

Electronic Alert

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Oregon Sick Leave Law Update By Charlotte Hodde and Nicole Elgin

On December 8, 2016, Linn County Circuit Judge Daniel Murphy ruled that Oregon’s new law requiring Oregon counties to provide paid sick leave to their county employees is an unfunded mandate. The nine counties that filed the lawsuit therefore do not have to follow the paid sick leave law with respect to their employees. Those counties include: Linn, Douglas, Jefferson, Malheur, Morrow, Polk, Sherman, Wallowa, and Yamhill. This ruling does not allow private employers in those nine counties or other local government entities who were not parties to the lawsuit to avoid the paid sick leave requirements, although other local government entities may follow suit with similar legal challenges.

The basis for the decision is Section 15, Article XI of the Oregon Constitution, passed by ballot measure in 1996. Known as the unfunded mandate law, the provision prohibits the Oregon legislature from requiring local governments to implement new programs unless it provides the local governments with funding for the implementation.

Several Oregon counties also considered challenging Oregon’s new minimum wage increases under the same constitutional provision. Some have argued that private employers who compete with governments in those specific counties should also be exempted from the minimum wage and paid sick leave laws, under subsection (8) of the constitutional provision. However, there have been very few challenges under this provision from the private sector. In the opinion, Judge Murphy commented that “this is not a case where the answer is crystal clear,” and a spokesperson from the Oregon Department of Justice reported that the State is considering whether to appeal the decision to the Oregon Court of Appeals.

This decision came recently after the Oregon Bureau of Labor and Industries (BOLI) announced it would not be finalizing its draft sick time rules that we discussed in our [alert](#) earlier this fall, despite the fact that the “proposed rules were an attempt to clarify and explain how BOLI’s existing interpretation works in practice.”

In a letter to members of the Oregon legislature in late November, BOLI’s Legislative Director clarified how BOLI interprets some of the paid sick leave provisions, explaining that the current language in the Oregon sick leave statute and the related administrative rules “provide sufficient clarity to guide the agency in enforcement of the law.” Therefore, employers should continue to comply with BOLI’s guidance as if it were formally-adopted regulations. Here are the key points:

- **Employees Paid on a Commission or Piece-Rate Basis.** BOLI explicitly states that for employees paid on a commission or piece-rate basis, “the agreed upon commission or piece-rate *is* their regular rate of pay.” Only if the employee does not have a previously-established regular rate of pay would these employees be paid no less than minimum wage.

- **Family Exception in Employee Definition.** Under the law’s definition of “employee,” an individual is not an “employee” if the individual “is employed by the *individual’s* parent, spouse or child.” BOLI’s letter clarifies that a “corporation or LLC cannot be the parent, spouse or child of an individual.” Therefore, this narrow exception only applies when the employer is an individual or sole proprietor.
- **Track PTO used for Sick Leave.** Through the rule making process, BOLI made clear that it takes the position that when an employer provides PTO in lieu of sick leave and when the PTO policy is more generous in the amount of leave provided, that an employer may not simply count the first 40 hours of PTO as satisfying the sick leave requirements with any additional leave being unprotected. Rather the employer must track whether PTO is used for sick leave purposes versus vacation. For example, an employee with 80 hours of PTO who uses the first 40 hours of PTO for vacation still has the remaining 40 hours of PTO protected by the sick leave law in the event they use it for sick leave purposes.

Employers should carefully review their sick leave and PTO policies and practices for compliance with BOLI’s interpretations.