

Washington's Paid Sick Leave Law is Coming- Are you Ready?



Today's webinar will begin shortly. We are waiting for attendees to log on

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ON THE FRONT LINES OF WORKPLACE LAW<sup>SM</sup>

*Washington's New Paid Sick Leave Law is Coming- Are You Ready?*



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## Today we will cover...

1. What's Happening?
2. Who's Covered?
3. What About City Law?
4. Employer Responsibilities
5. Retaliation
6. No, really, what about the different city laws?



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**WHAT IS  
HAPPENING  
?!?!?!?!?!?**

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# WHY?

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“[T]o promote public health, family stability, and economic security, balanced with the demands of the workplace. [The Paid Sick Leave law] includes provisions addressing the accrual and carryover of paid sick leave, defines what paid sick leave can be used for and when, and prohibits employers from retaliating against employees for exercising any rights provided by chapter 49.46 RCW.”

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## Who's Covered?



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## Who's Covered? Employers

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- "Employer" includes **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.



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## Who's Covered? Employees

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- Includes any individual employed by an employer, **except:**
  - Employees of charitable institutions charged with childcare responsibilities
  - Individuals whose duties require they reside or sleep at their place of employment or who otherwise spend a substantial portion of their work time subject to call.
  - Inmates and others in custody
  - Elected or appointed public officials and employees of the state legislature
  - Washington State ferry crews
  - Crews of non-American vessels



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## Who's Covered? Employees

- Includes any individual employed by an employer, **except**:
  - Certain agricultural workers
  - Casual laborers
  - **White-collar exempt employees**
  - Educational, charitable, religious, state or local government, or non-profit organization volunteers
  - Newspaper vendors or carriers
  - Forest protection and fire prevention employees
  - Any carrier subject to regulation by Part 1 of the Interstate Commerce Act



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## “White Collar”?

- Overtime exemptions: Bona fide executive, administrative, professional or outside salesperson.
- Remember, WA has its own tests for these exemptions that are not necessarily identical to the FLSA's.

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## What about independent contractors?



A **bona fide** independent contractor is exempt from Washington's Paid Sick Leave law because that person is not "employed" by an employer.



## What About Seattle, SeaTac, Spokane and Tacoma?



- Except for Spokane, you must follow them all.
- If a conflict, you must follow the more generous provision, i.e., the law that gives the employee the most rights
- More later . . .

## Paid Sick Leave Accrual – Start Tracking!



- **Employees must accrue at least 1 hour of paid sick leave for every 40 hours worked.**
  - Employees who are employed on or before January 1, 2018 will accrue paid sick leave for all hours worked beginning on January 1, 2018.
  - Employees hired after January 1, 2018 will begin to accrue paid sick leave **upon the commencement of employment.**



## Can I Frontload Paid Sick Leave?



Yes! Just make sure...

- Employer uses a reasonable calculation to determine the amount of paid sick leave the employee would be projected to accrue.
- Employer **must** have a written policy or collective bargaining agreement that sets forth the frontloading policy and the employer must notify employees of such policy.

# Can I Frontload Paid Sick Leave?



## CAUTION!

- If the employee uses an amount of frontloaded paid sick leave which exceeds the paid sick leave the employee would have otherwise accrued, the employer may not seek reimbursement from the employee for such paid sick leave.
- If an employee frontloads paid sick leave to an employee, but the frontloaded amount is less than the amount the employee was entitled to accrue, the employer must make such additional paid sick leave available to the employee no later than thirty days after identifying the discrepancy.
- Employers **may not** deduct frontloaded paid sick leave from an employee's final paycheck, unless there is a specific agreement in place to do so.

# Hours Worked vs. Hours Paid



Employers are not required to allow employees to accrue paid sick leave for hours paid when not working.







## When Can Employees Use It?

- Accrued time available after **90<sup>th</sup> Day** of Employment
  - More generous than Seattle.



## When can employees use paid sick leave?

  
**KEEP  
CALM  
ONLY  
90 DAYS  
LEFT**

Employees are entitled to use accrued paid sick leave beginning on the 90th calendar day after the start of their employment.

