

Management Alert



If Pain, Yes Gain – Part X: Oregon Becomes Fourth State to Enact Paid Sick Leave Law

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As employers finalize their efforts to comply with the California and Massachusetts statewide paid sick leave laws, both of which go into effect on July 1, 2015,¹ Oregon kicked off the summer paid sick leave wave² when earlier this week, Governor Kate Brown signed a statewide mandatory paid sick leave law (“the Oregon PSSL” or “the Act”). The Act becomes effective on January 1, 2016.³ The Oregon PSSL, Senate Bill 454, is only the country’s fourth statewide paid sick leave law, after Connecticut, California, and Massachusetts.⁴

Which Employers Are Covered Under the Oregon Law?

The Oregon PSSL defines covered employers broadly to include “any person that employs one or more employees working anywhere in this state, a political subdivision of the state and any county, city, district, authority, public corporation or entity, and any instrumentality of a county, city, district, authority, public corporation or entity, organized and existing under law or charter.”⁵

While even the smallest employers are covered, the Oregon PSSL 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.⁶

¹ In California, the July 1, 2015 effective date applies only to the paid sick leave entitlement provision, such as accrual, use and carryover of paid sick leave. The rest of the statutory additions and amendments in the California paid sick leave law, including those imposing posting, notice, and recordkeeping requirements, became effective on January 1, 2015, under normal operation of California law. In addition, in Massachusetts, certain employers with an existing paid time off policy are covered by a “safe harbor” provision, allowing them to forego compliance with the law until January 1, 2016. For more information on the “safe harbor” provision, see our earlier post [here](#).

² The following paid sick leave laws are scheduled to go into effect this summer: (a) California (7/1/15); (b) Massachusetts (7/1/15); (c) Bloomfield, NJ (approximately 6/30/15); (d) Emeryville, CA (7/1/15). While a Eugene, Oregon ordinance was scheduled to go into effect on July 1, 2015, this ordinance has been preempted by the Oregon PSSL. Please see our discussion below.

³ While the civil penalties for violations of the Act generally become effective on January 1, 2016, the law states that all penalties, except for 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.

⁴ Please see our earlier posts for more information on the [Connecticut](#), [California](#), and [Massachusetts](#) paid sick leave laws. In addition to the statewide paid sick leave laws, there also are at least 23 municipalities with PSSLs, including: (1) San Francisco, CA; (2) Washington, D.C.; (3) Seattle, WA; (4) Long Beach, CA; (5) SeaTac, WA; (6) Portland, OR; (7) New York City, NY; (8) Jersey City, NJ; (9) Newark, NJ; (10) Eugene, OR; (11) Passaic, NJ; (12) East Orange, NJ; (13) Paterson, NJ; (14) Irvington, NJ; (15) Los Angeles, CA; (16) Oakland, CA; (17) Montclair, NJ; (18) Trenton, NJ; (19) Bloomfield, NJ; (20) Philadelphia, PA; (21) Tacoma, WA; (22) Emeryville, CA; and (23) Montgomery County, MD. The Tacoma ordinance was enacted on January 27, 2015 and is scheduled to go into effect on February 1, 2016. The Montgomery County ordinance was enacted on June 23, 2015 and is scheduled to go into effect in October 2016. The Long Beach, Los Angeles, and SeaTac, WA ordinances only apply to hospitality or transportation employers.

⁵ The federal government is excluded from the definition of employer.

⁶ An employer will have 10 or more employees under the law if it is determined that its per-day average number of employees is 10 or greater for each of 20 workweeks in the calendar year or the fiscal year immediately preceding the year in which the leave is to be taken.

Notably, the law 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 statewide law 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, and as discussed in greater detail below, Portland businesses must comply with all other aspects of the Oregon PSL.

Which Employees Are Covered by the Law?

The Oregon PSL applies to virtually all employees who work in Oregon, including full-time and part-time employees paid on an hourly, salaried, commission, or piece-rate basis.⁷ The Act excludes from coverage independent contractors, certain railroad workers, certain participants in a work study or work training program, and individuals employed by their parent, spouse, or child. Also excluded from coverage are employees whose terms and conditions of employment are covered by a collective bargaining agreement, who are employed through a hiring hall, or whose employment-related benefits are provided by a joint multi-employer-employee trust or benefit plan.

