

Labor and Employment Law Update

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Seattle Employers: Get Ready for Paid Sick and Safe Leave

On September 12, the Seattle City Council passed an ordinance mandating paid leave for employees who perform work in Seattle. Mayor Mike McGinn signed the ordinance into law on September 23. According to press reports, “This bill is about ensuring healthier workplaces by preventing the spread of disease.” However, the ordinance casts a wide net, mandating paid sick leave when an employee’s family member is sick, as well as paid leave when an employee or his or her family member needs “safe time” because of domestic violence, sexual assault or stalking. And it broadly defines “family member” to include spouses, domestic partners, children, parents, parents-in-law and grandparents. According to the Greater Seattle Chamber of Commerce, the ordinance is “a complex, bureaucratic and prescriptive mandate” for employers.

Take this simple test to see if your company’s current practices will comply with the ordinance:

- Does your company have a “use it or lose it” sick or paid time off (“PTO”) policy?
- Does your company have a no-fault attendance policy that counts time off for an employee’s sickness?
- Does your company impose a waiting period before a newly hired employee begins to accrue paid time off?
- When an employee calls in sick regularly on Fridays and Mondays, does your company ask for a doctor’s note verifying the employee’s diagnosis?

Did you answer “yes” to any of these questions? If so, your company’s practices will violate the Seattle sick and safe leave ordinance when it becomes effective on September 1, 2012.

The ordinance consists of 29 pages of mandates and complex definitions, some of which borrow from state laws, such as the Family Care Act and the Domestic Violence, Sexual Assault and Stalking Leave Act. However, those definitions can easily create confusion and, in at least one case, ambiguity. The ordinance also appears to conflict in several respects with federal laws, such as the Family and Medical Leave Act and ERISA. The following discussion highlights some of the ordinance’s requirements. Employers are strongly encouraged to consult with legal counsel about how the ordinance will impact their policies and practices.

1. When must employers begin offering paid leave to Seattle employees?

The ordinance becomes effective on September 1, 2012.

2. Which businesses are covered by the law?

The ordinance applies to all businesses with five or more employees *in any location*. Businesses operating for less than two years are also exempted. In counting employees, full-time, and part-time employees and temporary workers supplied by a staffing agency are included, but work-study students are excluded.

3. Which employees are covered by the law?

Employees are covered if they perform work in the City of Seattle and work for a business with five or more employees. An employee who occasionally works in Seattle is covered if he or she works more than 240 hours in Seattle within a calendar year.

4. Can an employer with covered employees avoid the requirements of the ordinance?

An employer may enter into a bona fide collective bargaining agreement that clearly and unambiguously waives the requirements of the ordinance. However, this is a narrow exception; any waiver by an individual is contrary to public policy and will be deemed void and unenforceable.

5. When does paid sick and safe time begin to accrue?

For covered employees who are employed on the effective date, leave begins accruing immediately on September 1, 2012. Accrual rates do not apply to hours worked before the ordinance takes effect. For employees hired after the ordinance's effective date, paid leave begins to accrue when employment begins.

6. Is there a waiting period before a covered employee may use paid safe and sick time?

Yes. The ordinance imposes a waiting period of 180 calendar days. An employee may use paid leave beginning on the 180th calendar day after their employment begins, regardless of the number of hours worked.

7. When may a covered employee use available paid sick time?

- For the employee's own mental or physical illness, injury or health condition;
- To accommodate the employee's need for medical diagnosis or treatment of a mental or physical illness, injury or health condition;
- For the employee's need for preventive care;

- To allow the employee to provide care to a family member with a mental or physical illness, injury or health condition;
- To allow the employee to provide care to a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; or
- To allow the employee to provide care to a family member who needs preventive medical care.

8. Who are considered “family members” for the purposes of sick time?

The definition of “family member” is borrowed from the Washington Family Care Act, RCW 49.12.265 and 49.12.903. Generally, those provisions define family member to include a child, spouse, domestic partner, parent, parent-in-law or grandparent. Under the ordinance, “domestic partner” also includes partnerships registered with either the City of Seattle or State of Washington.

9. When can a covered employee use available paid safe time?

- When the employee’s place of business has been closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material;
- To accommodate the employee’s need to care for a child whose school or place of care has been closed by order of a public official for such a reason;
- To enable the employee to seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee’s family members including, but not limited to, preparing for, or participating in, any civil or criminal legal proceeding related to or derived from domestic violence, sexual assault or stalking;
- To enable the employee to seek treatment by a health care provider for physical or mental injuries caused by domestic violence, sexual assault or stalking, or to attend to health care treatment for a victim who is the employee’s family member;
- To enable the employee to obtain, or to assist a family member in obtaining, mental health counseling related to an incident of domestic violence, sexual assault or stalking, in which the employee or the employee’s family member was a victim of domestic violence, sexual assault or stalking; or
- To enable the employee to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee’s family members from future domestic violence, sexual assault or stalking.

