

# Washington's Paid Sick Leave Law

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A T T O R N E Y S

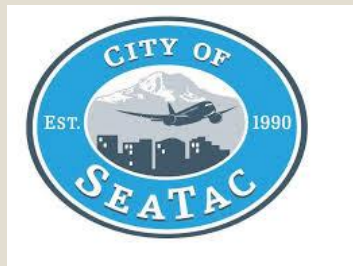


**Thursday, January 18<sup>th</sup>, 2018**  
**With Kyle Abraham**

# State Sick Leave Laws



Washington State law DOES NOT pre-empt City Ordinances, WAC



Oregon State law DOES pre-empt City Ordinances, ORS 653.611



# Different Origins



## Washington

- Created through the initiative process
  - No legislative history
- Written into existing minimum wage law
  - L&I's interpretation is limited by placement as a "minimum wage" provision

## Oregon

- Passed by the Oregon legislature, and signed into law by the Governor
  - BOLI may look to legislative history

# Making Sense of the Laws



- Covered employer, and eligible employee
- Accrual rate
- Rules on use
  - Waiting period
  - Availability
  - Amount
  - Increments
  - Qualifying absences
  - Scheduling
  - Notice from employee
  - Paid time
  - Unused time
- Curbing abuse
  - Medical verification
- Employer obligations
- Interaction with PTO/Vacation leave
- Enforcement
- Crossing state lines

# Washington - Who is Covered/Eligible?



- **Employers**
  - “Any individual, partnership, association, corporation, business trust, or any person or group of persons”
  - Regardless of employer location
  
- **Employees**
  - “An individual who renders personal services at a fixed rate to an employer”
  - Includes part-time, seasonal, and temporary workers
  - Must be “Washington-based” employees

# Washington - Excluded Employees



- Exempt employees
- Some agricultural workers
- Certain crew members of vessels
- Casual labor in a private home
- Volunteers
- Independent contractors
  - RCW 49.46.010(3) – sick leave is interpreted in the context of minimum wages

**No exclusion for employees covered by a union contract,  
even those hired from a hiring hall!**

# Washington - Accrual of Sick Time



- Accrual rate
  - 1 hour per 40 hours worked
- Accrual begins on first day of employment
  - No hourly minimum required
- “Hours worked” means hours worked both in and out of state
  - *Bostain v Food Express, Inc.*  
*159 Wn. 2d 700 (2007)*
- No cap on maximum amount of hours accrued
- Accrual based on hours worked, not hours compensated
  - Accrual on overtime hours too
  - No accrual on vacation, PTO, or sick

# Washington - Frontloading



- Frontloading is providing an employee with paid sick leave before it has accrued
  - Presumably it avoids the need to track accrual
- Challenges of frontloading
  - Employer must have a policy outlining frontloading procedure
  - If employer underestimates the amount of sick leave to frontload, employer must provide additional sick leave
    - Employer has 30 days to add additional time after identifying the discrepancy
  - Upon termination, an employer may not recoup used frontloaded time through payroll deduction from a final paycheck



# Washington - Rules on Use of Sick Time



- Waiting Period: on the 90<sup>th</sup> day of employment, unless employer permits use sooner
  - Part-time, temporary and seasonal employees eligible
  - Employment within 12 months is added for 90<sup>th</sup> day calculation
- Availability: after accrual and consistent with employer's practice on distribution of leave, but not more than one month from accrual
- Amount: may use all leave accrued
- Increment: must be permitted to take time off in increments consistent with employer's payroll system (e.g. 15 minutes)
  - Employers may apply for a variance by establishing "good cause" under WAC 296-128-640

# Washington - Qualifying Absences



- Employee or family member's mental or physical illness, injury or health condition
- Preventive care for employee or family member
  - (e.g. medical or dental appointments)
- Treatment of mental or physical illness, injury or health condition
- Closure of the employee's place of business or child's school/place of care by order of a public official for any health-related reasons
- Absences that qualify for leave under Washington's Domestic Violence Leave Act

# Washington - Scheduling/Notice Rules



- If the leave is **foreseeable**
  - Employee must provide notice IAW the employer's policy
  - Employer may require at least 10 days advanced notice
  - Employer may require leave be scheduled in a manner that does not unduly disrupt operations
- If the leave is **unforeseeable**
  - Employee must provide notice before start of shift or as soon as practical
  - Notice may come from a third party
- Employer must have a written policy outlining notice requirements
- Staffing issues
  - Permitted: voluntary shift trading/flex time
  - Not permitted: find replacement

