

Management Alert



If Pain, Yes Gain—Part XLIX: Duluth Diagnosed With Paid Sick Leave; Symptoms Begin 2020

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Seyfarth Synopsis: On May 31, 2018, Duluth, MN enacted a mandatory paid sick leave ordinance known as the Earned Sick and Safe Time Ordinance. Duluth joins Minneapolis and St. Paul as the only municipalities in Minnesota to pass such an ordinance. The ESSTO is scheduled to go into effect on January 1, 2020.

After months of debate and multiple iterations of a potential sick leave mandate, Duluth, MN has officially joined the paid sick leave landscape. On May 31, 2018, Duluth enacted the Earned Sick and Safe Time Ordinance (“ESSTO”), which will impose paid sick leave obligations on employers beginning on January 1, 2020. Duluth now joins Minneapolis and St. Paul as the third city in Minnesota to enact a paid sick leave ordinance.² The [Minneapolis](#) and [St. Paul](#) ordinances both went into effect on July 1, 2017.³

Some highlights of the Duluth ESSTO include:

- Employers with five or more employees, which is measured by averaging the number of employees per week during the previous calendar year *regardless* of whether they work in Duluth, must provide paid sick and safe time (“PSST”) to their Duluth employees.
- Employees must accrue PSST at least as fast as one hour of earned PSST for every 50 hours worked, up to 64 hours per year. Employers can limit employees’ use of PSST to 40 hours per year.
- The ESSTO definition of “family member” includes individuals whose close association with the employee is the equivalent of a family relationship.
- While an employer must notify its employees about certain PSST topics, such as their right to PSST, the amount of PSST provided under the ESSTO, how PSST can be used, that retaliation against those who request or use PSST is prohibited, and employees’ right to file a complaint about alleged ESSTO violations, the ordinance *does not* clearly identify how or when such notice must be given.

¹ With special thanks to Amanda Williams for her assistance.

² Duluth joins a growing list of states and municipalities that impose paid sick leave obligations on employers. The existing statewide paid sick leave laws include: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; (5) Vermont; (6) Arizona; (7) Washington; (8) Maryland; (9) Rhode Island; and (10) New Jersey. The Rhode Island paid sick leave law goes into effect on July 1, 2018 and the New Jersey paid sick leave law goes into effect on October 29, 2018. The existing municipal paid sick leave ordinances 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; (25) Santa Monica, CA; (26) Plainfield, NJ; (27) Minneapolis, MN; (28) San Diego, CA; (29) Chicago, IL; (30) St. Paul, MN; (31) Cook County, IL; (32) Berkeley, CA; (33) Morristown, NJ; and (34) Austin, TX. The Austin, TX ordinance becomes effective on October 1, 2018. The 13 municipal ordinances in the state of New Jersey will be preempted as of October 29, 2018 when the New Jersey statewide paid sick leave law goes into effect. Los Angeles, CA has two paid sick leave ordinances, one of which only applies to certain “hotel employers.” The Long Beach, CA and SeaTac, WA ordinances only apply to hospitality and/or transportation employers. The Pittsburgh, PA ordinance was enacted on August 3, 2015; however, it is not currently in effect due to an ongoing lawsuit challenging the validity of the ordinance under Pennsylvania law.

³ For employers with 23 or fewer employees, the St. Paul paid sick leave ordinance went into effect January 1, 2018.

Which Employers are Covered Under the ESSTO?

The ESSTO defines “employer” as any individual, corporation, partnership, association, nonprofit organization, or group of persons who has five or more employees. An employer’s size will be determined by averaging its number of employees per week during the previous calendar year. Importantly, under the ESSTO, these employees do not have to work in Duluth, MN to be counted.

“Employer” does not include the United States government, the state of Minnesota, or any county or local government, except the city of Duluth.

Which Employees are Covered by the ESSTO?

The ESSTO defines “employee” using a primary place of work standard. In particular, an individual will be eligible for PSST if, over a 12-month period, more than 50% of her working time is spent within the geographic boundaries of the city. Alternatively, an individual will be eligible for PSST if her work is based in the city of Duluth, she spends a substantial part of her time working in the city, and she does not spend more than 50% of her time working in any other particular place.

