

WASHINGTON STATE PAID SICK LEAVE

This Keynote was developed to assist employers in understanding the Washington Paid Sick Leave law, which became effective on January 1, 2018. This law includes many nuances not easily covered by this format. Eligible members are encouraged to call Archbright HR Advisors with specific questions, or to seek clarification when necessary. Employees covered by local paid sick leave laws, such as those in the Cities of Seattle or Tacoma, described below, must keep in mind that employees are entitled to the more generous provisions of any applicable law.

OVERVIEW

Employers must provide paid sick leave to all non-exempt employees who perform work in the state of Washington, including part-time, temporary, and seasonal employees. Paid sick time covers an employee's absence from work due to any of the authorized reasons described below. Time off also includes needed leave to care for a family member, as defined below.

EMPLOYEE ELIGIBILITY

The paid sick leave initiative amended the Washington Minimum Wage Act, so it applies only to those employees who are not exempt from Washington's minimum wage and overtime requirements. Paid sick leave for non-exempt employees is no longer a benefit; it is a legal right. Employers may choose to extend paid sick leave to exempt employees; however, such leave would be a benefit that is not subject to this law.

AUTHORIZED USE OF SICK LEAVE

Employees may use paid sick leave for hours they are scheduled to work, for the following reasons:

1. To take leave for their own health condition or to care for a family member with a health condition. Family member is defined as:
 - Child (regardless of age or dependency status) includes biological children, adopted children, foster children, stepchildren, children to whom the employee is in "loco parentis", children to whom the employee is a legal guardian, and children to whom the employee is a "de facto" parent.
 - Parent includes biological parent, adoptive parent, foster parent, stepparent, person who stood in "loco parentis" when employee was a minor child, legal guardian, and "de facto" parent.
 - Spouse
 - Registered domestic partner
 - Grandparent and Grandchild
 - Sibling
2. To take leave if they are a victim of domestic violence, sexual assault, or stalking; or they have a family member who is a victim of domestic violence, sexual assault or stalking. Family member is defined as spouse, domestic partner, former spouse, former domestic partner, persons who have a child in common regardless of whether they have been married, adult person related by blood or marriage, or who are household members or former household members. It includes persons who are 16 years of age or older who are presently residing together, or who have resided together in the past and who have or have had a dating relationship, and persons who have a biological or legal parent-child relationship including stepparents and stepchildren and grandparents and grandchildren.

3. To take leave when the employee's place of business has been closed by order of a public official for any health-related reason, or when an employee's child's school or place of care has been closed for such a reason.

Paid time accrued can be taken beginning on the 90th calendar day after the start of employment. Unless employers allow a more generous use policy, any absences before 90 calendar days of employment are not protected by this law.

SICK LEAVE ACCRUAL AND USE

Employers must provide employees with a minimum of one hour of paid leave for every 40 hours worked within the state, including overtime hours worked. Employers may choose to award 1 hour of paid leave after an employee has worked 40 hours (whether in one week or across several weeks), or .025 hours of paid leave for each hour worked.

Accrual of paid sick leave may not be capped, and employees must accrue paid sick leave for all hours worked, including overtime hours. Employers may provide employees with a more favorable paid sick leave accrual rate.

Employees must be paid the greater of the minimum wage or their normal hourly compensation. Normal hourly compensation is the hourly rate that an employee would have earned for the time during which the employee used paid sick leave. Normal hourly compensation does not include tips, gratuities, service charges, holiday pay, overtime rates, or other premium rates, unless otherwise required by company policy or collective bargaining agreement. Normal hourly compensation *does* include shift differentials.

An employer may require employees to give reasonable notice of an absence from work as long as such notice does not interfere with an employee's right to use the paid sick leave. For foreseen absences, employers may require up to 10 days advance notice.

UNION WORKERS: The law provides union workers the same rights as non-union employees. Employers with collective bargaining agreements that do not provide paid leave for the reasons in the law and in equivalent amounts must provide the leave. Employees cannot waive their right to paid sick leave in a collective bargaining agreement.

CARRYOVER REQUIREMENTS

Employers must allow employees to carry over 40 hours of accrued and unused hours to the following year. Employers can choose to provide a more generous carryover allowance. Any leave over the 40 hour carryover requirement may be forfeited. Employers may allow a more generous policy, such as cash-out of the excess hours, or carryover into an extended leave bank.

