FAQ: What Employers Need To Know About Portland Paid Sick Leave

Insights
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Beginning January 1, 2014, Portland, Oregon will require most employers to offer paid sick leave to their employees. The following list of Frequently Asked Questions will help employers get up to speed with the ordinance and accompanying administrative regulations.

BASICS

When does the law go into effect?

Portland's paid sick leave ordinance will go into effect on January 1, 2014.

What does the ordinance require?

The ordinance requires all businesses with employees working within Portland, regardless of size, to provide "Sick Time" for their qualifying employees. However, only employers with six or more employees are obligated to provide paid Sick Time. All other private employers will be required to provide unpaid Sick Time.

How does the Sick Time ordinance affect small employers?

Because all employers, regardless of size, are required to provide Sick Time to qualifying Portland employees, smaller employers that do not fall under the provisions of either the Oregon Family Leave Act (OFLA) or the Family Medical Leave Act (FMLA) will now be required to provide unpaid medical leave or – in many instances outlined below – paid leave for their employees working in Portland, up to a maximum of 40 hours per year.

How are the number of employees calculated?

As a general rule, all employees of the employer, regardless of where the employee works, will be counted in determining whether the employer is obligated to provide paid Sick Time. However, only employees who physically work in Portland are entitled to leave. For example, an employer may have six workers but only one employee physically working in Portland. In that case, the employer is covered under the ordinance but must only provide paid Sick Time to the one employee who physically works in Portland.

What area is considered to be in "Portland" for purposes of this ordinance?

The exact territorial reach of the ordinance remains somewhat unclear. While the ordinance certainly applies to those with employees working in the core of the City of Portland, the ordinance also covers "the area within the territorial City limits of the City of Portland, Oregon and such

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also covers "the area within the territorial City limits of the City of Portland, Oregon and such territory outside the City over which the City has jurisdiction or control by virtue of ownership or any Constitutional or Charter provisions, or law."

What does this mean for employers with employees who, for example, work in an unincorporated area of Washington County but have a Portland address? The short answer is that we don't know for sure and it is unclear if the City will provide additional guidance.

COVERAGE ISSUES

Which employees are covered?

All employees who perform work within Portland city limits are covered, regardless of where the employer is actually located. This includes full-time, part-time, and temporary employees. However, the ordinance only applies to work that the employee physically performs in Portland. For example, an employee who performs work by telecommuting will be covered by the ordinance if the employee telecommutes from within Portland. On the flip side, the ordinance does not apply if the employer is located in Portland but the employee telecommutes from a different locale (e.g., Bend, OR).

The ordinance also covers certain situations when employees temporarily travel to Portland. According to the regulations, employees who travel to Portland and make a stop "for the purpose of conducting their work" (i.e., sales calls, delivering items, etc.) will be covered by the ordinance. However, employees traveling through Portland and making only "incidental stops" (e.g., purchasing gas, stopping at a restroom, eating a meal) will not be entitled to Sick Time.

How many hours of Sick Time does the employer need to provide?

The ordinance requires all employers to provide qualifying employees with up to forty (40) hours of accrued Sick Time per year. Unlike other paid sick leave laws utilized by other cities, the number of leave hours that an employer is required to provide under the Portland ordinance does not fluctuate depending on the size of the employer.

Can we provide more Sick Time than the ordinance requires?

Yes, the ordinance serves as the floor, not the ceiling. Employers may voluntarily choose to provide employees more than forty hours of Sick Time. Additionally, some employers with employees in multiple cities are choosing to provide Sick Time to all employees, both for perceived fairness and competitive advantage reasons, and also to ease the administrative burden that would result from administering multiple leave policies.

What is the effect of a collective bargaining agreement ("CBA")?

Unlike other paid sick leave ordinances enacted by other jurisdictions, Portland's ordinance does not explicitly carve out employees governed by a CBA from coverage. Therefore, even unionized employers must comply with the ordinance's leave requirements. In cases where the leave provisions in the CBA are sufficient to meet the ordinance's minimum requirements, employers are obviously not required to provide additional coverage, but should still comply with the notice and other provisions described below. However, where the leave provisions in the CBA fail to meet the

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other provisions described below. However, where the leave provisions in the CBA fail to meet the ordinance's requirements, employers are advised to work with the union to determine how the CBA should be revised, as leave is generally a subject of mandatory bargaining.

ACCRUAL ISSUES

How do employees accrue Sick Time?

Employees accrue Sick Time at a rate of one hour per every thirty hours worked, with overtime hours included in the calculation. Exempt employees are presumed to work forty hours per week unless the their normal work week is less than 40 hours a week. Employees do not accrue Sick Time during time spent on paid or unpaid leave. Employees accrue a maximum of 40 total hours per year (unless an employer voluntarily allows for greater accrual).

Who accrues Sick Time?

Current employees will begin accruing Sick Time on January 1, 2014, the date the ordinance takes effect, and accrual rates will not apply to hours worked before that date. Employees hired on or after January 1, 2014 will begin to accrue Sick Time from the start date of their employment.