“Employee” contains several exclusions, including independent contractors, student interns, seasonal employees, and any person who is entitled to benefits under or otherwise covered by the federal Railroad Unemployment Insurance Act. The ESSTO’s failure to cover seasonal employees is a deviation from general paid sick leave law treatment of these individuals, although certain laws do also carve out seasonal employees.⁴

How Much Sick Time Can Employees Accrue, Use and Carryover?

Eligible employees begin accruing PSST at the start of their employment or on January 1, 2020, whichever is later. Employees must be permitted to accrue PSST at least as fast as one hour of PSST for every 50 hours worked. This accrual rate is significantly slower than the one hour for every 30 hours worked accrual rate under the Minneapolis and St. Paul sick leave ordinances. In fact, the ESSTO’s accrual rate is one of the slowest (i.e., most employer-friendly) accrual rates of any sick leave law or ordinance in the country.⁵

Covered employers must allow eligible employees to accrue up to 64 hours of PSST per year. However, in practice, it is unlikely that many employees will reach this accrual threshold if employers enforce the ESSTO’s one hour for every 50 hours worked accrual rate. Additionally, while the ESSTO’s 64-hour annual PSST accrual cap is greater than the Minneapolis and St. Paul ordinances’ respective 48-hour annual accrual caps, unlike the Minneapolis and St. Paul ordinances, the ESSTO does not also impose a “point-in-time” accrual cap on employers.⁶

Under the ESSTO, employers must allow an employee to carry over up to 40 hours of earned but unused PSST from one benefit year to the next. The ESSTO explicitly states that an employer can satisfy certain requirements under the ordinance by frontloading at least 40 hours of PSST to an employee after her first 90 days of employment and at the start of each subsequent year. Unfortunately, it is unclear whether employers that adopt such a frontloading system will be shielded from the ESSTO’s year-end carryover requirements.

⁴ For example, the Philadelphia paid sick leave ordinance does not apply to employees who are hired for a term of less than six months. Similarly, the Vermont statewide paid sick leave law does not apply to individuals who are employed by an employer for 20 weeks or fewer in a 12-month period and in a job scheduled to last 20 weeks or fewer.

⁵ Some examples of paid sick leave laws with even slower minimum accrual rate standards are (a) Vermont - one hour of paid sick leave for every 52 hours worked, and (b) Washington, D.C. - one hour of paid sick leave for every 87 hours worked where the employer has less than 25 employees who work in the city.

⁶ In addition to setting a 48-hour annual paid sick leave accrual cap, both the Minneapolis and St. Paul paid sick leave ordinances impose an 80-hour “point-in-time” accrual cap.

The ESSTO states that employers must allow employees to start using PSST after 90 calendar days of employment. To minimize the cost and impact of PSST, employers can limit employees to using a maximum of 40 PSST hours in a benefit year. This is true regardless of accrual and carryover balances. Employees can use available PSST in increments consistent with company policy or practice, or industry standards, as long as the increments do not exceed four hours.

Under What Circumstances May Employees Use Sick Leave?

According to the ESSTO, employees can use their accrued PSST for the following reasons: (a) an employee's own mental or physical illness, injury, or health condition, need for medical diagnosis, care, or treatment, or need for preventive medical care; (b) to care for a covered family member who needs care, diagnosis, or treatment of a mental or physical injury, illness, or health condition, or who needs preventive medical care; or (c) for absences due to sexual assault, domestic abuse, or stalking of the employee or employee's family member.

The ESSTO defines family member as an employee's (a) child, adopted child, adult child, foster child, legal ward, or child for whom the employee is a legal guardian, (b) spouse or domestic partner, (c) sibling, stepsibling, or foster sibling, (d) parent, stepparent, or parent-in-law, (e) grandchild, including foster grandchild, (f) grandparent, including step-grandparent, and (g) any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.

Can Employers Use PTO Policies for Compliance with the ESSTO?

