A Timely Analysis of Legal Developments

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Seattle Paid Sick Time and Paid Safe Time Ordinance Adopted

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On September 23, 2011, Seattle Mayor Mike McGinn signed into law the Seattle Paid Sick Time and Paid Safe Time Ordinance.[1] Effective on September 1, 2012, nearly all private sector employers must provide to employees who work in Seattle specified amounts of accrued, job-protected paid time off for personal illness, family care and other purposes. Seattle joins San Francisco, Washington D.C., Connecticut, and potentially Denver, in mandating that employers provide a paid time off benefit.[2]

The 50-page Seattle ordinance is both broad and complex. Employers with employees who perform work in Seattle should begin their compliance planning now, while substantial time remains before the effective date next year. This article provides a high-level summary of the law and key planning points, followed by a detailed analysis of the law.

Summary

Which Employers and Employees are Covered? Every private sector employer that employs more than four employees, at least one of whom performs work in Seattle, is covered by the law. All employees who perform their work in Seattle are covered, including part-time, casual and temporary employees. Covered employees include those who do work in Seattle only occasionally, if they do more than 240 hours of work in Seattle in a calendar year.

What Amounts of Paid Time Must be Provided? Minimum leave *accruals* vary by employer size and are based on an employee's hours worked. Employers may impose caps on an employee's *usage* and year-end *carry over* of accrued paid time, which vary depending on the employer's size. Exclusions of part-time employees, and strict annual "use it or lose it" policies, are both prohibited. Likewise, capping the maximum amount of paid time that an employee may accrue is likely prohibited (although a similar result may be obtained by capping year-end carry overs). The accrual rates and caps under the ordinance are:

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	Number of Employees (Prior Calendar Year) (Regardless of Location)	Accrual Rate	Annual Caps (Usage and Carry Over)
Tier 3	250 or more FTEs	1 hour per 30 hours of work (about 9 days per year for full time)	72 hours (9 days); 108 hours (13.5 days) for PTO programs
Tier 2	50 or more FTEs	1 hour per 40 hours of work (about 7 days per year for full time)	56 hours (7 days)
Tier 1	More than 4 FTEs	1 hour per 40 hours of work (same as Tier 2)	40 hours (5 days)
Exempt	4 or fewer FTEs	Exempt	Exempt

An employee may use accrued paid time beginning on the employee's 180th calendar day of employment. It appears that an employee's total period of employment, both inside and outside Seattle, is counted for this purpose. The ordinance does not require an employer to cash out unused paid time at separation from employment.

For What Purposes May the Paid Time Be Used? A single bank of paid time off must be made available for both "sick time" and "safe time" uses. *Sick time* involves an employee's own illness or medical care, or time for the employee to care for a family member who is ill or requires medical care. *Safe time* involves an employee's absence due to a business closure caused by a public hazard, a school closure caused by a public hazard that affects the employee's child, or domestic violence affecting either the employee, a member of the employee's family or household, or a person with whom the employee has a current or former dating relationship.

Key Planning Points

What Is the Key Planning Decision that All Employers Face? The key decision for all employers is whether to comply through an existing paid leave program, or by establishing a separate leave bank specifically for Seattle paid time. Issues to consider when making this decision include the following:

