year” starts on the employee’s hire date.

While SB 312 does not require employers to pay out unused leave — whether frontloaded or accrued — at termination, the employer’s policy, contract, agreement, handbook, or collective bargaining agreement may. Whether an employer has to allow an employee who is quitting to use leave to cover a two-week notice period similarly depends on its policy, contract, agreement, handbook, or collective bargaining agreement for paying out leave. However, if the employer decides to terminate the employee prior to the termination date, the employer cannot deduct paid leave from an employee’s final paycheck that was not actually taken.

Calculating rate of pay

The AO makes clear that employees should be compensated for paid leave at the hourly rate of pay in effect when leave is taken and paid on the same payday as the hours taken are normally paid. For employees paid on a salary, commission, piece rate, or a method other than hourly wage, the rate is determined by dividing the employee’s total wages (including earned bonuses but excluding discretionary bonuses, overtime pay, hazardous duty pay, holiday pay, and tips) paid for the immediately preceding 90 days by the number of hours worked during that period.

While the law is silent as to the applicable rate of pay for salaried and exempt employees’ leave, the AO provides that the calculation must be “reasonable” and “consistent” but offers only one example that translates the employee’s annual salary into an hourly rate.

Recordkeeping

While SB 312 generally requires employers to maintain a record of each employee's receipt, accrual, and use of paid leave for a one-year period, the recordkeeping requirements would not apply under any of the above exemptions. Although the labor commissioner is not requiring tracking the accrual and use of paid leave by salary or exempt employees, the guidance reminds employers of their basic wage and hour compliance obligations under Nevada law.

Notice and posting obligations

The new law provides that employers may require employees to provide notice of the need for PTO "as soon as practicable," but did not address how much advance notice employers may require. The AO similarly failed to set parameters, suggesting that an acceptable timeframe will depend on the circumstances.

While the law did not include substantive provisions on employers' notice and posting obligations, it did require the labor commissioner to prepare and post on its website a bulletin that sets forth the new employee benefit and require all employers to post the bulletin in their workplaces. The labor commissioner has now released a poster summarizing the provisions of SB 312 in both English and Spanish, as well as updating the wage and hour abstract that employers are required to post to include information on the new paid leave requirement in both English and Spanish.

In closing

Employers should review their existing paid leave benefits to ensure that they satisfy Nevada's paid leave mandate. Employers should develop or update their PTO policies, handbooks, or collective bargaining agreements to offer paid leave that meets or exceeds the new state requirements prior to January 1, 2020.

Produced by the Knowledge Resource Center

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive.