



# Stoel Rives World of Employment

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## Top 25 FAQs Employers May Have About Implementing the New Portland Paid Sick Leave Ordinance in 2014

In March 2013, the Portland City Council [passed the new Portland Paid Sick Leave Ordinance](#) requiring all but the smallest employers to provide paid sick leave (“PSL”) for employees who work within city limits. On November 1, the city released [final regulations](#) interpreting the Ordinance and fleshing out some of the requirements in more detail. Also, the [original Ordinance](#) was [amended in early October](#) while the regulations were being finalized. The law becomes effective January 1, 2014, so employers with employees in Portland need to review relevant policies to confirm they comply with the new ordinance.



Many of the Ordinance’s requirements will look familiar to employers used to dealing with other leave laws, particularly the Oregon Family Leave Act (“OFLA”). But this Ordinance has its own twists, many of which result from the fact that it’s not a state-wide law like OFLA but instead only applies to employees within Portland. This list of 25 frequently asked questions (“FAQ”) covers many of the the questions employers might have as they work through understanding the Ordinance and update their policies to ensure compliance. Yes, there are really 25 of them.

### The Basics

#### **1. What does the Ordinance require in 20 words or less?**

Employers with six or more employees must allow employees in Portland at least 40 hours of PSL per year. That’s 19 words! But of course, there’s a lot more to it than that, so read on.

### The “Which,” “What,” and “Who” – Which Employers Are Covered and What PSL Do Employees Get?

#### **2. Which employers are covered by the Ordinance?**

The short answer is that all employers are “covered” by the Ordinance. Employers with six or more employees are required to provide PSL (i.e., *paid* sick leave) to its Portland employees. Smaller employers with less than six employees are also covered, but must only provide *unpaid* sick

leave. Note that for the purposes of counting whether the employer meets the six employee minimum required for PSL, all of the company's employees are counted, including employees not located in Portland, even though only employees in Portland are entitled to leave.

This FAQ doesn't address separate requirements for those smaller employers further—let us know if you're one of them and have a question about it.

### **3. Does that include non-profit or government employers?**

Yes and no. The U.S. government and state of Oregon are specifically exempted from the Ordinance. But there's no exception for non-profits—they're covered and are required to provide PSL.

### **4. How much PSL must covered employers provide?**

All employees must accrue at least one hour of PSL for every 30 hours of work performed within the city of Portland, up to a maximum of 40 hours per year. PSL is only accrued for hours actually worked (including overtime hours), but not for time spent on employer-approved leave or other non-work time. Note that it is the location of where the *employee* works that is important, not where the *employer* is located. If an employer is based in Portland but also has employees outside the city, it is only required to provide PSL for its Portland employees, not those who work outside of Portland.

### **5. Are exempt salaried employees also entitled to PSL?**

Yes. All employees are entitled to leave and accrue PSL at the same rate. Full-time exempt salaried employees are presumed to work 40 hours per week for accrual purposes; salaried employees working less than full time accrue based on their regularly scheduled workweek.

### **6. Are part-time or temporary employees also required to accrue PSL?**

Yes! Again, all employees must accrue PSL at the required rate of one hour of PSL per 30 hours of work, and the Ordinance and regulations specifically state that includes temporary and part-time workers. Temps placed with an employer through a staffing agency are considered employees of the staffing agency for purposes of the Ordinance, and the staffing agency will be responsible for providing required PSL.

Employers should watch out for this one! In many companies part-time employees working less than a specific number of hours (e.g., 20 hours per week or less) are often excluded from some benefits including paid leave or vacation plans. Those employees will need to accrue PSL under the Ordinance.

### **7. My company already provides paid sick leave or paid time off (“PTO”)—do we need to provide more PSL now?**

Not necessarily. Employers with preexisting paid sick leave or PTO policies at least as generous as what the Ordinance requires are considered to already comply with the Ordinance and are not required to provide additional paid leave. Watch out for hidden gotchas, though! To fall within this carve-out, the employer's current paid sick leave or PTO policy should be at least as generous as the Ordinance *in every respect*—e.g., same rate of accrual, available to all employees (including part time and temporary), can be used for the same purposes, etc.