How Much Sick Leave Must Covered Employers Provide?

Covered employees are entitled to one hour of sick leave for every 30 hours worked. Exempt employees are presumed to work a 40-hour workweek for purposes of sick leave accrual unless the employee's normal workweek is less than 40 hours, in which case sick leave accrues based on the employee's actual workweek.

Eligible employees begin accruing sick leave under the Oregon PSL on the Act's effective date (January 1, 2016) or their first day of employment, whichever is later.

Alternatively, the Act allows employers to provide employees with 40 hours of sick leave by frontloading the sick leave at the beginning of each year. As discussed below, any employer that uses the frontloading method does not need to comply with the law's accrual and carryover requirements.

Importantly, employers with paid leave policies, such as PTO, that are "substantially equivalent to or more generous" than the Act's requirements need not offer additional paid time off. However, they still must comply with the Act's other requirements, e.g., providing proper notice, requesting medical certification, etc.

What Are the Rules Governing Sick Leave Use?

Eligible employees may begin using accrued sick leave on the 91st calendar day of employment. However, the Act includes an exception to the new employee 90-day waiting period for those employees who are employed with the employer as of the Act's January 1, 2016 effective date. These employees may take sick leave as soon as it accrues.

Employers are not required to allow employees to use more than 40 hours of sick leave each year.

Accrued sick leave may be taken in hourly increments unless: (a) doing so would impose an undue hardship on the employer; and (b) the employer has a policy or combination of policies that allows an employee to use at least 56 hours of paid leave per year that may be taken in minimum increments of four hours and may be used for the covered purposes under the law.

⁷ The Oregon law also covers individuals for whom withholding is required under ORS 316.162 to 316.221 and certain home care workers.

Do Employees Carryover Accrued, Unused Sick Leave at the End of the Year?

An employee who does not use all of his or her accrued sick leave within a given year is entitled to carryover up to 40 hours of unused sick leave to the following year. However, and as noted above, an employer is not required to comply with the law's accrual and carryover requirements if it frontloads at least 40 hours of sick leave to its employees at the beginning of each year.⁸

Under What Circumstances May Employees Use Sick Leave?

An employee may use sick leave earned under the Oregon PSLL for any of the following reasons:

- For an employee's mental or physical illness, injury or health condition, or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or preventive medical care;
- For care of a family member⁹ with a mental or physical illness, injury or health condition, or who needs who needs medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition or preventive medical care;
- For purposes allowed under the Oregon Family Leave Act, which include:
 - a) To care for an infant, newly adopted child or newly placed foster child, or for an adopted or foster child with a mental or physical disability;
 - b) To care for a family member with a serious health condition;
 - c) To recover from or seek treatment for a serious health condition of the employee that renders the employee unable to perform at least one of the essential functions of the employee's regular position;
 - d) To care for a child of the employee who is suffering from an illness, injury or condition that is not a serious health condition but that requires home care; or
 - e) Certain absences related to the death of a family member;
- For certain absences related to domestic violence, harassment, sexual assault, or stalking;
- In the event of a public health emergency, such as closing the employee's place of business, or the employee's child's school or place of care due to a public health emergency, determining that the presence of the employee or the employee's family member in the community would jeopardize the health of others, or excluding the employee from the workplace for health reasons under any law or rule.

What Is the Rate of Pay for Sick Leave?

As explained above, an employer that has 10 or more employees working anywhere in Oregon must provide *paid* sick leave. Sick leave is paid at an employee's regular rate of pay. If an employee paid on a commission or piece-rate basis does not have a previously established regular rate of pay, then the employer must pay the employee for sick leave at a rate equal to at least the state minimum wage.

⁸ Section 2(5)(b) of the Oregon PSLL states "[f]or employees employed by an employer for less than a full year, 'front-load' means to assign and make available to an employee as soon as the employee becomes eligible to use sick leave a number of hours of sick leave that is the pro rata percentage of the hours the employee would be entitled to for an entire year based on the number of hours the employee was actually employed by the employer for the year."

⁹ Section 2(4) of the Oregon PSLL defines "family member" as having "the meaning given that term in ORS 659A.150," which states that "[f]amily member means the spouse of an employee, the biological, adoptive or foster parent or child of the employee, the grandparent or grandchild of the employee, a parent-in-law of the employee or a person with whom the employee was or is in a relationship of in loco parentis."

