Portland Paid Sick Leave: Is Your Organization Ready?

Christie Totten, Carol Noonan

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Overview of ordinance, regulations

- Coverage – who and when
- How to accrue
- When leave used (not just for sickness!)
- Verification, call-in, rehire and other policies impacted

Updating your policies and considering options

Sample policies

Q&A
Overview

- National trend
- City’s goals
- Equivalent PTO is OK
Covered Employers

Applies to

- all employers

Excludes

- federal, state, city government

Employer’s obligations differ by size (based on total employees, regardless of location)

<table>
<thead>
<tr>
<th>5 or fewer employees</th>
<th>6 or more employees</th>
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<tr>
<td>mandatory leave, unpaid</td>
<td>mandatory leave, paid</td>
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Eligible Employees

- Any individual working in the City of Portland at least 240 hours/year*
  - NOT independent contractors
  - NOT co-partner of employer
  - NOT qualified work-study student
  - NOT qualified work training program
  - NOT railroad worker exempted under federal law
  - YES - everyone else!
    - Part-time, seasonal, union member, etc.
    - Temporary workers (but they are staffing agency employees)
  - No waiver
What is a Year?

- Calendar
- Fiscal
- Tax
- Contract
- Employee’s anniversary date
Covered Non-Portland workers ("occasional workers")

- **Examples:** pick-ups, deliveries, sales calls, meetings in Portland
- **Traveling:**
  - includes work stops
  - exception for de minimis
- **Estimating time**
  - Employer may make "reasonable estimate" including by dispatch logs, estimated travel times, delivery logs, historical averages
- **Telecommuting**
  - EE physically in Portland telecommuting = covered
  - EE physically elsewhere telecommuting for Portland employer = not covered

Accrue for hours paid to work in City of Portland only
ACCRUAL
Accrual Generally

Accrue from date the ordinance goes into effect or on date of hire (if hired after Jan. 1, 2014)

<table>
<thead>
<tr>
<th>90-Day Waiting Period</th>
<th>Must accrue immediately from day 1</th>
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<tbody>
<tr>
<td></td>
<td>Can prohibit use in first 90 days of employment</td>
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<tr>
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<td>- Unless policy says otherwise</td>
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**Accrual Mechanics**

1 hour for every 30 “hours of work performed” in Portland

<table>
<thead>
<tr>
<th>Non-exempt</th>
<th>Must count overtime too</th>
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<tbody>
<tr>
<td>Exempt</td>
<td>Presume 40 hours/wk</td>
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<tr>
<td></td>
<td>Unless normal work week &lt; 40 hrs (then base upon normal work week)</td>
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Accrual, Carry Over, and Use

40 hours

- Maximum annual accrual
- Maximum annual carry-over
- Maximum annual use
Accrual, Carry Over, and Use

Employee may use sick time:
- In 1-hour increments
- To cover a full or partial shift
  - Cannot require full shift off unless physically impossible
- Shifts scheduled within Portland
- Immediately

Employer may require:
- Use of PSL when absent for qualifying reason
- Exception: if shift trading policy, must allow employee to trade shifts instead of using sick time

Employee may NOT use sick time:
- For shifts outside City of Portland

Employer may NOT require employee to:
- Find replacement worker as condition of taking PSL
- Work a shift to make up time off
Cash Outs: No requirement to cash out at end of employment (but employer may choose to)

Frontloading: CAN frontload 40 hours at start of year
- Must still meet rules for use, etc.
- Do not need to allow carry over
### Equivalent Policies

- **Equivalent PTO**
  - If your PTO policy provides
    - at least 40 hours/year of paid time off
    - time off for any reason
  - Then no further PSL required
- **Equivalent Sick Leave or PTO** = comply with accrual and use sections
### Re-hire

Employee re-hired within 6 months gets:

- Accrued hours back for immediate use
- Previous hours worked counted toward 240-hour requirement
- No 90-day waiting period

### Business transfer

If business is sold or transferred, employee keeps his/her accrued hours.

### Employee transfer

Employee transferred to new location or entity within Portland brings accrued hours along.