### **8. I want to provide more PSL than what the Ordinance requires. Is that OK?**

Of course. Like OFLA and most other laws regulating leave, employers may always provide paid leave more generous than what the Ordinance requires. For example, to save yourself the administrative hassle of trying to track accrual and eligibility issues under the Ordinance, you may wish to just give all employees 40 hours of PSL each year--you can do that. But only the 40 hours

under the Ordinance and accrued at the required rate will be considered “protected” PSL under the law.

**9. Can employees carry over unused but accrued PSL from year to year?**

Yes, up to 40 hours. Carrying over PSL does not increase the total amount of PSL an employee may use in a year, however. The maximum an employer is required to allow an employee to use is 40 hours per year, regardless of how much is carried over from the previous year.

**10. Does the employer need to pay out employees for accrued unused sick leave if they’re terminated?**

No, but you can if you want to. The general rule in Oregon is that employers must pay out accrued unused paid time off (sick leave, vacation, PTO, etc.) if its policies state that it will do so, but it’s not required. The Ordinance operates in the same way.

**11. My current employees have already accrued PSL or equivalent PTO—is that automatically converted to PSL protected under the Ordinance?**

No. Employees only begin to accrue PSL starting on January 1, 2014, so any already-accrued PSL is not considered “protected” PSL required by the Ordinance.

**12. Do new employees start accruing leave from day one?**

Yes. While employees only become “eligible” to *use* PSL later on during employment (see # 16, below), all Portland employees begin *accruing* PSL immediately when they start working.

**13. I have employees who move around the Portland area and its suburbs and only work sometimes within the city of Portland. Do those employees also accrue PSL?**

Yes, but only for work actually performed within the Portland city limits. This will be straightforward for most employees, who usually work primarily at one location and will accrue PSL for all the hours they work. But other employers with employees who work both in and out of Portland may want to track work time in Portland separately from work time in other locations for the purposes of PSL accrual.

This may be one of the most administratively difficult aspects of complying with the Ordinance for employers that (1) don’t already provide equivalent PSL and (2) have employees who occasionally move from location to location. Those types of employees could include delivery truck drivers who cover both the City and surrounding areas, construction workers who move to different job sites throughout the year, retail workers who may work one day at a store in Portland but the next day at a store in Beaverton, or office workers from a suburban worksite who travel to a Portland office occasionally for meetings. Only those hours spent working in Portland count toward accrual of PST.

**14. My company is located outside of Portland, but I have employees who live in Portland and telecommute to work. Do they get PSL under the Ordinance?**

Yes. Again, the physical location of the employee is what is important for accrual purposes, and any employee accrues PSL for hours worked within the city limits of Portland. That includes anyone who telecommutes from a location in Portland (i.e., their home) for an employer located outside the city. On the other hand, if an employee who lives in the suburbs and commutes to work in Portland chooses to work from home one day, those hours working from home are not within the Portland city limits and therefore probably don’t count towards PSL accrual.

**15. My employees’ sick leave is governed by a collective bargaining agreement (“CBA”) between the company and their union—what should I do?**

Unlike similar Ordinances enacted recently [in Seattle](#) and San Francisco, the Portland Ordinance and related regulations don't address or provide a carve-out for CBAs. This means that even unionized employers must comply. Provided that the leave provision in the CBA is at least as generous as what the Ordinance requires, you need not do anything since employers that already provide equivalent PSL are already in compliance (see #7 above). If it's not, however, you may need to make sure employees get the required PSL. Note that before implementing those changes you should plan to discuss them with the union, as leave policies are usually considered a "mandatory subject of bargaining." Also, CBAs often don't cover all employees (such as administrative or managerial employees), so make sure those other employees not covered by the CBA are also provided PSL as required by the Ordinance.

### **The "When" and "How": When Can Employees Use Accrued PSL?**

#### **16. Can employees begin using PSL immediately as soon as they accrue it?**

No, at least at the beginning of employment. While employees begin *accruing* PSL immediately when they begin working (after January 1, 2014), they aren't immediately "eligible" to *use* it. Employees become "eligible" to use accrued PSL only after they have worked at least 240 hours (six weeks at full-time work) within the city of Portland after January 1, 2014, and have been employed for at least 90 days. (Note that if you allow employees to take leave during this initial 240 hour / 90-day period, it likely will *not* count against the employee's PSL accrual under the Ordinance.) After the 240-hour and 90-day thresholds are reached, however, employees can use accrued PSL as soon as they accrue it.

