

Management Alert



If Pain, Yes Gain -- Part XVI: Winter 2016 Brings Flurry of Paid Sick Leave Activity

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One area of employment law that certainly isn't hibernating this winter is mandatory paid sick leave. Since the start of 2016, mandatory paid sick leave developments have occurred from coast to coast and include: (1) an amendment of one of the country's first sick leave laws; (2) three additional municipal laws going into effect; (3) a city's court battle to unfreeze its sick leave law; and (4) a vote that has paved the road for Vermont to become just the fifth state in the country to mandate statewide paid sick leave.¹

This alert explains and summarizes the key aspects of these developments as employers continue to work their way through America's sick leave storm.

A) Statewide Developments

Vermont Sick Leave is on the Horizon

The biggest sick leave development of the new year took place yesterday when the Vermont Senate passed a statewide mandatory paid sick leave bill. After a series of amendments and multiple days of discussion, the Senate passed the bill by a vote of 21 to 8. The Vermont House of Representatives passed an earlier version of the bill on April 23, 2015 by a vote of 72 to 63. Because the Senate amended the bill beyond the version that passed in the House, the bill will be sent back to the House for an additional reconciliation vote. If and when the House approves the current bill,² it will be sent to Vermont Governor Peter Shumlin, who has indicated his support for statewide paid sick leave.

Interestingly, despite the Vermont bill generally burdening covered employers with sick leave obligations, the current version contains a number of pro-employer provisions when compared to existing sick leave laws. For instance, if the current bill becomes law, it would require employers to allow employees to accrue earned sick time at a rate of one hour for every 52 hours worked -- the second slowest sick leave accrual rate in the country.³ The bill also contains a number of exceptions and carve outs for small employers.

¹ If the bill becomes law, Vermont would join Connecticut, California, Massachusetts, and Oregon as the only states with statewide mandatory paid sick leave laws. Please see our earlier posts for more information on the [Connecticut](#), [California](#), [Massachusetts](#), and [Oregon](#) paid sick leave laws.

² If the Vermont House does not approve the current version of the state's paid sick leave bill, it likely will result in the creation of a Conference Committee. According to the Vermont legislature [website](#), "[i]f this occurs, each House will appoint three members to serve on the Committee of Conference. The six conferees meet and try to agree on a report, and if accomplished, the report is submitted to both houses for adoption. After adoption, any amendments are written into the original bill, and it is delivered to the Governor for his signature."

³ The slowest accrual rate in the country exists in Washington, D.C. where employers with between one and 24 employees who work in the city are only required to allow sick leave accrual at a rate of one hour for every 87 hours worked. The Washington, D.C. accrual rate increases to one hour for every 43 hours worked for employers with between 24 and 99 Washington, D.C. employees, and to one hour for every 37 hours worked for employers with more than 100 Washington, D.C. employees.

While Vermont still has some work to do, its efforts to join the nation's growing list of mandatory paid sick leave jurisdictions have almost blossomed and will probably come to fruition before the first robin sighting in the State. Stay tuned for further updates on Vermont sick leave.

Oregon Sick Leave Goes Into Effect

On January 1st, Oregon's paid sick leave law ("Oregon PSL") went into effect, a move which officially preempts the Portland and Eugene, OR municipal sick leave laws. The Oregon PSL generally only requires employers with 10 or more employees working in the state to provide eligible employees with *paid* sick leave. Employers with fewer than 10 employees generally are required to provide *unpaid* sick leave.⁴ Employees begin accruing sick time on the first day of employment and earn one hour of sick time for every 30 hours worked or one and one-third (1 1/3) hours for every 40 hours worked, up to 40 hours of sick time per year.⁵

Importantly for companies with operations in Oregon, while the civil penalties for violations of the Oregon PSL generally became effective on January 1st, the law states that all penalties, except penalties for violations of the non-retaliation provision and prohibition against an absence control policy that penalizes employees for using sick leave, may be assessed beginning on January 1, 2017.

