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Understanding Oregon's New Sick Time Law

Oregon's new statewide sick time law is the fourth in the nation. It will take effect on January 1, 2016 and will require Oregon employers to provide either paid or unpaid sick time to their employees, depending on their location and number of employees. The law includes a preemption of local sick time ordinances, overrides the ordinance enacted by Eugene in 2014, but leaves in place the Portland ordinance that took effect in January, 2015.

How the New Law Works

Sick Time Accrual Rates: Both paid and unpaid sick time are required to accrue at a rate of at least one hour of sick time for every 30 hours worked, up to 40 hours of sick time each calendar year. Alternately, employers can grant 1.33 hours of sick time for every 40 hours worked (this is functionally the same accrual rate, but allows employers who have a payroll software based on a 40 hour work-week to continue to use the same system). *[Section 3]*

The final version of the new law (SB 454-B) is here:

<https://olis.leg.state.or.us/liz/2015R1/Downloads/>

Using Accrued Sick Time: Employees can use sick time for their own illness or that of a family member and as protected leave for victims of domestic violence, sexual assault and stalking. The illness can be a non-serious illness, like a cold, a more serious medical condition or non-urgent preventive care, like annual physicals or dental check-ups. Sick time can also be used in the event of a public health emergency. Generally, sick time can be taken in minimum increments of 1 hour unless doing so would pose an "undue hardship" to the employer. These employers can require that sick time be used in 4 hour increments if they allow for up to 56 hours of sick time accrual instead of the 40 hours required for other employers. "Undue hardship" will likely be defined by BOLI in rulemaking. *[Section 7(1)]*

Waiting Period: An employee should begin accruing sick time on their first day of employment, but are not eligible to use their accrued sick time until after 90 days of employment. Sick time accruals shall begin Jan. 1, 2016 or after that date, when an employee begins work. *[Section 3(5)]*

Retaliation: Use of paid and unpaid sick time is protected, and employers cannot retaliate or take any adverse actions against employees for using or seeking to use protected sick time. An absence control policy that counts sick time as an absence that negatively impacts an employee's performance review, pay or promotions counts as retaliation for use of sick time. *[Section 11]*

Exemptions: Individuals who are exempt from the law and not covered by sick time provisions include: independent contractors, federal employees, students in work-study programs, railroad workers,

employees who are the parent, spouse or child of the employer, and building and construction trade union employees. The exemption for construction trade union employees is found in Section 12 and exempts any employee who is represented by a collective bargaining unit, is dispatched through a hiring hall or similar referral system *and* whose benefits are administered by a joint employer-employee trust. Building trade unions, stagehands and longshoreman are the only employees known to meet all three exemption criteria. *[Section 1(1) & Section 12]*

Portland’s Sick Time Law Stands: Under the new law, employers who are located *outside* Portland city limits with ten or more employees are required to provide employees up to 40 hours of *paid* sick time per year. Employers with fewer than ten employees still must provide up to 40 hours of *unpaid*, job protected, sick leave per year. Employers located *inside* the Portland city limits will be required to offer paid sick time if they employ six or more employees and unpaid, protected sick time if they employ fewer than six employees. All other aspects of the law are identical for employers located in Portland. *[Section 3 of SB 454-B]*

- Note that any physical location, office or storefront counts as an employer located inside the Portland city limits; if an employer has a single location in Portland, all employees of that business will be counted under the Portland size threshold, regardless of where the work is performed. For example, if a business has four employees at a branch in Portland and four employees at a branch in Beaverton, both locations will be covered under the Portland employer size threshold and all eight of those employees must be offered paid sick time. *[Section 2(3) and Section 3(12)]*
- It is no longer necessary to track employee travel in and out of Portland city limits. An employer is covered by the Portland or statewide threshold dependent on where the *employer is located*, not where the *work was performed*. For example, if an employer is based in Beaverton and regularly sends employees into the city for work, but has no physical location inside the city limits, the employer is covered by the statewide employer size threshold, not the Portland standard.

How Employers Can Comply Using Existing Paid Time Off Policies

Employers who have an existing Paid Time Off (PTO) policy that meets or exceeds the minimum accrual rates set out in the sick time ordinance can use the PTO policy to comply with the required accrual and usage rates of the sick time law — provided that it can be used for the same purposes. If an employer has an existing PTO policy and counts it for required sick time accruals, they must also allow their employees to use it for sick time, which can be used without notice or prior approval. If an employee has exhausted their PTO accruals, no additional protected sick time is available to the employee unless the employer chooses to provide it - it doesn’t matter if the PTO was used for sick time or vacation. *[Section 4]*

Employers who intend to use an existing PTO policy to satisfy the requirements of the law should update their employee manuals and notify employees that PTO can also be used for sick time and clearly state that it can be used for the same purposes and under the same conditions provided in the ordinance, which means an employee doesn’t need prior approval or notice to take sick time.

How the Law Will Be Enforced

The law will be enforceable through either BOLI's administrative process or through a private right of action. Violations of unpaid sick time will be enforced through the regular wage claim process (ORS 653), and allegations of retaliation will be enforced through the civil rights process (ORS 659A).

The law also contains an "easing-in" period, meaning that BOLI lacks authority to impose penalties for unpaid sick time wages for violations occurring prior to Jan. 1, 2017, one year after the law takes effect. BOLI will have the authority to investigate allegations of unpaid sick time and recover lost wages, but won't be able to assess penalties for violations occurring prior to Jan. 1, 2017.

BOLI will have immediate authority, however, to impose penalties for retaliation violations as soon as the law takes effect. This is intended to protect employers from penalties being assessed for the first year while they learn about the law and come into compliance, but also maintain employee protections against retaliation.