Does Sick Time carry over to the next year?

Yes, the ordinance provides that employers must allow employees to carry over up to 40 hours of unused Sick Time to the following year. The administrative rules provide an exception for employers that provide frontloaded Sick Time. In other words, if you provide employees with all of their annual Sick Time at the beginning of the leave year rather than having employees accrue Sick Time throughout the year, you are not required to allow employees to carry over unused hours to the following year. Presumably, the rationale behind this exception is that employees with frontloaded Sick Time will have sufficient hours to use early in the year such that it is unnecessary for them to rely on carried over Sick Time.

Do employers have to compensate employees for unused Sick Time upon termination?

No, the ordinance does not require employers to compensate employees for unused paid Sick Time upon the termination of employment. Just to be sure, employers are advised to provide an express notification to their employees about their practice in a written policy manual.

USE OF PAID SICK TIME

When is a new employee entitled to use Sick Time?

Although new employees begin accruing Sick Time immediately from their start date, they are only eligible for sick leave under the ordinance after they have (1) worked at least 240 hours (e.g., 6 weeks at fulltime) within Portland city limits (after the ordinance goes into effect January 1, 2014) and (2) been employed at least 90 days.

The ordinance, similar to OFLA and FMLA, allows an employer to define a “year” as “any consecutive 12-month period of time” that is normally used by the employer in calculating wages and benefits (e.g., fiscal year, calendar year, anniversary year, etc.).

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What situations does Sick Time cover?
The ordinance provides for both "paid sick leave" and "paid safe leave." Employees can choose to use their accrued Sick Time in the following scenarios:

- *The employee's own illness or medical care.* This is defined to include an employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis care or treatment of a mental or physical illness, injury, or health condition; or an employee's need for preventive medical care.

- *Family care.* This allows for an employee to care for a covered family member who has the medical issues listed above. It also includes instances where a lawful public health authority has determined that the covered family member's presence would jeopardize the health of others. The "covered family member" standard is generally the same as under the Oregon Family Leave Act and thus includes a child, spouse, registered domestic partner, parent, parent-in-law, or grandparent.

- *Business or school closures*. This includes situations where the employee's place of business or an employee's child's school or place of care is closed by the order of a public official due to a public health emergency.

- *Domestic violence, sexual assault, or stalking.* This allows an employee to use "safe time" for reasons related to domestic violence, sexual assault, or stalking that affect either the employee or the employee's covered family member. The covered family member standard is the same as is used under the ordinance's sick leave provision.

Medical care is broadly defined to include preventive medical care, such as prenatal visits and "routine" medical and dental visits. Additionally, there is no requirement that the illness be "serious," thereby making the ordinance applicable to mild illnesses such as the common cold.

When can employees not based in Portland use their Sick Time?
Those employees not based in Portland can only use their accrued Sick Time when working in Portland. This is because use of Sick Time, like accrual, is tied to the time an employee is physically in Portland.

What is the minimum increment that employees can be required to use their Sick Time?
An eligible employee is entitled to use accrued Sick Time in increments as small as one hour (unless the employer allows for lesser increments). Employers are explicitly prohibited from requiring an employee to take a full shift off as a condition of using his or her Sick Time. However, if it is "physically impossible" for an employee to commence/end work part way through a shift, the employer may count the entire shift against the employee's Sick Time bank.

NOTICE AND DOCUMENTATION

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NOTICE AND DOCUMENTATION

What type of notice can the employer require?

The ordinance requires employers to establish a written policy or standard for employees to use when notifying the employer regarding Sick Time. When the need for leave is foreseeable, employees must follow the employer's established notice policy and provide notice as soon is practicable. The ordinance also requires that all employers have a written policy or standard regarding the reasonable notice requirement.

Additionally, employees are required to make a reasonable effort to schedule Sick Time in a manner that does not disrupt business operations. If the expected duration of Sick Time changes, employees are required to notify employers of that change as soon as practicable. When the need for leave is not foreseeable, the employee must utilize the employer's established policy to notify the employer of the need for Sick Time before the start of the employee's scheduled work shift or as soon as practicable.

What type of notice must an employer provide to employees?

All employers are required to provide written notice to Portland employees regarding their rights under the ordinance. In order to meet the ordinance's requirements, the employer must do allof the following:

(1) Disseminate a written notice to all employees (e.g., supplementing the employee handbook, mailing a statement with the employee's paychecks, emailing the employees, adding a section to the company intranet, etc.) regarding rights of employees under the ordinance;

(2) Post a poster in a conspicuous location at the worksite (the City of Portland has indicated that the Oregon Bureau of Labor and Industries (BOLI) will create and disseminate the required poster); and

(3) Send each qualifying employee quarterly notice containing the amount of accrued but unused sick time available to that employee. This could be accomplished through the distribution of paystubs.