Employers must allow employees to use paid sick leave in increments consistent with the employer's payroll system and practices, not to exceed one hour.

## Using Paid Sick Leave

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Employees may use paid sick leave:

- To care for themselves or their family members.
- When the employees' workplace or their child's school or place of care has been closed by a public official for any health-related reason.
- For absences that qualify for leave under the state's Domestic Violence Leave Act.



Employers may allow employees to use paid sick leave for additional purposes.

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## Family Member?

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- A child, including a biological, adopted, or foster child, stepchild, or a child to whom the employee stands in loco parentis, is a legal guardian, or is a de facto parent, regardless of age or dependency status;
- A biological, adoptive, de facto, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child;
- A spouse;
- A registered domestic partner;
- A grandparent;
- A grandchild; or
- A sibling.

*Note: Not identical to Seattle*



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## Reasonable Notice

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Please Notice This



- If the need for paid sick leave is foreseeable, the employer may require advance notice from the employee.
- If the need for paid sick leave is unforeseeable, the employer may require notice from the employee.
  - The employee must provide notice to the employer as soon as possible before the required start of their shift, unless it is not practicable to do so.
  - In the event it is impracticable for an employee to provide notice to their employer, a person on the employee's behalf may provide notice to the employer.

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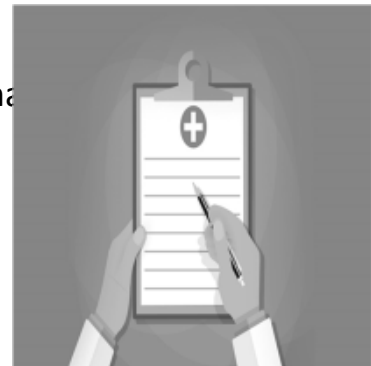
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## Verification

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If an employee is seeking to use or has used paid sick leave for absences exceeding three days, during which the employee is/was required to work, the employee may be required to provide verification that establishes or confirms that the use of paid sick leave is for an authorized purpose.

Verification must be provided to the employer within a reasonable time period during or after the leave.



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## What is An Absence Exceeding 3 Days?

“Absences exceeding 3 consecutive days an employee is required to work”

### Example:

Assume an employee is required to work on Mondays, Wednesdays, and Fridays, and then the employee uses paid sick leave for any portion of those three work days in a row.

If the employee uses paid sick leave again on the following Monday, the employee would have absences exceeding three days.

## Verification?

- The WA law is silent on whether an employer can require verification for
  - ✓ Suspected Abuse
  - ✓ Suspected Misuse

\* Different than Seattle!

MATTHEW BRODERICK

FERRIS  
BUELLER'S  
DAY OFF



## Rate of Pay

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Employees must be paid the greater of the minimum hourly wage rate established by Washington's Minimum Wage Act or the employee's **normal hourly compensation**.

- Normal hourly compensation must be calculated based on the hourly rate that an employee would have earned for the time during which the employee used paid sick leave.



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## Rate of Pay

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**Normal hourly compensation does not include:**

- Normal hourly compensation does not include tips, gratuities, service charges, holiday pay, or other premium rates, unless the employer or a collective bargaining agreement allow for such considerations.
- However, where an employee's normal hourly compensation is a differential rate, meaning a different rate paid for the same work performed under differing conditions (e.g., a night shift), the differential rate is not a premium.



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## How to Calculate Normal Hourly Compensation

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- For an employee paid partially or wholly on a commission basis, dividing the total earnings by the total hours worked in the full pay periods in the prior 90 days of employment.
- For an employee paid partially or wholly on a piece rate basis, dividing the total earnings by the total hours worked in the most recent workweek in which the employee performed identical or substantially similar work to the work they would have performed had they not used paid sick leave.
- For a nonexempt employee paid a salary, dividing the annual salary by 52 to determine the weekly salary, and then dividing the weekly salary by the employee's normal scheduled hours of work.



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## When is payday?

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Generally, employers must pay paid sick leave to the employee no later than the payday for the pay period in which the employee took the leave.

