Dealing With Seattle's Paid Sick and Safe Leave Ordinance

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The wait for the Seattle Paid Sick and Safe Leave Ordinance, which went into effect September 1, is over.

The City of Seattle, through the Seattle Office for Civil Rights (SOCR), spent nine months after Mayor Mike McGinn signed the Ordinance to gather public comments and adopt final administrative rules implementing paid sick and safe leave for employees working in Seattle. Indeed, the SOCR's proposed rules generated substantial comments from the employer community.

The SOCR responded to these comments by making significant changes before adopting final rules on June 29. On the eve of the effective date, many employers were still scrambling to decipher the complicated Ordinance and understand the final administrative rules. The City's "Frequently Asked Questions" publication has continued to evolve even after adoption of the "final" rules.

Based on our experience over the last few months presenting seminars to employers to assist them in preparing for compliance, we have put together the following pointers for counsel advising employers.

Getting the Word out — Notice to Employees. Employers must ensure that their affected (and potentially affected) employees get notice of the Ordinance. One way — and a highly recommended way — is for the employer to update its written sick leave or paid time off (PTO) policy and circulate it to all employees.

Employers may also display the poster that SOCR created, which is located on its website. SOCR also prepared a draft letter that employers may distribute to their employees. An employer would also be wise to get signed acknowledgement forms from affected employees, just as with any other new policy rollout.

Nuts and Bolts: Some of the Basics and the Not-So-Basics. The Ordinance is not for those who dislike math. It is a maze of calculating tier levels, accrual rates, usage rates and carryover numbers.

Accrual, use and carryover rates are all driven by each employer's Tier Level. So the first order of business is to calculate the number of full-time equivalent (FTE) employees employed during the prior calendar year. This can trip employers up in a number of ways.

First, some employers read FTE to mean full-time employees, not full-time equivalents. Applying these different definitions can dramatically affect the employee count for Tier Level purposes. Second, employers may mistakenly only count employees who work in the City of Seattle, when the Ordinance requires that all employees be counted. Third, employers sometimes mistakenly fail to count temporary workers or workers from staffing agencies in their Tier Level calculation.

Once the employer gets its Tier Level right, it should calculate its accrual rates and usage and carryover caps as follows:

Are All Plans Created Equal? The short answer is "not necessarily." For Tier One and Tier Two employers, the accrual, usage and carryover rates are the same. For Tier Three employers, the rates increase across the board if the employer uses a PTO plan versus a sick/vacation plan.

Moreover, because of the increased carryover requirements, employers who cash out PTO annually or at the time of termination may have to pay out more than employers with only sick/safe plans (or sick/safe and vacation plans). Although the pendulum swung in favor of PTO plans in the last decade, given the more onerous requirements on Tier Three employers,those employers may consider shifting back to a sick/safe and vacation plan.

Don't Be So Sure an Existing Plan Passes Muster. The Ordinance has been a shock to the system for some employers who have never had sick leave plans before, such as many in the food service industry. Those employers may, however, be in an administratively easier position because they are building plans from scratch in accordance with the Ordinance and the administrative rules. Employers with existing plans need to carefully review their plans to make sure they comply with the Ordinance and should not assume that their current plans comply, even if very generous.

One of the biggest pitfalls in this area occurs where employers have sick leave plans that meet or exceed the accrual, usage and carryover rules, but do not address "safe" leave. Safe leave must be granted when employees (or their family or household members) are victims of domestic violence, stalking or sexual assault and need time off to address legal matters, obtain medical care or counseling, or simply move to a safer location.

Another pitfall is when an employer has a waiting period to accrue or use sick/safe leave. Pursuant to the Ordinance, employees must begin accruing sick/safe leave immediately upon hire. Accordingly, employers who require employees to complete a probationary period before being eligible for benefits must modify their plans.

Employers should also review their policies to make sure they do not have "use it or lose it" or "no fault" attendance policies that could violate the Ordinance.

Navigating the Rules for Employees Who only Work Occasionally in the City of Seattle. A number of issues plague employers with employees who fit this model. First — and this probably is the most challenging aspect of the Ordinance — time must be tracked for exempt employees who work only occasionally in Seattle.

This is problematic because many exempt employees may not be vigilant about recording their time. No safe harbor for employers exists if the occasional Seattle employee drops the ball. Any acknowledgement form should include a provision by which the occasional employee affirms that it is his or her burden to track all hours worked in the City, and that failure to do so may result in discipline, up to and including termination.

Second, employers need to understand that occasional Seattle employees can only use sick/safe time when the employee is scheduled to work in Seattle. The SOCR has not provided any guidance on how to address sick/safe requests from employees who can set their own schedules, where it is unclear whether they would have actually been working in Seattle.

Third, employers must check whether their accounting system tracks hours worked in Seattle indefinitely. According to information from the City, employers should be prepared to keep records for an unspecified period of time.

Doctors' Notes: Confirmation, But at What Cost? Several rules apply to doctors' notes, but these are key. First, unlike the FMLA, employers have to wait until an employee is absent from work more than three days before asking for a

doctor's note. Second, the note cannot request disclosure of the employee's medical condition (in contrast to an employer's rights to seek such information for disability accommodations).

Third, and of considerable note to employers who do not provide health insurance, the cost of getting documentation may be more than you bargained for. While the Ordinance only requires employers to pay for half the cost of "documentation," the administrative rules define those costs broadly to include treatment, testing and even transportation to the treating facility. Employers should consider the utility of requiring documentation for every qualifying absence.

Food for Thought: Shift-Swapping Rules. The Ordinance permits shift-swapping in eating and drinking establishments. Employers should check their shift-swapping policies to see if they can take advantage of some of the benefits of these rules.

This includes deducting time from sick/safe leave banks when an employee makes up or "swaps" a shift. In these situations, employers should obtain the employee's consent to do so.

Training Is of Paramount Importance. Employers should make sure that anyone who might be fielding requests for leave under the Ordinance understands its requirements. Employers may even rethink who handles such calls.

Did You Bargain for This? Employers subject to collective bargaining agreements will need to know the interplay between their bargaining obligations and the Ordinance. The City has provided a sample written waiver form for unionized employers. Employers should seek advice on how to avoid possible violations of the Ordinance or the National Labor Relations Act.

Why Is All of This So Important? Employers that ignore the Ordinance or fail to meet recordkeeping requirements should beware. Violations can expose employers to up to two years' back wages and emotional distress damages up to $10,000. That is a hefty price to pay compared to the cost of compliance.

Share Your Thoughts and Comments. One promising feature of the Ordinance is that it requires — 18 months from the effective date — that the Seattle Office of the City Auditor provide a written evaluation of its impact on employers and employees. Employer representatives are encouraged to voice their experiences to the city auditor and/or SOCR..

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