



Webinar Series: Guidance on State and Local Paid Sick Leave Laws

Part V: Spotlighting Practical Tips on Navigating the National Paid Sick Leave Law Patchwork in 2021

October 7, 2021

Seyfarth Shaw LLP

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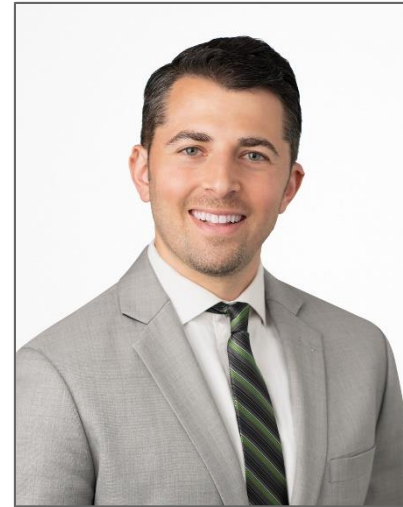
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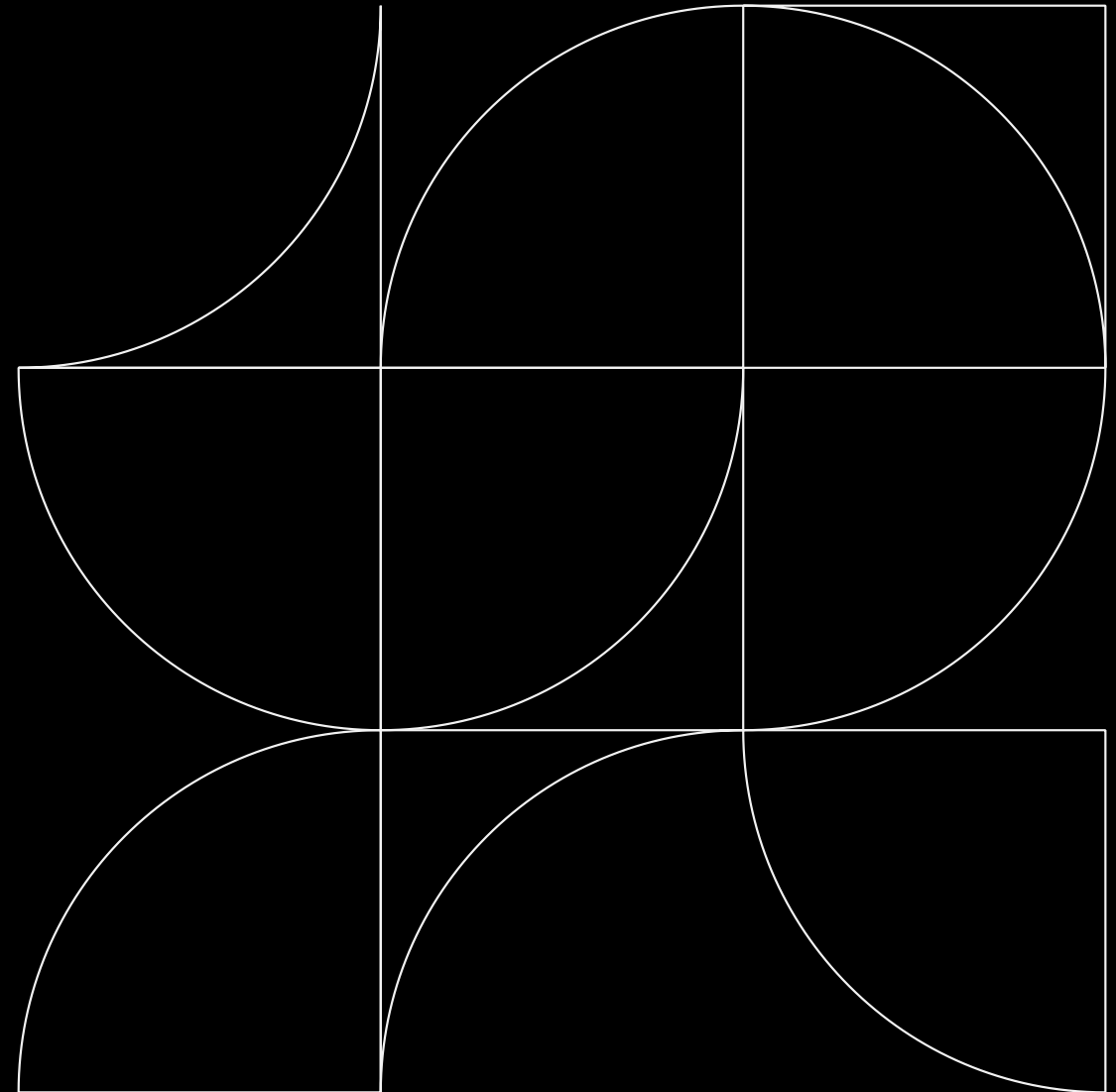


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Agenda

01	State and Local Paid Sick Leave (PSL) Patchworks
02	PSL Nationwide Compliance Options and Considerations
03	PTO and PSL Compliance + California Nuances
04	“Unlimited” PTO and PSL Compliance + California Nuances

State and Local Paid Sick Leave Patchworks



Mandatory Paid Sick Leave (PSL) and PTO Laws

Total Mandates

**As of Oct. 1, 2021:
63 TOTAL PSL & PTO
Mandates in the U.S.**

- **Why?** Several jurisdictions have enacted multiple mandates.