What Notice Must Employees Provide When Using a Sick Day?

The Oregon PSLL states that employers must allow employees to use accrued sick leave upon the employee's request. The law does not specify if the employer can require that the employee's request be in writing, or instead, if the employer must honor the employee's oral request to use sick leave. If the need to use sick leave is foreseeable, such as a doctor's appointment, the employer may require reasonable advance notice of the employee's intention to use sick leave, not to exceed 10 days prior to the date the sick leave is to begin. If the need to use sick leave is unforeseeable, the employee shall provide notice to the employer as soon as practicable.

Can Employers Require Employees to Provide a Medical Certification?

Employers generally can require an employee to provide verification from a health care provider or other certification of the need for the sick leave only if the employee has been absent for more than three consecutively scheduled workdays. However, employers can require the verification, regardless of whether the employee has used sick leave for more than three consecutive days, if the employer suspects that an employee is abusing sick leave, including engaging in a pattern of abuse (i.e., repeated use of unscheduled sick leave on or adjacent to weekends, holidays, vacation days or paydays). Importantly, employers cannot require that the verification or certification explain the nature of the illness or provide details related to domestic violence, sexual assault, harassment, or stalking.

What Notice Must Employers Provide?

After the ordinance goes into effect, employers must provide (a) written notification at least quarterly to each employee of the amount of accrued and unused sick leave available for use by the employee, and (b) written notice of the requirements of the Oregon PSLL. The notices provided under this section must be in the language the employer typically uses to communicate with the employee. In addition, and likely prior to the law's effective date, the Oregon Bureau of Labor and Industries shall make available to employers a template that meets the above notice requirements.

What Can Employers Do and Not Do?

An employer cannot: (a) require an employee to search for or find a replacement worker as a condition of using sick leave; (b) require an employee to work an alternate shift to make up for using sick leave; (c) deny, interfere with, restrain or fail to pay for sick leave; (d) retaliate or in any way discriminate against an employee with respect to any term or condition of employment because the employee has exercised his or her rights under the Oregon PSLL; or (e) apply an absence control policy that penalizes employees for sick leave absences covered under the Oregon PSLL.

An employer can: (a) allow an employee to work additional hours or shifts to compensate for hours or shifts during which the employee was absent from work without using accrued sick leave for the hours or shifts missed; or (b) allow an employee to donate accrued paid leave to another employee.

Must Unused Sick Leave Be Paid Upon Employment Separation?

Employers are not required to pay out accrued sick leave when an employee resigns or is terminated. However, any accrued sick leave must be restored to an employee who is rehired within 180 days of separation from employment. Notably, an employee does not lose his or her accrued sick leave upon transfer to another location of the same employer or upon sale of the business to another employer.

What Happens to the Portland and Eugene Paid Sick Leave Ordinances?

While the Oregon PSLL is the state's first such law, two Oregon cities (Portland and Eugene) have enacted PSLLs over the last couple of years. First, in January 2014, the Portland PSLL went into effect. Second, the Eugene PSLL was enacted in July 2014 and has a January 1, 2016 scheduled effective date (the effective date was originally July 1, 2015 until a city council vote earlier this month moved the date).

The Oregon PSSL expressly states that it “preempts all charter and statutory authority of local governments to set any sick leave requirements.” Based on this language, it appears that the Oregon PSSL preempts the Portland and Eugene ordinances (except for the requirement that Portland employers with six or more employees in the state provide paid sick leave). Therefore, Portland and Eugene employers must prepare to comply with the Oregon PSSL moving forward. We will provide updates on the Oregon PSSL’s preemptive effect, if and when those updates become available.

What Should Employers Do Now?

Oregon employers should take steps now to ensure that they will be able to achieve full compliance with the Oregon PSSL by the law’s January 1, 2016 effective date. These are among the actions to consider:

- Review their sick leave or PTO policies and procedures immediately to ensure that they meet at least the minimum requirements of the ordinance no later than the law’s January 1, 2016 effective date.
- Develop a new Oregon paid sick leave policy that complies with the Oregon PSSL 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 Oregon PSSL.
- Prepare to comply with the law’s notice requirements.
- Monitor the Oregon Bureau of Labor and Industries [website](#) for template notices.
- Train supervisory and managerial employees, as well as HR, on the law’s requirements.

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