In addition to enforcement, BOLI will have one new full-time technical assistance staff dedicated to helping employers understand the new law. This position will be responsible for putting together seminars and materials for employers and responding to telephone inquiries from employers.

Other

There are a number of other issues that are important to consider when understanding how the new law will apply, who it covers and how to calculate leave accruals. It is important to note, however, that BOLI has broad rulemaking authority and will likely begin the rulemaking process in early fall in order to have final rules adopted by the time the law takes effect Jan. 1, 2016.

- **Cash-out of Unused Sick Time:** There is no requirement that unused sick time will be paid out by the employer. Unused sick time, paid or unpaid, has no required cash value if it is not used for sick time purposes. Employers and employees can mutually agree to cash-out unused sick time at the end of the year if the employer also front-loads sick time at the beginning of the subsequent year. *[Section 3(7)]*
- **Commission or piece-rate employees:** For employees who are paid on a piece rate or commission basis and have no set hourly wage, sick time will be paid at least at the minimum wage. If a piece rate or commission employee has a previously established regular rate of pay, sick time will be paid at the employee's regular rate. *[Section 3(5)(c)(B)]*
- **Concurrent use of sick time with OFLA or FMLA leave:** If an employee is taking sick time for purposes also covered under the Oregon Family Leave Act (OFLA) or the federal Family and Medical Leave Act (FMLA), the sick time taken by the employee can also be counted against their annual allowances under OFLA and FMLA leave. For example, if an employee takes paid sick time to attend regular prenatal visits to their doctor, this leave is covered by OFLA, FMLA and the new sick time law. The time taken by that employee will count against their "bank" of sick time, OFLA and FMLA as they run concurrently. If the leave is for the employee's own, non-

serious medical condition like a cold, the leave is only protected under the sick time law and not OFLA or FMLA so cannot also be counted against the employee's OFLA or FMLA bank of time. Employers are covered by OFLA if they employ more than 25 Oregon workers and by both OFLA and FMLA if the employ more than 50 workers.

- **Counting the number of employees:** An employee is anyone the employer pays or agrees to pay for services in a home or place of business. Those who *do not* need to count as employees include: a co-partner of the employer, independent contractors, those in work-study programs, or those in state or federal-run work training programs. For employers with a fluctuating number of employees, any person who has been employed each working day during each of 20 or more work weeks in the current or preceding calendar year should be counted. [Section 3(2)]
- **Covered family members:** Sick time under the law can be taken for the employee's own health condition or that of a family member (as defined in ORS 659A.310). Covered family members include the employee's spouse, children, parents, parents-in-law, grandparents, grandchildren and registered same-sex domestic partners. Additionally, sick time may be taken for absences resulting from workplace or school closures, or for reasons related to domestic violence, sexual assault or stalking that affect the employee or the employee's family members. [Section 2(4)]
- **Employees Returning to Employment After a Separation:** If an employee separates from an employer and returns to work for that same employer within 180 days, the employee is entitled to have all of the previously accrued sick time immediately restored again. Likewise, the employee does not have to wait 90 days before they are eligible to use their accrued sick time and is immediately eligible to use it. If the employee worked fewer than 90 days previously, they will be credited with the same number of days they worked previously. [Section 3(11)]
- **Front-loading sick time hours:** The law allows for employers who don't want to track sick time accruals for their employees have the option to "front-load" the maximum amount of sick time at the beginning of the year in one allocation. Employers who opt to provide all sick time up-front will only need to track their employee's use of sick time. [Section 2(5)]
- **Maximum accruals and carry-over of unused time:** Unused sick time can be carried over to the following calendar year, but an employee's annual *accrual and use* of sick time accrued under the new law is capped at 40 hours. An employee could conceivably accrue up to 80 hours of leave, but will still only be able to use 40 hours of leave each year. Unused leave can be carried over to the following year, but the maximum amount of accruable sick time is capped at 80 hours. Employers can also offer additional leave at their discretion. [Section 3(1-4)]
- **Medical verification:** Employers can require medical verification for sick time absences in excess of 3 days. If an employer requires medical verification, the employer must also pay the any associated costs (exam fees, co-payments, etc). The law does also allow employers to require medical verification for "suspected sick leave abuse" by employees, but employers are still required to pay for this verification. Employers should use caution when requiring medical verification based on suspected patterns of abuse. [Section 8]

- **Posting and notice to employees:** All employers will be required to provide and post notice to employees describing the new law. BOLI will provide employers with the required poster and template language for notifying employees of sick time rights. In addition, employers must provide employees with at least quarterly notice of the amount of sick time available for use by the individual employee. *[Section 9]*
- **Shift trading:** With mutual consent of the employee and employer, employees can trade their shift with another employee rather than take a paid sick day. This provision was included primarily for tipped employees who may rather swap a shift with another employee than be out for illness and lose a day's tips. If an employer allows shift trading, they cannot require shift trading or require an employee to search for their own replacement. *[Section 3(9)]*
- **Suspected Abuse of Sick Time:** Employers who suspect employees of abusing sick time and suspect a "pattern of abuse" can require medical verification prior to three days of absence due to illness. "Pattern of abuse" is defined in the law and "includes, but not limited to, repeated use of unscheduled sick time on or adjacent to weekends, holidays, vacation days or paydays." An employer who suspects abuse cannot deny sick time, but can require medical verification for the illness. If the employee is unable to produce medical documentation, the employer can discipline the employee, but should be very careful it is discipline for failing to produce required medical verification and not discipline for taking protected sick time, which could be construed as retaliation. *[Section 8(3)]*