- Many existing paid leave programs include qualification periods, exclusions of part-time employees, and accrual caps or carry-over limits that are inconsistent with the ordinance. An employer that wishes to comply by using an existing program will be required to amend it to comply with the law, at least to the extent the plan applies to covered employees.
- Many existing paid leave programs include use conditions that are not permitted by the Seattle ordinance. For example, the ordinance does not allow an employer to require a doctor's note or other verification of need for an absence of three consecutive days or less, and does not allow an employer to require that the first day (or days) of an absence will be unpaid.
- Many employers agree in their paid leave policies that unused vacation and/or PTO will be cashed out at separation from employment. Modifying an existing paid leave program to comply with the Seattle ordinance may result in greater leave cash outs than the employer wishes to provide, due to the ordinance's requirement that employees be permitted to carry over a specified minimum leave amount at the end of each calendar year. A separate Seattle paid time bank could provide that unused Seattle paid time is forfeited at termination.
- The Seattle ordinance arguably prohibits an employer from placing a cap on the amount of paid time that an employee may accrue.[3] Many multi-state employers, however, have included accrual caps in their nationwide PTO programs, to address the fact that forfeiting accrued PTO is unlawful in California. The Seattle ordinance allows an employer to forfeit an employee's accrued paid time at the end of each calendar year, to the extent the accrual exceeds the applicable Seattle carry-over cap, and doing this will have an effect similar to imposing an accrual cap equal to twice the permitted carry-over cap. But although similar in effect, a year-end forfeiture is administratively inconsistent with the accrual caps many employers currently use.
- Paid time taken under the Seattle ordinance may not be counted as an absence when evaluating absenteeism, or under a no-fault

absenteeism policy. If an existing paid leave program is used to comply with the Seattle ordinance, all leave used under the paid leave program will potentially become subject to this "ignore the absence" rule.[4]

- The ordinance requires reinstatement of previously available Seattle paid time when an employee is rehired or transferred back to Seattle. An employer may have difficulties in tracking compliance with these requirements if it does not establish a separate Seattle paid time bank. Also, the ordinance does not address how reinstatement of paid time is to be handled when accruals were cashed out at separation from employment, or were used or cashed out during employment outside of Seattle.
- Tier-three employers (250 or more FTE employees) who choose to comply through a PTO policy will be subject to higher usage and carry-over caps than if they segregate sick and safe time from vacation (108 hours per year instead of 72).
- Employers that use an untracked vacation practice must consider whether that practice complies with the Seattle law, which contemplates that an accrued and tracked benefit will be provided.

What Key Administrative and Training Challenges Do Employers Face? Difficult challenges will be created by the following aspects of the law:

- Managers and supervisors must not require documentation for absences unless they exceed three consecutive days, and must not take Seattle paid time absences into account when evaluating absenteeism.
- Managers and supervisors must comply with the confidentiality provisions of the law, including keeping confidential the mere fact an employee's absence is for a Seattle paid time purpose.
- Managers and supervisors must waive any normal advance absence notification requirements that are inconsistent with the ordinance.
- Employers must track which employees are covered who are based outside of Seattle but perform some work in Seattle. This includes an obligation to track the number of hours that employees work inside the city, unless the employer chooses to grant Seattle paid time to all employees who do any work in Seattle.
- Employers must restore paid time accruals when an employee previously employed in Seattle is rehired or transferred back to Seattle.

What Parts of the Ordinance May be Subject to Legal Challenge? In general, the City of Seattle has the same authority to legislate within its boundaries as is possessed by the state legislature. For this reason, it would be difficult to attack the overall validity of the ordinance. There are some narrowly-targeted attacks available, however, that employers may wish to explore, including:

- Is the requirement to provide paid leave to employees whose primary work location is outside of Seattle an invalid extension of legislative power outside of Seattle's boundaries?
- Is the requirement to count employees who are employed entirely outside of the city, when determining the employer's tier level, invalid legislation outside of Seattle?
- Is the general compensatory damages remedy provided by the ordinance, which includes back pay, damages for mental suffering and attorneys' fees, beyond the authority of the City to impose?
- Is the provision that permits requests for documentation only for absences exceeding three consecutive days preempted when an employer is permitted to ask for the information pursuant to federal law (*e.g.*, the Americans with Disabilities Act) or state law (*e.g.*, workers' compensation)?

Why Should I Start Planning Now When the Effective Date is Not Until Late Next Year? Some compliance measures may require substantial lead time. Systems modifications may be necessary to permit tracking leave accruals based on hours worked, or to permit reporting available leave balances to employees with each payroll. Contracts and procedures with third-party administrators may need to be modified. Amendments to existing paid leave programs in collective bargaining agreements may need to be negotiated with unions. Employee placement agencies may wish to ask their customers to assume the Seattle paid time obligation for temporary employees who are not retained on the agency's payroll. And some employers may wish to adopt a paid leave program covered under the Employee Retirement Income Security Act (ERISA) to allow them to assert ERISA preemption as to their businesses.

