

Management Alert



If Pain, Yes Gain—Part XVIII: Vermont Becomes Fifth State to Enact Paid Sick Leave Law

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Vermont finally hopped on the [paid sick leave bandwagon](#) when last week, Governor Peter Shumlin signed the Vermont Paid Sick Leave Law (“Vermont PSL”). Vermont joins Connecticut, California, Massachusetts, and Oregon as the only states to pass a statewide paid sick leave law.¹ The Vermont PSL goes into effect on January 1, 2017 for employers with at least six employees, and January 1, 2018 for smaller employers.

While the Vermont PSL is certainly a win for employees, as illustrated below, it contains many employer-friendly attributes that should help ease the compliance burdens awaiting covered employers.

Which Employers Are Covered Under the Vermont Law?

The Vermont PSL defines “employer” broadly to include any individual, organization or governmental body, partnership, association, corporation, legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company doing business in or operating within [Vermont].”

Which Employees Are Covered by the Law?

On the other hand, the law defines “employees” more restrictively. To be covered under the Vermont PSL, an employee must work for a company for an average of at least 18 hours per week during a given year. The Vermont PSL further contains various exclusions from the definition of “employee,” which most notably include: (a) individuals employed by the federal government; (b) individuals employed by an employer for 20 weeks or fewer in a 12-month period where the job is scheduled to last 20 weeks or fewer; (c) individuals under the age of 18; and (d) persons that (i) work on per diem or intermittent basis, (ii) work only when the person indicates that he or she is available to work, (iii) who are under no obligation to work for the employer offering the work, and (iv) have no expectation of continuing employment with the employer.

¹Please see our earlier posts for more information on the [Connecticut](#), [California](#), [Massachusetts](#), and [Oregon](#) paid sick leave laws.

How Much Sick Leave Must Covered Employers Provide?

Covered employees accrue one hour of earned sick time for every 52 hours worked. This is one of the most management-friendly provisions of the Vermont PSLL as existing state and local paid sick leave laws generally have a much faster accrual rate.

In addition to the pro-employer accrual rate, employers can calculate earned sick time either as it accrues, or “on a quarterly basis, provided that [the] employee may use earned sick time as he or she accrues it during each quarter.” Moreover, the Vermont PSLL imposes a reduced earned sick time accrual cap on employers from January 1, 2017 through December 31, 2018. During this period employers must allow employees to accrue at least 24 hours of earned sick time in a 12-month period. Thereafter, the cap increases to 40 hours in a 12-month period.

To further decrease the burden on employers, the law carves out an interesting, and highly beneficial usage waiting period. Under the Vermont PSLL, an employer can prohibit new hires from using earned sick time for up to one year following the start of their employment. Similarly, an employer also may require employees employed on January 1, 2017 (or on January 1, 2018 for smaller employers) to wait a period of one year before they can use accrued earned sick time.² In other words, employers with six or more employees have almost two years from today, and smaller employers have almost three years before their employees can use accrued earned sick time.

Do Employees Carryover Accrued, Unused Sick Leave at the End of the Year?

The Vermont PSLL seemingly provides no cap on carrying over accrued, unused sick time at year end. However, the law does include some important restrictions. First, if an employer cashes out an employee’s unused earned sick time at the end of the year, the amount for which the employee was compensated does not carry over to the following year. Second, if the employer frontloads its employees a lump grant of 24 or 40 earned sick time hours (depending on the year), the employer need not comply with the law’s carryover requirements.

Under What Circumstances May Employees Use Sick Leave?

Under the Vermont PSLL, an employee shall use accrued earned sick time “in the smallest time increments that the employer’s payroll system uses to account for other absences or that the employer’s paid time off policy permits.” Employers may limit employees’ use of earned sick time to increments that are no shorter than one hour.

An employee may use sick time earned under the Vermont PSLL for any of the following reasons:

- The employee is ill or injured.
- The employee obtains professional diagnostic, preventative, routine, or therapeutic healthcare.
- The employee cares for a sick or injured parent, grandparent, spouse,³ child, brother, sister, parent-in-law, grandchild, or foster child, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment, or accompanying the employee’s parent, grandparent, spouse, or parent-in-law to an appointment related to his or her long-term care.
- The employee is arranging for social or legal services or obtaining medical care or counseling for the employee or for 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.

²During this initial usage waiting period, employees may accrue, but cannot use earned sick time.

³Although not expressly stated in the Vermont PSLL, “spouse” likely will include domestic partners.

- The employee cares for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, because the school or business where that individual is normally located during the employee's workday is closed for public health or safety reasons.