FRONTLOADING

Paid leave may be front-loaded at the beginning of the year provided such front-loading meets or exceeds the accrual, use, and carryover of paid leave required by the Act. Employers who choose to front-load must periodically audit hours worked to ensure that sufficient paid leave is awarded.

Front-loading paid leave does not eliminate the carryover requirement. For front-loading and carryover purposes, employers may define the year as any 12-month period. If the employer does not otherwise define it, the law defines it as a calendar year.

VERIFICATION REQUIREMENTS

For absences exceeding three consecutive days, an employer may require verification that an employee's use of paid sick leave is/was for an authorized purpose. Verification requirements may not result in an unreasonable burden or expense on the employee and may not exceed privacy or verification requirements otherwise established by law.

An employer may only require verification if it has a written policy or a collective bargaining agreement outlining such requirements. Employers must notify employees of such policy or agreement, including the employee's right to assert that the verification requirement results in an unreasonable burden or expense on the employee, prior to requiring the employee to provide verification. If requested, verification must be provided to the employer within a reasonable time period during or after the leave.

NOTICE REQUIREMENTS

Employers must notify each employee of the employee's entitlement to paid sick leave, the rate at which the employee will accrue paid sick leave, the authorized purposes under which paid sick leave may be used, and that retaliation by the employer for the employee's lawful use of paid sick leave and other rights is prohibited.

Employers must provide such notification in written or electronic form and must make this information readily available to all employees. Notification of an employee's paid sick leave rights must be made no later than the commencement of employment.

Not less than monthly, employers must provide each employee with written or electronic notification detailing the amount of paid sick leave accrued and the paid sick leave reductions since notification was last made, and any unused paid sick leave available for use by the employee. Employers may satisfy the notification requirements by providing this information in regular payroll statements.

RECORDKEEPING

Employers are required to keep and preserve 1) paid sick leave accruals each month and unused paid sick leave available for use by an employee, 2) paid sick leave reductions each month including, but not limited to, paid sick leave used by an employee, paid sick leave donated to a co-worker through a shared leave program, and paid sick leave carried over to the following year, and 3) the date of commencement of the employee's employment.

SEPARATION OF EMPLOYMENT

An employer is not required to pay unused sick leave upon termination. However, if an employee leaves employment and is rehired within 12 months of separation by the same employer, any previously unused accrued paid sick leave must be reinstated, and the previous employment period must be counted for purposes of determining the employee's eligibility to use paid sick leave.

Employers may choose to pay unused accrued time upon separation of employment. However, the employee must mutually agree to such payout and any agreement should be signed by the employer and separating employee.

If PTO is used to comply with the law, the provision to reinstate any forfeited leave applies. If separate sick leave and vacation leave policies are maintained, this provision only applies to paid sick leave, provided the sick leave policy complies with all provisions of the law.

ATTENDANCE POLICIES

The new law protects employees from retaliation for lawfully using paid sick leave. Absences that are protected by the new law may not be counted under attendance policies where "points" are given for unscheduled absences. Similarly, incentive or bonuses for perfect or "good" attendance would prove retaliatory if denied to employees as a result of exercising their rights to use paid sick leave for authorized purposes.

Paid holiday policies that require an employee to work the day before or the day after the holiday in order to receive holiday pay must also exempt the lawful use of paid sick leave. If paid sick leave is available, the employee has a right to use it for authorized sick leave purposes. Withholding holiday

pay is viewed by the State as retaliation for the employee's lawful use of accrued and unused sick leave.

Absences for any reasons not protected by this or any other law (e.g., FMLA, ADA, Washington Family Care Act) may be counted under attendance policies. After all paid sick leave has been used, any future absences are not protected by this law.

ENFORCEMENT

Any complaint filed with Washington Labor & Industries ("L&I") alleging failure to provide paid sick leave will be investigated as an alleged violation of a wage payment requirement. Employees who believe that they were subject to retaliation by their employer may file a complaint with L&I within 180 days of the alleged retaliatory action. L&I will investigate the complaint and, if applicable, provide the employer up to 30 days to take corrective action.

