Sick leave laws for businesses that work across state lines

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Businesses that operate in Oregon and Southwest Washington are no strangers to sick leave laws. First, the city of Portland passed an ordinance requiring employers to provide paid sick leave to employees, or otherwise provide paid time off that may be used to cover qualified absences. Then, the Oregon Legislature passed a state sick leave law, which, fortunately, trumped Portland's ordinance and took effect on Jan. 1, 2016.

Most recently, Washington's sick leave law took effect on Jan. 1, 2018. Now businesses operating on both sides of the Columbia River must comply with both the Oregon and Washington state laws on sick leave.

The first challenge facing employers is reconciliation of the significant and numerous differences between the two states' laws. For example, each law has a different rate of accrual for sick time. Oregon law requires one hour of paid sick time for every 30 hours worked; however, Washington law requires one hour of paid sick time for every 40 hours worked. The maximum amount of required sick time is different too. Oregon law allows employers to cap the amount of sick time an employee may accrue in one year to a total of 40 hours; however, Washington law requires employers to accrue sick time for all hours worked – meaning no cap.

These two differences are just the tip of the iceberg; there are a number of other differences between the state laws. Over the past six months, employers have taken one of two different approaches: create one policy that complies with the minimum requirements for both Oregon's law and Washington's law (and more than either law individually requires) or create two policies – one applied to Oregon employees and one applied to Washington employees. Accordingly, employers either create a policy with the highest accrual rate (Oregon's 1:30) and the highest accrual amount (Washington's no cap), or create two different policies.

The compliance issue gets even more complicated for businesses that send workers across the state line, as is common in the construction industry. Consider the following, common scenario: a Washington resident, working for a union contractor incorporated in Oregon, is dispatched from a hiring hall in Oregon, for a job in Washington, using tools kept at the worker's home, and is being directed by a foreman from Oregon to install materials kept at the business' office in Oregon. While this may read like a law school exam question, similar situations are not uncommon. Under this scenario, what must the employer do to comply with state sick leave laws?

Unfortunately, the answer is, of course, it depends. It depends on whether the employee will be deemed to be Oregon-based or Washington-based. Washington's position is that employers must comply with Washington law for "Washington-based" employees, according to the Washington State Department of Labor and Industries (L&I). The state agency will examine each case individually to determine if the employee's most significant relationship is to Washington or Oregon.

L&I is in the process of developing an administrative policy on the issue of Washington-based employees, and the policy is close to publication. Hopefully, L&I's policy will provide some helpful guidance on the Oregon-based versus Washington-based employee determination.

For union contractors, the stakes are high on this issue. Benefits, including sick leave, in the construction industry are generally provided through a multi-employer trust. Businesses contribute a definite sum of money per hour (e.g., $4/hour) to a worker's sick leave account, and the worker can withdraw the money from the account to cover lost wages for a sick day. This method of provided benefits is commonly referred to as "fringes."

Thoughtfully, Oregon lawmakers created an exception in the sick leave law, and excluded from the law workers who are covered by a collective bargaining agreement, hired through a hall, and with benefits provided by a multi-employer trust or benefit plan. Unfortunately, the Washington law does not have the same exception for union workers. Generally, union workers receive a more generous sick leave benefit from the union contract relative to the legal requirement. Nevertheless, L&I's position is that sick leave provided in the form of "fringes" does not comply with the Washington sick leave law. L&I requires a union contractor to provide its Washington-based employees with paid sick leave, on top of fringes, to comply with the law. So, the determination of Oregon-based versus Washington-based has a significant cost to businesses operating across the state line.

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