

PACIFIC NORTHWEST DESIGN PROFESSIONAL LEGAL UPDATE

WASHINGTON OREGON ALASKA IDAHO

Summer
2012

Design and
Construction
Attorneys

William J. Bender
David K. Eckberg
Jeffrey C. Grant
Kara R. Masters
Hillary A. Madsen
Peter A. Offenbecher
Lindsey M. Pflugrath
Terence J. Scanlan
Pamela S. Tonglao

1301 Fifth Avenue
Suite 3401
Seattle, Washington 98101
(206) 623-6501
www.skellengerbender.com

Seattle Sick/Safe Leave Ordinance Becomes Effective September 1, 2012 *Are You Ready?*

Last year, the City of Seattle adopted Ordinance No. 123698, mandating that certain employers provide a certain amount of paid "sick" and "safe" leave for their employees. The ordinance, codified as Chapter 14.16 of the Seattle Municipal Code, becomes effective September 1, 2012. Since its adoption, there has been a flurry of articles and seminars designed to assist employers in complying with the ordinance. Because of the complex nature of this ordinance and its interplay with other employment laws, it is anticipated that many firms will continue to face compliance issues and questions as new and modified employment policies are unfolded in response to the Seattle mandate.

In the A&E arena, as in other businesses, "people" costs are often the most significant cost of running a business. Requirements for taking care of your "people" are two-fold - the protections from the policies and procedures of individual business and a base line of protections from government regulations.

This article summarizes the Seattle ordinance and highlights potential problem areas that employers should be aware of as they begin to implement the mandates of this law.

Summary of the Law

The Seattle ordinance is one of only a handful of local ordinances existing across the country. San Francisco was the first to pass such an ordinance, followed by Washington, D.C., and the state of Connecticut.¹ A few other jurisdictions are considering similar laws.

The key parts of the ordinance are as follows:

Coverage. The law applies to all employers with five (5) or more full-time

¹This overview of the new ordinance and is not exhaustive. Employers should carefully review the new ordinance to determine how its provisions would apply to specific circumstances and confer with counsel about any questions on applicability. The ordinance can be found on the Seattle Office of Civil Rights website at <http://www.seattle.gov/civilrights/SickLeave.htm>.

Seattle Sick/Safe Leave Ordinance Becomes Effective September 1, 2012

(CONTINUED)

equivalent employees (FTE's) (wherever situated throughout the country), who have at least one employee who works more than 240 hours per year in Seattle. Covered employees include full-time, part-time and temporary workers who work for the employer in Seattle. New companies are not required to comply with the ordinance until at least two years have passed since their first employment hire.

Mandated Sick/Safe Leave Requirements. The minimum leave requirements are determined by employer size and the total hours worked. The ordinance establishes three size tiers:

Tier 1 = employers with more than 4 and less than 50 FTEs on average per calendar week during the prior calendar year must allow accrual of 1 hour per 40 worked, but an employee can only use up to 40 hours in any one year. In addition, up to 40 hours can be carried over to the next calendar year.

Tier 2 = employers with at least 50 and less than 250 FTEs on average per calendar week during the prior calendar year must allow accrual of 1 hour per 40 worked, but an employee can only use up to 56 hours in any one year. Up to 56 hours can be carried over to the next calendar year.

Tier 3 = employers with 250 or more FTEs on an average per calendar week during the prior calendar year must allow accrual of 1 hour per 30 worked, but an employee can only use up to 72 hours in any one year. Up to 72 hours can be carried over to the next calendar year.

Exempt and Non-Exempt Employees. Calculating accruals differs based on whether an employee is

exempt from the federal Fair Labor Standards Act (FLSA). Accrual of Seattle Time² for exempt employees is based on a 40-hour work week (or less if the employee's normal work week is less than 40 hours), and no Seattle Time accrues for any hours worked by exempt employees in excess of 40 hours/week. Accrual of Seattle Time for non-exempt employees is based on their actual hours worked.

PTO Policies. The law does not require employers with universal leave or paid time off (PTO) policies to provide for additional paid sick/safe time; however, the PTO that is provided must meet the minimum accrual and carry-over requirements, and must allow employees to use the PTO for the uses provided for under the law. In addition, for Tier 3 employers with PTO plans, these plans must provide for at least 108 hours of Seattle Time carry over and annual usage caps.

No Cash Out Required. The ordinance does not require employers to cash out accrued Seattle Time upon separation from employment. However, if a PTO policy provides for cashing out and Seattle Time is part of the PTO, then accrued and unused Seattle Time must be cashed out in accordance with the PTO policy.

Uses. The ordinance creates a single bank of leave that can be used for either "sick time" or "safe time."

²"Seattle Time" for purposes of this Article, is defined as the mandated paid time off for sick leave and safe leave.

Seattle Sick/Safe Leave Ordinance Becomes Effective September 1, 2012

(CONTINUED)

- “Sick time” relates to an employee’s own illness or medical care, or to time an employee needs to care for a family member, as defined by the Washington Family Care Act to include children, grandparents, parents, parents-in-law, spouse and registered domestic partner.

An employer can only ask for verification of sick leave if the illness exceeds three consecutive days; however, the ordinance precludes any requirements that the documentation explain the nature of the illness.

- “Safe time” relates to absence due to business or school closures because of public hazards or to domestic violence, sexual assault or stalking affecting the employee or a family member of the employee, which is defined to include spouses, domestic partners, former spouses and domestic partners, persons who have a child in common, regardless of whether they have been married or lived together, adult persons related by blood or marriage, adult persons over age 16 residing together or who formerly resided together, or who had a dating relationship, and stepparents, stepchildren, grandparents and grandchildren.

