

## OUR INSIGHTS

### Implementing Arizona's New Paid Sick Time Law: What Employers Need to Know

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Last month we wrote about the likely passage of Arizona's Proposition 206, the so-called Minimum Wage and Paid Time Off Initiative, and we touched on some of its key elements. Now that Prop. 206 has passed, we offer the following comprehensive analysis of the Paid Sick Time provision (PST) and primer on what Arizona employers need to know—and do—to get ready before July 1, 2017, when the law takes effect.

#### Who Is Covered?

**Employers:** Virtually every private employer with employees in Arizona, as well as all municipalities and school districts, are covered. So-called "small businesses" are exempt from coverage. However, to qualify as a "small business," a business must have gross annual revenues of less than \$500,000 and not be engaged in interstate commerce or in the production of goods for interstate commerce. State of Arizona employees and federal workers are also exempt.

By way of comparison, in the case of nongovernmental employers, the federal Family and Medical Leave Act of 1993 (FMLA)—which requires the provision of certain *unpaid* leave benefits—applies only to companies with 50 or more employees within a radius of 75 road miles for at least 20 workweeks in the current or preceding calendar year. The difference means that even small Arizona companies, which up to now have not been subject to *any* mandatory leave requirements, must now find the time and resources to ensure compliance with the new PST law.

**Employees:** The Arizona Minimum Wage Act (AMWA), which Prop. 206 amended, defines as a covered employee "any person who is or was employed by an employer," except for those working for a parent or sibling and babysitters. "Employee" even includes recipients of public benefits who are engaged in "work activity" as a condition of receiving public assistance.

By way of comparison, to be a covered employee under the FMLA, an individual must work for the employer for at least 12 months and have worked at least 1,250 hours during the previous year. As a practical matter, employees in Arizona who may never become eligible for FMLA leave will be eligible to take PST beginning 90 days after starting employment—and benefit accrual begins on the first day of work.

**Family Members:** The PST law also covers an employee's time off to care for or obtain defined services

for a “family member.” The law broadly defines family members to include:

- children of any age (including biological, adopted, or foster children, legal wards, children of a domestic partner, or children for whom the employee stands *in loco parentis*);
- parents (including biological, foster, stepparents or adoptive parents or legal guardians of the employee or the employee’s spouse or domestic partner, including persons who stood *in loco parentis* when the employee or employee's spouse or domestic partner was a minor child);
- spouses or domestic partners;
- grandparents, grandchildren, or siblings (including foster, adoptive, or step relationships) of the employee or the employee's spouse or domestic partner; or
- any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

### What Is “Paid Sick Time”?

Paid sick time is defined as “time that is compensated at the same hourly rate and with the same benefits, including health care benefits, as the employee normally earns during hours worked.” In other words, PST must be paid at no less than the rate the employee would have earned had he or she actually worked the PST. Employees may use accrued PST in the smallest increments that the employer’s payroll system uses to account for absences “or use of other time.”

### How Does PST Accrue?

**Rate of Accrual:** An employee’s PST accrues at a rate of no less than one hour for every 30 hours worked. If the employer has 15 or more employees, the maximum accrual is 40 hours of PST per year. If the employer has fewer than 15 employees, the maximum accrual is 24 hours of PST per year.

**FLSA-Exempt Employees:** Employees who are exempt from the federal Fair Labor Standards Act’s (FLSA) overtime requirements (e.g., salaried exempt managers, professionals, administrative employees, or outside salespeople) are presumed to work 40 hours per week for accrual purposes, except for weeks in which they work less than 40 hours, in which case their PST accrues based on the actual number of hours worked.

**Loaning PST:** Employers may “loan” PST to an employee in advance of the employee’s earning it. The statute is silent, however, as to how an employer may recover loaned PST upon the employee’s termination of employment. Perhaps this gap and other unanswered matters will be addressed in regulations that the PST law mandates the Industrial Commission of Arizona (ICA) issue.

**What is a “Year”?** The statute says a year is “a regular and consecutive 12-month period as determined by the employer.” Therefore, employers may designate a fiscal year (or some other consecutive 12-month period) as an accrual or usage year. However, if an employer fails to designate a year, the statute is silent on what a “default” year should be. Presumably, the ICA regulations will address this. By comparison, an FMLA accrual year defaults to a calendar year.

**Existing PTO Policies:** Employers with existing paid time off (PTO) policies that meet or exceed the benefits provided under the PST law are “not required to provide additional paid sick time.” A logical reading of this clause suggests that any PTO policy which provides fewer benefits than the PST law should be amended to reflect that PST supersedes the company’s PTO policy for its Arizona employees.