Ex) General PSL Law + COVID-19 Temporary PSL Law

But the number is constantly changing due to COVID PSL laws

***As Dec. 2020:
Approx. 69 TOTAL
Mandates in U.S.***

Federal

- **Executive Order 13706**

PSL for many EEs of certain federal contractors

- **Families First Coronavirus Response Act**

Emergency PSL for EEs of certain sized ERs (sunset as of 12/31/2020; reimbursement for voluntary leave option for select ERs ended 9/30/2021)

17 States + DC

PSL:

- California
- DC
- Massachusetts
- Connecticut
- Oregon
- Vermont
- Arizona
- Washington
- Rhode Island
- Maryland
- New Jersey
- Michigan
- New York
- Colorado
- New Mexico
- Virginia

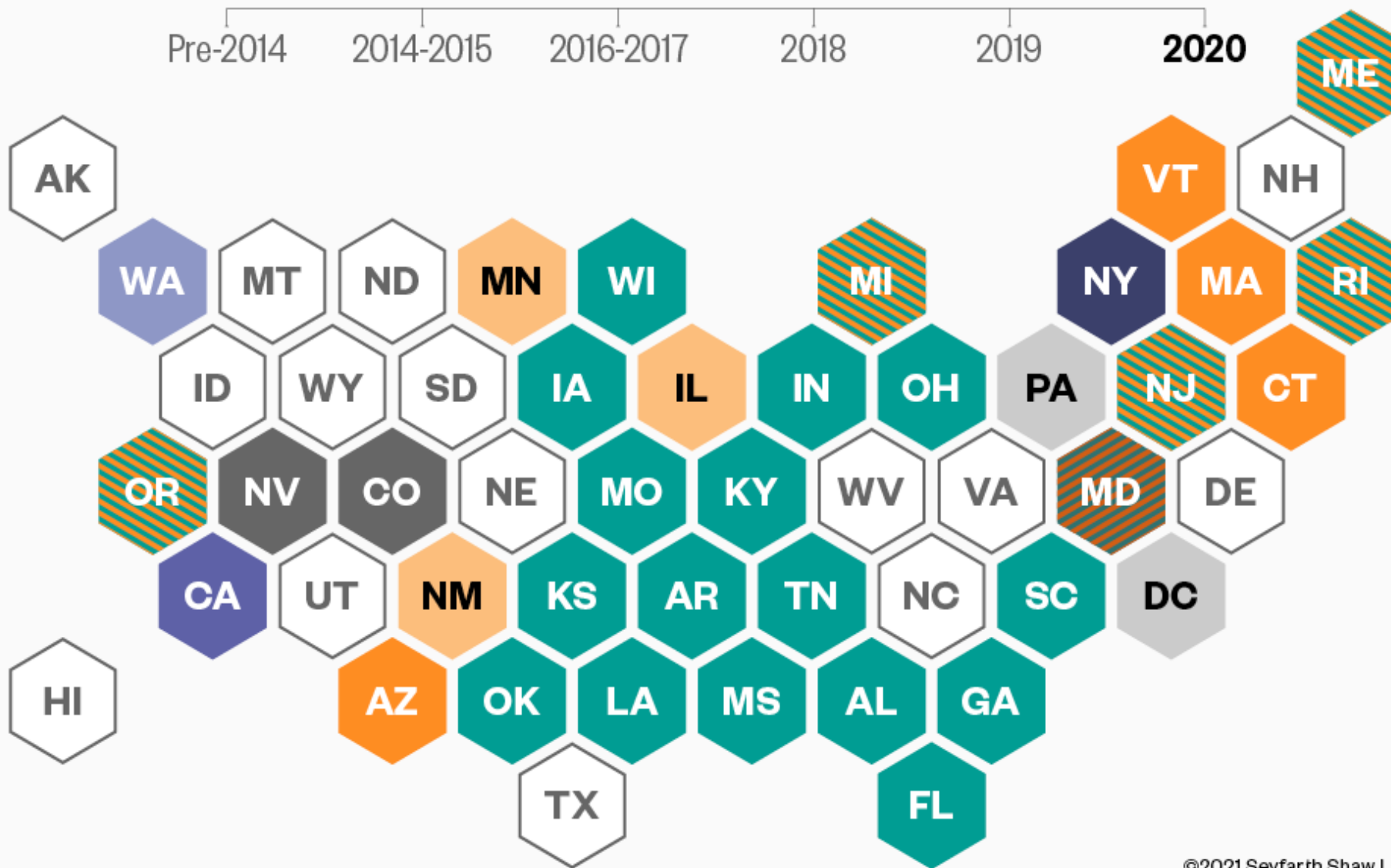
PTO:

- Maine
- Nevada

27 Municipalities

(1) San Francisco, CA; **(2)** Seattle, WA; **(3)** Long Beach, CA; **(4)** SeaTac, WA; **(5)** New York City, NY; **(6)** Los Angeles City, CA; **(7)** Los Angeles County, CA; **(8)** Oakland, CA; **(9)** Philadelphia, PA; **(10)** Tacoma, WA; **(11)** Emeryville, CA; **(12)** Montgomery County, MD; **(13)** Pittsburgh, PA; **(14)** Santa Monica, CA; **(15)** Minneapolis, MN; **(16)** San Diego, CA; **(17)** Chicago, IL; **(18)** Berkeley, CA; **(19)** Saint Paul, MN; **(20)** Cook County, IL; **(21)** Austin, TX; **(22)** Duluth, MN; **(23)** San Antonio, TX; **(24)** Dallas, TX; **(25)** Westchester County, NY; **(26)** Bernalillo County, NM (PTO law); **(27)** Allegheny County, PA

