

Oregon Legislature Mandates Sick Leave for All Employees

June 18, 2015

On June 12, 2015, Oregon became the fourth state in the country to pass a statewide mandatory sick leave bill. Provided it is signed by Governor Kate Brown (which is virtually certain), the new law will require all Oregon employers to provide employees with up to 40 hours of legally protected sick time each year beginning January 1, 2016.

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While some details of the legislation will not be known until the Oregon Bureau of Labor and Industries (BOLI) passes regulations later this year, the framework of the law is very similar to the Portland and Eugene local ordinances that already passed, and businesses can begin to budget for its costs, outline new policies, and prepare for changes to benefit and payroll systems.

All Employers Are Covered and Most Must Provide Paid Leave

The sick leave law will apply to *all* employers in Oregon. Employers with 10 or more employees anywhere in the state will be obligated to provide employees with up to 40 hours of *paid* sick time per year, without regard to whether the employees are full-time, part-time, seasonal, or temporary, and without regard to whether they are paid on a salary, hourly, commission, piece-rate, or other basis. However, employers that are located in Portland and that employ six or more employees anywhere in the state will be subject to the same 40-hour paid leave mandate.

Employers that are not required to provide paid leave (i.e., those located in Portland with five or fewer employees or those outside Portland with nine or fewer employees) will still be obligated to provide employees up to 40 hours of sick time, but the leave may be *unpaid*. Notably, covered employees include

“consumer employed home care workers” hired to provide hourly or live-in care services for elderly, physically disabled, developmentally disabled, or mentally ill persons, provided all or part of the home care worker’s compensation is paid by the Department of Human Services.

The Portland and Eugene Local Ordinances Will Be Preempted

Assuming the new law takes effect on January 1, 2016, the Portland sick time ordinance in effect since January of 2014, and the Eugene ordinance currently scheduled to take effect later this year, will no longer be enforceable. However, the Portland ordinance will remain in effect until January 1, 2016. On the other hand, the Eugene City Council voted on June 17, 2015, to delay its ordinance’s effective date to January 1, 2016, meaning it will automatically be preempted by the state law and will, therefore, never take effect.

The Mandatory Sick Time Law Applies Regardless of Most Collective Bargaining Agreements

Oregon’s mandatory sick time law will not be impacted by the paid leave provisions of most collective bargaining agreements (CBAs). Most employees covered by CBAs that address paid sick leave will be eligible for sick time under both the terms of the CBA *and* the proposed state law, even if they conflict, and there is no provision allowing for employers and unions to agree to waive compliance under a CBA. The only exception will be for employees (1) whose terms and conditions of employment are covered by a CBA, (2) who are employed through hiring halls or similar referral systems, *and* (3) whose employment-related benefits are provided by a joint multi-employer-employee trust or benefit plan. In other words, only workers in certain construction trades may be excluded from coverage under the law. Employers in other industries will need to work with each local union to determine how to implement the law alongside any governing CBA.

Leave Must Accrue at a Minimum Rate, or Be Frontloaded, on the First Day of Employment

In order to comply, employers must ensure that employees accrue sick time at the minimum rate of either (a) one hour for every 30 hours worked or (b) one and one-third hours for every 40 hours worked (up to 40 hours per year). Employers may assume that employees deemed exempt under the executive, administrative, or professional exemptions to the Fair Labor Standards Act work 40 hours per week, unless an exempt employee’s actual workweek is less than 40 hours, in which case the actual workweek can be used as the basis for accrual. Employees will begin accruing leave on their first day of employment, although they are not eligible to use any accrued leave until after working 90 days.

As an alternative to accruing leave, employers may frontload employees with a full bank of 40 hours of sick time as soon as they are eligible to use leave (i.e., after 90 days of employment, or the first day of each subsequent year). If an employee starts working or otherwise becomes eligible mid-year, an employer may frontload a pro rata percentage of the hours the employee would be entitled to for an entire year.