10. Who are considered “family members” for the purposes of safe time?

The ordinance requires safe time be granted to an employee to care for “family members” who are victims of domestic violence, sexual assault or stalking. However, the ordinance does not specifically define “family members.” Instead, the ordinance provides a broad definition of “family or household members” that includes household members with whom an employee may not have a biological or legal relationship. The ordinance also uses a definition of “domestic violence” that includes injuries, sexual assault or stalking involving “family and household members.” It is not clear how this ambiguity will affect enforcement of the ordinance.

11. How much paid time must an employer provide to covered Seattle employees?

The accrual rate for paid sick and safe time depends on the number of full time equivalent (“FTE”) employees during the preceding calendar year for any and all weeks in which at least one employee worked for compensation. The method for calculating FTE’s is explained further in the ordinance. Businesses fall into three tiers for leave accrual purposes, depending on the average number of FTE employees paid for per calendar week.

Tier	Employer Size	Paid Leave Accrual Rate	Cap and Mandatory Carry Over
One	5 to 49 FTE	One hour for every 40 hours worked	40 hours
Two	50 to 249 FTE	One hour for every 40 hours worked	56 hours
Three	250 or more FTE	One hour for every 30 hours worked	72 hours

12. How does this ordinance affect employers with a PTO plan?

An employer who has a combined or universal paid leave policy, such as a PTO policy, is not required to provide *additional* paid sick and safe time, so long as the employer’s policy meets the following requirements:

- Available paid sick and safe time can be used for the same purposes and under the same conditions;
- Paid sick and safe time must accrue at rates equal to (or greater than) the ordinance’s accrual rates (see chart above);
- Employees must be able to use combined sick and safe time at cap and carry over rates equal to (or greater than) the ordinance’s caps (see chart above), except that Tier Three employers must allow 108 hours to be used and carried over to the following year.

13. May an employer require a doctor’s note to verify the employee’s need for sick time?

It depends. An employer may ask an employee to provide documentation signed by a health care provider indicating that sick time is necessary only if the employee uses paid sick time for the employee’s own illness that exceeds *three consecutive days*. “An employer may not require that the documentation explain the nature of the illness.” An employer who does not offer employee health insurance benefits must pay one-half of the out-of-pocket expenses incurred in obtaining the documentation.

14. Does the ordinance require an employer to pay out unused sick and safe time upon the employee’s separation from employment?

No. The ordinance specifically states that by requiring paid leave to accrue and carry over, it shall not be construed to require “financial or other reimbursement” to an employee upon an employee’s termination, resignation, retirement or other separation from employment.

15. Does the ordinance provide legal protections to employees who use or seek to use sick or safe time?

Yes. The Seattle ordinance creates broad legal protections for employees who exercise their right to use paid sick or safe time, similar to provisions in other laws that prohibit adverse action against those who engage in protected activity as defined in the ordinance. The ordinance specifically forbids an employer from counting paid sick or safe time as an absence that may lead to or result in adverse action, such as under a no-fault attendance policy.

16. What should an employer do now to prepare for the Seattle sick and safe leave ordinance?

- If your company has five or more employees, and any employees working full-time in Seattle, a written policy allowing paid sick and safe time will be required. Now is the time to begin preparing your policy to ensure that it meets the ordinance’s numerous requirements prior to the effective date of the ordinance, September 1, 2012.
- If your company has a “use it or lose it” policy that requires employees to use sick leave or PTO before year end, prepare to transition to a policy that allows some sick leave or PTO to carry over to the following calendar year.
- If your company has a PTO policy, consider whether this approach continues to meet your business needs. In particular, Tier Three employers must allow carry over of 108 hours (13.5 days) into the following calendar year.
- If your company permits accrued but unused PTO to be cashed out upon termination of employment, consider whether to modify the policy in light of the carry over requirements.

- If your company has a no-fault attendance policy, modify it so that employees are not penalized for using paid sick and safe leave.
- If your company requires doctor's notes for an employee's prolonged illness or sporadic attendance, make sure that your policy and practices comply with the ordinance.
- Consider having your policies and practices reviewed by experienced legal counsel to avoid the penalties and charges permitted under the ordinance.

For more information, please contact the Labor and Employment Practice Group at Lane Powell: employlaw@lanepowell.com

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