The Spread of Sick/Personal Leave & Anti-Local Leave Laws



General Sick/Personal Leave Laws

- State
- Local

Anti-Local Leave Laws

- State

Hybrid

- General State + Anti-Local
- General State and Local + Anti-Local

Hybrid COVID-19

- General State + COVID-19 State
- General Local + COVID-19 Local
- General State and Local + COVID-19 State
- General State and Local + COVID-19 State and Local
- General State and Local + COVID-19 State + Anti-Local

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COVID-19 State and Local Leave Overview

Paid Sick Leave / PTO Laws and COVID-19 Developments

Four Main Groups:

Group 1 –

Entirely new laws / executive or other emergency orders dealing with non-vaccine COVID-19 absences

Group 2 –

Entirely new mandate exclusively for COVID-19 vaccine paid leave

Group 3 –

Amendments to existing laws or regulations

Group 4 –

General non-binding guidance regarding applicability of an existing PSL law in light of COVID-19

COVID-19 State and Local Leave Overview

Paid Sick Leave / PTO Laws and COVID-19 Developments: 41 (or 27) locations

(1) Arizona - State; (2) California - State; ~~(3) California - Daly City;~~
(4) California - Emeryville; (5) California - Long Beach;
(6) California - Los Angeles City; (7) California - Los Angeles County; ~~(8) California - Millbrae;~~ (9) California - Oakland;
~~(10) California - Sacramento City;~~ (11) California - Sacramento County; (12) California - San Diego; (13) California - San Francisco; ~~(14) California - San Jose;~~ ~~(15) California - San Mateo County;~~ ~~(16) California - San Mateo City;~~ ~~(17) California - Santa Rosa;~~ ~~(18) California - Sonoma County;~~ ~~(19) California - South San Francisco;~~ (20) Colorado - State; (21) Illinois - Chicago*; (22) Illinois - Cook County*; (23) Maryland - State; (24) Massachusetts - State; (25) Michigan - State; (26) Minnesota - Duluth; (27) Minnesota - Minneapolis; (28) Minnesota - Saint Paul; (29) Nevada - State; (30) New Jersey - State; (31) New York - State; (32) New York - New York City; (33) Oregon - State; (34) Pennsylvania - Philadelphia; ~~(35) Pennsylvania - Pittsburgh;~~ (36) Washington - State; (37) Washington - Seattle; (38) Washington, D.C.; ~~(39) Marin County, CA;~~ ~~(40) Fairfax, CA;~~ ~~(41) San Anselmo, CA;~~

Polling Question



**In how many states does your
Company or Organization operate?**

- 1. Fewer than 5 states**
- 2. 6 - 15 states**
- 3. 16 – 25 states**
- 4. More than 25 states**

Polling Question



Does your Company or Organization have employees in California?

