

Management Alert



If Pain, Yes Gain—Part I: Seattle Starts Summer with Amended Sick Time Rules

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Seyfarth Synopsis: Earlier this month, the Seattle Office of Labor Standards released its final amended paid sick and safe time rules. The amended rules, which go into effect on July 1, 2018, expand on the city's amended Paid Sick and Safe Time Ordinance. The amended rules also largely serve to further align the Seattle paid sick and safe time standards with those under the Washington state Paid Sick Leave Law.

The 2018 calendar year has seen a wave of paid sick leave activity in the state of Washington. On January 1, the [Washington statewide paid sick leave law](#) went into effect, making it the then-seventh state in the country to impose mandatory sick leave obligations on employers.¹ That same day also saw Tacoma's amended paid sick leave ordinance become effective, and was the first day after [Spokane's paid sick leave ordinance sunset](#) (i.e., it is no longer in effect). Then, on January 14, Seattle amended its Paid Sick and Safe Time Ordinance ("PSSTO"). The amendments in Tacoma and Seattle were largely meant to align the ordinances with the new Washington statewide law, although both ordinances remain more generous than the statewide law in certain respects.

The latest example of Washington paid sick leave activity occurred earlier this month in Seattle—home of one of the nation's first mandatory paid sick leave laws. Specifically, the Seattle Office of Labor Standards has released its final amended paid sick and safe time rules (the "Amended Rules"), which go into effect on July 1, 2018. The Amended Rules continue Seattle's efforts to better align its sick leave requirements with those of the statewide law. However, as is the case with the PSSTO, the Amended Rules contain at least some differences from the Washington sick leave law.

Here are the highlights:

- **Eligibility of Occasional Employees:** The amended PSSTO left open the question of what standard employers should use to determine if employees who occasionally work in the city of Seattle are entitled to paid sick and safe time ("PSST") benefits. The Amended Rules resolve this uncertainty and confirm that an employee who is "typically based outside of the City and performs work in the City on an occasional basis" will be covered by the PSSTO after performing more than 240 hours of work in Seattle within a year. The PSSTO states that the 240-hours worked standard only needs to be satisfied once during an individual's employment. Further, once an employee who works in Seattle on an occasional basis is covered under the PSSTO, all previous hours worked in Seattle during that benefit year count toward PSST accrual.

¹ 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 Maryland paid sick leave law went into effect on February 11, 2018. 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.

- Typically Based Outside of the City: The Amended Rules explain that an employee is considered to be typically based outside of the city if she works outside of the Seattle geographic boundaries for more than 50% of her work hours in a year. For new hires, the same 50% standard applies, except it is measured over the course of the employee's employment.
- Occasional Basis: The Amended Rules also note that performing work in Seattle on an occasional basis means that an employee does not have a regular work schedule of hours within the geographic boundaries of Seattle.
- **Accrual and Use of PSST**: The Amended Rules confirm that Tier 1 and Tier 2 employers under the PSSTO must allow employees to accrue PSST at least as fast as one hour of PSST for every 40 hours worked.² Similarly, the Amended Rules confirm that Tier 3 employers must allow employees to accrue PSST at least as fast as one hour of PSST for every 30 hours worked.³ As with the Washington state paid sick leave law, neither the PSSTO nor the Amended Rules include language that would cap how much PSST employees can ultimately accrue and use in a single year.⁴
 - No PSST Accrual For Non-Work Hours: The Amended Rules make clear that employers are not required to allow overtime eligible employees to accrue PSST for hours compensated when not working. For example, employers are not required to allow overtime eligible employees to accrue PSST during vacation, paid time off, or while using paid sick and safe time.
- **Frontloading**: As with the Washington state sick leave law, the Amended Rules explain that frontloading PSST to employees will be viewed as an advance on accrual. Accordingly, an employer who follows a frontloading approach *must* meet or exceed the PSSTO requirements on accrual, use and carryover of PSST. If an employer frontloads PSST, the employer must use a reasonable calculation to determine the amount of PSST the employee would have otherwise accrued absent frontloading. If the employer's calculation turns out to be less than what the employee would have accrued, the employer must provide the additional PSST to the employee as soon as practicable and no later than 30 days after identifying the discrepancy.
- **Increments of Use**: The PSSTO (at least for overtime eligible employees) and Washington sick leave law state that employers must allow employees to use sick leave in increments consistent with the employer's payroll system and practices, not to exceed one hour. Under the Washington state law, employers can receive a variance from the required increments of use if the employer makes a successful showing of "good cause," namely that the general increment is infeasible and would cause harm to the involved employees. The Amended Rules explicitly state that no such variance option exists under the PSSTO and that the city will *not* recognize a variance issued by the state.
- **Sick Time Payment**: Pursuant to the Amended Rules, an employer must calculate an employee's normal hourly compensation using a reasonable calculation based on the hourly rate that the employee would have earned for the time during which the employee used PSST. The Amended Rules provide examples of reasonable calculations of "normal hourly compensation" for overtime eligible employees (including those who are paid a salary), overtime exempt employees, and employees whose hourly rate of pay fluctuates.
 - Written Policy Requirement: Notably, the Amended Rules expand an employer's written sick time policy obligations (see below) by adding sick time payment as a mandatory written policy topic. By September 1, 2018, Seattle employers' sick time policies must state that an employee has a right to be paid their normal hourly compensation for using PSST.