The ESSTO generally allows employers to use non-sick paid leave policies for compliance with the ordinance. Specifically, if an employer has a non-sick paid leave policy, such as a PTO or vacation policy, that provides employees with an amount of paid leave that may be used for the same purposes and under the same conditions as PSST, the employer *does not* have to provide additional earned sick and safe time.

Can Employers Require Employees to Provide Medical or Other Documentation?

Yes, an employer can require an employee to provide reasonable documentation that PSST was used for a covered reason under the ESSTO. However, employers can *only* do so when the employee has been absent for more than three consecutive days.

What is the Rate of Pay for Sick Leave?

An employer must compensate an employee for used PSST. Compensation must be at the employee's standard hourly rate for hourly employees, or at "an equivalent rate" for salaried employees.⁷ Employers do not need to include lost tips or commissions when paying employees for PSST.

What Notice Requirements Must Employees Provide When Using Sick Leave?

The ESSTO states that employers must allow employees to use available PSST upon employee request. The request should include the expected duration of the absence, whenever possible. An employer can require an employee to comply with its typical notice and procedural requirements for absences or requesting leave, as long as they do not interfere with the employee's right to use PSST.

⁷ With respect to salaried employees, the ESSTO does not specify whether "an equivalent rate" means an equivalent hourly rate or equivalent salary. We are hopeful forthcoming administrative guidance will provide clarification.

Although the ESSTO lacks specific notice standards for foreseeable and unforeseeable PSST absences, nothing in the ESSTO prevents an employer from taking reasonable action when an employee uses PSST in bad faith, such as a clear instance of abuse.

Does the ESSTO Impose Notice Requirements on Employers?

Yes. However, the ESSTO *does not* clearly identify how or when notice of certain paid sick leave topics must be given to employees, only what topics must be included in the notice. These topics include employees' right to earned PSST, the amount of PSST provided under the ESSTO, how PSST can be used, that there is a prohibition on retaliating against those who request or use their PSST, and employees' right to file a complaint about alleged ESSTO violations. Forthcoming administrative guidance hopefully will provide further instruction on this obligation.

What Records Must Employers Maintain?

The ESSTO requires employers to retain accurate records of the hours worked by employees, the number of accrued PSST hours, and the amount of PSST taken by employees for a period of at least three years.

Are Employers Required to Payout Unused PSST Upon Termination?

No, an employer is not, regardless of the circumstances under which the employee left the employer. Notably, if an employee separates from her employer, but is rehired by that employer within 90 days of separation, any previously unused PSST must be reinstated to the employee.

How Will the ESSTO be Enforced and What Potential Penalties Exist?

An employee, or any other person, may report any suspected violation of the ESSTO to the city clerk's office. The ESSTO sets a one-year statute of limitations for filing claims of alleged violations.

The city clerk may order appropriate relief for ESSTO violations, including but not limited to: (a) reinstatement and back pay; (b) crediting an employee with the sick time they accrued but were not credited with; (c) payment of any accrued sick time that was unlawfully withheld; and (d) administrative penalties.

An employee may bring a civil action to recover any and all damages recoverable by law and may receive injunctive and other equitable relief as determined by the court only after exhausting administrative remedies identified in the ESSTO.

What Should Employers Do Now?

Duluth employers should take steps now to ensure that they will be able to achieve full compliance with the ESSTO and any forthcoming regulations by the January 1, 2020 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 ESSTO.
- Review policies on attendance, anti-retaliation, conduct, and discipline for compliance with the ESSTO.
- Develop a new paid sick leave policy that complies with the ESSTO for any employees who are not covered under existing paid sick leave or PTO policies.
- Monitor the Duluth city website for further information on the ESSTO, including regulations, how to comply with the ESSTO's notice requirement, etc.
- Review accrual calculation procedures and systems based on the ESSTO's one hour for every 50 hours worked accrual rate.

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.

If you would like further information, please contact [Joshua D. Seidman](#) at jseidman@seyfarth.com, or [Tracy M. Billows](#) at tbillows@seyfarth.com.

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