- 1. Yes**
- 2. No**

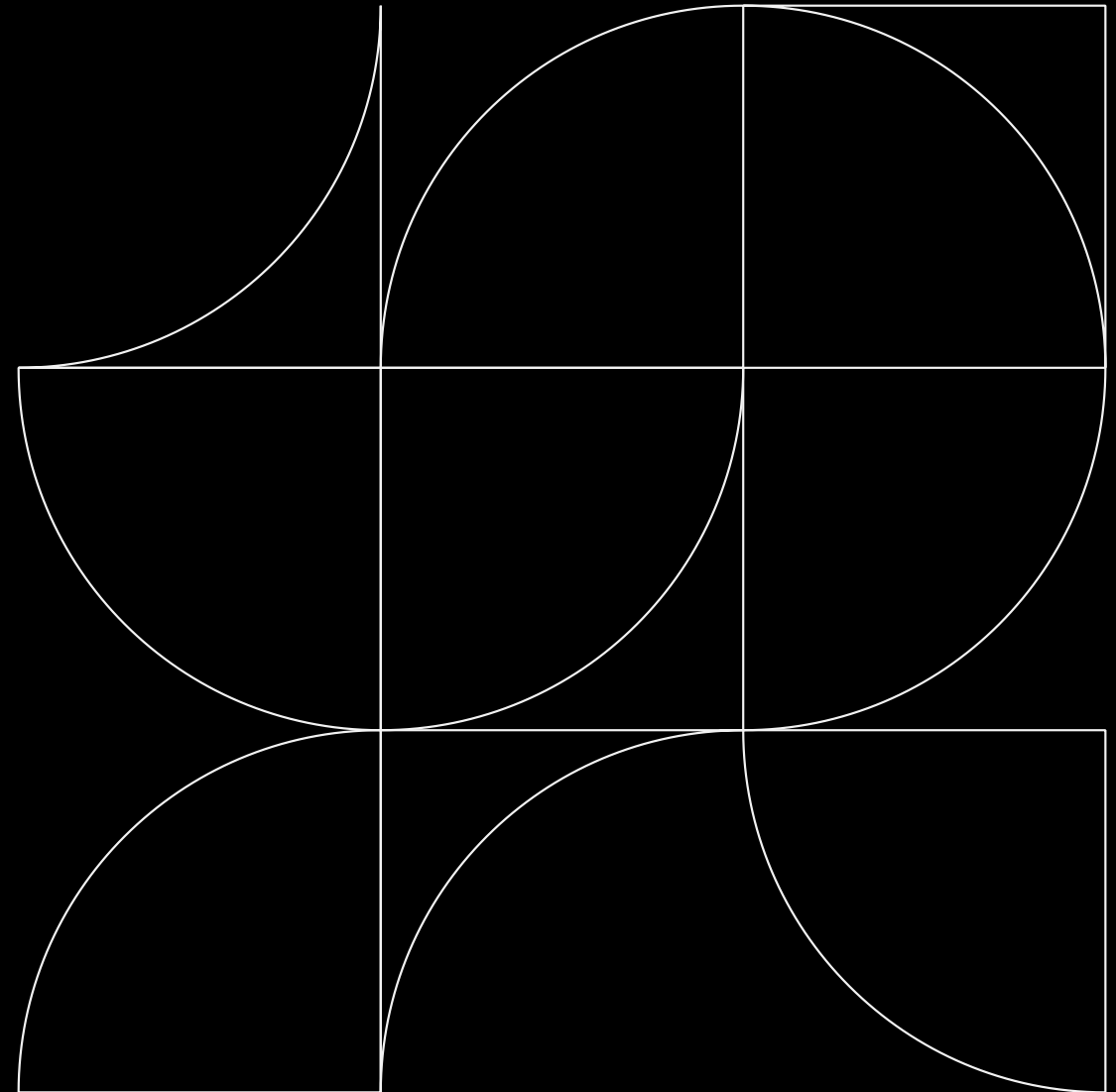
Polling Question



What kind of policy does your Company or Organization currently use for paid sick leave law compliance?

- 1. Individual PSL Policies For Each Location**
- 2. One-Size-Fits-All or One-Size-Fits-Most Policy**
- 3. PTO Policy Granting or Accruing Specific Amount of Leave**
- 4. “Unlimited” PTO Policy**
- 5. Combination of Above -- Depends on Employee Population**

Paid Sick Leave Nationwide Compliance Options and Considerations

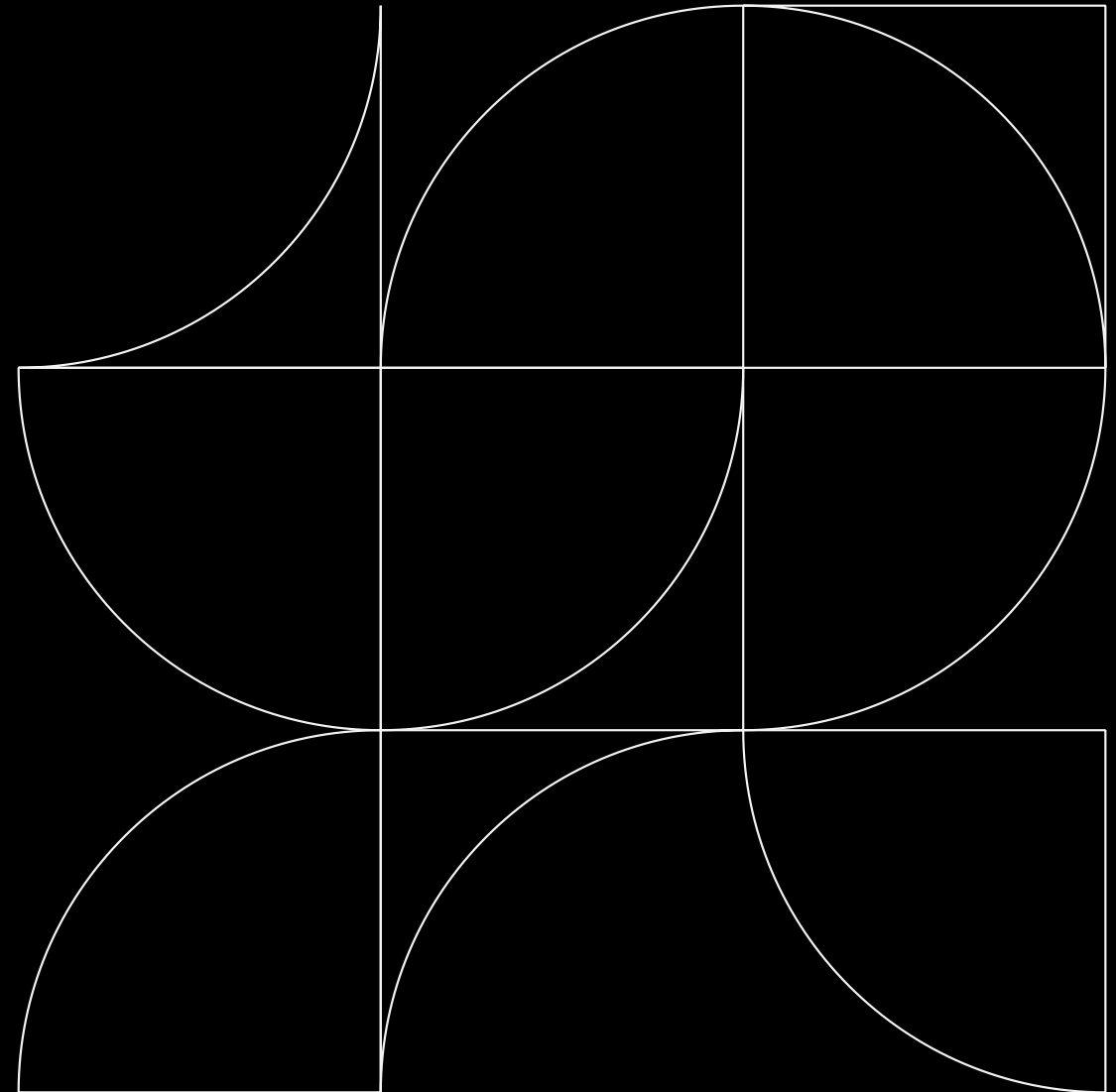


Paid Sick Leave Compliance Options

There are many PSL issues that affect employers, especially those with nationwide operations. These issues include:

