

Management Alert



If Pain, Yes Gain — Part XIII: Oregon Paid Sick Leave Final Rules and Model Notice Issued; Effective Date Near

By Ann Marie Zaletel and Joshua D. Seidman

Earlier this week, the Oregon Bureau of Labor and Industries (“BOLI”) issued multiple, significant pieces of guidance on the Oregon statewide paid sick leave law (“the Oregon PSLL” or “the Act”). First, BOLI published a [model notice](#) for employers to distribute to employees, which summarizes the Act’s main provisions. Second, BOLI released a set of final “[Sick Time Rules](#)” (“the Rules”), which clarify and expand on the Act in various ways. This guidance comes on the eve of the Act’s January 1, 2016 effective date,¹ after which Oregon will become the country’s fourth statewide mandatory paid sick leave law, after Connecticut, California, and Massachusetts.²

By way of background and [as we previously reported](#), the Oregon PSLL 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.³ Employees begin accruing sick time on the first day of employment and earn one hour of sick time for every 30 hours worked or one and one-third (1 1/3) hours for every 40 hours worked, up to 40 hours of sick time per year.⁴

Below are some of the noteworthy updates in the Rules:

Definition of “Family Member”

The Rules add the following individuals to the definition of “family member”: same-gender domestic partners; the parents or children of same-gender domestic partners; custodial, non-custodial and stepparents; and stepchildren. The Rules also define “spouse” to include individuals who have lawfully established a civil union or domestic partnership under the laws of any state.

¹ While the civil penalties for violations of the Act generally become effective on January 1, 2016, the Act states that all penalties, except 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. In addition, the Act states that employees who are employed by a covered employer as of January 1, 2016 may use sick leave as soon as it accrues, rather than waiting 90 calendar days to use sick leave -- a requirement that employers can impose on new hires after the effective date.

² Please see our earlier posts for more information on the [Connecticut](#), [California](#), and [Massachusetts](#) paid sick leave laws.

³ Notably, the Act 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 Act requires businesses in Portland with six or more employees in the state of Oregon to provide paid sick leave according to the Oregon PSLL (Portland employers with less than six employees must provide unpaid sick leave). Otherwise, Portland businesses must comply with all other aspects of the Oregon PSLL.

⁴ Subject to further guidance from the state, Section 3(3)(a) of the Act can be interpreted as imposing a one-time accrual cap of 80 hours, so that an employee can never have more than 80 hours of accrued paid sick leave in his or her bank at any one time.

“Hours Worked” and Overtime

In addition to adding a definition for “hours worked,” the Rules confirm that eligible employees continue to accrue paid sick leave when working overtime.

Payment of Sick Leave

The Rules provide clarity on how employers should handle payment of sick leave and the meaning of “regular rate of pay” for different types of employees. First, hourly employees should receive sick pay at the same hourly rate the employees would have earned for the period of time in which sick time is used. Second, salaried employees’ sick pay is calculated by taking an employee’s total wages earned during the pay period covered by the salary and dividing by the number of hours agreed to be worked in the pay period which the salary is intended to compensate. For example, if an employee is paid a weekly salary of \$525 and it is understood that the salary is compensation for a regular work week of 35 hours, the employee’s regular rate of pay is \$15 per hour (\$525 divided by 35 hours).

Third, the Rules explain that “regular rate of pay” does not include bonuses, tips, overtime, holiday pay, and other premium rates. Fourth, the Rules confirm that sick time must be paid no later than the payday for the next regular pay period after the sick time was used by the employee.

Increments of Use and “Undue Hardship”

The Act generally allows employees to use sick leave in one hour increments. However, employers can set a minimum increment of use of up to four hours, if they meet certain conditions. One such condition is showing that the company will face an undue hardship if employees are allowed to use sick leave in one hour increments. The Rules provide a definition of “undue hardship” and a list of factors to consider in determining if such a hardship exists.

Notably, even if an employer establishes an undue hardship, the employer can only require minimum increments of use beyond one hour if it (1) allows its employees to use at least 56 hours of sick leave per year, and (2) provides each employee with a notice provided by the BOLI Commissioner regarding what increments of sick leave will be used.⁵

Joint Employers

The Rules expressly state that all joint employers are responsible, both individually and jointly, for ensuring compliance with the provisions of the Oregon PSL and the Rules. Whether a joint employment relationship exists is not determined by applying any single factor, but rather by viewing the entire relationship in its totality. The Rules explain that in joint employment relationships, the “primary employer” is responsible for giving required notices to its employees, providing sick time leave and other leave, and maintenance of health benefits. In joint employer relationships involving temporary placement agencies, the Rules note that the placement agency most likely would be the primary employer. The Rules list a number of factors to consider in determining which employer is the primary employer.

