

Management Alert



If Pain, Yes Gain—Part XLVIII: Rhode Island Releases Final Sick Leave Regulations; Effective Date is Near

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Seyfarth Synopsis: Last month, the Rhode Island Department of Labor and Training released the state's final paid sick and safe leave regulations. As the state paid sick leave law's July 1, 2018 effective date approaches, the regulations impose additional obligations on various topics — employer coverage, written policy requirements, sick leave accrual, calculating payment for used sick leave, etc.— that employers must satisfy for full compliance.

Last month, the Rhode Island Department of Labor and Training published the state's long-awaited regulations for the Healthy and Safe Families and Workplaces Act ("Act"). When the Act, which Governor Gina Raimondo signed on September 28, 2017, goes into effect on July 1, 2018, Rhode Island will become the ninth state in the country with a statewide paid sick leave mandate.² Our [previous alert](#) on the Act outlined the Act's key provisions. Now, after months of anticipation, the final regulations bring a potpourri of selective clarity, unresolved gray areas, and additional compliance burdens in advance of the Act's looming effective date.

Here are the highlights of the Rhode Island Final Paid Sick and Safe Leave ("PSSL") Regulations:

Covered Employers and Determining Employer Size

The Act requires employers with 18 or more employees *in Rhode Island* to provide paid sick and safe leave to eligible employees. The Act generally applies to any person suffered or permitted to work by an employer. Despite some uncertainty in the Act and no further clarification in the regulations, it appears that smaller employers (i.e., those with less than 18 Rhode Island employees) are not obligated to provide either paid or unpaid leave to their Rhode Island employees. However, it does appear that smaller employers will be required to protect unpaid time off used for covered reasons under the Act up to 24, 32, or 40 hours depending on the year in question.

The regulations establish the calculations needed for determining employer size under the Act. Annually, employers must determine whether they meet the 18-employee threshold by taking an average of their total Rhode Island employees during the previous payroll year's highest two employment quarters. This determination remains in effect, regardless of potential changes in employer size, for the following 12 months.

¹ With special thanks to Samuel Rubinstein for his assistance.

² The other nine states that have passed a statewide mandatory paid sick leave law are: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; (5) Vermont; (6) Arizona; (7) Washington; (8) Maryland; (9) New Jersey. The Washington statewide paid sick leave law went into effect on January 1, 2018. The Maryland statewide paid sick leave law went into effect on February 11, 2018. The New Jersey governor signed the state's paid sick leave law on May 2, 2018, and it is scheduled to go into effect on October 29, 2018. The other six statewide laws are in effect.

The regulations explain that an employee is considered to be employed in Rhode Island if their primary place of employment over the last year was in Rhode Island, regardless of the employer's location.³ However, an employee does not need to spend at least 50 percent of their time working in Rhode Island for it to be considered their primary place of employment. Instead, the employee only needs to spend more time working in Rhode Island than in any other state in order to be included in the 18-employee calculation.

Employers with a Paid Time Off Policy

The Act expressly states that employers who afford their employees the correct amount of paid leave in 2018, 2019 and thereafter, under a non-sick paid leave policy, such as PTO, are exempt from the Act's accrual and carryover requirements. However, the Act does not clarify whether an employer must frontload the PTO, or if employers with an accrual based PTO setup can take advantage of these exemptions.

The regulations do not resolve these issues. While the regulations acknowledge that a PTO policy that frontloads paid leave to employees at the start of each year will exempt an employer from tracking leave accrual, allowing year-end carryover, and paying employees for unused time, the regulations also contain language suggesting that the same exemptions may apply when PTO is accrued. This outcome would be very different than treatment of accrual-based policies under other existing paid sick leave laws and ordinances and thus further clarification may be coming from the state.

Whichever paid leave delivery method the employer chooses, it must provide full-time employees working an entire year with the minimum amount of paid leave as required by the Act. The regulations further state that employers can prorate paid leave for non-full time employees based on their start date and number of hours worked.

Accrual of PSSL

The regulations clarify that a Rhode Island employee will accrue PSSL for all hours worked, regardless of the location of the work. Additionally and significantly, employees also will accrue PSSL **for all hours paid by their employer**. As a result, employers will need to include paid holidays (when the employee is not working), paid sick, vacation and personal time, and other forms of paid time off when calculating accrual under the Act's one hour for every 35 hours worked accrual rate.

This requirement represents a departure from accrual rate calculations under most, if not all, existing paid sick leave laws. Employers with operations in non-Rhode Island paid sick leave locations should immediately assess their current sick leave accrual tracking system to determine if updates are needed based on this new obligation.

Use of PSSL

Covered Family Members: The Act allows covered employees to use PSSL for, among other reasons, their family member's health needs. The Act defines "family member" to include child, parent, spouse, mother-in-law, father-in-law, grandparents, grandchildren, domestic partner, sibling, care recipient, or member of the employee's household. The regulations include a definition of "member of employee's household," which was absent from the Act. This term is defined as a person that resides at the same physical address as the employee or a person that is claimed as a dependent by the employee for federal income tax purposes.

