
SB on HR

January 1st is Coming: Are you Prepared for State-Wide Mandatory Paid Sick & Safe Leave?

Beginning January 1, 2018, *all* Washington employers are required to provide paid sick and safe leave to employees. Employers of sufficient size in cities like Seattle, Tacoma, and Spokane—who are already subject to paid sick leave requirements—are probably familiar with some of the challenges of complying with paid sick leave requirements.

However, there are a few key differences, including the fact that the new state-wide law *prohibits* any annual cap on accrual or usage for paid sick or safe leave. Therefore, regardless of where you operate, we recommend you carefully review these new requirements, along with your existing policies, to ensure that you are ready for compliance come January 1. Below is a general guide to better acquaint you with the law and its essential provisions. Final rules regarding employer requirements, employee rights and enforcement of the law are still in development by the Department of Labor and Industries but are expected this month.

To whom do these requirements apply?

- The law covers all employers, regardless of size or industry in Washington state.
- These requirements cover all your employees—including part-time or seasonal workers—unless the employee is exempt from minimum wage or overtime requirements. “Exempt” employees are defined specifically by statute, and must be paid a qualifying salary and perform work that meets the duties test for each exemption. The exemptions include “administrative,” “executive,” “professional,” “computer professionals,” and “outside sales” employees.
 - *Note:* Seattle and Tacoma paid sick leave requirements **do not** make any exceptions for “exempt” employees. So even if your employee might not be entitled to paid sick leave under the new state law, they may be entitled to paid sick leave under Seattle’s or Tacoma’s ordinances.
 - Additionally, be aware that Federal Contractors are further required to comply with Executive Order 13706, which requires that Federal Contractors provide 7 days of paid sick leave each year to covered employees. More details can be found here:

<https://www.dol.gov/whd/govcontracts/eo13706/>

- The state-wide law does *not* supersede existing paid sick leave ordinances. Employers in Tacoma and Seattle must comply with both their local and state paid sick leave requirements. Transportation and hospitality employers in SeaTac must comply with SeaTac’s specific requirements as well. Spokane decided to end its law upon the effective date of the new state-wide requirements.
 - A few of the significant differences between the new state-law rule and existing local ordinances are specifically noted below. However, for more details regarding the differences between the state law and existing local ordinances, see the Comparison Chart at the end of this article.

How much paid sick leave must I provide?

- Employees must be permitted to accrue at least **one hour of paid sick leave for every 40 hours worked**.
 - *Note:* Seattle requires accrual of one hour for every 30 hours worked for employees of employers with more than 250 employees.
- Employees begin accruing paid sick leave on January 1, 2018. Employees hired after January 1, 2018 begin accruing paid sick leave on their first day of employment.
- Employers are not required to accrue paid sick leave hours when the employee is not working (for example, during an employee’s vacation, paid time off, or while using paid sick leave).
- There is no limit on the number of hours an employee may accrue in one year, and in fact, the Department of Labor & Industries has clarified that caps on accruals are prohibited.
 - *Note:* This ban on accrual caps will trump the accrual caps in Seattle and Tacoma.
- Employers can, however, impose a “carry over” cap, and limit employees from carrying more than 40 hours over into the next year.
 - *Note:*
 - Seattle has higher limits for carryover for employers that have more than 49 employees, that will trump the state law 40-hour carryover cap.
 - SeaTac’s ordinance (applicable only to qualifying “Transportation” and “Hospitality” employers) does not contemplate any carry over, and instead, requires that employers pay out any accrued, unused paid sick leave available at the end of each calendar year.
- There is no limit on the number of hours of accrued paid sick leave an employee can use in a year. As with accrual, this will trump the usage caps in Seattle and Tacoma.

Can I just give employees a bank of paid sick leave hours, instead of tracking accruals?

- Yes, employers may also opt to “front load” paid sick leave hours in advanced of accrual. This means that, instead of tracking how many hours each employee accrues each pay period, you may opt to provide employees with a bank of available paid sick leave hours in advanced. For example, you may decide to simply provide 4-5 hours of paid sick leave to each full-time employee at the beginning of each month.
- In order to front load, you must calculate the amount of paid leave you anticipate the employee will accrue in a given period, and provide those paid sick leave hours at the beginning of the period. Some employers select this method because it gives employees more flexibility to use their paid sick leave.
- If you already have a PTO program in place for your employees, this program may already

meet the accrual and use requirements for paid sick leave. So long as you provide sufficient PTO hours to meet the law’s accrual requirements, do not limit usage or carryover contrary to the law, and the employee can use those hours for any of the protected reasons provided below, you are not required to provide any additional paid leave to your employees.

- Bear in mind, you may have to cure any discrepancy in the frontloaded amount if the employee works additional hours, and is entitled to more paid sick leave under the law. You must also provide the employee with written notice, identifying the cure.

What can an employee use his or her paid sick and safe leave for?

- Employees may use paid sick leave for a number of different reasons including:
 - an employee’s illness, injury, or health condition, including diagnosis, treatment, care, and preventive care;
 - to care for a family member’s illness, injury, or health condition, including diagnosis, treatment, care, and preventive care;
 - when an employee’s place of business or an employee’s child’s school or place of care is closed by a public health official for any health-related reason; or,
 - for employee absences for qualified leave under the domestic violence leave act (Chapter 49.76 RCW).
- The definition of a qualifying “Family Member” differs, depending on whether the leave is used for qualifying “sick” or “safe” time:

Paid Sick Leave	Paid Safe Leave
<ul style="list-style-type: none"> • Child • Parent • Parent-in-law • Spouse • Registered domestic partner • Grandparent • Grandchild • Sibling 	<ul style="list-style-type: none"> • Child • Parent • Parent-in-law • Spouse • Grandparent • Person with whom the employee has a dating relationship

- The law protects employees’ rights to use their available paid sick leave time for any of the above enumerated reasons.