Detailed Analysis of the Ordinance

Which Employers are Covered? All private sector employers with more than four full-time equivalent employees (either inside or outside of Seattle) are covered if they have at least one employee working in Seattle. The notice and anti-retaliation provisions of the law apply to all private sector employers, regardless of size, if the employer has any employees working in Seattle. The City of Seattle, as an employer, is covered by the law, but all other public sector employers are exempted.

Which Seattle-Based Employees are Covered? All employees are covered, including part-time, casual and temporary employees, if they "perform their work in Seattle." Only work-study employment is excluded. Thus, for example, excluding part-time employees from leave accrual is prohibited. Any employee who primarily works at a physical site of employment located in Seattle (other than work-study students) will be covered under this standard. In addition, some employees based outside of Seattle are covered, as is discussed below.

Which Employees Based Outside of Seattle are Covered? The ordinance applies to some employees who are based outside of Seattle, but the details are not clear.

The ordinance states that an employee who works in Seattle on an occasional basis is covered only if the employee performs more than 240 hours of work in Seattle within a calendar year. Thus, any employee who works more than 240 hours in Seattle in a calendar year is covered. In order to comply with this coverage rule, employers are expected to track the hours of occasional work in Seattle. Coverage presumably commences the day the employee crosses the 240-hour threshold in a calendar year, with the employee apparently falling back out of coverage again on January 1 of the next calendar year. The ordinance does not address this "in and out" issue directly, however. Likewise, the ordinance does not specify whether paid time accruals in these instances must be made retroactive to the first of the year.

The ordinance does not clearly address how coverage is determined for a non-Seattle employee who has worked less than 240 hours in Seattle year-to-date but who might be said to be working in Seattle on more than an occasional basis. The City Council appears to have intended that the 240-hour rule applies to all non-Seattle employees, but employees may contend that they are automatically covered if their work takes them into Seattle on a regular basis.

The ordinance states that if an employee transfers out of Seattle and then back, the employee will be entitled to all paid time that the employee accrued at the original Seattle location. Left unaddressed is whether the employer is given a credit for Seattle paid time off that the employee was permitted to use while employed outside of Seattle, or that was cashed out while the employee was employed outside of Seattle.

Must Unused Paid Time Be Cashed Out at Separation from Employment? The ordinance does not impose an obligation to pay out unused accrued paid leave at separation from employment. But if an employer uses an existing paid leave policy to comply with the ordinance, and that policy provides for a cash-out, the employer will be bound to comply with that policy provision.

What Details Do I Need to Know About Calculating an Employer's Tier Level? An employer's tier level is determined by average weekly paid hours of employment during the prior calendar year, counting employees both inside and outside of Seattle. For exempt employees, it is likely that the "paid hours of employment" calculation may be based on an assumed 40-hour workweek (or the lesser workweek applicable to a part-time exempt employee), but the ordinance does not directly address this question. The hours of paid work that equate to a "full-time equivalent" employee are based either on a 40-hour workweek or on the definition of full-time employment that the employer uses for other purposes, as adopted in writing or in practice. Employers who use workers employed by a temporary agency must include those paid hours of work when determining the employer's tier level.

What Details Do I Need to Know About Tracking Accruals? For nonexempt employees, paid time must be accrued based on actual hours worked, including overtime. For overtime-exempt employees, paid time need not be accrued for more than a 40-hour workweek. If an exempt employee's normal workweek is less than 40 hours, paid time may be accrued based on the employee's normal workweek. Paid time must begin to accrue at the commencement of employment, or on the effective date of the law, whichever is later.

An employer may track use of paid time in hourly increments, or smaller increments if an employer so designates. Private sector employers should not dock the paid leave bank of a salaried exempt employee for an absence of less than one hour, however, as doing so is inconsistent with exempt status under Washington law.