Employee transfer: If employee transferred to location outside Portland, retain records for 2 years and reinstate unused PSL upon transfer back.
REASONS FOR USE

Sick ... and other reasons
Paid Sick Leave: Allowable Uses

- Absence related to:
  1. Your *employee’s health* - diagnosis, care or treatment of employees’ own mental/physical illness, injury or health condition
    - Includes pregnancy and post-partum, preventative care, dental, etc.
Paid Sick Leave: Allowable Uses

- Absence related to:
  2. Your employee’s family member’s health – diagnosis, care or treatment of family member’s mental/physical illness, injury or health condition

  • Family member defined – parent-in-law, grandparent, domestic partner, etc.
3. Your employee’s safety - purposes described in Oregon’s Domestic Violence, Harassment, Sexual Assault or Stalking Leave law

4. Public health context - (1) place of business, child’s school or place of care is closed for public health emergency, (2) employee caring for family member determined to pose community health risk or (3) any law requires employer to exclude employee from workplace for health reasons.
<table>
<thead>
<tr>
<th>Oreg. Domestic Violence Leave Law (ORS 659.270-285)</th>
<th>To seek the services under the statute, for the employee, minor child or dependent:</th>
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<tbody>
<tr>
<td></td>
<td>law enforcement assistance</td>
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<td></td>
<td>medical treatment or recover from injuries</td>
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<tr>
<td></td>
<td>mental health counseling</td>
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<tr>
<td></td>
<td>victim services</td>
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<td></td>
<td>relocation</td>
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Employee’s Notice Requirements

- **Employer must** have written call-in/notice policy or standard
  - Phone number or reasonable communication channel

- **Employee must notify via established policy before the shift or “as soon as practicable”**
  - Foreseeable need: employee provides notice as soon as practicable, making reasonable effort to schedule leave to not unduly disrupt business, and updating changes to leave length
  - Unforeseeable need: as soon as practicable = fact-specific

- **CAN deny PSL if inadequate notice or failure to make reasonable effort to schedule to avoid disruption**
Verification of Absences

- May require reasonable documentation for absences of more than 3 “consecutive” days of leave
  - Consecutive = scheduled
  - Examples: HCP documentation, DV/harassment documentation in statute, or a “signed personal statement that the Sick Leave was for a purpose covered by” the Ordinance
    - Sick leave:
      - Yes - simple statement
      - No - nature of illness
Verification of Absences

• DV leave:
  – Yes – police report, court protective order, clergy or attorney document, etc.
  – Employee statement
  – Can deny leave until documentation provided
  – Cannot require second opinion
  – Must pay cost of verification not covered by insurance/benefit plan
  – Exception for suspected sick leave abuse
    • Can require HCP documentation at employee’s expense
    • e.g. – repeated use of unscheduled PSL; use corresponds to weekends, holidays, vacations, pay day, or mandatory shifts

□ Confidentiality
Relationship to Other Laws

- Does not limit other laws
- Not required to allow PSL during workers’ comp or other paid leave
- Can run PSL concurrently with OFLA/FMLA
- Employee’s response to requests may impact employee’s OFLA/FMLA rights or ADA interactive process
  - But still has right to use accrued PSL
PAY AND HOURS
What is the Rate of Pay?

The same hourly rate they would have earned during the time the leave is taken

• Except: tips and commissions

Pay for hours scheduled to work

Benefits
Calculating Pay

- Pay PSL on payday for the next regular payroll period
  - Exception: valid outstanding request for verification
- Pay base rate for hours scheduled
  - No lost tips or commissions
- Hourly – regular hourly wage (NOT overtime rate if PSL for hours that would have been overtime)
- Salaried exempt – calculate hourly rate:
  - divide annual salary by 52 for weekly salary
  - then divide weekly salary by hours in normal work week
How Many Hours of PSL?