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## What happens to accrued paid sick leave when the employee leaves the employer?

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Employers may choose, but are not required, to reimburse an employee for any portion of their accrued paid sick leave when the employee separates from his/her employment.

- Must be in your written policy!



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## The Carryover

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Unused paid sick leave of 40 hours or less must be carried over to the following year.

If an employee carries over forty hours of unused paid sick leave to the following year, accrual of paid sick leave in the subsequent year would be in addition to the forty hours accrued in the previous year and carried over.



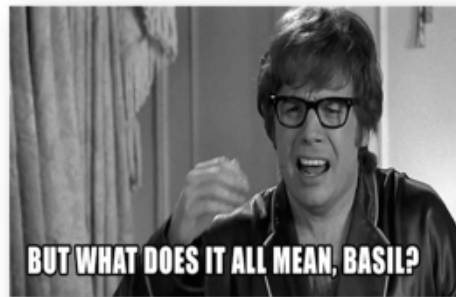
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## Can I Combine Sick and Safe Leave with Vacation ?



- Yes, but . . .



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## But what about my PTO policy?



PTO policies must meet or exceed the provisions of Washington's Paid Sick Leave Law:

- Accrual of not less than one hour of PTO for every 40 hours worked.
- Payment of PTO must be at the employee's normal hourly compensation.
- Carryover of at least 40 hours of accrued, unused PTO to the following year.
- Employees must be permitted to use PTO for all the purposes authorized under the Paid Sick Leave law.
- Must comply with recordkeeping and notification requirements.

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## What happens when PTO is exhausted?



If combined, universal PTO Policy and an employee exhausts his/her PTO for purposes other than those authorized under Paid Sick Leave law, and the need for use of paid sick leave later arises when no additional PTO leave is available . . .

The employer is **not** required to provide any additional PTO leave to the employee as long as the employer's PTO program meets or exceeds the provisions of Paid Sick Leave law.

## Shared Leave



- An employer may establish a shared paid sick leave program in which an employee may choose to donate paid sick leave to a co-worker.
- If an employer establishes a shared paid sick leave program, the employer **must** have a written policy or a collective bargaining agreement which specifies that an employee may donate accrued, unused paid sick leave to a co-worker for purposes authorized purposes.
- The employer must notify employees of such policy or agreement prior to allowing an employee to donate or use shared paid sick leave. An employer must make this information readily available to all employees.



## Let's Swap Shifts!

- An employer may not require an employee using paid sick leave to search for or find a replacement worker to cover the employee using paid sick leave.
- If the employer and the employee(s) agree, an employee may work additional hours or shifts, or trade shifts with another employee, in lieu of using available paid sick leave for missed hours or shifts that qualify for the use of paid sick leave.



## My employee used paid sick leave for an unauthorized purpose- now what?

- If an employer can demonstrate that an employee used paid sick leave for an unauthorized purpose, the employer
  - Can withhold payment of paid sick leave for such hours
    - Keep in mind:
      - If the employer withholds payment, the employer must provide notification to the employee.
      - If the employee maintains that the use of paid sick leave was for an authorized purpose, the employee may file a complaint with the Department of Labor and Industries.
  - Can NOT deduct those hours from an employee's legitimately accrued, unused paid sick leave.

## What are my responsibilities as an employer?



- Employers must notify employees in either written or electronic form of the following:
  - Employee entitlement to paid sick leave.
  - The rate at which the employee will accrue paid sick leave.
  - The authorized purposes for which paid sick leave can be used.
  - Retaliation is prohibited.
- This information must be readily available to employees and must be provided to employees no later than the first day of employment.
  - For existing employees, the employer must notify the employees by March 1, 2018.

## What are my responsibilities as an employer?







- At least monthly, employers **must** provide each employee with notification detailing:
  - the amount of paid sick leave accrued
  - paid sick leave reductions since the last notification, and
  - any unused paid sick leave available for use by the employee.