### **In What Kinds of Situations May PST Be Used?**

PST in Arizona may be used for a wide assortment of reasons—many more than under the FMLA. For example, while FMLA requires the existence of a “serious health condition” for medically based FMLA leave, PST must be permitted for an employee’s (or for an employee to care for a family member’s) “mental or physical illness, injury or health condition,” “need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition,” or “need for preventive medical care.”

PST may also be used if a public health emergency causes the employee’s “place of business” to close, or the employee’s child’s school or daycare to close. Employees also may use accrued PST to address various issues (whether as to the employee or the employee’s family member) relating to domestic or sexual violence, or “abuse or stalking,” including the need for medical attention, services from a victim services program, counseling, relocation, or attendance at legal hearings. However, unlike FMLA, PST does not mandate time off to care for newborn or newly placed adopted children.

### **What Happens to Unused, Accrued PST at the End of a Year?**

Unused, accrued PST carries over to the following year but will not affect the minimum annual accrual and use caps during that following year (i.e., the employer still is not required to allow more annual accrual or use than the minimum 24 or 40 hours requirements, depending on size). The law also includes an unusual payout provision that permits an employer to pay out unused, accrued PST in lieu of carryover to the following year. However, any incentive to employ this option is thwarted by the law’s simultaneous requirement to “provide the employee with an amount of earned paid sick time that meets or exceeds the requirements of [the PST law] that is available for the employee’s immediate use at the beginning of the subsequent year.” In other words, voluntarily paying out accrued PST merely earns the employer the obligation to advance that sum of PST to be immediately available the following year.

### **What Happens to Accrued PST When Employment Ends?**

**Termination Without Reinstatement:** Employers are not required to pay unused, accrued PST to employees whose employment terminates for any reason, including involuntary termination, voluntary resignation, layoff, or death.

**Reinstated Employment:** All accrued PST must be reinstated if, after a “separation from employment,” the employer rehires the employee within nine months. Presumably, this would apply to employees reinstated after a temporary layoff.

**Successor Employers:** If an employer “succeeds or takes the place of an existing employer,” the PST accrued by employees of the original employer who “remain employed” by the successor employer remains valid and exercisable. The statute does not define what constitutes a “successor” employer, nor does it explain whether “remain[ing] employed” means the same thing as being hired by the “successor.” Unless specifically addressed to the contrary in the ICA’s anticipated regulations, successor employers

should consider treating accrued PST as an assumed liability irrespective of how the predecessor employer's employees become employees of the successor.

### **What Notices Are Required?**

**Employers' General Notice Requirements** : Employers are subject to various notice and disclosure requirements under the PST law. By its effective date (July 1, 2017), employers must post notices to employees informing them of their entitlement to earn PST, how much PST they are entitled to earn, the guaranteed terms of PST use, the prohibition against retaliation, the right to file a complaint, and the ICA's contact information. This notice must be provided in English, Spanish, and any other language the ICA requires. In other words, your multipurpose U.S. Equal Employment Opportunity Commission notice poster, or other such poster, will get even bigger next year. The statute directs the ICA to create sample notices in each language.

### **Employees' Notice Requirements**

- **"Foreseeable Leave"**: If the PST is "foreseeable" (the statute does not elaborate on the meaning of this term), employees must make a "good faith effort" to give their employers advance notice and schedule their absences in a way that lessens the impact on the employers' businesses. Exactly what constitutes "good faith effort" is undefined. However, the statute does expressly state that a request for PST leave "may be made orally, in writing, by electronic means or by any other means acceptable to the employer." Absent clear regulatory guidance on the timing and content of notice, employers should proceed very cautiously before denying PST on the basis nonexistent or deficient notice of foreseeable leave.
- **"Unforeseeable Leave"**: The law allows employers to require employees to give notice of an "unforeseeable" need for PST, *provided* those notice requirements are contained in a written policy that explains the procedures that employees must follow to provide notice *and* the policy is disseminated to affected employees before the leave arises. The scope of such procedures is not addressed in the statute. It is noteworthy that the statute does say that "when possible, the [employee's] request shall include the expected duration of the absence."
- **Replacements**: Employers cannot require an employee to find a replacement worker for his or her time off during PST leave.

### **Verification Permissible, but Very Limited**

Employers' ability to verify that employees are not abusing PST is limited, especially when leave is taken for a short duration. For example, employers may require certain statutorily defined reasonable documentation that PST is being used for a permissible purpose only when the employee takes three or more days of consecutive PST. The implication, of course, is that employers likely will be unable to verify if employees are using PST for permissible reasons when taken in increments shorter than three days.