- **Accrual System vs. Frontloading System**
- **Remote Work and Mobile Workers**
- **One-Size-Fits-All vs. One-Size-Fits-Most**
- **Written Policy Requirements**
- **Non-Policy Requirements**
- **California Considerations**

PTO and Paid Sick Leave Compliance Considerations



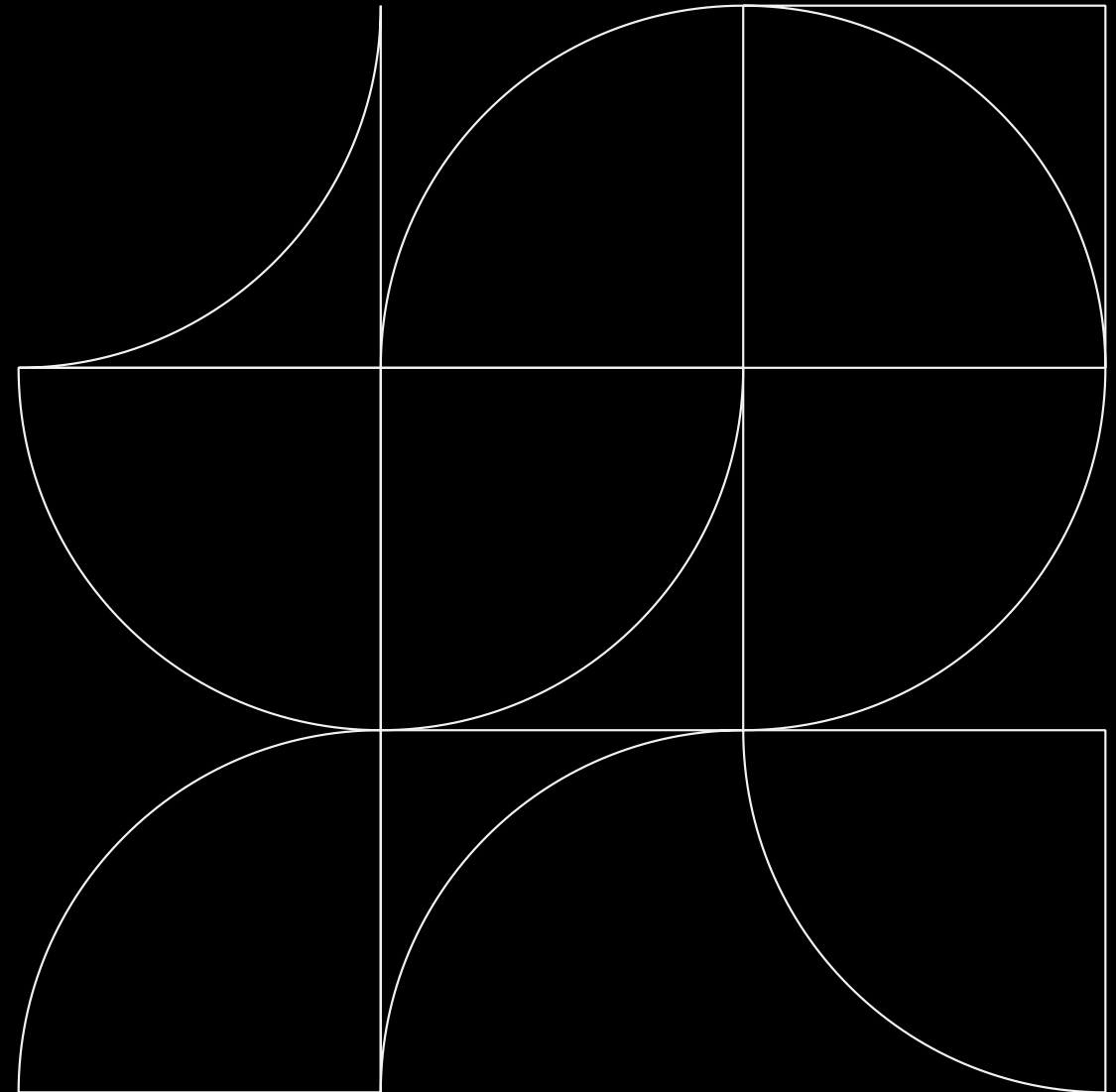
PTO Policy Considerations and PSL Compliance

Overall: Most, if not all, non-COVID-19 PSL mandates permit employers to use non-sick paid time off policies (e.g., PTO, vacation, etc.) for PSL law compliance; however, there are many legal challenges and considerations.