If the Department of Labor & Industries finds that the employer did not properly provide paid sick leave in compliance with the new law, it may order the employer to:

- a. Provide employees full access to the balance of paid sick leave hours that should have been provided by the employer;
- b. Pay employees the normal hourly rate for each hour of paid sick leave that they would have used had the hours been available; and/or
- c. Not cap employees' carryover of paid sick leave into the year following the finding of noncompliance.

If the Department of Labor & Industries finds that the employer retaliated against an employee for exercising the right to use paid sick leave, the Department may order the employer to:

- a. Pay the employee the earnings that were not received because of the employer's retaliation, including interest of one percent per month;
- b. Reinstatement the employee to the same (or equivalent) position that the employee held when the retaliation occurred;
- c. Cease using an attendance policy that may result in employee discipline for using paid sick leave; and/or
- d. Pay a civil penalty of up to \$20,000 for a first violation, and up to \$40,000 for each repeated violation.

FREQUENTLY ASKED QUESTIONS

The FAQs below are provided to assist members in understanding and implementing the law. Eligible members are encouraged to call an Archbright HR Advisor before taking disciplinary action against an employee.

IS THE MANDATORY PAID TIME IN ADDITION TO AN EXISTING PTO (PAID TIME OFF) POLICY?

No, provided the existing PTO policy allows employees to enjoy the same or better provisions as required by this Act.

If an employee uses all of the employee's universal PTO time for purposes other than those that qualify for Paid Sick Leave and the need for Paid Sick Leave arises later, the employer need not provide additional paid time if its universal PTO program meets the above qualifications under the Paid Sick Leave law.

IS THE MANDATORY PAID TIME IN ADDITION TO AN EXISTING VACATION POLICY?

It depends. If an employer currently uses a universal Paid Time Off ("PTO") program or vacation policy that allows use for any purpose, AND the program satisfies the Paid Sick Leave provisions with regard to accrual, carryover, payment, and access to leave, then an employer need not provide paid sick time in addition.

CAN AN EMPLOYER CASH OUT ACCRUED SICK LEAVE DURING THE BENEFIT YEAR, IF REQUESTED BY THE EMPLOYEE?

An employer may offer employees the option to cash out their accrued sick leave 1) at the end of the year for unused paid sick leave accruals in excess of the 40 hour carryover, or 2) at the time of separation. Cash out of accrued, unused paid sick leave during on-going employment would not be in compliance with the State's paid sick leave requirements.

CAN THE EMPLOYER REQUIRE THE EMPLOYEE TO MAKE UP THE MISSED TIME?

No. The paid leave is considered protected leave. The employer cannot penalize or retaliate against an employee for taking protected paid sick leave. Additionally, the employer cannot require, as a condition of an employee taking paid sick leave, that the employee find a replacement worker to cover the absence.

CAN THE USE OF SICK LEAVE BE RESTRICTED AFTER NOTICE OF RESIGNATION IS GIVEN?

No. Employers may continue to have policies that prohibit the use of paid time off for vacation or personal reasons once an employee gives notice of resignation. However, policies that prohibit the use of sick leave *for authorized sick leave purposes* would be seen as retaliation under the law. Thus, if an employee calls out sick during the notice period, employers must allow the use of available sick leave.

Further, even if sick leave was used during the notice period, if sick leave or paid time off is paid out upon termination of employment, employers must still pay out any remaining sick leave or paid time off in accordance with company policy. Programs that count the lawful use of paid sick leave as a disqualifying factor from a bonus or reward (in this case payout of unused paid time off) is viewed by the State as a restraint on an employee's right to use accrued, unused paid sick leave.

IF A MORE GENEROUS PTO PLAN IS PROVIDED, CAN PROTECTED LEAVE BE LIMITED TO THE AMOUNT OF LEAVE REQUIRED BY LAW?

If a more generous paid time off policy is provided, an employer can limit the amount of protected leave to the amount required by law (i.e., 1 hour for every 40 hours worked). However, employers must clearly track the protected leave (and subsequent more generous balance). Best practice

would be to ensure clear communication of the protected leave and more generous balance (i.e., on monthly statement or pay statement).