- Unknown shift length – if employee’s shift is indeterminate length, calculate reasonably:
  - hours worked by the replacement employee or
  - similarly situated employees who worked similar shift in past
Employee can choose shift trade if allowed & available

Cannot require employee to seek shift trade as a condition
SO WHAT DOES AN ORGANIZATION NEED TO DO?
No Retaliation

**Protection includes:**
- Use of PSL
- Filing complaints
- Cooperating with related investigations

**Adverse action includes:**
- Termination
- Suspension
- Discipline
- Transfer
- Demotion
- Denial of promotion
- Interfering with an investigation or hearing
- Threatening such action
## Occurrence-based attendance policies

Use of PSL cannot be counted as an “occurrence” or otherwise impact an employee negatively.

<table>
<thead>
<tr>
<th>Absences incurred beyond PSSL minimums?</th>
<th>Rule applies to PSSL under the Ordinance</th>
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<tr>
<td></td>
<td>FMLA, OFLA, or other law may prohibit counting absence as an “occurrence”</td>
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Misuse and Patterns of Abuse

- Employers may respond to:
  - Using sick time for “an impermissible purpose” (e.g. pattern of abuse)
  - Falsified documentation/explanation of need for PSL
Employer's General Notice Requirements

Form of Notice:
- Physical poster (each building worksite)
- Timely written notice (pay stub, email, etc.)
  First pay period of 2014; first pay period for new employees
- Handbook (recommended)

Notice must include:
- Amount of PSL and terms of use
- Retaliation is prohibited
- Right to file complaint

Notice must be given to:
- All employees who perform work in Portland

Penalty
- Civil penalties
<table>
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<tr>
<th>Employer’s Individualized Notice Requirements</th>
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<tr>
<td>Employer must provide notice to each employee</td>
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<tr>
<td>Each quarter</td>
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<tr>
<td>Must include amount accrued and unused</td>
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Other Record Keeping

- Retain records for 2 years
  - Name, address and occupation of each employee
  - Amount of sick time or PTO accrued or used by each employee and
    - Hourly: hours actually worked in City per pay period
    - Salaried regularly-in-Portland: hours of a normal work week
    - Salaried occasionally-in-Portland employees: hours actually worked in Portland per pay period
    - Frontloaded: amount of PSL or PTO front-loaded, and dates on which available to use
Enforcement

Ordinance enforced by BOL:
- Safe Harbor Period

Remedies:
- Civil Penalties
  - e.g. improper denial of PSL = greater of 3x PSL denied or $250

Civil Action?
- Cause of action for damages + other remedies
√ Update sick leave and paid time off policies
√ Update other policies, processes

YOUR TO-DO LIST
Updating Sick Leave/PTO Policies

- Identify anyone newly entitled to accrue PSL/PTO
  - Create separate policy?
  - Add to existing policies?

- Accrue from date of hire for new employees

- Maximum 90-day waiting period

- Non-exempt accrual on hours worked, including overtime
Updating Sick Leave/PTO Policies

- Must allow carryovers at end of year
- Accruals continue at beginning of new year
Updating Sick Leave/PTO Policies

**Must be able to use:**
- For employee’s and family’s illness, injury, preventative care or treatment
- For domestic violence, harassment, stalking, sexual assault
- For public health reasons – closures of workplace, school, day care

**Put call in/notice policy in writing**
- Develop clear notice requirements for unforeseeable absences
- Allow exceptions for bona fide emergencies
- Apply policy consistently

**May not require unreasonable advance notice for foreseeable absences (other than PTO used for vacation))**

**May not require verification until more than 3 days of consecutive absence**
Updating Other Policies or Practices

Update “no fault” attendance policies
- May not discipline employees for protected absences under ordinance
- May discipline for occurrences that exceed maximum use allowed/year

Develop ways to track occasional workers in City of Portland

Ensure keeping required records related to hours worked, accruals, etc.
Updating Other Policies or Practices

- Develop system for communicating available accrual balances
- Train supervisors/managers about allowable questions, verification, retaliation and confidentiality
- Develop shift trade forms?
- Carefully read staffing firm contracts
- Post the required notice
Questions?

Christie S. Totten
cristietotten@dwt.com
503.778.5298

Carol Noonan
carolnoonan@dwt.com
503.778.5381

THANK YOU!