Nonexclusive examples include:

- “Same Conditions” as Statutory PSL
 - “Same Conditions” include, but are not limited to:
 - (a) increments of use; (b) waiting periods for new hires;
 - (c) documentation; (d) employee notice standards; (e) no unlawful retaliation; (f) proper rate and timing of pay
- Potential Need to Track Why PTO is Used
- State Vacation Time Laws
- Additional Protected Time Off
- Select Other PSL Law Considerations

Administering Paid Sick Leave Program vis-à-vis “Unlimited PTO”



Administering Paid Sick Leave Program vis-à- vis “Unlimited PTO”

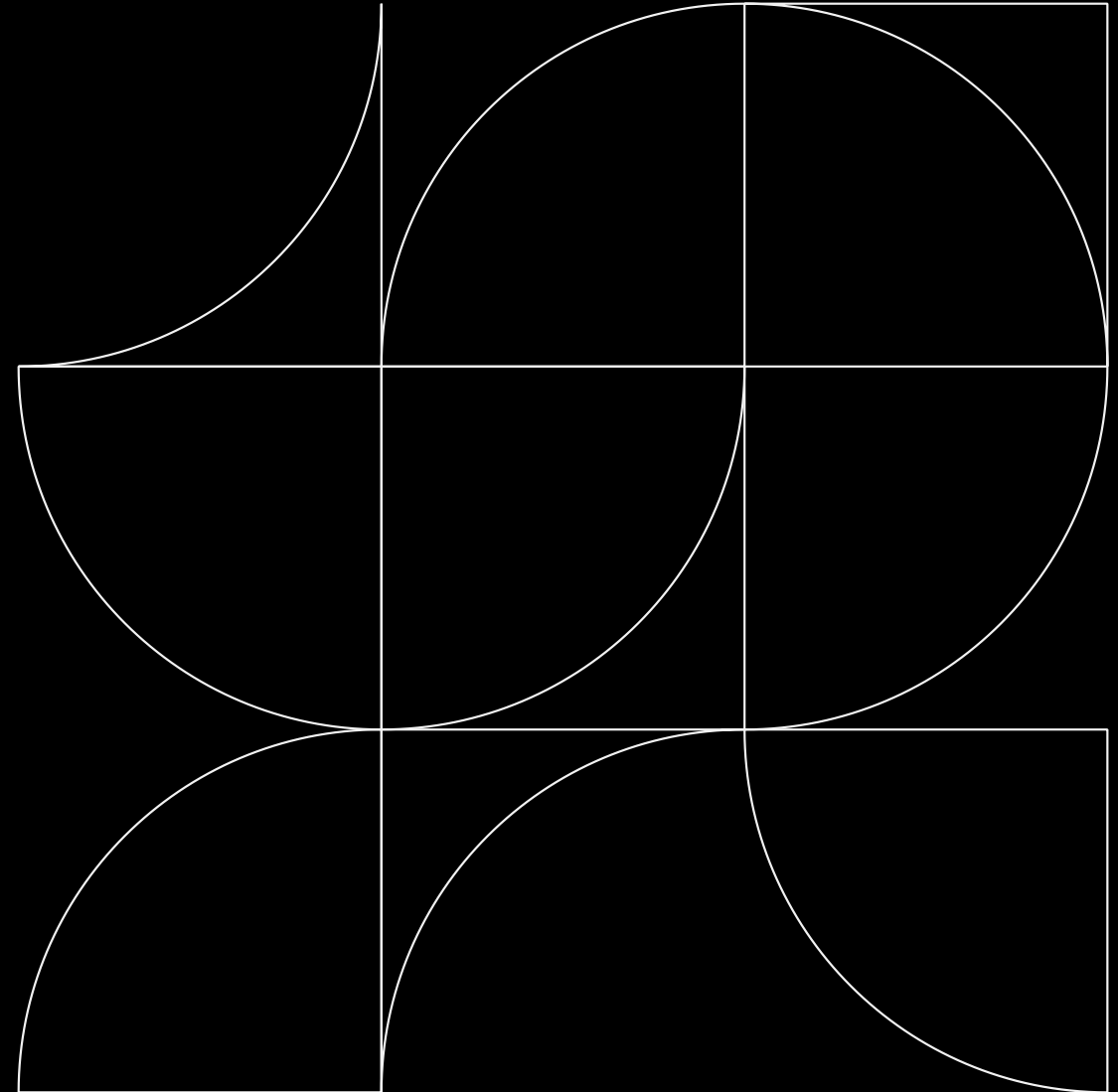
- What Employers Can/Cannot Do Related to Unlimited PTO Policies
- Available Balance Notification
- Recordkeeping
- Payment of PSL



“Unlimited” PTO Considerations

- Abuse – belief time off is in fact “unlimited”
- PSL Tracking
- PSL Payment
- Compliance with procedural aspects of PSL laws versus loose procedural requirements in unlimited PTO policies
- PSL Written Policy Requirements
- Transition from accrual based to unlimited policy

California Call-Out: Unlimited Time Off



California Call-Out: Unlimited Time Off

We do ***not*** recommend using a “no-accrual” or “unlimited” time off policy to comply with California paid sick leave obligations for two additional reasons:

- ***Reason #1.*** Despite their popularity, it is *not* clear that “no-accrual” or “unlimited” time off policies are lawful in California.
 - California law regards accrued wages that may never be forfeited – either during employment or upon employment separation.
 - The risk is that this type of policy will be found to incorporate a de facto accrual at a rate based on communicated expectations, expressed limitations, and other facts.
- ***Reason #2.*** Even *if* such a policy is lawful, use of this type of policy to comply with California paid sick leave obligations arguably results in unlimited legally protected paid sick leave for California employees.