# Washington - Rules on Paid Time



- All employers must pay for use of sick time, regardless of employee count
- Rate of pay
  - Employees paid at their normal rate
    - Not entitled to 1.5 rate of pay for using sick leave
  - Employer may use a reasonable calculation based on the hourly rate the employee would have earned

# Washington - Unused Time



- Employees are permitted to “carry over” at least 40 hours of accrued unused sick leave to the next year
  - Excess time is forfeited
- “Year” may mean: calendar year, fiscal year, benefit year, or anniversary year
- Unused leave at termination need not be paid
  - But if the employee is rehired within 12 months, then it is reinstated (up to 40 hours if in the “next year”)
    - Any policy to pay out unused sick leave at termination must be dollar-for-dollar
    - Employer must provide “accounting” of sick leave balance to employee

# Washington - Medical Verification of Leave



- May require medical verification if
  - An absence exceeds three consecutive days
  - The employer has a written policy outlining requirement to provide verification
- Employees may object that verification is “an unreasonable burden or expense,” which triggers an interactive dialogue with the employee
- Verification provided within a “reasonable amount of time,” but not less than 10 calendar days after the first day of the leave

# Washington - Curbing Abuse



- If verification is required, employer may withhold pay until verification is provided
  - Otherwise employer must pay sick leave in the pay period when sick leave is taken
- Employer may withhold payment of sick leave, if employee's use of sick leave was not for a qualifying reason
  - Must provide notice to employee

# Washington - Employer Obligations: No Discrimination



- No retaliation or discrimination because employee attempted to or exercised rights
- Employer may not adopt any policy that counts the use of paid sick time as an absence that may lead to or result in discipline
  - Revise your attendance policy
  - Absences beyond sick time are not protected, even if for a qualifying absence



# Washington - Employer Notice Requirements



- Written notice of Sick Time law
  - By March 1, 2018
- At least monthly, employer must provide employees notice of accrued sick leave, used leave since last notice, and unused leave

# Washington - PTO/Vacation Policies



- PTO provided to employees that meets or exceeds the requirements of the paid Sick Time law satisfies the requirement to provided paid sick leave
  - If employee uses PTO leave for vacation, and sick leave later arises, employer is not required to provide additional PTO
  - **If employer already meets the requirement, the law does not require more sick time** - WAC296-128-700
- “PTO program” is undefined
  - Combines vacation and sick time into one pool

# Vacation - Construction Industry



- Vacation Fund and Paid Sick Leave
  - Employers may contract with TPA to administer leave, WAC 296-128-740
  - Vacation Fund must “meet all paid sick leave requirements under RCW 49.46.200, 210, and all applicable rules.”
- MLA with IBEW 48
  - Accrual rate is 4% of gross hourly wages
    - 1:40 ratio would require 2.5% of base wages
  - Method of delivery = problematic
  - Common situation in the construction industry

# Washington – Enforcement



- Employees may pursue
  - Private legal action
  - File a complaint with L&I within 180 days of violation
- L&I may issue civil penalties and/or reinstatement

# Working Across State Lines



- Washington-based employee performs work in Oregon
  - If employee is “Washington-based” the employee accrues paid sick leave for *all hours* worked, even hours outside of Washington
- In order to determine if an employee is Washington-based, you must apply the Most Significant Relationship standard
  - *Bostain v. Food Express, Inc.* 159 Wn. 2d 700

# Practical Tips for Crossing State Lines



- Best to base employees in Oregon, exempt from paid sick leave law
- Keep language in the MLA that pulls in Oregon
  - “Per Oregon State law” in Paydate section
  - “Employee’s place of employment is the permanent place of business of the employer” in Travel Time section
- Create contacts with the state of Oregon
  - Dispatch employees from hiring hall in Oregon
  - Direct employees’ work from Oregon
  - Assign employees to begin and end work in Oregon
  - Pick up equipment (beyond Tool List) in Oregon
  - Residency of employee is not relevant

# Washington - Final Thoughts



- PTO programs may satisfy requirements of the law, without providing more paid time
- Local ordinances are not pre-empted
  - Must comply with Seattle, SeaTac, and Tacoma too
- Direct contact at L&I
  - Nick Burrows; 360-209-6768; [nicholas.burrow@lni.wa.gov](mailto:nicholas.burrow@lni.wa.gov)

~Thank You~



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