B) Municipal Developments

Seattle, Washington Amends Paid Sick and Safe Time Ordinance

Following approval by Mayor Ed Murray in December 2015, on January 16, 2016 an amended version of the Seattle Paid Sick and Safe Time Ordinance ("Seattle PSSTO") went into effect.⁶ The amendments place additional burdens on employers, expand potential penalties and fines, and create a private right of action for employees to seek enforcement of alleged violations by their employer.

Here are some of the key amendments of the Seattle PSSTO:

- **Minimum Increments of Use**: The amendments state that employers are required to allow nonexempt employees to use accrued paid sick and safe time in the smaller of hourly increments or, if feasible through the employer's payroll system, increments that round to the nearest quarter of an hour, i.e., in 15-minute increments. The amendment allows employers that use quarter-hour increments to round up or down to the nearest quarter hour when an employee uses paid sick and safe time in order to prevent the employee from incurring an occurrence point under the employer's absence control policy.
- **Recordkeeping Requirements**: Another burden on employers following the Seattle PSSTO amendments is a heightened recordkeeping requirement. The amendments increase employers' recordkeeping obligation from two years to three years.
- **Written Sick Time Policy Requirement**: A major development for employers under the amended Seattle PSSTO is a written sick time policy requirement. By April 1, 2016, covered employers must give their employees written notice of the employer's policy and procedure for meeting the Seattle PSSTO's requirements. Importantly, employers' written policies must include the employer's (a) choice of benefit year, (b) tier size, (c) rate of accrual, use and carry-over of paid sick and paid safe time hours, (d) manner of providing employees with an updated amount of available paid sick and safe time hours each time wages are paid, and (e) notification requirements for absences and requesting leave.

⁴ Notably, the Act contains an exception for employers located in an Oregon city with a population of more than 500,000 (which currently is limited to Portland). In particular, the Act requires businesses in Portland with six or more employees in the state of Oregon to provide paid sick leave according to the Oregon PSL (Portland employers with less than six employees must provide unpaid sick leave). Otherwise, Portland businesses must comply with all other aspects of the Oregon PSL.

⁵ Subject to further guidance from the state, Section 3(3)(a) of the Oregon PSL can be interpreted as imposing a one-time accrual cap of 80 hours, so that an employee can never have more than 80 hours of accrued paid sick leave in his or her bank at any one time.

⁶ The Seattle PSSTO originally went into effect on September 1, 2012, which at the time made it the fourth paid sick leave law in the nation.

- Civil Penalties and Fines: The amendments add a host of additional penalties and fines that await noncompliant employers. For instance, employers now face civil penalties per aggrieved party up to \$500 for a first violation, up to \$1,000 for a second violation, up to \$5,000 for a third violation, and up to a maximum of \$20,000 for all subsequent violations. The amendments also increase the fine employers must pay for violating the Seattle PSSTO's notice and posting requirements (from \$125 or \$250 up to \$500), and add fines for a number of other specific violations, including of the Seattle PSSTO's recordkeeping (\$500 per missing record), written sick time policy (\$500), and anti-retaliation provisions (\$1,000 per aggrieved party). The amendments further afford increased remedies for employees, including treble damages, 12% annual interest, liquidated damages, and attorney's fees and costs.
- Private Right of Action: Starting on April 1, 2016, employees working for businesses with 50 or more employees can file a civil action in a court of competent jurisdiction on either an individual or class basis for alleged violations of the Seattle PSSTO. The amendments extend this right to employees of smaller employers beginning on April 1, 2017.
- Joint Employers: The amendments increase the likelihood of two businesses being deemed joint employers under the Seattle PSSTO and consequently bearing responsibility for compliance with the law. An amendment to the definition of "employer" significantly notes that multiple entities "may be the 'employer' if employment by one employer is **not completely disassociated** from employment by the other employer."
- Definition: "Benefit Year": For purposes of providing paid sick and safe time, the amendments add a definition of "benefit year," which means "any fixed, consecutive 12-month period of time that is normally used by an employer for calculating wages and benefits," and includes a calendar year, tax year, fiscal year, contract year, or employee's anniversary year.