California Call-Out: Unlimited Time Off (Cont.)

Last year, in *McPherson*, a California Court of Appeal panel issued the first published decision addressing “unlimited” time off policies under California law.

The *McPherson* court held that the particular policy at issue was unlawful.

McPherson Requirements. The court left open the *possibility* that a ***truly unlimited*** time off from work policy ***might*** be lawful if the policy:

- Clearly provides that employees’ ability to take paid time off from work is not a form of additional wages for services performed, but perhaps part of the employer’s promise to provide a flexible work schedule – including employees’ ability to decide when and how much time to take off;
- Spells out the rights and obligations of both employee and employer and the consequences of failing to schedule time off;

California Call-Out: Unlimited Time Off (Cont.)

- In practice allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off; **and**
- Is administered fairly so that it neither becomes a de facto “use it or lose it” policy nor results in inequities, such as when one employee works many hours, taking minimal time off, and another works fewer hours and takes more time off.

In sum, the *McPherson* court appears to view a potentially lawful “unlimited” time off policy as a scheduling policy (not a time off policy) that provides that:

- Employees have the discretion to decide when and when not to work; **and**
- Employees will continue to be paid when they are not working, and that this time is not limited.

California Call-Out: Unlimited Time Off (Cont.)

The California Paid Sick Leave Law requires employers to:

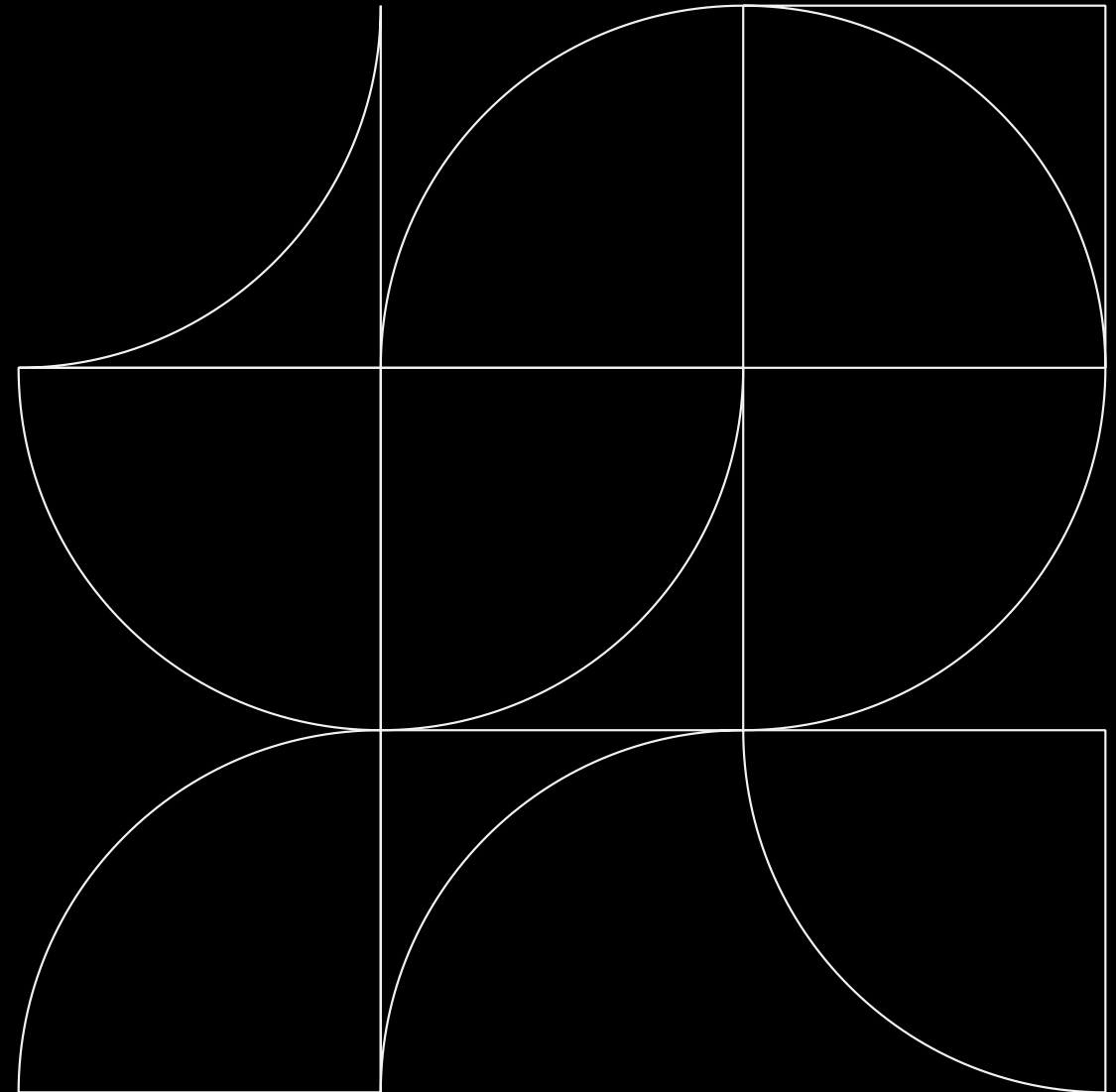
- Include employees' available paid sick leave balance information on their paystubs each payday; or
- Provide employees with a separate *written* notice that includes their available paid sick leave balance.