## Record Keeping Requirements

- Employers are required to keep and preserve records containing the following information:
  - Name in full and the employee's identifying symbol or number if such is used in place of the employee's name on any time, work, or payroll records.
  - Home address.
  - Occupation.
  - Date of birth.
  - Time of day and day of week on which the employee's workweek begins.
  - Total daily or weekly straight-time earnings or wages.
  - Total overtime excess compensation for the workweek.
  - Total additions or deduction from wages paid each pay period.
    - When an employer makes additions to or deductions from wages shall also maintain a record of the dates, amounts, and nature of the items which make up the total additions and deductions.
  - Total wages paid each pay period.
  - Date of payment and the pay period covered by the payment.
  - **Paid sick leave accruals each month, and any unused paid sick leave available for use by an employee.**
  - **Paid sick leave reductions each month.**
  - The date of commencement of the employee's employment.

## No Retaliation Zone

-  Employers may not interfere with any right protected by the Paid Sick Leave law.
-  Employer may not use an employee's exercise of any of his/her paid sick leave rights as a negative factor in any employment action.
-  Employers may not adopt or enforce any policy that counts the use of paid sick leave for an authorized purpose as an absence that may lead to or result in discipline.
-  Employers may not take, or threaten to take, any adverse employment action against an employee because the employee exercised his/her rights under the Paid Sick Leave law.

## What about the City Sick Leave Laws?



- Seattle
- SeaTac
- Spokane (Will **sunset** when state law takes effect)
- Tacoma (Will match WA law as of 1/1/18)
- Statewide

**None** are identical. For example. . .

Key Element	Statewide	Seattle	Sea-Tac*	Tacoma
Employer Size (Private)	All	4 + FTE's anywhere	Hospitality and Transportation*	All
Type of Employees	All, except "white collar" exempt	All	Hospitality and Transportation*	All
When in Effect	1/1/2018	Now	Now	Now
Hours requirement?	No.	"Regular" or "occasional" (< 240 in prev. yr)	No. ("ad hoc" count)	<del>80</del>
Accrual	1/40	1/40 <u>or</u> 1/30	1/40	1/40
Wait Period?	90 days	180 days	None	<del>180 days</del>
Cash out?	Policy	Policy	Yes (yearly and at termination)	Policy
Bereavement?	No	No	No	Yes

Key Element	Statewide	Seattle	Sea-Tac*	Tacoma
Carry Over	40	Varies by employer size	None, because of mandatory pay out	40
Annual Use Cap	None	Varies by employer size	None	None
Verification?	3 consecutive days	3 days, or misuse or abuse	None	3 consecutive days
Rate of Pay	"normal hourly compensation"	Base rate	"normal hourly compensation"?	Hourly
Private Right of Action	No	Yes	No	No
Notification of Paid Leave Available	Monthly	Each pay period	Each pay period	Monthly

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## Enforcement of Retaliation Claims\*



- Deadline to file with L&I (180 Days)
- Investigations
- Issue findings
- Issue penalties

\* *Still in rule-making process*



## What'll it cost me?\*

### Retaliation:

- First violation: not less than \$1,000 or an amount equal to 10% of the total amount of unpaid earnings attributable to the retaliatory action – whichever is greater. (Max is \$20,000).
- Repeat violations: up to double the civil penalty listed for a first violation. (Max is \$40,000)

*\*Still in rulemaking process*



## Enforcement of Claims that Employee Was Not Provided with Paid Sick Leave\*

- If an employee files a complaint with the Department alleging that their employer failed to provide an employee with paid sick leave, the Department will investigate the alleged violation.
  - If the Department determines there was a violation, the employee may elect to:
    - Get the paid leave
    - Get money

*\*Still in rule making process*



## Final Questions?



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## Peer Into Our Crystal Ball: Predictions for 2018 Workplace Law Trends




**December 5, 2017**

8:00 AM - 12:30 PM

Bell Harbor Conference Center

2211 Alaskan Way, Pier 66

Seattle

For Questions or to RSVP: [klyons@fisherphillips.com](mailto:klyons@fisherphillips.com).

Cost: We ask that you donate up to \$20 at the door towards Women's Funding Alliance -Improving the lives of women and girls in Washington State. Fisher Phillips will match all contributions.

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