

Management Alert



If Pain, Yes Gain—Part XIX: Minneapolis Passes Paid Sick Leave Ordinance

By Joshua D. Seidman and Tracy Billows

Seyfarth Synopsis: On May 27, 2016 the Minneapolis, MN city council unanimously passed a mandatory paid sick leave ordinance—the first of its kind in the state and perhaps the most generous of any paid sick leave mandate in the country.

After months of debate, on May 27, 2016 the Minneapolis city council voted on and unanimously passed a mandatory paid sick leave ordinance—the first of its kind in the state.¹ The ordinance, which is known as the “Sick and Safe Time Ordinance” (“SSTO”), is one of the most generous paid sick leave laws in the country.

As discussed in greater detail below, some of the primary requirements imposed by the SSTO include:

- Employers with six or more employees, which is measured by counting all full-time, part-time and temporary employees, regardless of whether they work in Minneapolis, must provide paid sick time (“PST”) to their Minneapolis employees.
- Employers must comply with both “annual” and “point in time” PST accrual caps.
- It appears employers cannot set an annual cap on the amount of PST employees can use per year and the cap on accrual does not address total annual usage.
- “[M]embers of the employee’s household” are included in the SSTO’s definition of covered family members.
- Upon employee request, an employer must provide its employees with information containing the employee’s then-current amount of accrued and used PST.

The SSTO is scheduled to become effective on July 1, 2017. However and significantly, the agency tasked with enforcing the SSTO, the Minneapolis Department of Civil Rights (the “Department”), will not begin full enforcement immediately. Rather, it “must only mediate disputes and issue warnings and notices to correct” to companies that incur “first violations” through June 30, 2018. Subsequent violations by the same employer through June 30, 2018, and all violations after June 30, 2018 may be subject to the full complement of relief and penalties permitted under the SSTO.²

¹ Minneapolis joins a growing list of states and municipalities that impose paid sick leave (“PSL”) obligations on employers. The existing statewide mandatory PSL laws include: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; and (5) Vermont. For most covered employers, the Vermont law becomes effective on January 1, 2017. The existing municipal PSL laws include: (1) San Francisco, CA; (2) Washington, D.C.; (3) Seattle, WA; (4) Long Beach, CA; (5) SeaTac, WA; (6) New York City, NY; (7) Jersey City, NJ; (8) Newark, NJ; (9) Passaic, NJ; (10) East Orange, NJ; (11) Paterson, NJ; (12) Irvington, NJ; (13) Los Angeles, CA; (14) Oakland, CA; (15) Montclair, NJ; (16) Trenton, NJ; (17) Bloomfield, NJ; (18) Philadelphia, PA; (19) Tacoma, WA; (20) Emeryville, CA; (21) Montgomery County, MD; (22) Pittsburgh, PA; (23) Elizabeth, NJ; (24) New Brunswick, NJ; (25) Spokane, WA; (26) Santa Monica, CA; and (27) Plainfield, NJ. The Los Angeles, CA law becomes effective on July 1, 2016. In addition, Los Angeles has a separate PSL ordinance that adds further compliance obligations on certain “hotel employers,” which has been in effect since November 2014. The Plainfield, NJ ordinance becomes effective on or about July 15, 2016. The Montgomery County, MD law becomes effective on October 1, 2016. The Spokane, WA and Santa Monica, CA laws become effective on January 1, 2017. The Long Beach, CA and SeaTac, WA ordinances only apply to hospitality and/or transportation employers. The Pittsburgh, PA ordinance was enacted on August 3, 2015, however, in December 2015 the law was deemed “invalid and unenforceable” by a Pennsylvania state court (the city’s appeal is pending).

² Relief and penalties for violating the SSTO include (a) reinstatement and back pay, (b) crediting the employee owed PST hours plus paying the employee the greater of \$250 or the dollar value of the owed PST hours multiplied by two, (c) payment of any PST unlawfully withheld plus paying the employee the greater of \$250 or the dollar value of the withheld PST hours multiplied by two, (d) up to a \$1,500 administrative penalty for violating the SSTO’s confidentiality, anti-retaliation, or anti-interference provisions, and (e) an administrative fine of up to \$50 per day for violations of the SSTO’s notice and posting, balance notification, or recordkeeping provisions.