Frontloading Sick Time

The Rules add a definition of “front-load,” and confirm that, as was stated in the Act, frontloading is a permissible method of providing sick leave. Importantly, the Rules state that employers can provide a prorated amount of sick leave to employees hired in the middle of the benefit year based on the number of hours the employee would have received had he/she been employed by the employer for the full year.

⁵ The Rules also state that if an employer requires employees to take leave in increments of more than one hour and an employee lacks sufficient accrued sick time to cover the additional time away from work that the employer is requiring, the employer may not discipline the employee for taking the additional time or include the additional hours as violations of an absence control policy.

Determining Employer Size

The Rules state that an employer must count all employees who perform work for the employer in the state of Oregon, including full-time, part-time, and temporary employees, in determining whether the employer must provide paid or unpaid sick leave. Employees jointly employed by two employers must be counted by both employers.

Application of Sick Time Provisions to New Businesses

The Rules provide guidance on how the sick time provisions apply to new businesses opening in Oregon. The Rules explain, among other topics, how new businesses comply with the accrual requirements, calculate the size of their workforce, and pay employees for accrued sick time.

Employee Notice to Employer

The Rules clarify that, for foreseeable absences, an employer may require employees to comply with the employer's usual and customary written notice and procedural requirements for requesting time off, assuming those requirements do not interfere with employees' ability to use sick time. Furthermore, for foreseeable absences, employees must make a reasonable effort to schedule sick time in a way that does not unduly disrupt the employer's operations. While the Act already provides employers with some recourse if an employee does not follow the employer's notice requirements before using sick leave, the Rules affirmatively state that an employer may discipline an employee who fails to provide the required notice.

Verification and Certification of Sick Time Use

The Rules state that where an employee uses sick time for domestic violence, sexual assault, stalking, or harassment, sufficient certification includes: (a) a copy of a police report; (b) a copy of a protective order or other evidence from a court, administrative agency, or attorney that the employee appeared in or was preparing for a civil, criminal or administrative proceeding; or (c) documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the employee or the employee's minor child or dependent was undergoing treatment or counseling, obtaining services, or relocating.

Importantly, if an employer requires that employees provide written documentation or verification consistent with the Oregon PSLL, the Rules allow the employer to withhold sick time payment until the employee has provided such documentation or verification. To take advantage of this option, an employer's sick leave or other time off policy must state the consequences resulting from an employee's failure or delay in providing the required documentation or verification.

What Notice Must Employers Provide?

The Oregon PSLL requires that employers 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.

As discussed above, BOLI recently released a model notice for employers to use in satisfying the latter of the two notice requirements. Specifically, the model notice discusses the following topics: (1) how much sick time the law requires; (2) when must sick time be paid; (3) for what purposes sick time may be used; (4) notices and verification; (5) prohibition of discrimination and retaliation; and (6) the collective bargaining exception. The Rules state that employers must provide the model notice no later than the end of the employer's first pay period after January 1, 2016, or, for employees hired after the effective date, the end of their first pay period.

The Rules list several ways for employers to satisfy the notice requirement, including (i) distributing the written notice to each employee personally, by regular mail or email, or by including it with a paycheck, (ii) incorporating the written notice into a handbook or manual made available to employees, whether in a print or electronic format, or (iii) posting the written notice in a conspicuous and accessible location in each workplace of the employer.

Existing Time Off Policies

The Rules explain that an employer does not have to offer additional sick leave to employees if the employer's own sick leave, paid vacation, or other paid time off policy is substantially equivalent to the sick time required under the Act. In particular, the employer's policy must provide at least the same number of sick time hours an employee would earn under the Act, and must comply with all other minimum requirements, including, but not limited to, provisions related to when employees can use sick time, the rate of accrual, the regular rate of pay, qualifying absences, conditions of notice and documentation, and employment protections.

Next Steps for Employers

Employers with operations in Oregon should review their sick leave or PTO policies immediately to ensure that they comply with requirements of the Oregon PSL and the recently released Rules, prior to January 1, 2016.

[Ann Marie Zaletel](#) is a partner in Seyfarth's Los Angeles - Century City office and [Joshua Seidman](#) is an associate in the firm's New York office. If you would like further information, please contact your Seyfarth attorney, or Ann Marie Zaletel at azaletel@seyfarth.com or Joshua Seidman at jseidman@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | December 11, 2015

©2015 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.