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Oregon Sick Leave Law Frequently Asked Questions

Q: What are the basics of the Oregon Sick Leave law?

A: The basic provisions require employers to allow employees to use, accrue, and generally carryover up to 40 hours of paid sick leave (unpaid if fewer than 10 employees or fewer than 6 employees in Portland) per year. The law went into effect on January 1, 2016.

Q: I've heard that the time off is protected. What does that mean?

A: Protected time means that generally an employee has a right to use the time off, regardless of business needs. It also means that an employer cannot interfere with an employee's right to use the time or discourage an employee from using the time. An employer may not retaliate against an employee for using time off by taking some sort of employment action. Finally, employees have a right to return to work after taking time off.

Q: We offer more than 120 hours of sick time each year. Does this mean we have to protect all 120 hours?

A: If you offer a more generous PTO or sick leave policy, your policy should clearly state that protected time under the Oregon Sick Leave law is limited to 40 hours per year. If you do not do this, arguably all the time off you provide would be considered protected, which could limit your flexibility to find a replacement to fill a position in situations of long-term absences or deal with employees with attendance problems.

Q: I already offer my employees 40 hours of PTO. Do I need to provide additional sick leave time?

A: No, as long as you update your PTO policy to be in "substantial compliance" with the new sick leave law. BOLI has interpreted "substantial compliance" to mean "exact compliance." So essentially, your PTO policy must meet every other requirement of the law, but you would not be required to offer additional paid time off.

Q: Currently, I offer benefits (including sick leave) to my full-time employees only. Am I in compliance with the new state sick leave law?

A: No. The state law requires that covered employers provide benefits to all employees, including full-time, part-time, temporary, on-call, and commissioned employees. While there are a few exceptions, they are extremely limited.

Q: I already offer my employees 40 hours of sick leave, and they accrue it over the course of the year. This is substantially equivalent, right?

A: No. While you are offering enough total time off, if you use the accrual method (as opposed to frontloading) the law requires you to provide 1 hour of sick leave for every 30 hours worked (or .0333 p/hour worked). If 40 hours accrues over the course of the entire year, it is accruing at .0192 p/hour worked. You must allow your employees to accrue at the rate mandated by law, but you can cap their accruals at 40 hours in the year.

Q: Currently, my employees accrue a set amount of time off on a monthly basis. Is there any issue with that?

A: There are three potential issues with a monthly accrual. First, there are different amounts of working hours depending on the month, so it's possible that your employees may not accrue enough time to be in compliance with the law in a high-hour month. Second, sick leave must also accrue on overtime, and if your employees who work overtime are accruing only a set amount each month, you may not be giving them enough time off to account for their overtime hours worked. Third, employees must accrue the time at least for every 40 hours worked. You cannot make an employee wait until the end of the month to accrue time for use.

Q: How do I handle accruals for exempt employees?

A: Exempt employees are presumed to work 40 hours per week unless they actually work less than that. For instance, if you have a .5 FTE exempt employee who actually works only 20 hours per week, they would accrue sick leave based on a 20-hour work week. All other provisions of the sick leave law apply the same to exempt employees as non-exempt employees.

Q: What limits can I impose on the accrual and use of sick leave?

A: Employers may limit an employee's use and accrual of sick leave to 40 hours in a year. After an employee has accrued 40 hours in a year, you may stop all accruals. After an employee has used 40 hours of sick leave in a year, you may deny any further requests to use sick leave or take time off. Employers may also set a total cap (i.e. non-annual) on accrued sick leave at 80 hours. After the employee has accrued 80 hours, you may stop all accruals, regardless of how many hours the employee has already accrued during the year. Remember, even if they have a total of 80 hours accrued, you do not have to let them use more than 40 hours in a year.

Q: Our sick leave is based on the employee's anniversary date. Do I need to switch to a calendar year for accrual purposes?

A: No. While you do need to have a defined year for both use of sick leave as well as for how time is earned you can choose the 12 month period of time. Common years are a calendar year, anniversary date or fiscal year.

Q: What are the benefits and downsides to frontloading?

A: Frontloading time (i.e. providing it in a lump sum at the beginning of the year) is administratively simple because you do not need to track accruals. Another benefit is that if you hire an employee part way through the year, you may prorate the amount of time you frontload. For instance, an employee hired on April 1 would need to be provided only 30 hours of sick leave. That same employee, if full-time, would accrue 40 hours over the course of the year on an accrual system.

The downside is that you have an employee who uses all their paid sick leave soon after receiving the award, and then they leave your employment. If you believe your workforce may be prone to abuse sick leave in this way, this can create a substantial cost for employers.