Similar to OFLA / FMLA, companies can define which type of "year" to use for the purposes of tracking both eligibility and accrual. A year can be any twelve month period that is normally used for calculating wages and benefits, including calendar years, fiscal years, or the year running from the employee's start date. While the Ordinance does not specifically allow for "rolling" leave years based on when employees actually use PSL (similar to OFLA / FMLA), that would probably also be allowed.

#### **17. Can employees who only sometimes work in Portland use PSL for any absence?**

No. Somewhat confusingly, *use* of PSL is tied to work performed in Portland, just like accrual is. This means that employees can only use PSL for shifts or days when they are scheduled to work *in Portland*. While this will often be straightforward since most employees work in a single location, this could be difficult to track in the case of employees who work sometimes in Portland but not always, such as delivery drivers or retail workers (see #13 above). Similarly, part-time or temporary employees can only use PSL on days they are normally scheduled to work. For example, a part-time employee who only works two days a week cannot take a full week (five consecutive days) of PSL; he or she must only use PSL for the two days in the week he or she would otherwise actually be working.

As with the note in #16 above regarding providing PSL within the 240-hour / 90-day initial period, note that if you allow employees to take PSL to employees for time they would not be working in Portland, that PSL probably will not count against the employee's bank of accrued PSL under the Ordinance.

#### **18. For what purposes can employees take leave?**

A lot more than you might think from the term "sick" leave. The Ordinance of course allows employees to take PSL when they have an illness such as a cold or the flu. But it also covers absences due to mental illness, injury, or a "health condition," defined as "including, but not limited to, pregnancy, childbirth, post-partum care and preventative medical care." The regulations state that routine doctor visits and check-ups, such as pre-natal checkups and dental visits, are covered

absences. Moreover, the Ordinance covers domestic violence or stalking leave allowed under [ORS 659A.272](#).

Employees may also take PSL to care for any “family member” who is dealing with any of those conditions or situations. The Ordinance adopts the definition of “family member” from OFLA, [ORS 659A.150\(4\)](#), which includes the employee’s biological, adopted, or foster child, spouse, domestic partner (both opposite sex and same sex), parent, parent-in-law, grandparent, grandchild, or any person for whom the employee acts “in loco parentis” (as a parent). Finally, the Ordinance allows employees to take PSL for certain public health reasons, including when (1) the employee’s worksite or child’s school is closed due to a “public health emergency,” or (2) public health authorities determine the employee’s or one of his or her “family member’s” presence in the community jeopardizes the health of others.

### **19. How much PSL can employees take at one time?**

Employees can take PSL in increments of one hour (or less if allowed by the employer), such as for routine doctor visits or similar partial day absences. Or, the employee can use all his or her accrued PSL in one block up to the maximum of 40 hours.

### **20. Can I require employees to provide advance notice?**

Yes, up to a point. The Ordinance states employers can require employees to follow its standard written procedures for notification in the event of absences (note that if you don’t have a *written* policy for how employees should provide notification of a PSL absence, the regulations specifically require that you adopt one). Generally, employees can be required to provide advance notice per the employer’s policy for planned PSL absences, and at the beginning of a shift or as soon as “practicable” for unplanned absences. While employers may deny PSL to employees who don’t follow proper notification procedures, it may be risky as the employee is only required to make a “reasonable effort” to schedule leave in a manner that doesn’t “unduly disrupt” the employer’s operations.

### **21. Can employees be required to submit a doctor’s note or other documentation to substantiate the need for PSL?**

Most of the time, no. Employers may only require documentation of the absence, such as a doctor’s note, if the employee takes PSL for *more* than three consecutive work days. There is a narrow exception if an employer suspects “sick time abuse,” but generally this means that employees cannot be asked for documentation for most absences, including the usual single sick day or partial day absences for routine doctor visits.

