

Understanding Portland's New Paid Sick Leave Ordinance

On January 1, 2014, Portland's new law requiring paid and protected sick leave for employees working within the City limits will take effect. ***On Oct. 16, 2013, the City Council amended the ordinance specifically for union construction contractors to allow for vacation pay account payments to count as the equivalent of paid time off, and sick leave accruals, under the ordinance.*** The Council also deleted references to a "calendar year" in the ordinance to allow employers to calculate leave accrual and use based on a fiscal year or a calendar year.

Basic Overview of the Law

Under the new law, employers with six or more employees are required to provide employees up to 40 hours of *paid* sick leave per year. Employers with fewer than six employees still must provide up to 40 hours of *unpaid*, job protected, sick leave per year. Both paid and unpaid leave are required to accrue at a rate of 1 hour of sick leave for every 30 hours worked, up to 40 hours of sick leave each year. Use of paid and unpaid sick leave is protected and employers cannot retaliate or take any adverse actions against employees for using or seeking to use protected sick leave. Sick leave can be taken in minimum increments of 1 hour unless it is physically impossible for an employee to start or end work part way through a shift.

Sick leave accruals begin Jan. 1, 2014 or after that date, when an employee begins work. Employees are not eligible to use accrued leave until after 90 days of employment. In addition, an employee who has not worked 240 hours inside the city limits in a year is not eligible to use accrued leave. However, once an employee becomes eligible to use sick time under the 240 hour threshold, they remain eligible regardless of the number of hours worked in subsequent years.

Existing Paid Time Off Policies and Vacation Pay Accounts

Employers who have an existing paid time off (PTO) policy that meets or exceeds the minimum accrual rates set out in the ordinance can use the PTO policy to comply with the required accrual and usage rates of the sick leave ordinance provided that it can be used for the same purposes. If an employer has an existing PTO policy and counts it for required sick leave accruals, they must also allow for their employees to use it for sick leave, which can come without notice or prior approval. If an employee has exhausted their PTO accruals, no additional protected sick leave is available to the employee; it doesn't matter if the PTO was used for sick leave or vacation.

- Construction trade union employers can also count contributions made to vacation pay accounts as PTO under the ordinance as long as the contributions meet or exceed the accrual rates set out in the ordinance and can be used for the same purposes (i.e. employees have protected sick leave available to them, even if it is essentially unpaid, or pre-paid).

DO THE MATH:

If an employer uses vacation pay accounts, the minimum required hourly contribution can be determined using the following:
 $(\text{wage}) \div (30) = (\text{min. hourly contribution}).$

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- Note that this language is only applicable to construction trade union employers who use vacation pay accounts to provide PTO to their employees. These employers are still required to provide protected leave to their employees, up to 40 hours per year.

Enforcement of the Sick Leave Ordinance and Easing in Period

The City will contract with BOLI to do enforcement of the ordinance, under the City's authority. The City has not yet entered into a contract with BOLI, but it is anticipated that an enforcement budget and contract will be adopted in coming weeks. Once the ordinance takes effect, BOLI will provide all technical assistance for employers and process complaints filed by employees.

BOLI and City Commissioners have also announced a period of easing into the new ordinance from Jan. 1, 2014-July 31, 2014. During this 180-day period, if a business inadvertently violates the ordinance, it will have 30 days to remedy the situation and make its employee whole. If the company moves into compliance, BOLI will consider the matter closed. BOLI intends to assess civil penalties during the easing in period only if the agency finds that a business intentionally disregarded the ordinance and acted egregiously against its employees. Portland businesses can also expect free trainings in November, December and January.

Other Specifics of the Paid Sick Leave Ordinance

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.

Covered family members: Sick leave under the ordinance 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 leave 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.

Paid Time Off: Employers who intend to use an existing PTO policy to satisfy the requirements of the ordinance 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 leave.

Maximum accruals: 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. Employers can also offer additional leave at their discretion.

Documentation: Employers will be required to document sick leave accruals and use by their employees and track hours spent by employees working within the city limits. Wherever possible, employers should utilize existing recordkeeping procedures.

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Work and travel in and out of city limits: Technically, employers will be required to accrue and provide sick leave only for time spent working within the geographical boundaries of the city. Meaning that time only has to be accrued for time an employee spent working in the city limits. Likewise, accrued time can also only be used for leave during times that would have been spent working in the city limits.

- For employees who travel regularly inside and outside city limits, documenting and providing appropriate leave accruals may be difficult. Implementing rules on the sick leave ordinance allow an employer to make a “reasonable estimate” of time an employee spends working within the city limits based records such as dispatch logs, historical averages, delivery routes, etc. If employees traverse city limits in the regular course of business, it is advisable to err on the side of caution when providing for leave accruals and use.

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.

Medical verification: Employers can require medical verification for sick leave 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 ordinance 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 under state law (despite the ordinance saying they do not have to pay, state law prevails). Employers are strongly advised to use caution when requiring medical verification based on suspected patterns of abuse.

OFLA/FMLA: If the type of leave is also counted under OFLA or FMLA, employers may also deduct this leave from the employee’s OFLA and FMLA annual allowances. Generally, 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.

Posting and notice to employees: Covered employers will be required to provide and post notice to employees describing the new law. The required poster can be found on the city’s website.

Cashing out Accrued Sick Leave: Employers are not required to cash out any unused sick leave to employees. Unless the employer’s existing policy is to allow for unused PTO to be cashed out by employees, employers do not have to pay employees for accrued but unused sick leave time.

The ordinance, implementing rules, FAQs and the required poster can be found on the City’s website at:
<http://www.portlandoregon.gov/sicktime/>

Focus Point Communications worked to ensure that the ordinance was amended to allow for vacation pay accounts to count as PTO under the ordinance and provide comments specific to the construction industry to inform final rule writing. Despite City Council Commissioners’ reluctance to re-open the ordinance, we were able to convince them it was a necessary amendment to ensure that the existing method of providing hourly contributions to vacation pay accounts was allowable under the ordinance and union contractors wouldn’t need to pay twice.