Another downside is that when you frontload the time, you cannot pro-rate the time for employees that work less than full-time. One way around this is to frontload to full-time employees and accrue for other classifications of employees such as part-time or seasonal.

Q: Do I have to allow my employees to carryover time at the end of the year?

A: Generally, yes. Employees must be allowed to carryover up to 40 hours of unused sick leave at the end of each year. You can avoid carrying over sick leave if you meet the following three requirements: (1) you frontload at least 40 hours of sick leave for the next year; (2) you pay the employee at their regular rate for up to 40 hours of unused sick leave; and (3) the employee agrees to waive the right to carryover.

However, BOLI has taken the position that if an employer frontloads an employee at least 40 hours a year, it does not need to carryover any time, and it does not need to meet the three requirements listed above. Essentially it is use it or lose it.

Despite BOLI's position, you may still want to follow the three requirements listed in the statute. BOLI's position – while it makes a lot of practical sense – does not appear to be supported by the language of the statute. This is important because while BOLI is responsible for enforcing this law, employees can also bring a civil suit for sick leave violations, and their attorneys could make a persuasive argument that carryover must occur unless those three requirements are met.

Q: Are employees eligible to use sick leave as soon as they accrue it?

A: Employers may impose a requirement that employees work for the company for at least 90 days prior to being able to use sick leave.

Q: What rate of pay am I supposed to pay my employees?

A: Employees are to be paid at their regular rate of pay for the pay period in which they took sick leave. If an employee has multiple hourly rates or shift differentials within a single pay period, you must pay the employee at a rate that is a weighted average of all the time worked at different rates during the pay period. For commission and piece-rate employees, you may agree upon a rate to pay the employee for missed time. The agreed-upon rate cannot be less than minimum wage. In the absence of an agreed-upon rate, you must pay the commission or piece-rate employee at least minimum wage for missed work time.

Q: How do I determine how many hours to pay an employee for if they call out sick, and they weren't scheduled to work for a specific amount of time?

A: For shifts of indeterminate length, pay the employee for the amount of hours a replacement worker actually worked. If no replacement worker is called in, make a reasonable estimate about the length of the shift based on similar past shifts.

Q: Do I have to payout for unused sick leave upon termination of employment?

A: No. Your policy should clearly state whether sick leave is or is not paid upon termination of employment.

Q: Can I require an employee who calls in sick to find a replacement worker or make up a shift?

A: No, but if the employee agrees to do either of those things, that is fine.

Q: What happens if I rehire an employee who already worked for me?

A: If you did not payout the employee for his/her unused sick leave upon termination, you must reinstate the employee's sick leave balance if you rehire them within 180 days of termination. Additionally, if the employee had not met your length of service eligibility requirement (up to 90 days) prior to termination, all days previously worked still count toward the eligibility requirement.

Q: What are the reasons an employee can take sick leave?

A: These are the approved reasons:

- Your own illness, injury, or health condition, including time off for medical diagnosis, care, treatment, and preventive care;
- Care for your family member with an illness, injury, or health condition, including time off for medical diagnosis, care, treatment, and preventive care;
- For purposes allowed under OFLA, such as bereavement leave, caring for a newborn child or newly adopted/foster child, or sick child leave, regardless of whether the employee is eligible for OFLA leave and regardless of whether the company is a "covered employer" under OFLA;
- For any purpose allowed under Oregon's domestic violence, harassment, sexual assault, or stalking law; or
- A public health emergency, including upon an order of a general or specific public health emergency, or when the Company requires you to be away from the workplace by law or rule for health reasons.

Q: Currently, I require employees to take sick leave in full-day increments. Is that still OK?

A: No. Employers typically cannot require employees to take time off in increments larger than 1 hour. There is, however, a limited exception that allows employers to require 4-hour increments if an employer (1) provides employees with at least 56 hours of paid sick leave; (2) can show that providing sick leave in 1-hour increments is an undue hardship; and (3) provides employees with an undue hardship notice. Please note, BOLI has taken the position that it will be very difficult to demonstrate an undue hardship. It will likely only be found in instances where geography, equipment shutdowns, food spoilage, or other factors make it very difficult to find workers to cover for the absent employee in 1-hour increments and it is necessary to have a certain amount of employees present on each shift.

Q: Can I allow employees to use their sick leave in increments of less than one hour?

A: Yes. Employers may allow employees to use sick leave in increments of less than one hour.

Q: Can I require my employees to follow my call-in policy?

A: Employers must establish a call-in policy and can require employees to follow it. The policy may require employees to call in prior to the start of their scheduled shift for unanticipated absences. However, the policy must allow for exception when it is not possible to do so, as long as the employee calls in as soon as it is possible.