An employer can ask for verification of safe leave based on business or school closure or when leave is based on domestic violence, sexual assault or stalking. The documentation to substantiate the request may be the employee’s written statement explaining that the paid safe time was for a purpose covered by the ordinance.

Tracking Requirements. The ordinance requires employers to track hours worked, accrued Seattle Time and paid sick/safe leave taken. It also

requires employers to provide employees with information on available sick/safe leave each time wages are paid. The ordinance allows some flexibility in how that information is conveyed, as long as the system is reasonable, such as being included on a pay stub or available on an accessible online system. The ordinance does require that employers maintain confidentiality of information provided by an employee on sick/safe leave, including the mere fact that the absence is for a Seattle Time purpose, and must maintain medical records separate from an employee’s personnel file.

Notice Requirements. There are notice requirements for both employers and employees.

Employers are required to provide employees with notice of their rights to paid sick/safe leave. That can be accomplished by (1) adding a provision to an existing employee handbook; (2) distributing a new written policy to existing employees and any new employees; or (3) displaying the poster provided by the Seattle Office for Civil Rights (available at http://www.seattle.gov/civilrights/documents/PSST_Poster6-20-12.pdf).

Employees must request leave at least 10 days, or as early as possible, before leave is taken, unless an employer’s policy provides for less notice. Notice compliance is required unless it interferes with the purpose for which leave is required (i.e., if the leave is unforeseeable, the employee must provide notice as soon as practicable).

Penalties and Liabilities for Noncompliance.

Initial enforcement of the ordinance is through the Seattle Office for Civil Rights (SOCR) and is initiated by the filing of a charge by an em-

Seattle Sick/Safe Leave Ordinance Becomes Effective September 1, 2012

(CONTINUED)

ployee. The SOCR will then obtain a response from the employer, complete its investigation, make a determination of probable cause, and seek to resolve the matter through conciliation; failing such resolution, the SOCR will turn the matter over to the city attorney, who can conduct a hearing before the Seattle Human Rights Commission. Relief can include payment for back wages and compensation for mental suffering capped at \$10,000. In addition, employers found to willfully violate the ordinance can be subject to a civil penalty of up to \$500.

Watch Out for These Pitfalls

As employers in the A/E industry begin to implement the requirements of this new law, they should be cognizant of the following:

1) This law applies to all companies that have employees doing work in Seattle for at least 30 days in any given year. This includes employers with corporate offices outside of Washington and employers that have construction projects in Seattle requiring the presence of their employees. It is very important to reconcile the long-standing corporate policies of companies maintaining corporate offices outside Seattle or even Washington with the mandates of this new law.

2) Many companies maintain PTO policies that allow for unspecified use of PTO. This new law requires companies to track and record specifically the Seattle Time accrued and used. This tracking and accrual needs to be implemented consistent with the existing tracking and use of other PTO under a company's policy.

3) The law does not require the cashing out of accrued-but-unused PTO time upon termination of employment. However, if employers plan to comply with this law by incorporating its requirements into existing PTO plans that do provide for cashing out, then care needs to be taken as to how the requirements are incorporated without creating an unintended cash-out scenario.

4) The law, in effect, creates a new paid leave requirement for "safe time." If employers are performing significant cost-based contracting for public agencies, including the federal government, they need to consider how to properly account for this cost and whether it is allowable under the Federal Acquisition Regulations (FAR's) and applicable state and local cost based initiatives.

5) The "safe time" leave requirement is defined broadly and can potentially invite abuse by employees. The law provides little protection from employee abuse and relies heavily on the truthful representations of employees in a written statement. Confidentiality and restrictions on notice are overriding concerns of the law, and employers need to be careful how they address employees who may be abusing the paid time off.

6) Employers who develop a policy that is unique and applicable only to their employees working in Seattle to comply with the law need to carefully evaluate this approach in light of potential disparate treatment claims by their employees.

7) Employers with compensation plans for employees working more than 40 hours a week, whether exempt or not under the FLSA or Washington law, should consider how they are

Seattle Sick/Safe Leave Ordinance Becomes Effective September 1, 2012

(CONTINUED)

accounting for this time and whether they want to treat the accruing rates under this law differently for exempt and non-exempt employees.

Conclusion

For most A/E firms, the mandated leave requirements of the new Seattle ordinance are not inconsistent with existing leave policies (allowing for between 5 and 9 days per year for sick leave), so from a cost standpoint, the impacts may be negligible. However, the ordinance does create record-keeping, annual carry over, and notice requirements that will likely require modifications to, and may conflict with, most plans. In addition, the new ordinance makes clear the importance of allowing employees to take paid time off for themselves or to assist family members in the event of a threat to their safety as defined in the ordinance. Paying particular attention to and understanding the details of this ordinance and effectively incorporating these details into a company's overall employment policies will be the key to avoiding non-compliance problems in the future.



This paper is a publication of Skellenger Bender, P.S., and summarizes general legal information, including recent developments. This general information is neither legal advice nor tax advice. No action should be taken on the basis of this paper without legal and/or tax advice based on your specific circumstances. For further information, please contact David Eckberg at 206.387.4706.



ABOUT THE AUTHORS



David Eckberg and Kara Masters are shareholders in the firm. They will be discussing the Seattle ordinance as part of an employment seminar for ACEC WA on September 5, 2012.

UPCOMING PRESENTATIONS AND SEMINARS BY SKELLENGER BENDER

Hall & Company: Managing Professional Fees, Risk Management Webinar, August 21, 2012, Dave Eckberg & Kara Masters will provide a presentation on protecting fees

ACEC-WA: Business Practice Breakfast, September 5, 2012, Dave Eckberg & Kara Masters will provide a wage and hour update

Clark Nuber: Merger & Acquisition Workshop, October 9, 2012, Dave Eckberg will provide advice on structuring mergers and acquisitions