Employers Generally Must Allow Employees to Carry Over Accrued Leave to Subsequent Years

Employers using an accrual method must generally allow employees to carry forward up to 40 hours of unused sick time into the subsequent year. In no event, however, must an employer allow an employee to accrue a total of more than 80 hours of sick time.

Additionally, carryover is not required if an employer and employee agree that, at year end, the employer will pay for all unused sick time accrued that year, provided the employer frontloads an employee with a full bank of sick time on the first day of the next year.

Employers that frontload leave will not be required to allow any carryover, as employees will automatically receive a full bank of sick time at the beginning of each year. Employers will also not be obligated to pay out any unused sick time at the end of the year.

Sick Time Must Be Allowed for Six Specific Reasons and Cannot Be Held Against an Employee

Although accrual must begin on the first day of employment, employees will become eligible to use any accrued or frontloaded leave on their 91st day of employment. From that point on, employees who accrue sick time must be credited with each hour as it accrues (e.g., after working 40 hours). An employer may not require employees to wait until the end of a workweek or pay period to be credited with accrued sick time.

Employers must allow employees to take sick time in one-hour increments for any of the following purposes:

1. For an employee's own illness, injury, or health condition, *or* the need for diagnosis, care, or treatment, *or* the need for preventive medical care;
2. For care of a family member with an illness, injury, or health condition, *or* who needs medical diagnosis, care, or treatment, *or* who needs preventive medical care—"family member" has the same broad definition as is found in the Oregon Family Leave Act (OFLA);
3. For any purpose allowed under OFLA, even if the company is not covered by OFLA by virtue of having fewer than 25 employees, and even if the employee is not eligible for OFLA leave;
4. For any purpose allowed under Oregon's domestic violence, harassment, sexual assault, and stalking law;
5. To donate accrued sick time to another employee if the other employee uses the donated sick time for a purpose specified under the law and the employer has a policy that allows an employee to

donate sick time;

6. In the event of a public health emergency, including: (a) closure of the employee's place of business, or the school or place of care of the employee's child, by order of a public official due to a public health emergency; (b) a determination by a lawful public health authority or by a health care provider that the presence of the employee or the family member of the employee in the community would jeopardize the health of others, such that the employee must provide self-care or care for the family member; or (c) the exclusion of the employee from the workplace under any law or rule that requires the employer to exclude the employee from the workplace for health reasons.

If allowing the use of sick time in one-hour increments would pose an "undue hardship" (a standard BOLI will have to define) and a company allows an employee to use at least 56 hours of paid leave per year, then it may require paid sick leave to be used in increments of up to four hours.

When the leave is required to be paid, sick time must be paid out at the employee's "regular rate" of pay, which is typically at a base hourly or salary rate. Employees paid on a commission or piece-rate basis who do not have a previously established regular rate of pay will be entitled to at least the Oregon state minimum wage.

In addition to mandatory use for the reasons above, it will also be unlawful to count such time off against an employee, whether formally via an attendance policy or performance evaluation, or informally through adverse assignments, exclusion from projects, etc. It will also be unlawful to require an employee to search for a replacement as a condition of using available sick time, or to require an employee to work an alternate shift or otherwise make up for time. In short, employers should consider any use of sick time to be legally protected, just as they would for leave taken under the OFLA or federal Family and Medical Leave Act.

Employee Notice Requirements

In order to regulate employee use of available sick time, employers may require employees to comply with their usual and customary notice and procedural requirements for absences or for requesting time off, provided those requirements do not interfere with the ability of the employee to use sick time. This is another standard likely to be expanded upon by BOLI regulations.

If an employee's need to use sick time is foreseeable, an employer may require reasonable advance notice of the employee's intention to use sick time, not to exceed 10 days prior to the date the sick time is to begin or as soon as otherwise practicable. Employers may also require employees to make a reasonable attempt to schedule the use of sick time in a manner that does not unduly disrupt the operations of the employer.