² "Tier 1 employer" means an employer that employs at least one employee and fewer than 50 full-time equivalents, regardless of where those employees are employed, on average per calendar week. "Tier 2 employer" means an employer that employs at least 50 and fewer than 250 full-time equivalents, regardless of where those employees are employed, on average per calendar week.

³ "Tier 3 employer" means an employer that employs 250 or more full-time equivalents, regardless of where those employees are employed, on average per calendar week.

⁴ FAQ No. E.2 in the PSSTO's [December 2017 FAQs](#) states that "Employers may not cap the use of PSST. As long as employees have accrued and unused PSST, they may use it without limit."

- **Employee Notice to the Employer:** As with the Washington state paid sick leave law, the Amended Rules confirm that where an employee has an unforeseeable need to use PSST and is unable to provide notice to the employer, a person on the employee's behalf may provide the required notice. Also, like the Washington state law, the Amended Rules note that for PSST absences related to domestic violence, sexual assault, or stalking, employees should follow the notice standards set forth in the state's Domestic Violence Leave Act. Among the many components of the PSSTO's written policy requirement,⁵ the Amended Rules expressly note that employers must have a written policy outlining any requirements of an employee to provide notice for the use of PSST.
- **Documentation:** Under the PSSTO, an employer can require an employee to provide reasonable verification that the employee's use of PSST was for an authorized purpose when the employee has been absent for more than three consecutive days. Consistent with the Washington state paid sick leave law, the Amended Rules note that employers cannot require that the employee provide this verification until at least 10 calendar days after the first day the employee uses PSST. Further, as noted above, the Amended Rules confirm that any such verification requirements must be expressly stated in a written policy.
- **Available Balance Notification:** Both the Washington state sick leave law and the PSSTO mandate that employers provide each employee with written notification stating an updated amount of PSST available to each employee for use as either paid sick time or paid safe time. The updated amount must include (a) accrued PSST since the last notification, (b) reduced PSST since the last notification, and (c) any unused PSST available for use. The Amended Rules further echo the Washington state law by mandating that employers also provide employees with notice of their PSST balance upon rehire (see below) and in situations where an employer frontloads PSST to employees in advance of accrual.
- **Suspected Abuse of PSST:** Consistent with the Washington state paid sick leave law, under the Amended Rules, if an employer can demonstrate that an employee's use of PSST was for an unauthorized purpose, the employer may withhold payment of PSST for such hours. However, in this situation, the employer may not subsequently deduct those hours from the employee's legitimately accrued, unused PSST hours. If an employer withholds payment when PSST is used for unauthorized purposes, the employer must inform the employee of the withholding.
- **Separation of Employment, Payout, and Reinstatement of Unused PSST:** The PSSTO expressly states that employers are not required to payout an employee's accrued, unused PSST balance at termination or other separation of employment. In addition, the PSSTO states that when a separated employee is rehired by the employer within 12 months of separation, previously accrued, unused PSST must be immediately reinstated to the employee. The Amended Rules add a caveat to this general reinstatement standard. Specifically, the Amended Rules state that, an employer and employee can mutually agree, in writing, that the employer will reimburse the employee for any portion of their accrued, unused PSST at the time of separation. Assuming this occurs and the unused PSST was paid at the appropriate rate, an employer need not reinstate unused PSST hours if the employee is rehired within one year of separation.

Seattle employers should take steps now to comply with the Amended Rules by their 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 Amended Rules.
- Ensure tracking systems can meet the PSSTO and Amended Rules' available balance notification standards.
- Monitor the Seattle PSSTO website for further information on the Amended Rules, including potential updated FAQs.

⁵ The amended PSSTO states that an employer must provide each employee with a written PSST policy and that the policy must include: (a) the employee's right to PSST; (b) the employer's benefit year; (c) the employer's tier size; (d) the employer's rate of PSST accrual and carry over; (e) authorized purposes under which PSST may be used; (f) the manner of providing employees with notification of available PSST each time wages are paid; (g) the reasonable notice requirements for requesting use of PSST; (h) prohibitions against retaliation for use of PSST; (i) any standards regarding verification for use of PSST for more than three consecutive days, use of frontloaded PSST, a universal paid leave policy, or a shared PSST program where employees can donate time to a co-worker; and (j) other information that is material and necessary to complying with the PSSTO.

The paid sick leave landscape has not slowed down in terms of expanded laws and complexity of the laws. 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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