

BOLI Issues Long-Awaited Final Regulations for Mandatory Oregon “Sick” Leave

12.23.15

By *Christie S. Totten and Chrys A. Martin*

Employers should now finalize policies to comply with Oregon’s 2016 mandatory sick leave law, following publication of the law’s final administrative rules. Although titled “sick” leave, the law protects a broader range of absences, including preventative care, bereavement leave, and domestic violence absences.

Businesses with at least one employee in Oregon are subject to the law. The statewide law preempts and replaces the City of Portland’s ordinance—as of Jan. 1, the employers must instead comply with the slightly different provisions of state law.

What Businesses With One or More Oregon Employees Should Do Immediately

Employers who are still planning should get the following in place by the end of 2015:

- **Draft a compliant policy:** There are many detailed requirements, including appropriate employee call-in requirements and verification procedures. Absence control policies may not consider protected absences against the employee’s record in a way that could lead to an adverse employment action. Multiple employment policies will be affected.
- **But draft a compliant policy that serves your business well:** Despite the requirements, employers can and should proactively implement smart strategies that allow workforce management within the law. For some businesses, a broader paid time off (PTO) policy covering all types of absences may be a better fit than providing a separate category of sick leave. In some workplaces, it may make business sense to accrue hours for certain classes of employees but frontload hours for others. Employees can be required to make efforts to schedule pre-planned absences so as to minimize business disruption if the policy is drafted carefully without interfering with leave rights. Legal counsel or a human resources professional can help employers make policy decisions that are effective for specific business goals.
- **Pay attention even if you currently comply with the City of Portland’s law:** The statewide law differs in some respects from the City of Portland’s prior requirements. For example, Oregon’s law protects a broader range of absence reasons (including purposes covered by OFLA like bereavement), prohibits requiring employees to give more than 10 days’ advance notice of a preplanned absence, eliminates the 240 hour rule for working in Portland’s geographic boundaries, implements a narrow exception

RELATED PEOPLE

Sarah E. Ames

Kathy Dent

Chrys A. Martin

Jenna L. Mooney

Christie S. Totten

RELATED PRACTICES

Employment, Labor & Benefits

Employment Counseling

to the one-hour increment rule, and more.

- **Organize the required written notices:** Employers must provide written notice to employees by the first pay period in 2016 (or the first pay period after hire for new employees), including by posting the BOLI template available here. At least quarterly, employees must also receive individual written notice of their accrued, unused leave entitlement.
- **Carefully calculate the number of employees to determine if leave is paid or unpaid:** Although leave is protected for any Oregon employee, it must also be paid for businesses with (1) six or more employees in Oregon and a Portland location or (2) 10 or more employees in Oregon and no Portland location. Employers who believe they are not required to pay for time off must take special care to ensure they are appropriately counting all individuals. BOLI's regulations address how to approach joint employment settings, what to do if the workforce size varies from year to year, and other specific circumstances. Businesses unsure which category they fit should consult legal counsel.
- **Audit pay practices:** Ensure that sick time is paid timely and at the correct pay rate under the new law. Employee benefits may not be reduced due to protected absences, and employers requesting verification of an absence must pay the cost of verification, including lost wages.
- **Train supervisors:** Managers and supervisors accustomed to denying time off requests will need to appropriately consider absence requests and to seek help where questions arise. Absences that could previously be denied or counted against the employee's attendance record may now be protected by law.
- **Communicate:** Inform employees in writing of expectations and policies going forward.
- **Begin accruing:** Sick leave accrues for current employees as of January 1, 2016. Employees may use accrued leave upon the 91st day of employment; for current employees already meeting the 91-day minimum, one hour of leave will be available for use upon 30 hours worked in 2016.
- **Treat confidential information appropriately:** Although employers may not seek detailed health or victim information, any health information or similarly confidential information received must be treated confidentially and appropriately.
- **If operating as, or working with, a staffing agency, consider existing contracts between businesses:** New joint employer regulations are a reminder to review and possibly revise or renegotiate contracts between labor suppliers and businesses.
- **Do not deny or retaliate:** Lawsuits will ensue from employees who believe that their time off request was wrongfully denied or that they were retaliated against for

requesting or taking time off. Employers need to slow down and consider requests carefully while growing accustomed to the new rules. Although BOLI will generally not impose penalties for noncompliance until 2017, any employee who believes he or she has been denied leave or has been retaliated against for a leave request may complain to BOLI or file a lawsuit beginning in January 2016.

- **Seek help when needed:** Employers should contact legal counsel or a human resources professional before disciplining employees for failure to provide adequate advance notice of an absence or for any other reason related to protected leave. Employers may not discipline employees for using protected “sick” time.

What BOLI’s Final Rules Say

Some basic points of Oregon’s statewide law are available here, and the full text is available here. The newly issued regulations further address issues including:

- “Joint Employment” definition in the temporary staffing agency context
- Regular rate of pay calculations
- Number of employees and number of hours worked calculations
- Detailed frontloading options
- Definitions of terms like “family member” and “health care provider”
- Undue hardship requirements to allow leave in longer four-hour increments
- Verification of absence obligations for employers and employees
- BOLI’s view that collective bargaining agreement exception is “limited” to hiring hall type arrangements with qualifying benefit plans.

There are many tools to help businesses get up to speed before the Jan. 1 implementation. BOLI will conduct free trainings beginning in January 2016. DWT has also posted a free webinar on new Oregon laws for 2016 including statewide sick leave, available here.

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