What if an Employee Is Rehired? If an employee is rehired within seven months of separation, previously accrued paid time that had not been

used must be reinstated. If at the time of the separation the employee was eligible to use paid time (*i.e.*, had been employed by the employer, inside or outside of Seattle, for 180 calendar days), the employee upon rehire will be immediately eligible to use paid time. If the employee was not already eligible to use paid time, the prior period of employment must be counted in determining when the employee crosses the 180-day threshold to become eligible. The employer is not required, however, to total periods of employment occurring over more than two calendar years. The ordinance does not address how the leave reinstatement rule is applied if the prior paid time was paid out to the employee when employment ended.

What Details Do I Need to Know About Applying the Caps? The usage and carry-over caps are applied on a calendar-year basis. For example, a tier-two employer may limit an employee's use of accrued paid time to 56 hours in any calendar year, and also may limit to 56 hours the amount of paid time an employee may carry over from one calendar year to the next. A strict use-it-or-lose-it policy is not permitted.

What Pay Rate Applies when Paid Leave Is Used? Employees using paid time must be compensated at the same hourly rate and with the same benefits, including health care benefits,[5] as the employee would have earned during the time the paid leave is taken. For uses of paid sick time, the ordinance goes on to specify that employees are not entitled to compensation for lost tips or commissions, and that compensation is only required for hours the employee was scheduled to work.

For What Purposes May the Paid Time Be Used? A single bank of paid time off must be made available for both "sick time" uses and "safe time" uses, which are:

> *The Employee's Own Illness or Medical Care (Sick Time).* An absence resulting from an employee's mental or physical illness, injury or health condition; for medical diagnosis, care or treatment; or for preventive medical care. There is no requirement that the absence involve a "serious health condition" as is required for coverage under the federal Family and Medical Leave Act.
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> *Family Care (Sick Time).* To allow an employee to care for a family member who has any of those same medical issues. There is no requirement that a "serious health condition" be involved, or that the employee's presence be necessary.
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> Covered family members are generally the same as under the Washington Family Care Act: A child, spouse, registered domestic partner, parent, parent-in-law or grandparent. The Seattle law expands the definition of registered domestic partner, however, to include those registered under the City of Seattle Registration of Domestic Partnership ordinance. Unlike domestic partner registration under Washington State law, Seattle domestic partnership is available to heterosexual couples under the age of 62. Also, individuals may more readily enter and leave Seattle domestic partnerships. Unlike domestic partnership under state law, Seattle domestic partnership status has no legal significance and can be dissolved by a simple filing with the City.
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> *Business or School Closure (Safe Time).* When the employee's place of business has been closed by order of a public official because of an infectious agent, biological toxin or hazardous material, or to allow the employee to care for a child whose school or place of care has been closed for any of those same reasons. Employers are not required to make paid time available for weather-related business or school closures.
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> *Domestic Violence (Safe Time).* For any of the reasons related to domestic violence, sexual assault or stalking for which unpaid leave must be granted pursuant to the Washington Domestic Violence Leave Law (RCW Chapter 49.76). The covered reasons are to seek or obtain, for the employee or the employee's family member or household member, any of the following: Legal or law enforcement assistance, treatment by a health care provider, social services, mental health counseling, safety planning, relocation, or other actions to increase safety.
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> Safe time may be used for the same family members for which sick time may be used, and in addition may be used for the employee's grandchildren, any person with whom the employee has a child in common (regardless of relationship), any person related to the employee by blood, marriage or domestic partnership, and any person with whom the employee has a current or former dating or cohabitation relationship.

May an Employer Use an Existing Vacation, Sick Leave or PTO Program to Comply? An employer with a combined or universal paid leave policy,

such as PTO, is not required to provide additional paid sick and safe time, provided the policy is modified so that paid leave is available for the purposes and under the conditions required by the ordinance, and complies with the ordinance's accrual, use availability and carry-over rules. Further, although not expressly addressed by the ordinance, we see no reason why an existing vacation policy or sick leave policy may not similarly be modified to comply with the new law.

