Insight

IN-DEPTH DISCUSSION

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On the Rhode Again: Paid Sick Leave Drought Ends with New Rhode Island Law

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After a nine-month drought in 2017, a new paid sick and safe leave law has been enacted in Rhode Island. Upon coming back into session in September, state legislators swiftly returned to advancing their identical paid leave proposals (H5413 and S290) and, after tweaking the bills, sent them to Governor Gina Raimondo (D), who signed the measures on September 28, 2017. The Healthy and Safe Families and Workplaces Act sets statewide standards. The provisions become operative on July 1, 2018, giving employers less than one year to review existing, or create new, policies to comply with the law.

Covered Employers, Employees, and Relations

The law requires employers with 18 or more employees in Rhode Island to allow employees to accrue and use paid sick and safe leave. It is unclear whether the law imposes unpaid leave requirements on smaller employers. It is hoped that the labor department will clarify this issue via guidance or regulations.

The law generally covers all employees, except: 1) individuals not considered employees under the Rhode Island Minimum Wage Act (*e.g.*, outside salespeople, golf caddies, certain seasonal resort employees); 2) independent contractors; 3) subcontractors; 4) federal work-study participants; and 5) licensed nurses employed by a health care facility on a per diem basis.[1]

Like most paid sick leave laws, Rhode Island's allows employees to use leave for themselves or to care for or assist a "family member," which

1 Use of the term per diem herein relates to registered nurses that are not obligated to work a regular schedule, work only when they indicate availability to work without an obligation to work if availability is not indicated, and receive higher pay than employees of the same facility performing the same job on a regular schedule. The law appears to have intended to delay applicability to construction industry employees covered by a collective bargaining agreement, but, as written, the "delayed" comply-by date is July 1, 2018, which is when the law applies. We hope the state labor department will clarify this provision via guidance or regulations.

includes traditional family members – child, grandchild, grandparent, parent(-in-law), sibling, spouse – as well as care recipients (individuals for whom an employee is responsible for providing or arranging health- or safety-related care) and members of the employee's household.

Accrual, Caps, and Carryover

If an employer has a paid leave policy (PTO, vacation, etc.) that provides the amount of annual paid leave hours the law requires, or offers unlimited paid leave, it is exempt from the law's accrual, carryover, and use requirements even if an employee uses his or her paid leave for non-sick-leave purposes. For example, if an employer offers 40 hours per year of paid time off to use for vacations, sick, or other reasons, the employer is exempt from providing the sick leave mandated by the law.

Otherwise, employees begin to accrue leave when employment begins or July 1, 2018 – whichever is later – at a rate of one leave hour for every 35 hours worked, which varies from the more common one leave hour for every 30 hours worked requirement. FLSA-exempt executive, administrative, and professional employees accrue leave based on a 40-hour workweek or their normal workweek (if fewer hours are worked). Unless employers choose a higher annual limit, they must allow employees to annually accrue up to 24 hours in 2018, 32 hours in 2019, and 40 hours in subsequent years. Generally, accrued but unused leave must be carried over to the following year.

Instead of continually tracking accrual, employers can provide monthly lump sums of leave, the amount of which varies based on how many average hours an employee works per week; as does the number of monthly distributions an employer must make. In providing a monthly lump sum alternative, Rhode Island borrowed from Massachusetts' paid sick leave law, which has a similar provision. Additionally, the law allows employers to provide, at the beginning of a year, leave an employee is expected to accrue in a year.

If employers front load the required annual amount of leave at the beginning of each year, they are not required to track accrual or allow carryover of leave from year to year.[2] Alternatively, if employers want to shift from an accrual-based to front-loading system, they can either carry over unused leave accrued under the accrual system, or cash out that leave at the end of the year, then front load the required amount when the subsequent year begins.

Using Leave

Unless an employer sets a higher limit, employees cannot annually use more than 24 hours in 2018, 32 hours in 2019, and 40 hours in subsequent years. The law allows employers to set a 90-day waiting period before newly hired employees can use leave. Additionally, unlike most other paid sick leave laws, it also restricts use to the 151st day of employment for seasonal employees (those hired into a position for which the customary annual employment is six months or less) and to the 181st day of employment for temporary employees (those working for, or obtaining employment per an agreement with, any employment agency, placement service, or training school or center).

The law allows leave to be used for the following sick time, safe time, and other purposes:

- Mental or physical illness, injury or health condition of an employee or covered relation.
- Medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition of an employee or covered relation.
- Preventive medical care for an employee or covered relation.

2 The law allows for pro rata frontloading for full-time employees whose workday is less than eight hours per day—the equivalent of five days. If a workday were eight hours, five days would be 40 hours, but employers are not required to provide that amount of leave until, at the earliest, 2020. Regulations might clarify this issue.

- Leave related to domestic violence, sexual assault, or stalking impacting an employee or covered relation.
- Closure of the employee's place of business, or a child's school or place of care, by order of a public official due to a public health emergency.
- Health authorities or a health care provider determines the employee or covered relation's presence in the community may jeopardize others' health because of the individual's exposure to a communicable disease, whether or not the employee or covered relation has actually contracted the communicable disease.