For PST leave of three or more consecutive days taken for medical reasons, a note signed by a health care professional is reasonable documentation. For PST taken for domestic violence reasons, a police

report, court order, signed statement from a domestic violence services organization, signed statement from an attorney, clergy member, doctor, *or even the employee's own written statement* are all considered reasonable verifying documentation.

### **Confidentiality and Nondisclosure**

Employers are prohibited from requiring employees to disclose details of the nature of the employee's (or family member's) health condition or details relating to domestic violence, sexual violence, abuse or stalking, as a condition of providing earned PST. Also, if employers possess such health or other PST qualifying information, they must treat it as confidential and may only disclose it to the affected employee or with the affected employee's permission. Notably, there is no listed exception for disclosure to law enforcement officials, or if compelled by subpoena or court order. As written, this apparent omission seemingly conflicts with the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), which typically exempts such information, when maintained as employment records, from protected health information.

### **Recordkeeping Requirements**

The AMWA already requires employers to maintain detailed payroll records (for four years) for every covered employee, which includes, among other things, the number of hours worked each workday and workweek, rates of pay, and "additions to or deductions from wages paid." (See A.A.C. R20-5-1210). The new law amends the AMWA to also require the maintenance of records for all accrued and used PST. Failure to maintain such records creates a rebuttable presumption that the employer did not pay earned PST.

***Paycheck Notification:*** Employers must either record in, or attach to, employees' paychecks the amount of PST the employees have available, the amount of PST used, and the amount of pay received as earned PST.

### **Collective Bargaining Agreements**

The PST law does not apply to employees covered by a collective bargaining agreement (CBA) that is in effect on July 1, 2017 (the effective date) until that CBA expires. As for CBAs entered into after July 1, the PST law's requirements can be waived by the parties if the PST law is "expressly waived" by "clear and unambiguous" language in the CBA.

### **Nondiscrimination and Nonretaliation Provisions, Enforcement, and Penalties**

Employers are prohibited from interfering with, restraining, or denying the exercise of any right under the PST law. Such rights include, but are not limited to requesting to use PST, filing a complaint with the ICA, filing a complaint in court, informing anyone about a violation, participating in an investigation or proceeding, and informing others about their PST rights. The statute expressly prohibits discrimination or retaliation against any person who mistakenly, but in good faith, alleges violations of the PST law.

Like FMLA leave, employers may not count PST absences against an employee (i.e., in a way that could result in adverse action).

Because the PST law is part of the AMWA (and the latter's enforcement mechanism), any person or organization may file an administrative complaint with the ICA charging that an employer violated the PST law as to "any employee or other person." After the ICA receives a complaint, it has the authority to review all employee records at the implicated worksite in order to "protect the identity of any employee identified in the complaint" and "determine whether a pattern of violations has occurred." The name of any employee identified in a complaint may only be disclosed with the employee's consent.

The same enforcement provisions also authorize the filing of lawsuits to enforce the PST law by enforcement officers or by individuals "injured" by a violation of the law. In other words, lawsuits may be brought by the Arizona Attorney General, county attorney, city attorney, town attorney, or by an affected individual employee or group of employees. The AMWA also includes a presumption that within 90 days of an employee's engaging in any protected activity, any adverse action taken against that person is retaliatory, and such a presumption can only be rebutted by "clear and convincing evidence" that the action was taken for other permissible reasons.

Employers that violate the PST law are subject to civil penalties of at least \$250 for a first violation, at least \$1,000 for each subsequent or willful violation, and additional monitoring and inspections. Such employers also must pay affected employees the balance of any PST owed, including interest, and an amount equal to twice the amount of previously unpaid PST (i.e., "liquidated damages"). If an employer is found to have retaliated against an individual for exercising his or her rights under the PST law, the employer "shall be required to pay the employee" at least \$150 for each day that the violation continued or until legal judgment is final. A prevailing plaintiff is entitled to reasonable attorneys' fees and costs.

The statute of limitations for filing a claim for a PST violation is two years from the date of the last violation, unless the violation was willful, in which case the statute of limitations is three years. The statute of limitations is tolled during any investigation by the ICA.

Finally, "no verbal or written agreement or employment contract may waive any rights under [the PST law]." In other words, as with the FLSA, the settlement of a PST dispute might not be binding without ICA or court intervention.

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With decades of in-depth labor and employment law experience representing a wide range of employers, including the aerospace, healthcare, hospitality, retail, transportation, manufacturing and mining industries, Mr. Nagy has a keen understanding and perspective that few Arizona practitioners in the field can offer. His considerable employment litigation, arbitration, and appellate experience compliment and enrich the practical advice and creative solutions he provides to resolving complex human...

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