If a tier-3 employer uses a combined or universal paid leave policy, such as PTO, to comply with the ordinance, the annual usage and carry-over caps applicable to that employer increase from 72 hours (9 days) to 108 hours (13.5 days). The mandatory accrual rate, however, remains the same. It is unclear whether a pure vacation policy can be considered to be a "combined or universal paid leave policy."

It is not clear whether compliance may be attained by merely allowing an existing paid leave program to be used for the reasons required by the ordinance, without amending the leave program to comply with all terms of the ordinance. If an employer merely continues to offer its existing leave program, an employee may argue that paid sick and safe time in compliance with the ordinance must be granted *on top* of the existing paid leave program.

What Advance Notice Must an Employee Provide? Seattle paid leave "shall be provided upon the request of an employee." Employees may be required to comply with the employer's usual and customary notice and procedural requirements for absences and/or requesting leave, provided they do not conflict with the purposes for which the leave is needed. A written request must be provided at least 10 days in advance, or as early as possible, unless the employer's policy requires less advance notice or the leave is unforeseeable. When the leave is foreseeable, the employee must make a reasonable effort to schedule the time off so as not to unduly disrupt the employer's operations. If the leave is unforeseeable, the employee must provide notice as soon as practicable.

What Documentation Must an Employee Provide? An employer may request documentation only for uses of paid time of more than three consecutive days. For a use of more than three consecutive days of sick time, the employer may require reasonable medical documentation, but a health care provider's note indicating that sick time is necessary is considered sufficient, and the employer may not require an explanation of the nature of the illness. If the employee is not offered health insurance by the employer, the employer must pay half the cost of obtaining the documentation. For a use of more than three consecutive days of safe time, the employer may require verification of the closure order, or verification that the employee or family or household member is a victim of domestic violence, sexual assault or stalking and that the leave is for one of the purposes covered by the law.

With regard to documentation, a conflict exists between the Seattle ordinance and the Washington Domestic Violence Leave Law (RCW Chapter 49.76). The state law allows an employer to require an employee to provide documentation of the need for any leave requested under the law, while the Seattle ordinance prohibits an employer from requiring documentation unless the employee takes off more than three consecutive days. Cautious employers will give Seattle employees the benefit of the Seattle rule, as it is unclear whether this aspect of the Seattle ordinance is preempted by the Washington statute.

Notice to Employees. Employers are required to give specified notice to employees of their rights under the new law. This notice may be provided by displaying a poster that will be developed by the Seattle Office for Civil Rights, by including the notice in an employee handbook, or by other written or electronic means.

Paystub Notifications. Employers must provide a written statement of paid time available to each employee each time wages are paid. This information may be provided using any reasonable system, including electronically, but many employers will find it administratively desirable to include this information on employee paystubs.

Recordkeeping. Employers are required to maintain reasonable records of paid time accrued, paid time used, and of an employee's hours worked in Seattle. If these records are not maintained, and a dispute arises over the amount of paid time available to an employee, it will be presumed the employer violated the ordinance.

Confidentiality. Employers are required to maintain the confidentiality of information provided by the employee or others in support of an employee's request to use paid time. For example, the mere fact an employee has requested or obtained leave under the ordinance must be maintained confidential.

May Use of Paid Time Be Counted as an Absence? No. The ordinance prohibits an employer from counting use of paid sick or safe time as an absence under an absence control policy that may lead to or result in any adverse action against an employee.

How May Shift Substitutions Be Handled? An employer may offer a shift trade within the same or the next pay period in lieu of an employee's request to use paid time, but the employee may not be required to accept it. An employer also may facilitate voluntary shift trades among employees. In eating and drinking establishments only, if an employer offers substitute hours or shifts in lieu of an employee's request to use paid time and the employee voluntary accepts, the employer may deduct from the employee's accrued paid time the smaller of the amount of paid time off that was requested or the amount of time worked during the substitute period.