Waiting Period for New Hires: The Act imposes 90, 150 or 180-day usage waiting periods for new hires depending on whether the individual is a regular, seasonal, or temporary employee, respectively. The regulations explain that where an employer imposes an appropriate 90-day usage waiting period, it must notify new hires of this requirement in writing.

³ In effect, the employer will still be liable for paid or unpaid leave regardless of whether the employer has a physical location in Rhode Island. In addition, barring subsequent clarification from the state, the "primary place of employment" standard appears to be tied to determining employer size and not employee eligibility.

The regulations define “in writing” (or “written notice”) as any printed or printable communication that is provided in a physical or electronic format, including communications that are transmitted through electronic mail, a computer system or is otherwise sent and stored electronically. While electronic notice is permissible, employers must provide the notice in hard copy if requested by the employee.

Notice

The Act expressly states that employers must provide PSSL to an employee upon his or her request, and that such request can be made orally, in writing, by electronic means or by any other means acceptable to the employer. For purposes of providing notice when a PSSL absence is “foreseeable,” the regulations define “foreseeable” as something that is planned at least 24 hours in advance of when it is required.

Documentation

The Act allows employers to seek reasonable documentation when an employee has been absent for more than three consecutive work days. The regulations state that employers must accept such documentation within a reasonable timeframe, although they do not define what is considered a “reasonable timeframe.”

The Act also states that an employer’s verification may not result in an unreasonable burden or expense to the employee. The regulations determine “unreasonable” to be when the employee’s total cost to obtain the verification is more than two times their hourly rate of pay. Administrative, governmental or medical fees, and transportation costs must be included in making this determination. If the total cost to an employee is considered unreasonable, employers may require the employee to submit a signed statement indicating their use of PSSL was for covered purposes.

Leave Pay Rate Calculation

The regulations clarify what it means to be compensated at the same hourly rate for use of PSSL for the following types of employees:

- Hourly Employees: The employee’s regular hourly rate.
- Employees who receive different rates for hourly work from the same employer: Employer must annually choose the “same hourly rate” to be either the rate the employee would have been paid for the hours they would have worked or a weighted average of all regular pay rates for the previous pay period, month, quarter or other established period of time an employer customarily uses to calculate the weighted average for similar purposes.
- Salaried Employees: Total earnings in the previous pay period divided by the employee’s total hours worked during that pay period.
- Piece Work Employees: Employers may use a reasonable calculation of the wages or fees the employee would have received for the piece work, service or part thereof, if the employee had worked.
- Commissioned Employees: Must be paid the greater of the base wage or the effective minimum wage.
- Tipped Employees: Must be paid at least the minimum wage.

The regulations explain that commissions, drawing accounts, bonuses, incentive pay based on sales or production, sums excluded under 29 U.S.C. § 207(e), overtime pay, holiday pay, and other premium rates⁴ do not need to be included in the calculating payment for used PSSL.

⁴ When an employee’s regular hourly rate is a “differential rate,” meaning a different wage paid for the same work performed under differing conditions (hours, etc.), the “differential rate” is not a premium and shall be considered as regular wages for the purpose of determining the same hourly rate.

Loaned PSSL and Wage Deductions

The Act allows employers to loan or advance PSSL to employees before it is accrued, but is silent on whether employers can recoup any monies owed by an employee upon employment separation. The regulations state that an employer can deduct the PSSL owed from the employee's final wages provided that it has obtained the employee's written permission to do so. The regulations further clarify that an employer should clearly state in its employment policies that prior to advancing or loaning PSSL time it will require employees to agree, in writing, to allow it to recover any outstanding amounts owed from advanced or loaned PSSL time via payroll deductions in the employee's final wages.

Food Employees

While the Act was silent on food employees, the regulations make a point to discuss how the notice and documentation requirements differ for food employees. The regulations use the Rhode Island Food Code to define "food employees" as any individual working with unpackaged food, food equipment or utensils, or food-contact surfaces.

If a food employee (or someone who manages food employees) notifies their employer of their intent to use PSSL time, the employer may ask if the employee's reason would trigger the employer's obligations under the Rhode Island Food Code. If the employee answers in the negative, the employer cannot ask any further questions about the nature of the illness. However, if the answer is in the affirmative, the employer may ask about the symptoms on a limited basis to determine what steps it must take to comply with its obligations under the Food Code. Finally, if the employee states that they are suffering from any of the symptoms described in the Food Code, the employer must follow the Food Code's procedures.

When it comes to the Act's documentation requirements, if there is a conflict with the Food Code, the Act's requirements will not apply to Food Employees.

What Should Employers Do Now?

Rhode Island employers should take steps now to ensure that they will be able to achieve full compliance with the Act and its regulations by the rapidly approaching July 1, 2018 effective date. These are among the actions to consider:

- Review existing sick leave policies and either implement new policies or revise existing policies to satisfy the Act.
- Review policies on attendance, anti-retaliation, conduct, and discipline for compliance with the Act.
- Monitor the Rhode Island Department of Labor and Training website for information on the Act.
- Train supervisory and managerial employees, as well as HR, on the new requirements.
- Review accrual calculation procedures and systems based on the standard that employees accrue PSSL based on hours worked and hours paid by the employer.

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. To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list. Companies interested in Seyfarth's paid sick leave laws survey should reach out to sickleave@seyfarth.com.

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