Spokane, Washington Solidifies Law Following Override of Mayoral Veto

On January 25, 2016, less than three days after Spokane Mayor David Condon vetoed the Spokane Earned Safe and Sick leave Act ("Spokane law"), the Spokane City Council voted to override the veto. Spokane now joins Seattle, Tacoma, and SeaTac as the fourth city in the state of Washington, and at least the 25th municipality in the country to enact a mandatory paid sick leave law.⁷ The Spokane law becomes effective on January 1, 2017.

Employees who work more than 240 hours in Spokane in a calendar year are covered by the Spokane law. The law does not cover seasonal employees, domestic workers, independent contractors, work-study students, and employees of certain firms engaged in "construction work."

Employers must allow their eligible employees to accrue at least one hour of paid sick and safe leave for every 30 hours worked by the employee in Spokane. Notably, and similar to the Seattle PSSTO, the Spokane law, as currently worded, does not contain a cap on sick leave accrual. The Spokane law does, however, set an annual cap on paid sick and safe leave usage and carryover. Employers with ten or more employees (likely in Spokane, although this is unclear from the current law) must allow their employees to use at least 40 hours of paid sick and safe time per year. For smaller employers, the usage cap drops to 24 hours per year. While the Spokane law states that employees may carryover up to 24 hours of accrued, unused time from one year to the next, the [law's corresponding FAQs](#) state that employees can carryover up to either 40 or 24 hours of accrued unused time, depending on the employer's size.

Paid sick and safe time can be used for the employee's or the employee's family member's illness, injury or health condition, for reasons related to domestic violence, sexual assault, or stalking of the employee or the employee's family member, when the employer's business or the employee's child's school or daycare is closed by order of a public health official, or for bereavement leave related to the death of a family member.

⁷ The current municipal mandatory paid sick leave 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; and (25) Spokane, NJ. The Montgomery County, MD law becomes effective on October 1, 2016. The Elizabeth, NJ ordinance becomes effective on March 2, 2016. The Long Beach, Los Angeles, and SeaTac, WA ordinances only apply to hospitality and/or transportation employers. The Pittsburgh ordinance was enacted on August 3, 2015, however, and as discussed in more detail below, the law was recently deemed "invalid and unenforceable" by a Pennsylvania state court.

While the Spokane law is silent on a number of topics, such as minimum increments of use, employee notice requirements for requesting leave, and restrictions on when an employer can require employees to provide reasonable documentation of proper paid sick and safe time use, the Spokane law does contain notice and posting requirements. In particular, at least quarterly **and** upon employee request, employers must provide employees information about their available leave balance and the amount of leave used in that particular year. Employers also must maintain records demonstrating their compliance with the Spokane law for a period of three years.

The Spokane law's FAQs note that additional enforcement guidance will be released by October 1, 2016.

Tacoma, Washington Sick Leave Goes Into Effect

On February 1, 2016 the Tacoma Paid Leave Ordinance ("Tacoma law") became effective. The Tacoma law allows employees who work in Tacoma for at least 80 hours in a calendar year to earn one hour of paid sick leave for every 40 hours worked in Tacoma, up to 24 hours per year. Eligible employees can carryover up to 24 hours of accrued, unused paid sick leave from one year to the next, and between their accrued and carried over paid sick leave, can use up to 40 hours of paid sick leave per year.

While the Tacoma law contains various nuances, two particular points stand out. First, the Tacoma law's FAQs expressly state that while an employer can frontload paid sick leave to employees, rather than using an accrual system, employers that opt to frontload nevertheless are subject to the law's carryover obligations. Second, the Tacoma law imposes an annual "certification of compliance" burden on employers. Each year covered employers must certify that they comply with the Tacoma law's requirements, either on their [Tacoma business license](#) or, for employers that are not required to have such a license, on a separate "[certification form](#)".