WHAT IF AN EMPLOYEE CALLS OUT "SICK" THE DAY BEFORE OR AFTER A HOLIDAY?

Holiday policies requiring employees to work the day before and the day after the holiday in order to be eligible for holiday pay now also present challenges. While this statement is acceptable to have in employer policies, if accrued sick leave is available, the employee must be able to use it for sick leave reasons. Guidance from Washington Labor & Industries states that withholding holiday pay in this situation is viewed as retaliation for the employee's lawful right to use accrued sick leave. Employers may enforce the policy if the absence is due to a non-sick related reason.

WHAT IF AN EMPLOYEE CALL OUT SICK FOR A FULL DAY BUT ONLY HAS ENOUGH SICK LEAVE TO COVER PART OF THE DAY?

The protections under the paid sick leave law only apply when the employee has the leave accrued and available for use. For example, if an employee only has four hours of paid sick leave for use and the employee calls out for an eight hour shift, the part of the shift that the employee does not have leave available to cover is not protected by the law. In this situation, the unprotected hours could be subject to any applicable attendance policy.

IS VERIFICATION RESTRICTED TO MORE THAN 3 FULL CONSECUTIVE DAYS?

Not necessarily. Verification may be requested for absences of more than three consecutive days, whether full or partial day absences. This means, for example, an employee who misses 30 minutes of each consecutive day, attributed to authorized sick leave reasons, may be asked for verification if they again are sick for any portion of the fourth consecutive day.

CAN YOU ASK FOR VERIFICATION IF SICK LEAVE ABUSE IS SUSPECTED?

No, verification may only be requested when absences exceed three consecutive days. If sick leave abuse is suspected (i.e., unscheduled sick leave is consistently used on Mondays or Fridays) AND the employer has *objective evidence* to support the suspicion (i.e., social media post or text message) the employer can withhold the sick leave pay. If sick leave pay is withheld, the sick leave balance may not be reduced. *If sick leave abuse is suspected, eligible members are encouraged to call an Archbright HR Advisor before taking action.*

WHAT WOULD BE CONSIDERED OBJECTIVE EVIDENCE OF SUSPECTED ABUSE?

Disciplining an employee *lawfully* using paid sick leave based solely on an employer's suspicion of a pattern of abuse would most likely be considered retaliatory if a complaint were filed with L&I. Sufficient evidence is determined on a case by case basis, depending on the facts of the situation. An example may include screenshots of a text conversation between the employee and another employee, or a social media post, indicating the employee was not going to use paid sick leave for an authorized purpose. *If sick leave abuse is suspected, eligible members are encouraged to call an Archbright HR Advisor before taking action.*

SEATTLE PAID SICK AND SAFE TIME ORDINANCE (PSST)

In 2011, the Seattle City Council passed an ordinance requiring businesses operating within the City of Seattle to offer paid sick time and paid safe time for their employees. Seattle's ordinance was amended in 2018 to match the more generous provisions of the Washington paid sick leave law that went into effect on January 1, 2018. Where the two laws conflict, the law which provides the more generous benefit to the employee will govern. Below are the key differences of the Seattle Paid Sick and Safe Time ordinance (PSST), as amended.

EMPLOYEE COVERAGE

Seattle's PSST ordinance applies to both overtime-eligible and overtime-exempt employees. The provisions of the Seattle ordinance apply to:

1. Employees who perform their work in Seattle.
2. Employees who perform work on an "occasional basis" in Seattle are covered if they perform more than 240 hours of work in Seattle in a benefit year. Once this requirement is met, the employee is covered for the duration of employment. *This coverage only applies to employees who are typically based outside of Seattle and work in Seattle on an occasional basis; employees who regularly work in Seattle are immediately covered regardless of whether they are based inside or outside of Seattle.*

ACCRUAL AND CARRYOVER

The amount of paid time off varies depending upon the size (employee count) of the employer, under a three-tiered matrix:

1. Tier One: Businesses with 1 to 49 employees must allow employees to accrue paid time at a rate of one hour for every 40 hours of work. Tier One employees are entitled to carryover a maximum amount of 40 hours of unused time into the following year.
2. Tier Two: Businesses with 50 to 249 employees must allow employees to accrue paid time at a rate of one hour for every 40 hours of work. Tier Two employees are entitled to carryover a maximum amount of 56 hours of unused time into the following year.
3. Tier Three: Businesses with 250 or more employees must allow employees to accrue paid time at a rate of one hour for every 30 hours of work. Tier Three employees are entitled to carryover a maximum amount of 72 hours of unused time into the following year. NOTE: Tier Three employers with a PTO plan must allow employees to carryover a maximum amount of 108 hours of unused time into the following year.

