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# Proposed Rhode Island Sick Leave Regulations Fail to Provide Clarity and Will Increase Employer Headaches if Finalized

## Description

The Rhode Island Department of Labor and Training (DLT) has finally released its proposed regulations, [260-RICR-30-05-5](#) regarding the Rhode Island Healthy and Safe Families and Workplaces Act (the “Sick Leave Law”). As we alerted you in [October](#), the text of the Sick Leave Law – which will require employers with 18 or more employees in Rhode Island to provide paid sick days – leaves many key questions regarding how an employer could comply with the law. DLT regulations will hopefully address these issues prior to the law going into effect on July 1, 2018. Unfortunately, the current draft of the proposed regulations does not do so.

## Lingering Questions

The proposed regulations fail to appropriately address the two biggest questions created by the Sick Leave Law – what smaller employers are required to do under the law and how the carryover and accrual provisions relate to paid time off (PTO) policies.

First, the proposed regulations fail to address unpaid time off. The regulations specifically state that their only purpose is to clarify the *paid* provisions of the Sick Leave Law. No regulations or guidance has been provided yet as to the unpaid leave obligations that appear to be applicable to employers with less than 18 employees..

Second, as to the exemption for the carryover and accrual provisions of certain PTO policies, the proposed regulations make clear there are two types of policies in play. One exemption, found in 5.4.1(B), is relatively straightforward. Employers can avoid the accrual and carryover provisions if the employer has a paid time off policy if:

- (a) the employee is allowed to use the time for all the protected Sick Leave Law reasons;
- (b) the employer front loads the time (gives it all to the employee on January 1<sup>st</sup> or the employee's start date in their first year of employment); and
- (c) all employees are given at least 24 hours of paid time in 2018, 32 hours of paid time in 2019 and 40 hours of paid time off thereafter.

Oddly, in addition to exempting these employers from carryover and accrual provisions, 5.4.1(B) contains an exemption from “paying employees for unused time”, which the Sick Leave Law does not require. The Sick Leave Law allows the employer to avoid the carry over provisions by paying out unused time in lieu of carrying the time over, but this would clearly be irrelevant given the exemption from carryover provisions. The other exemption, found in 5.4.1(A) is more difficult to understand. Under this exemption, the regulations state that an employer with a PTO policy ) providing at least 24 hours of paid time in 2018, 32 hours of paid time in 2019 and 40 hours of paid time off thereafter is exempt from the accrual and carry over provisions, but does not require front loading of the time. As discussed in our prior alert, this exemption at face value would seem to render the accrual and carry over provisions irrelevant except for employers who had policies accruing time at 1 hour for every 35 hours paid and also had part-time employees, or new employees that did not accrue the 24/32/40 hour yearly minimums. Another interpretation of the 5.4.1(A) exemption is that it is intended to apply only to employers whose PTO policy is a general time off policy (allowing for paid time off that can be used for any purpose, such as taking a vacation) and the 5.4.1(B) exemption was intended to limited PTO policies (such as a sick time policy). This might explain why the exemption in (B) explicitly references employers being exempt

from payment of unused time and (A) does not, as a different statute requires employers who offer general time off policies to pay unused time upon termination for certain employees. This might also help explain why the exemption in (A) does not reference use of the PTO time for sick time purposes and the exemption in (B) does.

**New Headaches**

The proposed regulations would also create four new problems for employers.

The first relates to getting doctor's notes. Under the Sick Leave Law, employers can require medical documentation (signed by a health care professional) if the employee is absent for three or more consecutive sick days. Under the proposed regulations, an employer *cannot* ask for that documentation if the *total* cost to the employee of obtaining the documentation would be more than two and a half times their hourly rate of pay. In other words, if the employee makes \$16 an hour, the amount of the employee's co-pay, tolls, mileage and copy costs to get to the doctor and obtain the note could not exceed \$40.

The second relates to the confidentiality issue. The proposed regulations only allow employers to disclose information relating to protected Sick Leave Law use as part of a defense in an administrative or judicial proceeding. Even then, it would only allow disclosure in the proceeding regarding the accrual, use and request to use time, as well whether the employee adhered to the existing policy regarding use, and not disclosure of the details of the illness or other reason for the absence. This is extremely problematic as it means that employers will not be able to respond to a valid subpoena for a personnel file. In addition, it will create real problems when defending a claim unrelated to the Sick Leave Law – such as a disability discrimination claim – where information contained in notes and documentation submitted in connection with a Sick Leave Law absence would be vital to the defense of the claim.

The third relates to out-of-of state employers. The proposed regulations make it abundantly clear that the paid time off requirement would apply to employers – including out of state employers – with eighteen employees who either worked in Rhode Island fifty percent of the time or spent the most time working in Rhode Island, even if it was less than fifty percent of the time (which could happen if the employee worked in three or more states). This means employers with no office location and employees who only worked in Rhode Island part of the time (including working from home) would be subject to the law.

Finally, the proposed regulations state that employers must accrue based upon hours *paid* not worked, meaning that employees accrue time on vacations, on sick or other leave and on holidays.

**Next Steps**

The hearing on the proposed regulations takes place on April 2, 2018 at 5:00pm and the comment period expires on April 8, 2018. Hopefully the DLT addresses these issues after receiving comments and implements a more comprehensive and explanatory set of regulations prior to the Sick Leave Law's July 1, 2018 effective date.

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