

# Management Alert



## If Pain, Yes Gain — Part XXXVIII: Washington Releases Final Paid Sick Leave Rules

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**Seyfarth Synopsis:** On October 20, 2017, the Washington Department of Labor & Industries released the state's final paid sick leave rules. Among other things, the final rules impose a number of additional burdens on covered employers, including broad recordkeeping requirements and multiple notice obligations, that must be satisfied and understood by the state paid sick leave law's January 1, 2018 effective date.

Last week, the Washington Department of Labor & Industries (the "Department") released the state's long-awaited final paid sick leave rules (the "Final Rules").<sup>1</sup> When the Washington paid sick leave ("PSL") law goes into effect on January 1, 2018, Washington will become the seventh state in the country with a statewide PSL law that is in effect.<sup>2</sup> Washington employers should assess and take the Final Rules into account as they prepare to comply with the impending law.<sup>3</sup>

There currently are four municipal paid sick leave [ordinances](#) in the state of Washington — Seattle, SeaTac, Tacoma, and Spokane.<sup>4</sup> The Washington PSL law expressly states that it will not preempt municipalities from establishing standards relating to PSL that are more favorable to employees than that under the state law. However, the Spokane PSL ordinance contains a section titled "Sunset," which states that the ordinance will be in effect until the later of December 31, 2017 or the effective date of the Washington PSL law. Thus, come January 1, 2018, Spokane employers will only need to follow the Washington PSL law.<sup>5</sup>

While not going as far as Spokane, Tacoma also is adjusting its PSL requirements based on the impending statewide law. Tacoma amended its PSL ordinance on September 26, 2017 and, per the city's [paid sick leave website](#), the amendments are designed so Tacoma "paid sick leave will match the more generous standards set by State law." The amended Tacoma PSL ordinance goes into effect on January 1, 2018.

It is unclear at this time if Seattle plans on revising its municipal PSL requirements based on the Washington PSL law. We will keep you posted on any developments.

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<sup>1</sup> Importantly, Washington is still finalizing a separate PSL rulemaking that is specifically designed to address enforcement of the PSL law's retaliation and enforcement directives.

<sup>2</sup> Including Washington, there currently are eight states with PSL laws that are either in effect or scheduled to go into effect in the coming months. The other seven states include Connecticut, California, Massachusetts, Oregon, Vermont, Arizona, and Rhode Island. As of January 1, 2018, only the Rhode Island PSL law will not yet be in effect.

<sup>3</sup> For more information on the Washington PSL law, see our earlier posts [here](#) and [here](#).

<sup>4</sup> The Seattle paid sick and safe time ordinance has been in effect since September 2012. The SeaTac PSL ordinance went into effect in January 2014 and only applies to certain hospitality and transportation employers. The Tacoma and Spokane PSL ordinances went into effect in February 2016 and January 2017, respectfully.

<sup>5</sup> The Spokane PSL ordinance expressly states that "[t]his chapter shall be effective until December 31, 2017, or until the implementation by the state of Washington of the paid sick leave requirements established by the passage of I-1433, whichever occurs last."

Here are the highlights of the Washington Final PSL Rules:

## Covered Employers

The Final Rules add a definition of “employer” to the state’s PSL law, which otherwise lacks any such definition. In particular, the Final Rules broadly define employer to include any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.

## Covered Employees

The Final Rules fill in another gap in the Washington PSL law by including a definition of “employee.” Who is included in the definition is quite short — “any individual employed by an employer.” However, the definition includes a lengthy list of individuals who are not considered employees for purposes of Washington PSL.

Among other groups, this list includes: (a) certain hand harvest laborers; (b) individuals employed in casual labor in or about a private home (with a few exceptions); (c) any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson; (d) any newspaper vendor, carrier, or delivery person selling or distributing newspapers on the street, to offices, to businesses, or from house to house and any freelance news correspondent or “stringer;” (e) individuals engaged in forest protection and fire prevention activities; (f) certain individuals employed by a charitable institution; and (g) any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation.

## Frontloading PSL

Employers covered by the Washington PSL law must allow employees to accrue one hour of PSL for every 40 hours worked. Employers also must allow 40 hours of earned, unused PSL to carry over at year-end. However, neither the Washington PSL law nor the corresponding Final Rules include any language that would cap how much PSL employees can ultimately accrue and use in a single year.

One ambiguous aspect of the Washington PSL law is its provision on “frontloading” PSL. The law states that “frontloading” is permitted as long as it “meets or exceeds the requirements...for accrual, use, and carryover of paid sick leave.” This provision is unclear on how “frontloading” meshes with the law’s nonexistent caps on accrual and usage and whether frontloading PSL would absolve an employer’s year-end carryover obligation, as is the case under many existing PSL laws.

The Final Rules contain language that partially resolves this uncertainty. The Final Rules define “frontloading” as providing an employee with PSL before it has accrued at the required one hour for every 40 hours worked accrual rate. The Final Rules state that employers should determine the amount of the frontload by reasonably calculating how much PSL an employee is projected to accrue based on anticipated hours worked. If an employer overestimates this amount and frontloads the employee with more PSL than he/she would have accrued, the employer is expressly prohibited from seeking reimbursement for the excess PSL. On the other hand, if the employer underestimates and frontloads the employee with less PSL than he/she would have accrued, the employer must make the additional PSL available to the employee as soon as practicable, and no later than 30 days after identifying the shortcoming. Employers taking advantage of the above “frontloading” option, must have a written policy in place that addresses the practice.