In a FAQ on its website, the California Division of Labor Standards Enforcement (DLSE) – the agency that administers the California Paid Sick Leave Law – suggests that an employer using an “unlimited” time off policy to comply with the law indeed provides employees with unlimited California Paid Sick Leave:

Q: My company offers unlimited time off. How does the new law affect me?

A: Most employers with this new but growing policy do not track how much time employees take off or for what reason. Although the new law requires that employers separately track sick leave accrual and use, for employers with unlimited paid time off plans, the notice, itemized pay stub or separate written statement provided with the payment of wages meets this requirement by indicating the paid sick leave is “unlimited.”

Seyfarth Paid Leave Resources



Seyfarth Paid Leave Resources



If you have questions about or would like assistance with the country's **Paid Sick Leave "Patchwork"** here are some ways Seyfarth can help:

(A) PSL Survey: Seyfarth maintains a ***comprehensive PSL survey*** breaking down the specific requirements of ***each*** existing state and local PSL law.

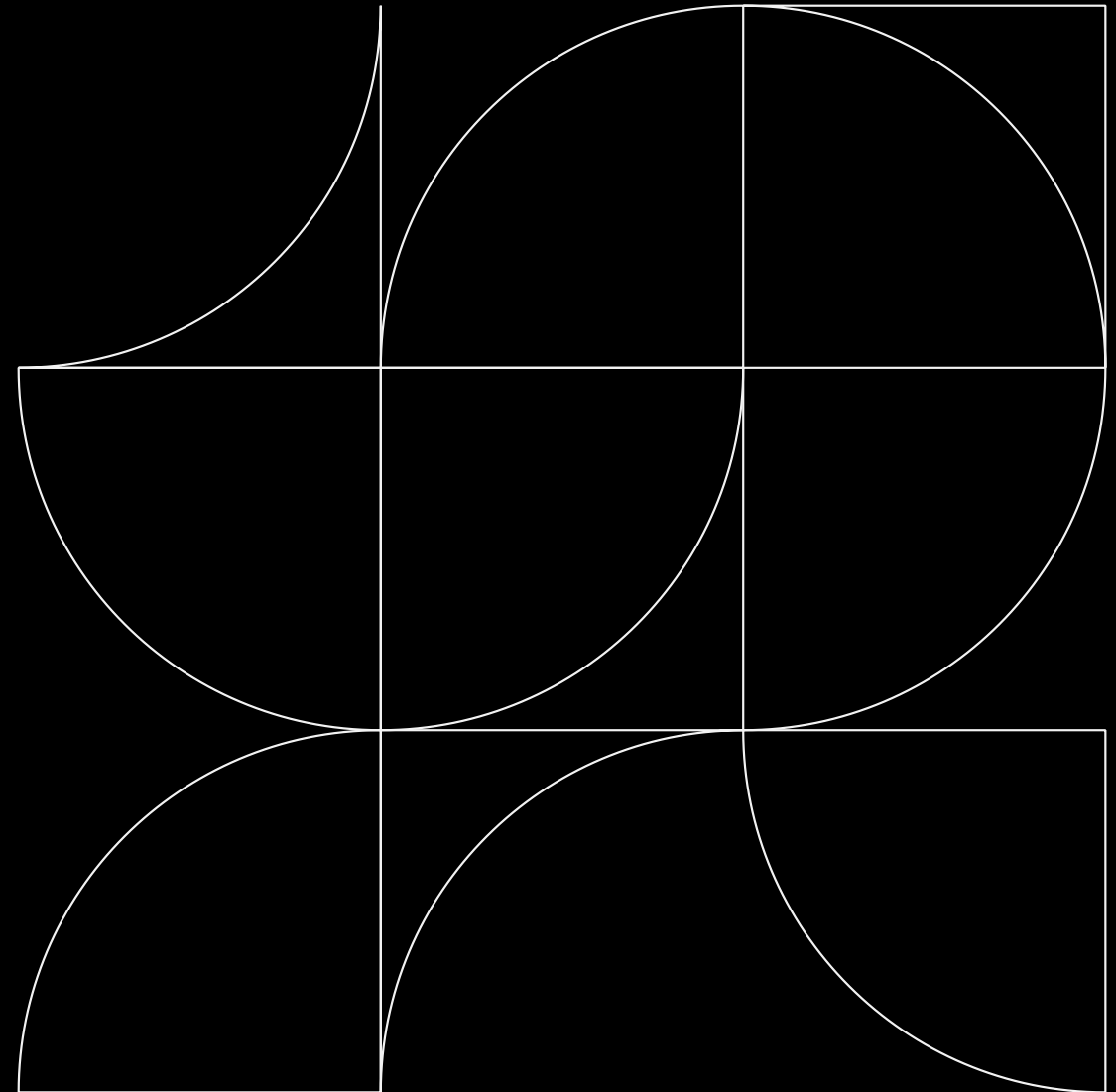
For more information contact: [**paidleave@seyfarth.com**](mailto:paidleave@seyfarth.com)

(B) Paid Leave Mailing List: Seyfarth regularly publishes Legal Updates and Blog Posts on PSL and other paid leave law developments.

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QUESTIONS?



THANK YOU!

