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Duff on Hospitality Law

What Requirements Washington Employers Need to Know About State Paid Sick Leave Law That Becomes Effective January 1, 2018

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A new statewide leave law that has taken many employers by surprise

In November 2016, Washington voters passed Initiative 1433, best known for increasing Washington's minimum wage to one of the highest in the nation. However, I-1433 also included a requirement for statewide paid sick leave ("PSL") for non-exempt employees that has caught many employers by surprise.

The PSL law becomes effective on January 1, 2018, and the Department of Labor and Industries ("L&I") just published final administrative rules about the law's requirements. All Washington employers need to review these requirements and take action to ensure compliance.

Under the new law, employees must accrue at least one hour of paid sick leave for every 40 hours worked. The PSL law permits use of paid sick leave for a broad array of reasons, including just about any medical need for the employee and the employee's extended family; domestic violence, sexual assault, or stalking issues; or in the unlikely event that the employee's or family member's work or school is closed for public health reasons.

Although the PSL law contains many requirements that may seem familiar to employers who are already complying with local sick leave laws, such as Seattle's Paid Sick and Safe Leave, there are some features of the new law that are different and more onerous on employers than under those local ordinances. The statewide PSL law does not replace those local ordinances, which means that employers who are subject to state and local laws must apply the terms that are most generous to employees.

The new law only applies to employees that are not exempt from Washington's Minimum Wage Act. All non-exempt employees receive the benefits under this law, even on-call, temporary, or seasonal workers, and regardless of where employees work in Washington. Unlike under many local sick leave laws, the PSL law affects all employers, regardless of their revenue or number of employees.

Also, unlike under many existing sick leave laws, employers and employees cannot agree to waive the requirements of the PSL law, such as under a collective bargaining agreement ("CBA"). This can cause

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significant challenges for employers with employees represented by a union, because the new law's requirements can render portions of existing union contracts illegal, or provide employees with a benefit that was not contemplated when existing contracts were bargained.

The remainder of this alert summarizes what employers must do, cannot do, and have the option of doing in response to the new PSL law. The final rules cover these matters in far more detail.

What employers must do by January 1, 2018 for non-exempt employees:

- Ensure that non-exempt employees accrue at least one hour of paid sick leave for every forty hours worked.
- Eliminate caps on PSL accrual, and ensure that employees can carry over at least 40 hours of leave from year to year.
- Permit the use of PSL in the lowest increment possible under an employer's payroll system and practices, not to exceed an hour.
- Permit employees to use PSL after 90 days of employment (versus 180 days under Seattle's paid sick leave law).
- Pay employees on PSL the rate that they would have earned if they had worked, including differentials, except that employers need not pay at an overtime or premium rate unless such a rate is required under a CBA or employer policy.
- Create a written policy covering PSL rights, including required employee notice, how the employer intends to handle verification of PSL, and, if an employer is using an existing leave bank to satisfy the new law's requirements, how PSL is designated within that bank. L&I has provided sample policies for employers to customize and use.
- Notify employees about their entitlement to PSL, the rate at which they will accrue PSL, authorized purposes for which PSL can be used, and that retaliation for use of PSL is prohibited.
- Each month, provide employees with their PSL balance, the amount of PSL accrued in that month, and the amount of PSL used in that month, including why it was used (used by the employee or donated to another).
- For three years, for each employee, keep records of the date the employee began employment, the monthly information discussed above, and the amount of PSL not carried over from year to year.

What employers cannot do starting on January 1, 2018 for non-exempt employees:

- Require that employees find coverage in order to use PSL.
- Use policies that count the proper use of sick leave as an absence that may lead to discipline (such as strict "point" attendance policies that do not consider the reason that employees were absent).
- Retaliate against employees for exercising their PSL rights, including using PSL absences as a negative factor in evaluations and employment decisions.
- Request verification that an employee on PSL is using the leave for its intended purpose until the employee has been out on leave for more than three consecutive days when the employee was

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scheduled to work (unless such verification is permitted by another law, such as FMLA).
- Permit existing employees to voluntarily cash out PSL that would leave them with a PSL balance of less than 40 hours.
- "Zero out" employees' PSL when the employees end employment or transfer to an exempt position, unless the value of the PSL is paid out to the employees. If an employee leaves employment and is re-hired within 12 months, the employee's PSL balance must be reinstated (unless it was cashed out at the end of employment).

What employers may do starting on January 1, 2018 for non-exempt employees:

- Use existing Paid Time Off programs to satisfy the PSL requirements of the new law, as long as such programs meet or exceed the requirements of the new law. However, unless employers want the entire Paid Time Off accruals to be subject to the PSL requirements, the Department of Labor and Industries has indicated that they must designate a portion of the existing program for PSL, notify employees about such designation, and separately track PSL accrual, use, and carryover.
- Pay for accrued, unused PSL upon employees' separation from employment. However, cashing out PSL is not required unless agreed to in a CBA or employee policy.

Although the rules describing the enforcement of the PSL requirements are not final, in their present form, they present significant risks for employers who do not comply with the new law. L&I has announced that it will investigate non-compliance with the accrual, use, and carryover requirements of the PSL law as wage payment violations. Under Washington law, wage payment violations can result in double damages and individual liability for people involved in decisions around sick leave. L&I can also investigate allegations that an employer retaliated against employees for taking PSL, and the law grants employees the right to sue on such claims. Final enforcement rules are scheduled to be released in mid-December, but we do not anticipate that the rules will change significantly from their current form.

Many employers understandably confused the voter-passed PSL law with a Paid Family and Medical Leave Law enacted by the Washington Legislature last summer. The Legislature's Paid Family and Medical Leave Law sets up a system of state-administered family and medical leave, funded by employer and employee contributions starting in 2019, and becoming available for employee use in 2020. We will issue an alert regarding this law after the 2018 legislative session.

If you have questions about the PSL law, please contact Michael Brunet or any of our Labor, Employment & Immigration attorneys.

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Tagged as collective bargaining agreement, Department of Labor and Industry, Initiative 1433, non-exempt employees, Paid Sick and Safe Time, paid sick leave, PSL, PSL accrual, PSL law, Seattle, Washington legislature, Washington state, Washington's minimum wage

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Foster Garvey

Authored by

Michael S. Brunet

Principal|Seattle

206.816.1480 mike.brunet@foster.com

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