If the need to use sick time is unforeseeable, employers may require employees to provide notice as soon as practicable, and to hold employees to the company's notice or procedural requirements for requesting or

reporting other time off, so long as those requirements do not interfere with the ability of the employee to use sick time.

Employer Notice Requirements

Similar to the Portland ordinance on which it was largely based, the legislation imposes numerous notice requirements on Oregon employers. First, employers will be required to provide written notice to all employees about 15 separate sections of the legislation, and to do so in the language the employer typically uses to communicate with employees. The legislature has left the precise requirements of this obligation for BOLI to define in regulations that will be promulgated later this year. BOLI will likely require a detailed written notice to employees (commonly achieved via a new or updated sick time policy) as well as a mandatory workplace posting.

Second, employers must provide written notification *at least quarterly* to each employee of the amount of accrued and unused sick time available for use. Including this information on paystubs will be sufficient, and BOLI may approve alternative notice methods.

Verification

Employers may require verification of an employee's need to use sick time, but generally only after the employee takes off more than three consecutive scheduled workdays. Alternatively, if an employer suspects an employee of abusing sick time (e.g., routinely using sick time on Fridays, Mondays, or adjacent to holidays), more frequent verification can be required. However, employers must pay any costs of medical verification (including lost wages) that are not paid under a health benefit plan.

No Payment at Termination

Consistent with Oregon's general rule that paid leave benefits need not be paid at the termination of employment, the legislation expressly provides that it does not require compensation "for accrued unused sick time upon the employee's termination, resignation, retirement or other separation from employment."

Existing Paid Leave Policies

As noted above, compliance will require written notice of 15 sections of the statute, and possibly additional notices once BOLI implements regulations. This includes mandatory notice to employees that they have the right to file a complaint with BOLI or a lawsuit for certain violations of the law.

Employers in compliance with the Portland ordinance should be able to efficiently revise their sick leave or paid time off policies to address the new state legislation. Mandatory changes will include:

- Removing the requirement that employees work at least 240 hours in Portland before becoming eligible to use accrued sick time; and
- Adding the right for employees to use sick time for any OFLA-related reason even if an employer is not covered by, and even if an employee is not eligible for, OFLA leave.

Discretionary changes will include:

- Adding an option accrual rate of one and one-third hours of sick time for every 40 hours worked (as opposed to the sole rate of one hour for every 30 hours worked mandated under the Portland ordinance);
- Adding a “donation” policy that allows employees to donate accrued sick time to one another; and
- Adding an “undue hardship” exception to the minimum one-hour leave increment.

Enforcement

The new law, if approved by the governor, will be enforced by both BOLI and by employees through private lawsuits. Private lawsuits can arise under Oregon’s wage and hour laws, which carry severe penalties of up to 30 days’ wages and an employee’s attorneys’ fees and costs. In addition, they can arise under Oregon’s civil rights protections, which provide for recovery of economic damages, as well as attorneys’ fees and costs. Private lawsuits also carry potential exposure to class action liability.

BOLI cannot assess penalties until 2017 for anything but civil rights claims, such as discrimination or retaliation for exercising rights under the statute. Nevertheless, employees and their attorneys are free to pursue claims as soon as the law takes effect, so timely compliance is critical to avoid potential legal exposure.

How Should Employers Respond?

As most Portland employers have already learned, transition from a standard sick leave or paid time off policy to statutorily mandated sick time requires significant effort and planning. The monetary impact of compliance is often significant—particularly the inclusion of part-time and temporary workers as employees eligible for paid leave. This impact should be considered as part of an overall assessment of a business’ paid leave policies, particularly with a January 1 start date that often coincides with benefit adjustments.

Another time-consuming aspect of compliance can be updating benefit accrual and payroll practices to comply with the various accrual, payment, and notice sections of the statute. Early planning will reduce administrative troubles and the risk of statutory violations.

Finally, both policy revisions and training will be essential to educate human resources and supervisory personnel in implementing the legislation and avoiding violations.

TOPICS

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