Which Employers Are Covered Under the SSTO?

The SSTO defines “employer” as any person or entity that employs at least one employee in Minneapolis. As noted above, employers with six or more employees must provide their eligible Minneapolis employees with *paid* sick time, while employers with fewer employees must provide their eligible Minneapolis employees with *unpaid* sick time. To determine an employer’s size under the SSTO, employers must determine their average number of employees per week during the prior year, counting all employees, regardless of whether they work in Minneapolis.

In addition and notably, from July 1, 2017 through June 30, 2022 (i.e., for the first years the SSTO is in effect), new Minneapolis employers, excluding “chain establishments,”³ are only required to provide *unpaid* sick time to their eligible employees during the employers’ first 12 months of operation.

Furthermore, the SSTO expressly states that employers who afford their employees sick and safe time under either a paid time off or other paid leave policy that meets or exceeds the SSTO’s minimum standards and requirements, are not required to provide additional sick and safe time.

Which Employees Are Covered by the SSTO?

The SSTO defines “employee” broadly. Specifically, the law covers any individual employed by an employer, including full-time, part-time and temporary employees, who work in Minneapolis for at least 80 hours in a year. The SSTO does not cover independent contractors.

How Much Sick Time Can Employees Accrue, Use, and Carryover?

Employees begin accruing PST at the start of their employment or on July 1, 2017, whichever is later. The SSTO notes that new hires are entitled to use accrued PST 90 calendar days after the commencement of their employment. However, the law is silent on whether this 90-day usage waiting period applies to employees who work for the employer on July 1, 2017.

Employers must allow eligible employees to accrue PST at least as fast as one hour of PST for every 30 hours worked, up to a maximum of 48 hours per year. In addition, the SSTO sets an 80 hour “point in time” cap, meaning that employers are only required to allow employees’ bank of accrued, unused PST to reach 80 hours at any one time. The SSTO states that accrued, unused PST will carryover from one year to the next, and that employers can limit employees’ use of PST to increments that are no shorter than four hours.

The SSTO is *silent* on whether an employer can satisfy the above accrual rate and annual accrual cap requirements by frontloading its employees a lump grant of 48 hours of PST at the start of the benefit year. However, on June 4, 2016 the Minneapolis city council issued a “council action” addressing existing employer policies that “allocat[e] annual paid time off or paid sick time (collectively ‘PTO/PST’) each calendar year without requiring direct accrual...but require PTO/PST to be used within the year without carryover.” The city council has given select city offices, departments, and individuals until August 17, 2016 to analyze and provide recommendations for how these policies can be accounted for in the SSTO.

Importantly, the SSTO also is *silent* on whether there is an annual cap on how much PST employees can ultimately use in a single year. Assuming no further clarification is provided on this issue, it is possible that an employee *could use up to 128 hours of PST in a single year*, thereby making the SSTO one of the most pro-employee paid sick leave laws in the country and imposing a significant burden on covered employers.

Consider the following illustrative example: *An employee accrues 48 hours of PST during Year 1 after the SSTO goes into*

³ Under the SSTO, “[c]hain establishment” means an establishment doing business under the same trade name used by two (2) or more establishments, or under the same ownership and doing the same business, whether such other establishments are located in the city or elsewhere and regardless of the type of ownership of each individual establishment.”

effect and does not use any accrued PST during that year. The employee carries over all 48 hours into Year 2. In Year 2, the employee accrues PST until she reaches 80 hours in her bank. Accrual stops even though the employee has only accrued 32 hours of PST in Year 2 because the employee has reached the SSTO's "point in time" accrual cap. The employee does not use any PST in Year 2, so she carries over all 80 hours into Year 3. The employee then gets sick several times during the first two months of Year 3 and has to use all 80 hours of her PST. As soon as the employee uses some of her 80 PST hours, she begins accruing PST based on her hours worked. The employee can accrue the full 48 hours in Year 3 because she will not hit the "point in time" cap. If the employee gets sick during the remainder of Year 3, she can use any or all of her 48 hours of PST. If she uses all 48 hours, the employee will have used 128 hours of PST in Year 3.