If an employee is committing fraud or abuse by engaging in an activity that is inconsistent with the law's covered purposes, discipline – up to and including termination – may be imposed for leave misuse. Discipline may also be imposed if an employee is exhibiting a clear pattern of taking leave on days just before or after a weekend, vacation, or holiday, unless the employee provides reasonable documentation that leave was used for a covered purpose.

Employees decide how much leave they need to use, unless this conflicts with state or federal law. However, an employer may set a minimum increment for leave use that cannot exceed four hours per day, and must be reasonable under the circumstances.

Requesting and Documenting Leave

Leave must be provided upon an employee's request, which can be made orally, in writing, electronically, or by any other means acceptable to an employer. An employer cannot require an employee to disclose details relating to domestic violence, sexual assault, sexual contact, stalking, or health information, as a condition of providing leave. When possible, a request must include the absence's expected duration. If leave is foreseeable, an employee must provide advance notice, and must make a reasonable effort to schedule use in a manner that does not unduly disrupt the employer's operations. If an employer wants to require notice for unforeseeable absences, it must institute and provide to employees a written policy with procedures for providing notice. If employees are not provided a copy of the policy, leave cannot be denied because of non-compliance with the policy.

If an employer gave employees advance written notice of the requirement, it may require reasonable documentation that leave of more than three consecutive work days was for a covered purpose. Additionally, written documentation may be required if leave is used during an employee's final two weeks of employment; another instance of Rhode Island borrowing from Massachusetts' law. Documentation signed by a health care professional indicating that leave is necessary is considered reasonable documentation for sick time, and the law provides employees various options for documenting safe time, *e.g.*, an employee's written statement, a police report, a court document, or a signed statement from a victim and witness advocate. An employer cannot require documentation to explain the nature of an illness or the details of domestic violence, sexual assault, or stalking unless required by another law. Additionally, an employer's requirements cannot unreasonably burden an employee, exceed other laws' privacy or verification requirements, or require an employee to incur unreasonable expenses. If an employer possesses health information or information pertaining to domestic violence, sexual assault, sexual contact, or stalking, it must be kept confidential and cannot be disclosed except to the affected employee or with the employee's permission, unless required by law.

Payment for Leave

Leave must be paid at the same hourly rate and with the same benefits – including health care benefits – an employee normally earns during hours worked, but in no case less than that the state minimum wage.

End of Employment Issues

Cash-out of accrued but unused leave is not required when employment ends. If an employee is rehired within 135 days of separation by the same employer, previously accrued but unused leave must be reinstated, and the employee can use it and accrue additional leave when employment recommences.

Notice Requirements, Penalties, Damages, and Enforcement

The law's notice and enforcement requirements are pegged to similar provisions in the Rhode Island Minimum Wage Act (RIMWA) (and, by reference in the RIMWA, the wage payment law). The RIMWA requires employers to display a state-created poster, so possibly the state labor department will revise the minimum wage poster or create a standalone paid sick leave poster. Under the RIMWA, aggrieved individuals are entitled to relief per the wage payment law, which allows a current or former employee, or an organization representing such employee, to file a lawsuit against an employer within three years of the alleged violation and, if successful, be awarded unpaid wages and/or benefits, compensatory damages, liquidated damages up to twice the amount of unpaid wages and/or benefits, equitable relief – including reinstatement of employment, fringe benefits and seniority rights – reasonable attorneys' fees and cost, and other appropriate relief or authorized penalties.[3] Additionally, the RIMWA allows complaints to be filed with the state labor department within the same timeframe.

Miscellaneous

Employers and employees can mutually agree to allow the employee, instead of using accrued leave for a covered purpose, to work an equivalent number of additional hours or shifts during the same or the next pay period. However, an employer cannot require, as a condition of providing leave, that employees search for or find a replacement worker to cover the hours during which they will use leave.

If an employer transfers a covered employee within Rhode Island, the employee is entitled to, and can use, all pre-transfer accrued but unused leave. When a different employer succeeds or takes the place of an existing employer, all original-employer employees that remain employed by the successor employer within Rhode Island are entitled to, and can use, all accrued original-employer leave.

What's Next?

For most of 2017, no new paid sick and safe leave laws were enacted. Even if Rhode Island had not broken this streak with its new law, employers are potentially facing new paid leave requirements in other jurisdictions across the country. On September 26, 2017, Tacoma, Washington finalized amendments to its paid leave law to conform requirements to the state law that will take effect on January 1, 2018. A proposed ordinance was introduced in Portland, Maine, and on September 28, 2017, the Austin, Texas City Council approved a resolution directing the city manager to solicit stakeholder input about implementing a paid sick leave ordinance and report findings at a December 5, 2017 City Council work session. On October 3, 2017, voters in Albuquerque, New Mexico will decide whether to approve a paid sick leave ballot measure. Additionally, we are possibly weeks away from Duluth, Minnesota's task force putting forth its proposal.

In the interim, businesses with Rhode Island operations should monitor the state labor department's website for guidance and regulations that (hopefully) will clarify existing requirements and fill gaps in the law (*e.g.*, how specific types of employees must be paid).

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3 The only penalty expressly provided for in the paid sick leave law is at least a $100 civil penalty for a first violation, with subsequent violations being subject to penalties within the RIMWA. It is expected that the state labor department will clarify via guidance or regulations which RIMWA penalties, if any, will apply for subsequent violations.