New Brunswick, New Jersey Sick Leave Goes Into Effect

On January 6, 2016, the New Brunswick Paid Sick and Safe Time Ordinance ("New Brunswick law") -- the eleventh municipal paid sick leave law in New Jersey⁸ -- went into effect. The New Brunswick law deviates from the state's other municipal paid sick leave laws in several significant ways, including the scope of covered employers and employees, the rate of sick leave accrual, and the addition of a "safe time" component to the law's covered uses. For more information on the New Brunswick law, see our [earlier post](#).

NYC Releases New FAQs and Proposed Amended Rules

The New York City Department of Consumer Affairs ("DCA"), the current enforcement agency of the city's Earned Sick Time Act ("ESTA") is in the process of amending ESTA's sick leave rules. In late-2015, the DCA released proposed amended ESTA rules, which as we [previously reported](#), affected a number of substantive topics, including duties of joint employers, minimum increments of using earned sick time, written sick time policy requirements, recordkeeping requirements, anti-retaliation, and potential penalties for noncompliance.

On January 11, 2016, the public comment period on the DCA's proposed amended ESTA rules closed. Once the DCA completes its review of the public comments, which is expected in the coming weeks, it will publish final amended ESTA rules on the New York City's "[Recently Adopted Rules](#)" page. The final ESTA rules become effective 30 days after publication.

While employers await the final amended ESTA rules, the DCA provided an appetizer last month when it released an updated set of [ESTA FAQs](#). The updated FAQs overlap with many of the substantive changes in the proposed amended ESTA rules. However, one FAQ that goes beyond the proposed amended ESTA rules involves employers' carryover obligations where the employer frontloads employees 40 earned sick time hours at the start of the year. Specifically, FAQ 10 in Section III notes that an employer who frontloads at least 40 earned sick time hours does not need to allow employees to carry over their unused sick time to the next year, regardless of whether the employer cashes out the employees' unused sick time at year end. This FAQ is a welcome reprieve for New York City employers who previously could only avoid carryover if they both frontloaded

⁸ The other New Jersey municipalities that have enacted or approved paid sick leave laws are: (1) Newark; (2) Passaic; (3) East Orange; (4) Paterson; (5) Irvington; (6) Montclair; (7) Trenton; (8) Bloomfield; (9) Jersey City; and (10) Elizabeth. As we [previously reported](#), Elizabeth's "Sick Leave for Private Employees" Ordinance becomes effective on March 2, 2016

employees 40 hours each year and cashed out unused sick time at the end of the year.

Pittsburgh, Pennsylvania Appeals Court Decision Deeming Sick Leave Law “Invalid and Unenforceable”

As we previously reported [here](#) and [here](#), over the last several months the City of Pittsburgh has been involved in a heated lawsuit challenging the validity of its Paid Sick Days Act (“PSDA”). On January 13, 2016, Pittsburgh continued its paid sick leave campaign and appealed a December 21, 2015 ruling from Judge Joseph James of the Allegheny County Court of Common Pleas that declared the PSDA “invalid and unenforceable.”

The PSDA was originally scheduled to go into effect on January 11, 2016. However, in response to the plaintiffs’ motion for a preliminary injunction, in November 2015 the Court stayed the PSDA and extended its effective date to March 11, 2016. The PSDA remains on ice as the appeal process plays out, leaving potentially covered employers free from the law’s requirements at this time.

We will be sure to advise you on any notable developments in Pittsburgh’s appeal as they occur.

C) What’s Next for Employers

Companies with nationwide, regional and local operations should review their paid sick leave policies and procedures now and ensure they are in compliance with any applicable laws.

Looking toward the rest of 2016, employers with operations in Vermont, New York City, and Pittsburgh should be on the lookout for additional paid sick leave developments in these locations. Paid sick leave laws in Elizabeth, NJ and Montgomery County, MD are scheduled to become effective later this year. Additional paid sick leave developments affecting federal contractors also are expected in the coming months in furtherance of an [Executive Order](#) signed by President Obama in September 2015 containing a September 30, 2016 deadline for the implementing regulations.

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