How are Workers Provided by Staffing Agencies Treated? A temporary worker provided by a staffing agency is treated as an employee of the staffing agency only, unless the parties agree otherwise by contract, except that the worker's hours of work for the customer are included when calculating the customer's employer tier.

Staffing agency is defined broadly as any person undertaking to procure, recruit, refer or place individuals with an employer or in employment. As such, it may be advisable for placement agencies to include in their contracts a provision requiring their customers to assume all obligations to provide Seattle paid time to placed employees.

What Special Rule Applies to Start-Up Companies? For a new business that employs 249 or fewer FTE employees, on average, during its first 90 days as an employer, the ordinance does not apply for the first 24 months the business is an employer.

How Are Transfers Within an Employer Handled? If an employee is transferred among divisions, entities or locations within Seattle, while remaining employed by the same employer, the employee's paid time rights may not be affected by the transfer.

Can Employees Waive Their Rights Under the Ordinance? The requirements of the law may be waived in a collective bargaining agreement, provided the waiver is express, clear and unambiguous. Any other waiver of rights under the law is prohibited and deemed void.

While the anti-waiver provision bars individual employees from agreeing in advance to waive their rights, the ordinance does not directly address whether employees may agree to be cashed out of accrued paid time after it is accrued. Under Washington law, employees are generally free to waive past rights in exchange for payment. A City staff memo prepared before the ordinance was adopted, however, stated the anti-waiver provision "[i]mplies that individual 'premium pay' programs, which offer additional compensation in lieu of benefits, will *not* satisfy the requirements of the ordinance (*unless negotiated through a union*)." (emphasis in original)

Are Employees Protected against Retaliation? Yes. It is a violation of the ordinance for any person to interfere with any attempt to exercise a right under the ordinance, or for an employer to take adverse action or discriminate against an employee because the employee has exercised in good faith, mistakenly or not, the rights protected by the ordinance.

What Damages and Remedies May an Employee Seek? The ordinance permits any remedy deemed necessary to correct a violation, which may include reinstatement, back pay, lost benefits, attorneys' fees, and damages for humiliation and mental suffering not to exceed $10,000. (It is an open legal question whether the City had the authority to enact these remedies.) Willful violations of the ordinance are defined as a crime punishable by a civil fine or forfeiture not to exceed $500.

The ordinance provides for enforcement initiated by a complaint to the Seattle Office for Civil Rights and culminating in an administrative hearing before a Hearing Examiner. A draft provision for direct civil actions in court was deleted, on advice from the City's law department that the City lacked authority to enact it. Further, an employee who is discharged allegedly in violation of the ordinance probably cannot sue directly in court for wrongful discharge in violation of public policy, because the ordinance does not evidence a public policy applicable to the state as a whole.

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[1] Chapter 14.16, Seattle Municipal Code.

[2] The San Francisco and District of Columbia ordinances have been in effect since 2007 and 2008, respectively. The Connecticut law takes effect on January 1, 2012. This November, Denver residents will vote on a paid sick time and paid safe time initiative; pre-initiative polling indicated that 65 percent of likely voters supported the concept. A Milwaukee paid sick days initiative, passed by voters in 2008, was voided by state preemption legislation on May 5, 2011. In June of this year, the Philadelphia City Council passed a paid sick leave law, but the Mayor vetoed the measure, citing concerns of putting thousands of jobs at risk and discouraging businesses from coming to Philadelphia.

[3] The ordinance requires that one hour of paid time be accrued for each increment of 30 (or 40) hours that an employee works. The ordinance allows an employer to place a cap on year-end carry overs, but does not expressly permit the imposition of a cap on accruals.

[4] Employers must already comply with this rule when an employee takes FMLA leave, but Seattle paid time is available for much broader uses. For example, FMLA leave for personal illness is limited to "serious health conditions" and is subject to the employee providing medical certification. Seattle paid time, by contrast, is available for any illness, and no medical certification may be required unless the use exceeds three consecutive days.

[5] The requirement to continue health care benefits is likely preempted by ERISA.