What do I need to know about how to administer paid sick leave?

- **Rates of pay:** Employers must pay paid sick leave at the employee’s “normal hourly compensation,” which is defined as the hourly rate that an employee would have earned for the time during which the employee used the paid sick leave. When the employee’s rate of pay fluctuates, employers are required to use “reasonable calculations” to determine what the employee would have earned had he or she been able to work.
 - This does not include tips, gratuities, service charges, holiday pay, or other premium rates.
 - This *does* include commissions. The Department of Labor & Industries recommends calculating the employee’s rate of pay by dividing the employee’s total earnings divided by total hours worked in the full pay periods in the prior 90 days of employment.

- **Increments of use:** Employers must also allow the employees to use their paid sick leave in increments that is consistent with normal payroll practices. For example, if your normal practice is to track increments of work for compensation purposes in 15-minute intervals, then you must allow the employees to use paid leave in 15-minute increments.
 - However, regardless of your typical compensation policy, the minimum increment of use cannot exceed one hour. For example, if an employee wishes to use paid sick leave for a 60-minute doctor's appointment, you cannot require that they use a full day of paid sick leave for that time-off.
- **Regular Notice:** Each month, you must provide employees with either written or electronic notification of the number of hours accrued and the number of hours used since the last notification, and their available paid sick leave balance. Many employers simply note this information directly on the employees' paycheck.
- **Written Policies:** Employers are required to provide employees with written notice regarding entitlements under the law and relevant policies. This can be accomplished through your handbook or standalone written policy.
- **Record Keeping:** You must keep records of the employees' monthly accruals, unused leave available each month, any deductions made, and date of hire.

What kinds of parameters can I create to regulate employees' use of time-off?

- **Waiting period for new employees:** employees are entitled to begin using their using paid sick leave by their 90th calendar day of employment.
- **Requiring notice of employee's absence:** As an employer, you can require that the employee provide you with reasonable notice of the paid sick leave absence.
 - You can continue to use your current notice policy for requesting time off, so long as the policy does not require more than 10 days' advanced notice, although this might be a good occasion to have your policies reviewed by your attorney. The law requires that your policy not unreasonably interfere with the individual's right to use paid leave.
 - This means that, for instances where the need for the leave is foreseeable (e.g. a doctor's appointment or a scheduled surgery), you cannot require that the employee give you more than **10 days' advanced notice** of the need for leave. For unforeseeable leave, you may require that the employee provide notice as soon as possible prior to the required start of their shift, unless it is not practicable to do so.
 - Ensure that any notification requirements are provided in writing to all employees.
- **Verification from Health Care Providers:** For paid sick leave that exceeds **three consecutive work days**, you may require that the employee provide you with verification of the need for the leave (e.g. a note from their health care provider), so long as the verification does not result in an undue burden, or impose an unreasonable expense, on the employee. You may not require that the employee provide the verification *before* taking their leave, but you may withhold payment for the leave until the employee provides verification.
 - An employee may challenge the reasonableness of your verification requirements, in which case, you must comply with the multi-step process set forth in the regulations in the Washington Administrative Code. The Administrative Code also provides additional guidance and requirements regarding the types of verifications that you can require.
 -

What do I do at termination?

- Upon separation of employment, employers are **not** required to pay employees for any accrued, unused paid sick leave. Make sure that this is clearly explained in any and all written policies, so that there is no expectation by the employee that these benefits will be paid out at the end of his or her employment.
 - *Note:* Again, if you are a qualifying SeaTac employer, you *are* required to payout any unused, accrued leave to covered employees.
- If an employee is rehired with your company within 12 months, you must reinstate their accrued, unused paid sick leave (unless, of course, you have already voluntarily paid out this time to the employee).

What are the risks if I don't comply?

- The Washington Department of Labor & Industries is charged with enforcing the new state-wide paid sick leave laws. If an employee complains to the Department, the Department has authority to investigate. If the Department finds that you are not in compliance, it may impose a fine of up to **\$500** for the first infraction. For any subsequent infraction within a three-year period, the Department may impose a fine of **\$1,000**.
- In addition, the statute allows employees to file a lawsuit against the employer, in which a prevailing employee may recover their actual damages plus attorneys' fees, as well as potential double damages for any willful withholding of the employee's paid leave.

Begin this conversation as soon as possible. There are many decisions to be made in implementing this policy, and you will want to ensure that implementation and enforcement of your new policy is consistent and makes sense with your company's business needs.

If you do not already have a draft written policy, you should be taking immediate steps to create one. The law requires that all employers have a written policy regarding paid sick leave, and that these policies are distributed to employees. Your current payroll administrator may be able to assist with the logistics of implementing your new policy. We further recommend having your attorney review or draft your leave policy, to assist in navigating the increasingly complex legal terrain, and ensuring that all the minimum requirements are being met.

For questions regarding this article, or any questions regarding HR or employment issues, contact Rochelle Nelson at nelson@skellengerbender.com or 206-623-6501.