What is the Rate of Pay for Sick Leave?

Under the Vermont PSSL, employers shall pay employees who use earned sick time the greater of either (a) the normal hourly wage rate of the employee, or (b) the Vermont state minimum wage.

What Notice Must Employees Provide When Using a Sick Day?

Employers may require employees to "make reasonable efforts" to avoid using earned sick time for foreseeable absences, such as routine or preventive health care appointments, during normal work hours. Employers also can mandate that employees provide notice of their intention to use earned sick time "as soon as practicable," and that the notice include the anticipated length of the employee's absence.

Can Employers Require Employees to Provide a Medical or Other Certification?

Unlike many existing paid sick leave laws, the Vermont PSSL lacks a provision discussing when and under what circumstances an employer can require its employees to provide reasonable documentation, such as a doctor's note, confirming that earned sick time was used for a sanctioned purpose. It is unclear whether Vermont will address this shortcoming in regulations or other administrative guidance released before the law's effective date.

What Notice Must Employers Provide?

The Vermont PSSL imposes both notice and posting obligations on covered employers. In particular, employers must post notice of certain rights under the law in a conspicuous location in the employer's place of business. Furthermore, employers must provide notice of the law's provisions to newly hired employees upon commencement of their employment.

What Can Employers Do and Not Do?

An employer cannot: (a) require an employee to find a replacement for covered sick time absences; (b) require an employee to use accrued earned sick time for a covered absence if the employer and employee mutually agree that either (i) the employee will work an equivalent number of hours during the same pay period, or (ii) the employee will trade hours with a second employee;⁴ (c) diminish the employee's rights under the Vermont Parental and Family Leave Act if the employee uses earned sick time under the Vermont PSSL; and (d) discharge or in any other manner retaliate against an employee for exercising his or her rights under the Vermont PSSL or filing a complaint against the employer.

An employer can: (a) adopt a policy that requires employees to use accrued earned sick time for an absence from work due to a covered reason under the law; and (b) decline to provide employees with additional earned sick time if the employer provided the employee with paid time off for reasons protected under the Vermont PSSL and the employee chooses to use the time for a different purpose.

⁴The Vermont PSSL allows that, if such an arrangement is made, the employer will not be required to pay the employee for the time that the employee was absent.

Must Unused Sick Leave Be Paid Upon Employment Separation?

Under the Vermont PSL, employers are not obligated to cash out an employees' accrued, unused earned sick time upon separation of employment.

Interestingly, employees who are discharged by their employer after completing the one year usage waiting period, and then subsequently rehired by the same employer within 12 months are treated more favorably than employees who resign. A formerly discharged employee can begin to accrue earned sick time without going through another usage waiting period. However, and fortunate for employers, the employer has no duty to reinstate the rehired employee's accrued, unused earned sick time from before the discharge. Whereas, employees who voluntarily separate from their employer after completing the one year usage waiting period, and who are subsequently rehired by their employer within 12 months after separation, must complete an additional one year waiting period before they can use accrued sick time.⁵ The law is silent on whether an employer in this situation must reinstate the employee's pre-separation accrued, unused sick time.

What Should Employers Do Now?

As discussed earlier, employers have a long time before their employees can use any paid sick time earned under the Vermont PSL. However, as the old adage goes "the bad news is time flies ... the good news is you're the pilot." Vermont employers would be prudent to use the remainder of 2016 to confer with counsel and establish a compliant and efficient system for employees to use their earned sick time. These are among other actions to consider:

- Review sick leave or PTO policies and procedures immediately to ensure that they meet at least the minimum requirements of the Vermont PSL no later than the effective date for the respective employer.
- Develop a new Vermont paid sick leave policy that complies with the Vermont PSL for any employees who are not covered under the employer's existing paid sick leave or PTO policies.
- Review and, as necessary, revise anti-retaliation, attendance, conduct, and discipline policies to prevent retaliation against employees for taking time off under the Vermont PSL.
- Prepare to comply with the law's notice and posting requirements.
- Train supervisory and managerial employees, as well as HR, on the law's requirements.

If you would like further information, please contact your Seyfarth attorney, or [William P. Perkins](mailto:wperkins@seyfarth.com) at wperkins@seyfarth.com, [Joshua D. Seidman](mailto:jseidman@seyfarth.com) at jseidman@seyfarth.com or [Samuel Sverdlov](mailto:ssverdlov@seyfarth.com) at ssverdlov@seyfarth.com.

⁵During this one year waiting period, these employees will be permitted to accrue sick time.

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