Accruals for exempt employees are based upon a 40-hour work week. For exempt employees, no hours are required to accrue beyond the normal workweek of 40 hours. If the exempt employee's normal workweek is less than 40 hours, paid leave accrues based upon that employee's normal work week. (State law does not apply to exempt employees.)

If a frontloaded plan is provided, the employer *cannot seek reimbursement from an employee* if the employer frontloads more PSST hours than required, even if the employee agrees.

NOTIFICATION

Employers need to notify employees about provisions of the Seattle City Ordinance through one or more of the following ways:

1. Including a paper or electronic copy of information in employee handbooks or other written guidance. Employers must give employees specific written notice of the employer's paid sick and safe leave policy and include (1) employer's choice of benefit year, (2) tier size, (3) rate of accrual, (4) use and carry-over of hours, (5) manner in which employees are provided an

updated amount of available paid sick and safe time hours each time wages are paid, (6) notification requirements for absences and leave requests, and (7) notice of no retaliation for use of PSST.

2. Distributing a notice to each new employee at the time of hire.
3. Displaying a poster created by the Seattle Office of Labor Standards (OLS) in a conspicuous and accessible place in the workplace.
4. Each time wages are paid, employers must provide notification of PSST accrued and used.

UNION EMPLOYEES

The provisions of the Washington State Paid Leave cannot be waived for unionized workers. PSST provides union workers the same rights as non-union employees. However, the PSST requirements that are more generous than Washington State Sick Leave, (e.g. tier 2 and 3 carry over, tier 3 accrual) can be waived in a collective bargaining agreement only through December 31, 2018 or through expiration of the CBA in effect as of that date. After December 31, 2018, a waiver of any PSST is not permitted.

TACOMA PAID SICK LEAVE ORDINANCE

On January 27, 2015, the Tacoma City Council passed an ordinance requiring businesses operating within the City of Tacoma to offer paid sick time and paid safe time for their employees. The bill was amended on September 26, 2017 to match the more generous standards set by the Washington Paid Sick Leave law effective January 1, 2018. Below are the key differences of the City of Tacoma Paid Sick Leave law, as amended.

EMPLOYEE COVERAGE

City of Tacoma Paid Sick Leave applies to both overtime-eligible and overtime-exempt employees. The provisions of the City law apply to:

1. Exempt and Non-exempt employees who perform their work in Tacoma.
2. Employees who perform work on an "occasional basis" in Tacoma are covered if they perform more than 80 hours of work in Tacoma in a 12-month period (this is the "benefit year" as determined by the employer). Employees who fall below this threshold retain rights to paid leave under the Washington Paid Sick Leave law.

ACCRUAL, USE, AND CARRYOVER

Accrual of paid time begins at the start of employment or the date this ordinance takes effect, whichever is later. Employers must choose a reasonable method for providing notice of remaining available paid time on each pay stub or may develop an online system where employees may access their own paid leave information.

In addition to the reasons an employee may take leave under the State paid sick leave law, employees may also use sick leave for bereavement leave for the death of a family member.

NOTIFICATION

Employers need to notify employees about provisions of the Tacoma City Ordinance through one or more of the following ways:

1. Including a paper or electronic copy of information in employee handbooks or other written guidance.
2. Distributing a notice to each new employee at the time of hire.
3. Displaying a poster created by Tacoma in a conspicuous and accessible place in the workplace.

UNION EMPLOYEES

The ordinance provides union workers the same rights as non-union employees. However, the requirements of this ordinance can be waived in a collective bargaining agreement if the waiver is expressed and presented in clear and unambiguous terms.

DISCLAIMER: The information in this document is provided for guidance purposes only. It should not be construed as legal advice and is not intended to be a substitute for legal counsel. If you are a Silver or Gold member, please contact us to obtain advice from the Archbright legal team.