

Management Alert



If Pain, Yes Gain—Part XL: Arizona Publishes Final Sick Leave Rules

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Seyfarth Synopsis: More than several months after the Arizona Fair Wages and Healthy Families Act went into effect, the state published its long-awaited paid sick time final rules. The final rules, among other things, explain how employers should handle unused sick time at year-end and the Act's notice and posting requirements.

The Industrial Commission of Arizona (the "Commission") published the Notice of Final Rulemaking (the "final rules") for the Fair Wages and Healthy Families Act (the "Act"). The Act, which went into effect on July 1, 2017, provides eligible Arizona employees with paid sick time benefits. After months of anticipation and as explained below, the final rules bring clarity to a number of gray areas in the Act.

The final rules represent the third iteration of the Commission's sick time rules. After releasing its [proposed rulemaking](#) in May 2017, the Commission made significant substantive changes to employers' would-be sick time obligations in its [Notice of Supplemental Proposed Rulemaking](#), which was released in late-June 2017. The final rules are largely consistent with the state's paid sick time supplemental proposed rulemaking. Here are the highlights:

- **Equivalent Paid Time Off:** The final rules include the phrase "equivalent paid time off" (defined below) when referencing earned paid sick time. This is helpful for employers seeking to use their current paid time off or other paid leave policies for Arizona sick leave compliance.
- **Definitions:** The final rules also contain the following definitions:
 - "Amount of earned paid sick time available to the employee" means the amount of earned paid sick time or equivalent paid time off that is available to the employee for use in the current year. This definition, along with the three that immediately follow, will assist employers in meeting the Act's burdensome paystub notice requirements.
 - "Amount of earned paid sick time taken by the employee to date in the year" means the amount of earned paid sick time or equivalent paid time off taken by the employee to date in the current year.
 - "Amount of pay the employee has received as earned paid sick time" means the amount of pay the employee has received as earned paid sick time or equivalent paid time off to date in the current year.
 - "Employee's regular paycheck" is defined as a regular payroll record that is readily available to employees and contains the information set forth in the Act's paystub notice requirements. The final rules expressly state that physical or electronic paychecks or paystubs are permitted.
 - "Equivalent paid time off" "means paid time off provided under a paid leave policy, such as a PTO policy, that makes available an amount of paid leave sufficient to meet the accrual requirements of the Act that may be used for the same purposes and under the same conditions as earned paid sick time."

- “Health care professional” means a physician, physician assistant, registered nurse practitioner, certified nurse midwife who is a registered nurse practitioner, licensed dentist, or a behavioral health provider practicing as a psychologist, clinical social worker, family therapist, or professional counselor.
- “Smallest increment that the employer’s payroll system uses to account for absences or use of other time” means the smallest increment of time that an employer utilizes, either by policy or practice, to account for employees’ absences or use of other paid time off. This clarification will aid employers in determining what minimum increment of use they must set in order to satisfy the Act.
- Same Hourly Rate: The final rules also amend and reorganize the definition of “same hourly rate” by: (1) modifying the methods for determining “same hourly rate” to result in hourly rates, not lump sums; (2) referencing minimum wage in each method of determining “same hourly rate”; (3) amending the method for determining “same hourly rate” for salaried employees; (4) modifying and adding an option for determining “same hourly rate” for commission, piece-rate, or fee-for-service employees; and (5) adding language clarifying that “same hourly rate” does not include bonuses, tips, gifts, or certain other types of incentive pay, but does include shift differentials and premiums meant to compensate an employee for work performed under differing conditions. The final rules also provide guidance on determining the “same hourly rate” for employees who are paid multiple hourly rates when they use sick time.
- **Frontloading:** Section R20-5-1206’s of the final rules references the ability to “front load” earned paid sick time, and includes subsections F, G, H and I to address procedures for front loading earned paid sick time and the effect of front loading on accrual and carry over requirements. The final rules also address: (1) an employer’s carry over obligations; (2) an employer’s ability to permit greater carry over than that required by the Act; and (3) the impact of carry over on accrual, usage rights, and usage limits.
 - Subsection F: This subsection notably states that an employer can prorate the amount of paid sick time it provides to new hires. Specifically, an employer is not required to provide employees with additional earned paid sick time during the year in which the employee was hired if the employer provides the employee for immediate use by his or her 90th day of employment an amount of earned paid sick time that meets or exceeds the employer’s reasonable projection of how much paid sick time the employee would have accrued from the date of hire through the end of the employer’s benefit year at a rate of one hour for every 30 hours worked. If the employer’s projection is too low, it must provide the employee with the difference between the projection and the actual amount of sick time the employee would have earned.
 - Subsections G, H, and I: The combination of these three subsections is the most interesting and noteworthy aspect of the final rules. Subsections G and H state that an employer with 15 or more employees that frontloads its workers at least 40 hours of paid sick time at the start of each year or an employer with fewer than 15 employees that frontloads at least 24 hours of paid sick time at the start of each year is not required to provide carryover or additional accrual. Significantly, Subsection I then states that “unless an employer: (1) elects to pay an employee for unused earned paid sick time or equivalent paid time off at the end of a year pursuant to A.R.S. § 23-372(D)(4); or (2) meets the requirements of subsections (G) or (H), [as set forth above,] unused earned paid sick time and equivalent paid time off may be carried over to the next year...” Based on this language, it appears that if an employer frontloads its employees with 40 hours of paid sick time at the start of each benefit year, it does not have to either allow year-end carryover or cash out unused sick time at year end.
 - While the above frontloading provision could be read as inconsistent with the Act’s provision on year-end carryover, see our earlier [client alert on Arizona paid sick time](#) for more information, because the Commission is tasked with enforcing the Act, and the updated frontloading language was proposed by the Commission itself, employers likely can take advantage of the language in practice barring any future contrary judicial interpretations or administrative guidance

- **Recordkeeping:** The final rules make several updates to employers' recordkeeping requirements, including adding a requirement to maintain records concerning employees' earned paid sick time balances. The final rules state that employers also should retain records of: (1) the amount of earned paid sick time available to the employee; (2) the amount of earned paid sick time taken by the employee to date in the year, (3) the amount of pay the employee has received as earned paid sick time, and (4) the employee's earned paid sick time balance. "The employee's earned paid sick time balance" means the sum of earned paid sick time that is: (1) carried over to the current year; (2) accrued to date in the current year; and (3) provided to date in the current year.
- **Posting Requirement:** The final rules make an exception to the Act's posting requirements for businesses deemed to be "small employers." The final rules state that *with the exception of small employers*, every employer must place the posters prescribed by the Department in a conspicuous place in every establishment where employees are employed and where notices to employees are customarily placed. The final rules define a "small employer" as a corporation, proprietorship, partnership, joint venture, limited liability company, trust, or association that has less than \$500,000 in gross annual revenue.

Now that Arizona's paid sick time final rules are published and in effect, employers should take steps to ensure that their paid sick time policies and practices comply with both the Act and final rules.

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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Seyfarth Shaw LLP Management Alert | December 8, 2017

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