Q: How much notice can I require my employees give for anticipated absences?

A: You can require no more than 10-day notice for foreseeable absences, and even then, if 10-day notice is not possible, you must allow employees to notify you as soon as possible.

Q: What can I do if an employee fails to give proper notice?

A: You may discipline the employee for violating your call-in policy/notice requirements. However, you may not deny the employee the use of sick leave. In other words, you must still pay them for the time, and you cannot use the absence itself against the employee.

Q: I require my employees to bring in a doctor's note before returning to work if they have missed three days due to illness. Can I still require that?

A: No. Employers may require a medical verification only *after* three consecutive absences (i.e. on the fourth consecutive absence) or if the employee exhibits a suspected pattern of abuse (e.g. frequently calling in the day before or after a weekend, holiday, payday, etc.). For foreseeable absences, you may generally require an employee to provide the medical verification prior to the absence. For unforeseeable absences, you can require an employee to return the verification within 15 days of the request.

Employers must pay for all costs associated with providing the medical verification, including co-pays, the full cost of visits if the employee is uninsured, *and lost wages* if the employee is required to miss work to obtain the medical verification.

Q: Do I have to provide my employees with their balances on each paystub?

A: No. You are required to provide employees with a quarterly balance statement on a proscribed form from BOLI. However, providing the balance on each stub is probably an easier way of doing it because BOLI's form must be manually completed.

Q: If an employee uses a lot of sick leave in a month, can I cancel their medical insurance benefits?

A: No. Sick leave must be included when determining eligibility for medical insurance benefits. This is especially important to note for if you are using measurement and stability periods under the Affordable Care Act to determine whether variable hour employees are eligible for benefits.

Q: How does this law affect employees who are placed with me from a temporary employment agency?

A: In a placement situation, the client will usually be considered the secondary employer, while the placement agency will be considered the primary employer. Primary employers are responsible for providing notices, providing sick leave, paying for sick leave, and maintaining benefits. Secondary employers cannot interfere or retaliate against an employee for taking leave, and they also must accept the employee back to work if the employer still needs the placement and the employee has not indicated that they do not wish to return to the placement.

The more complicated situation is in a temp-to-hire situation or potential temp-to-hire situation. In that situation, the secondary/client employer should do the following:

- Count all time worked on the temporary placement toward the 90-day eligibility requirement. Therefore, if the employee has been placed with you for at least 90 days, they will be immediately eligible to use sick leave upon hire.
- While the employee is on the temporary placement, track the employee accruals of sick leave as though they were already working for you. While the placement agency will be responsible for paying the employee for any sick time while they are placed with you, it will be important for you to track the accruals because any remaining time will be available for them to use (assuming they've met the 90-day eligibility requirement) upon hire.
- Also, track how much time the employee has taken for sick leave purposes while on temporary placement. You should be able to deduct this from any sick leave available to the employee upon hire.

Q: If an employee misses an entire week of work and has only 8 hours of accrued sick leave, can I terminate the employee?

A: Only the time that is actually accrued is protected, so the other 4 missed workdays would be unprotected absences – assuming that they are not protected by family leave, workers' compensation, another leave statute, or ADA accommodation law. If there is no other protection, and you would typically terminate any other employee who misses four consecutive days of work, you can terminate this employee.

Q: If I provide my employees PTO to be in compliance with the Oregon Sick Leave law, do I need to track whether they use the time for vacation/personal or sick time?

A: Nothing in the sick leave law requires you to track the reason that the time is used, but it is advisable. For example, if you have a PTO policy that provides employees 120 hours each year and you have language that states that only 40 hours of PTO will be protected each year under Oregon's Sick Leave law, then you definitely need to be tracking how the time is used.

There are also other issues with not tracking. You are allowed to deduct PTO hours used for vacation/personal time from the hours on which you pay your workers' compensation premium, while sick hours are not allowed to be deducted. If you cannot document the reason an employee uses their PTO, you may be challenged in an audit if you try to deduct the time. Keeping track of the reason on an employee PTO request form helps you prove when an employee takes time for vacation/personal, so you can confidently deduct that time from your premiums.

Q: What happens if I do not comply with the new law?

A: Beginning January 1, 2016, employees may bring civil lawsuits against their employers for violations of the sick leave law. A successful employee could recover lost wages for unpaid sick time, lost wages for future income if the employee was terminated or suspended, civil penalties of up to \$1,000 per violation, and attorney fees. Beginning January 1, 2017, employees may also bring administrative claims through BOLI for sick leave violations.