

# Management Alert



## If Pain, Yes Gain—Part XXXIV: Arizona Publishes Supplemental Proposed Sick Leave Rules

By Christopher W. Kelleher, Joshua D. Seidman, and Tracy M. Billows

**Seyfarth Synopsis:** On June 27, 2017, Arizona released a Notice of Supplemental Proposed Rulemaking interpreting and enforcing its new paid sick leave law, which goes into effect July 1, 2017.

On June 27, 2017, Arizona published a [Notice of Supplemental Proposed Rulemaking](#) which amends several sections of the Fair Wages and Healthy Families Act (“the Act”) and will be useful for employers as they wade into paid sick leave waters over the holiday weekend. The Notice of Supplemental Proposed Rulemaking (the “supplemental proposed rules”), while not a final set of rules, expands on the Industrial Commission of Arizona’s (the “Commission”) paid sick leave [Notice of Proposed Rulemaking](#), which was published in May 2017.

Here is a summary of the key updates in Arizona’s paid sick leave supplemental proposed rules:

- **Equivalent Paid Time Off:** First, the supplemental proposed rules now include the phrase “equivalent paid time off” (defined below) when referencing earned paid sick time. This is a helpful development for employers seeking to use their current paid time off or other paid leave policies for Arizona sick leave compliance.
- **Definitions:** The supplemental proposed rules also add the following definitions:
  - **“Amount of earned paid sick time available to the employee”** means the amount of earned paid sick time or equivalent paid time off that is available to the employee for use *in the current year*. This definition, along with the two that immediately follow, will assist employers as they prepare to satisfy the Act’s burdensome paystub notice requirements.
  - **“Amount of earned paid sick time taken by the employee to date in the year”** means the amount of earned paid sick time or equivalent paid time off taken by the employee to date *in the current year*.
  - **“Amount of pay the employee has received as earned paid sick time”** means the amount of pay the employee has received as earned paid sick time or equivalent paid time off to date *in the current year*.
  - **“Employee’s regular paycheck”** is defined as a regular payroll record that is readily available to employees and contains the information set forth in the Act’s paystub notice requirements. The supplemental proposed rules clarify that physical or electronic paychecks or paystubs are permitted.
  - **“Equivalent paid time off”** means paid time off provided under a paid leave policy, such as a PTO policy, that makes available an amount of paid leave sufficient to meet the accrual requirements of the Act that may be used for the same purposes and under the same conditions as earned paid sick time.”

- **“Heath care professional”** means a physician, physician’s assistant, registered nurse practitioner, certified nurse midwife who is a registered nurse practitioner, licensed dentist, or a behavioral health provider practicing as a psychologist, clinical social worker, family therapist, or professional counselor.
- **“Smallest increment that the employer’s payroll system uses to account for absences or use of other time”** means the smallest increment of time that an employer utilizes, either by policy or practice, to account for employees’ absences or use of other PTO. This clarification will aid employers in determining what minimum increment of use they must set in order to satisfy the Act.
- **Same Hourly Rate:** The supplemental proposed rules also amend and reorganize the definition of “same hourly rate” by: (1) modifying the methods for determining “same hourly rate” to result in hourly rates, not lump sums; (2) referencing minimum wage in each method of determining “same hourly rate”; (3) amending the method for determining “same hourly rate” for salaried employees; (4) modifying and adding an option for determining “same hourly rate” for commission, piece-rate, or fee-for-service employees; and (5) adding language clarifying that “same hourly rate” does not include bonuses, tips, gifts, or certain other types of incentive pay.
- **Frontloading:** The supplemental proposed rules change Section R20-5-1206’s title to reference the ability to “front load” earned paid sick time, and add subsections F, G, and H to address procedures for front loading earned paid sick time and the effect of front loading on accrual and carry over requirements. The supplemental proposed rules also amend prior proposed subsection H (now subsection I) to address: (1) an employer’s carry over obligations; (2) an employer’s ability to permit greater carry over than that required by the Act; and (3) the impact of carry over on accrual, usage rights, and usage limits.
  - **Subsection F:** This subsection notably states that an employer can prorate the amount of paid sick time it provides to new hires. Specifically, an employer is not required to provide employees with additional earned paid sick time during the year in which the employee was hired if the employer provides the employee for immediate use by his or her 90th day of employment an amount of earned paid sick time that meets or exceeds the employer’s reasonable projection of how much paid sick time the employee would have accrued from the date of hire through the end of the employer’s benefit year at a rate of one hour for every 30 hours worked. If the employer’s projection is too low, it must provide the employee with the difference between the projection and the actual amount of sick time the employee would have earned.
  - **Subsections G and I:** The combination of these two subsections is the most interesting and noteworthy aspect of the supplemental proposed rules. Subsection G states that an employer that frontloads its workers at least 40 hours of paid sick leave at the start of each year is **not** required to provide carryover or additional accrual. Significantly, Subsection I then states that “unless an employer: (1) elects to pay an employee for unused earned paid sick time or equivalent paid time off at the end of a year pursuant to A.R.S. § 23-372(D)(4); **or** (2) meets the requirements of subsections (G) or (H), unused earned paid sick time and equivalent paid time off may be carried over to the next year...” Based on this language, it appears that if an employer frontloads its employees with 40 hours of paid sick leave at the start of each benefit year, it does **not** have to either allow year-end carryover or cash out unused sick time at year end. Although still in draft form, this is a welcome proposed update for Arizona employers.
    - Employers should be aware of a potential side effect of the above proposed language stating that frontloading 40 hours of paid sick leave each year alone will absolve their year-end carryover requirements. The cover page to the supplemental proposed rules states that “[t]he Act authorizes the [Commission] to ‘enforce and implement’ both the minimum wage and earned paid sick time provisions and promulgate regulations consistent with the articles.” Unfortunately, the above proposed amendment, which is certainly favorable to employers, could be read as inconsistent with the Act’s provision on year-end carryover. That being said, because the Commission is tasked with enforcing the Act, and the updated frontloading language was proposed by the Commission itself, if this same language appears in Arizona’s final sick leave rules, employers likely can take advantage of the language in practice barring any future contrary judicial interpretations or administrative guidance.

- **Recordkeeping:** The supplemental proposed rules make several updates to employers' recordkeeping requirements, including adding a requirement to maintain records concerning employees' earned paid sick time balances. The supplemental proposed rules state that employers also should retain records of: (1) the amount of earned paid sick time available to the employee; (2) the amount of earned paid sick time taken by the employee to date in the year, and (3) the amount of pay the employee has received as earned paid sick time.

The Act goes into effect this Saturday, July 1, 2017. While unlikely that the state will release final paid sick leave rules before the effective date, employers nevertheless should continue to monitor the Commission's sick leave website and otherwise take steps to comply with the Act by July 1.

To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list.

If you would like further information, please contact [Christopher W. Kelleher](mailto:ckelleher@seyfarth.com) at [ckelleher@seyfarth.com](mailto:ckelleher@seyfarth.com), [Joshua D. Seidman](mailto:jseidman@seyfarth.com) at [jseidman@seyfarth.com](mailto:jseidman@seyfarth.com), or [Tracy M. Billows](mailto:tbillows@seyfarth.com) at [tbillows@seyfarth.com](mailto:tbillows@seyfarth.com).

[www.seyfarth.com](http://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 29, 2017**

©2017 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.