While the above guidance is instructive, the Final Rules do not explicitly explain what impact “frontloading” has on year-end carryover. That being said, both the Final Rules’ and Washington PSL law’s language on “frontloading” describe an approach that acts more as an advance on accrual than an alternative to accrual. In the PSL context this typically means that frontloading does not remove year-end carryover obligations.<sup>6</sup> As a result, employers who “frontload” Washington PSL to their employees most likely will need to permit year-end carryover of up to 40 hours of unused PSL. To avoid the carryover requirement, it appears that employers will have to frontload the anticipated accrual for the year, plus the 40 hours that

<sup>6</sup> See discussion of a PSL “advance” and providing PSL “up-front” under the San Francisco, CA PSL ordinance [FAQs](#).

would otherwise be carried over at the beginning of each year.

## Minimum Increment of Use

Generally, employers must allow employees to use PSL in increments consistent with the employer's payroll system and practices, not to exceed one hour. For example, an employer must allow employees to use PSL in 15 minute increments, if an employer's normal practice is to track work in 15 minute increments for purposes of compensation.

Despite the above standard, the Department will grant employers a variance from the required increments of PSL use if the employer can make a showing of "good cause." "Good cause" will exist where the employer demonstrates that the mandated increments of use are infeasible, and that granting a variance will not have a significant harmful effect on the health, safety, and welfare of the involved employees. To be approved for a variance, an employer must submit a written application to the Department and follow other procedures spelled out in the Final Rules.

## Sick Time Payment

The Washington PSL law is unclear on whether employees should be compensated for used PSL in their "normal hourly compensation" or "regular and normal wage." However, the Final Rules clarify that "regular and normal wage" has the same meaning as "normal hourly compensation."

Pursuant to the Final Rules, "normal hourly compensation" means "the hourly rate that an employee would have earned for the time during which the employee used paid sick leave." The Final Rules specify that normal hourly compensation does not include tips, gratuities, service charges, holiday pay, or other premium rates, unless otherwise provided by the employer. The Final Rules also provide examples of reasonable calculations of "normal hourly compensation" for commissioned employees, piece-rate employees, nonexempt employees paid a salary, employees whose hourly rate fluctuates, and employees who are scheduled to work a shift of indeterminate length.

## Reasonable Notice by Employees

The Final Rules state that when an employee's PSL absence is foreseeable, the employer may require that the employee provide notice at least 10 days in advance of the absence, or otherwise as early as practicable. If the need for the absence is unforeseeable, the employer may require notice as soon as possible before the required start of the employee's shift, unless it is impracticable to do so. If an employer requires employees to provide notice of a PSL absence related to domestic violence, sexual assault, or stalking, such notice must comply with the notice requirements under the Washington Domestic Violence Leave Act.

Notably, the Final Rules require that employers maintain and notify employees about a written policy "outlining any requirements of an employee to give reasonable notice for the use of paid sick leave."

## Verification

Employers can require an employee to provide verification that his/her PSL absence was for a covered purpose when the absence exceeds three days. The Final Rules explain that employers cannot require that the employee provide this verification until at least 10 calendar days after the first day the employee uses PSL.

The Final Rules further note that if an employee believes the employer's verification requirement will result in an unreasonable burden or expense, the employee must be allowed to provide an oral or written explanation to the employer asserting (1) the PSL use is proper, and (2) how the verification requirement creates an unreasonable burden or expense. The Final Rules outline steps for employers to follow in assessing and responding to these employee claims.

If an employer requires employee verification, it must maintain and distribute a written policy outlining any such requirements, including employees' right to assert that the requirement results in an unreasonable burden or expense.

## Suspected Abuse of PSL

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Under the Final Rules, if an employer can demonstrate that an employee's use of PSL was for an unauthorized purpose, the employer may withhold payment of PSL for such hours. However, in this situation, the employer may not subsequently deduct those hours from an employee's legitimately accrued, unused PSL hours.

If an employer withholds payment when PSL is used for unauthorized purposes, the employer must inform the employee of the withholding. The Final Rules note that if the employee disagrees with the withholding, he/she may file a complaint with the Department.

## Employer Notice Requirements

The Final Rules impose multiple notice requirements on covered employers. First, at least monthly, employers must provide each employee with written or electronic notification detailing (1) the amount of PSL accrued, (2) the PSL reductions since the last notification, and (3) any unused PSL available for use by the employee. Employers can satisfy this notification requirement by listing the information in employees' regular payroll statements. "Frontloading" PSL as discussed above, does not remove employers' obligation to provide at least monthly notice of an employee's PSL that is available for use.

Second, the Final Rules mandate that covered employers provide notice to an employee of the amount of accrued, unused PSL that is available for use when the employee is rehired following separation of employment.

Third, employers must notify each employee of certain rights under the Washington PSL law either upon hire for employees hired on or after January 1, 2018, or no later than March 1, 2018 for existing employees. The Department will release a model notice for employers to use in satisfying this obligation.

## Recordkeeping Requirement

The Final Rules also add a broad recordkeeping burden on employers. With respect to each eligible employee, a covered employer must retain, among nearly a dozen other records, (a) PSL accruals each month, (b) any unused PSL available for use by an employee, and (c) any PSL reductions each month including, but not limited to PSL used by an employee, PSL donated to a coworker through a shared leave program, or PSL not carried over to the following year.

## What Should Employers Do Now?

Washington employers should take steps now to ensure that they will be able to achieve full compliance with the Washington PSL law and Final Rules by their January 1, 2018 effective date. These are among the specific actions to consider:

- Review existing sick leave policies and either implement new policies or revise existing policies to satisfy the Final Rules and Washington PSL law.
- Review policies on attendance, anti-retaliation, conduct, and discipline for compliance with the Final Rules and Washington PSL law.
- Monitor the Department website for information on the Final Rules and Washington PSL law, including a forthcoming model notice.
- Train supervisory and managerial employees, as well as HR, on the new requirements.

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.

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