The notices should be in English and whichever other languages the employer "normally" uses to communicate with its employees.

Can employers require employees to provide documentation?

Employers are generallynot allowed to require the employee to provide documentation for use of Sick Time unless one of two exceptions apply:

- The employee is absent for more than three consecutive work days. In this case, the employer may require documentation of the employee's need for Sick Time. Employers are able to choose the type of documentation required. If the required documentation includes verification from a health care provider, the employer must pay the costs of verification (if not already covered by an insurance or benefit plan).

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- The employer suspects Sick Time abuse, including patterns of abuse. Here, employers may require documentation from a health care provider verifying the need for the employee's leave. Unlike the above exception, employers may require the verification to be at the employee's expense. Examples of situations that can rise to a suspicion of Sick Time abuse include repeated use of unscheduled Sick Time on or adjacent to weekends, holidays, vacation, payday, or when mandatory shifts are scheduled.

ADDITIONAL EMPLOYER REQUIREMENTS

What are the record-keeping requirements?

All employers are required to retain records relating to Sick Time for at least two years. The records must document both (1) employee hours worked and (2) Sick Time used and accrued by employees.

What are the anti-retaliation provisions?

As is common with laws of this nature, the Portland ordinance includes an anti-retaliation provision. The provision prohibits an employer from discriminating against an employee for exercising his or her good-faith rights under the ordinance. Additionally, the provision explicitly forbids employers from having an attendance policy that counts earned Sick Time as an absence that "may lead to or result" in an adverse employment action.

NEW AND EXISTING PTO POLICIES

Are employers required to create new PTO policies?

No, employers may keep their existing PTO policies provided that those policies meet the minimum standards required by the ordinance. Employers with existing PTO policies that do not comply with the Portland's Sick Time ordinance may (1) establish a separate leave bank specifically for Sick Time; or (2) bring the existing paid leave program into compliance with the ordinance.

How do employers bring existing PTO policies into compliance?

Bringing an existing policy into compliance is an extremely fact-specific determination. It is advisable to have an experienced labor and employment counsel review your policy. Three of the primary areas where existing PTO policies could run afoul of the Portland ordinance involve the ordinance's mandatory accrual requirement, immediate-qualification provision, and its bar on various leave prerequisites.

- *Accrual of Unused Time.* Many employers have "use it or lose it" time off policies, where employees may not carry over any accrued, unused time off from year to year, or carryover is limited to a certain number of hours or days. If employers want to comply with the Portland ordinance using their PTO policy, the PTO policy must either (1) allow employees to carry over at least 40 hours per year or (2) frontload the time off such that employees receive the full amount of leave at the beginning of the year, as the ordinance includes an exception to the carryover requirement when employers provide frontloaded time off.

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- *Qualification Periods*. Voluntary paid-leave programs often have qualifying periods before an employee begins accruing paid time off and/or before the employee may start using accrued time off (e.g., the employee must work for the employer for at least six months). Under the new law, Sick Time begins accruing from the employee's first day of work and an employee may begin using accrued Sick Time starting on their 91st day of employment. Thus, employers seeking to bring their existing leave program into compliance with the Portland ordinance must amend their policy to reflect these accrual and use provisions.

- *Imposition of Use Conditions*. Some conditions commonly imposed upon employees seeking to use paid time off under an existing program are not allowed under the new Portland law. For example, an employer cannot require a doctor's note or other form of verification from an employee using Sick Time unless the employee is out for more than three consecutive days or the employer suspects the employee is abusing the system.

LEGAL RAMIFICATIONS

What must employers tell employees about their legal remedies?

As noted above, the regulations require employers to take the drastic step of explicitly informing employees, in writing, that employees have the right to file a complaint if either (1) they are improperly denied Sick Time or (2) they are retaliated against for requesting or taking Sick Time. This information must be part of the employer-provided written notice addressed above.

Can an employee file a claim with BOLI?

Yes. Employees can file a complaint with BOLI alleging a violation of the ordinance (e.g., failure to provide required leave, unlawful retaliation, etc.). However, BOLI created a narrow grace period for employers when it announced that it will not begin enforcing the ordinance against employers who unintentionally violate the ordinance until July 31, 2014.

Can an employee file a lawsuit, too?

Yes. The ordinance explicitly provides that an employee may file a lawsuit in court. If an employee chooses to go that route, he/she can recover damages, civil penalties, and attorneys fees. Therefore, employers should not rely on the above-mentioned BOLI grace period as a reason to delay compliance with the ordinance because they could still face a private lawsuit for violating the ordinance soon after the effective date.

CONCLUSION

The Portland Sick Time ordinance imposes a variety of new obligations on employers with employees working in Portland. If you are such an employer, you should review your leave policies to ensure compliance with the new ordinance, and work to adopt a new policy or revise your existing policy prior to January 1, 2014.

For more information about the ordinance's requirements, or to receive guidance on updating written policies, contact any attorney in our Portland, Oregon office at (503) 242-4262.

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