Under What Circumstances May Employees Use Sick Leave?

An employee may use PST earned under the SSTO for any of the following reasons:

- The employee's or a covered family member's mental or physical illness, injury or health condition, need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition, or preventive medical or health care;
- Certain absences of the employee or the employee's family member due to domestic abuse, sexual assault, or stalking;
- Closure of the employee's place of business or a family member's school or place of care by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public health emergency; and
- Closure of a family member's school or place of care due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure.

The SSTO defines "family member" such that employees may use PST for their child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, guardian, ward, members of the employee's household, or registered domestic partner.

What is the Rate of Pay for Sick Leave?

Employers must compensate an employee who uses PST at the same hourly rate with the same benefits as the employee would have earned had he/she actually worked the scheduled hours. Employers do not have to compensate employees for lost tips or commissions.

What Notice Must Employees Provide When Using a Sick Day?

If the need to use PST is foreseeable (i.e., a scheduled doctor's appointment), an employer may require up to seven days' advance notice of the intention to use PST. If the need to use PST is not foreseeable (i.e., a sudden illness), an employer may require an employee to give notice as soon as practicable.

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

Employers can require reasonable documentation that the employee used PST for a permitted purpose only when the employee is absent for more than three consecutive days. The SSTO does not provide examples of what it considers to be "reasonable documentation."

What Notice Must Employers Provide?

Covered employers must post a notice published by the Department in a conspicuous place at any workplace or job site. The SSTO calls for the Department to release model notices in all languages spoken by more than five percent of the Minneapolis workforce by July 1, 2017. In addition, covered employers that provide an employee handbook to their employees must include notice of employee rights and remedies in the handbook.

What Records Must Employers Maintain?

The SSTO requires that employers maintain accurate records for each employee showing accrued and used PST for a period of at least three years in addition to the current calendar year. If an employer has employees who occasionally work in Minneapolis, the employer must track all hours worked in the city by such employees.

What Can Employers Do and Not Do?

Employers cannot (a) interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under the SSTO, (b) discriminate or retaliate against an employee who exercises his/her rights under the SSTO, (c) fail to maintain the confidentiality of health or medical information regarding an employee or an employee's family member or information pertaining to domestic abuse, sexual assault, or stalking of an employee or an employee's family member, and (d) require, as a condition of an employee using PST, that the employee seek or find a replacement worker.

Employers can advance PST to an employee prior to accrual by such employee.

Must Unused Sick Time Be Paid Upon Employment Separation?

Employers are not obligated to cash out an employee's accrued, unused PST upon separation of employment. However, any accrued, unused PST must be restored to an employee who is rehired within 90 days of separation from employment.

What Should Employers Do Now?

Minneapolis employers should take steps now to ensure that they will be able to achieve full compliance with the SSTO by the law's July 1, 2017 effective date. These are among the actions to consider:

- Review their sick days, sick leave or paid time off ("PTO") policies and procedures immediately to ensure that they meet at least the minimum requirements of the SSTO no later than the law's July 1, 2017 effective date. Employers will need to make sure the policy complies not only with the amount of time to be provided to employees but also with usage requirements, increments of use, carryover, etc.
- Develop a new Minneapolis paid sick leave policy that complies with the SSTO for any employees who are not covered under 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 SSTO.
- Prepare to comply with the law's posting and notification requirements.
- Monitor the [Minneapolis Department of Civil Rights website](#) for template notices and other guidance and updates on the SSTO.
- Train supervisory and managerial employees, as well as HR, on the law's requirements.

With the paid sick leave landscape continuing to expand and grow in complexity, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this law and sick leave requirements generally.

If you have any questions, please contact your Seyfarth attorney, [Joshua D. Seidman](#) at jseidman@seyfarth.com, or [Tracy Billows](#) at tbillows@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | June 7, 2016

©2016 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.