Note that consecutive work days means consecutive calendar days that the employee is normally scheduled to work. The regulation provides an example that if an employee is normally scheduled to work Monday, Wednesday, and Friday and takes PSL for those three days, those are consecutive work days and the employer may request reasonable documentation if the employee needs PSL on the *next* scheduled work day (remember, it’s for absences of *more* than three consecutive days). Note also that it does not mean *full* calendar days—employees who miss consecutive days, no matter how much or little they were scheduled to work on those days, can be required to submit documentation of the absence.

### **22. Great, one more leave law to track. If someone is taking OFLA or FMLA leave is that also counted as PSL and vice versa?**

Maybe, but not necessarily. The Ordinance doesn’t specifically address this issue. But FMLA and especially OFLA (on which the Ordinance is modeled, in part) cover some of the same types of leave also covered by the Ordinance. For example, almost any illness qualifying as a “serious health

condition” under OFLA/FMLA would probably also qualify as “sick time” under the Ordinance, and the Ordinance adopts OFLA’s definition of “family member.” The Ordinance and OFLA also both cover leave related to pregnancy or pre-natal visits, or taking “sniffly kid” leave to care for sick children home from school. When PSL is used for a purpose also protected by OFLA/FMLA, the employee will be drawing down his or her bank of both accrued PSL and also OFLA/FMLA leave. For those employers that already offer paid sick or PTO leave, this would be no different than allowing (or requiring) employees to use accrued paid time off concurrently with OFLA/FMLA leave.

But the Ordinance and OFLA/FMLA also cover different types of leave. For example, the Ordinance covers the employee’s (or employee’s family member’s) routine doctor or dental visits, employee sick days for common cold, or leave under Oregon’s stalker leave law. OFLA/FMLA do not cover those types of leave. In those cases, the employee would only draw down his or her bank of PSL, but his or her bank of OFLA/FMLA leave would remain untouched and could still be used for any OFLA/FMLA qualifying purpose.

### **The Other Stuff You Need to Do and Watch Out For**

#### **23. What if I think an employee is abusing PSL or it causes problems with the company attendance policy?**

Protected PSL absences cannot be counted against an employee for the purposes of a company attendance policy. Also, while employers are expressly allowed to discipline or terminate employees who misuse or abuse PSL, be very careful about doing so and be sure to thoroughly document the misuse. “Retaliation” claims of all types are becoming ever more common, and the Ordinance specifically prohibits retaliation for taking or requesting PSL. It can also be difficult to show that an adverse employment action was because of PSL misuse or abuse, and not motivated by the fact an employee took protected leave.

#### **24. Do I have to update my written policies, put up a poster, and otherwise inform employees about the Ordinance?**

Yes, yes, and yes. Employers must provide written notice to employees of the rights under the Ordinance by doing all of the following: (1) disseminating a written notice to all employees (can be email, a statement mailed with paychecks, a supplement to the employee handbook, or a posting on the company intranet), (2) posting a poster at each worksite, and (3) notifying each employee at least once per quarter of how much available PSL they have. Regarding the last requirement, pay stub summaries of accrued leave—which many employers already do—would probably be enough.

#### **25. Can employees file a lawsuit to enforce the Ordinance?**

Yes, an employee can either file a complaint with the Oregon Bureau of Labor and Industries (“BOLI”) or file a lawsuit in court, to remedy either an unlawful denial of PSL or retaliation for having requested or used PSL. Employees filing such complaints can recover damages, civil penalties, and attorney fees.

Note that BOLI has issued a statement stating it will not begin enforcing the Ordinance against employers who commit unintentional violations until July 31, 2014, to allow employers extra time to adjust and revise policies as needed. However, because aggrieved employees can file a lawsuit without first filing with BOLI, that grace period may not help employers much. So employers should not delay in reviewing and updating their leave policies to ensure they are in compliance with the Ordinance before 2014 starts.

### **Stay Tuned For Further Developments and Updates**

Whew. That covers most of the key points employers will need to know regarding what the new Ordinance and its regulations require and how company policies may need to be revised to comply. But believe it or not, there are even more nuances and details that we couldn't cover here. If you have questions about any of those more arcane requirements, or any of the provisions discussed in this FAQ, you should contact your labor and employment lawyer for advice.

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