

## **Impact of Denver Paid Sick and Safe Time Ordinance on Employers with Current Paid Leave Policies**

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## Overview

Efforts are underway by a coalition of nonprofit groups to pass an initiative on the Denver ballot this November that would require employers to provide “paid sick and safe time” to every person who works in Denver at least 40 hours a calendar year. Similar ordinances have already been adopted in San Francisco, Washington, D.C., and Connecticut, and have been proposed in many other jurisdictions. This handout discusses how key provisions of the Denver Paid Sick and Safe Time Ordinance (the “Ordinance”) will impact businesses with existing leave policies.

## Key provisions

- The initiative mandates that every person employed in the geographic boundaries of Denver, whether full time, part time, or temporary, is entitled to accrue one hour of “paid sick and safe time” for every 30 hours worked.
- “Paid sick and safe time” means “leave that is compensated at the same hourly rate and with the same benefits.”
- An employee can use paid sick leave to care for their own or a family member’s health needs, and can use paid safe time for domestic violence needs, such as obtaining a protective order, securing a home, and seeking treatment or legal services.
- "Employee" under the Ordinance means any person who is employed within the City of Denver, including a migratory laborer, performing labor, or services for the benefit of an employer in which the employer may command when, where, and how much labor or services shall be performed.
- Employers bound by the initiative include “every person, firm, partnership, association, corporation, migratory field labor contractor or crew leader, receiver, or other officer of court in Colorado, and any agent or officer thereof ... employing any person in Colorado.”
- Employers are not required to provide more than 72 hours of paid sick and safe time per calendar year, and small businesses with fewer than 10 a maximum of 40 hours per calendar year. The Ordinance sets the floor for paid leave, while encouraging employers to provide more generous leave policies.
- Employees can carry over no more than 72 hours of unused sick and safe time to the next calendar year.
- The initiative excludes “new small businesses” that are in the first year of operation.
- The initiative also excludes state and federal government employees.
- Although paid sick and safe time begins to accrue immediately, an employee cannot use accrued time until after 90 days of employment. An employer may allow employees to use earned time sooner, but not later than 90 days.
- An employer is not required to reimburse or otherwise pay out accrued sick and safe time when an employee is terminated, resigns, retires, or otherwise separates from employment.
- The Ordinance is enforced by the Agency for Human Rights and Community Relations (the “Agency”).

## Impact on employers’ current leave policies

According to the Ordinance, an employer that already offers paid time off (or PTO) need not provide additional paid leave so long as employees can accrue leave at the same or a more favorable rate as required by the Ordinance, and under the same conditions. There are no exemptions or exclusions from the remaining provisions of the Ordinance for employers

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that already offer paid leave. In other words, all employers with employees who work in Denver must adhere to the following provisions.

### **Covered employees**

To be covered, employees must be “employed” in the geographic boundaries of Denver. Although there is no specific definition of what it means to be “employed” in the City, the Ordinance states that “all employees who work in Denver for at least 40 hours in a year” have the right to paid leave. Notably, the Ordinance does not prescribe where the employer is located. Thus, employees who spend at least 40 hours in a year performing work in Denver would be entitled to paid leave under the Ordinance regardless of where their employers are located. In addition to providing the requisite amount of paid sick and safe time, employers would also be subject to the other provisions of the Ordinance. If the Ordinance passes, all businesses would need to thoroughly assess whether any of their employees perform work in Denver and if so, whether their current policies and practices comply.

### **Permissible use of sick and safe time**

Employers must allow employees to use paid sick time for at least the following purposes:

- to care for their own or a family members’ mental or physical illness, injury, health condition, or need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition or need for a medical procedure or preventative medical care; and
- closure of an employee’s place of business by order of a public official due to a public health emergency or an employee’s need to care for a child whose school or place of care has been closed due to a public health emergency.

Employers must also allow employees to use paid leave for absences due to domestic abuse, sexual assault, or stalking. This provision would likely require significant modification to existing leave policies, which typically do not cover domestic violence-related leave. According to the Ordinance, employers must provide paid leave for employees:

- seeking a protection order;
- obtaining mental health or physical treatment for themselves or their child;
- making the employee’s home secure or seeking new housing; or
- seeking legal assistance to address issues arising from domestic abuse or to prepare for or attend court-related proceedings.

Employers should also understand how the safe time provision applies to the state law requiring similar leave protection. Under state law, employers must provide up to three working days of leave in a 12-month period, with or without pay, to address needs arising from domestic abuse. According to the Ordinance, an employer may require an employee to use accrued safe time for that purpose, and is not required to provide an additional three days over and above the 72 or 40 hour maximum paid leave. If the Ordinance passes, employers would have to modify existing policies to cover the domestic violence needs of their employees.

Another provision in the Ordinance that could trigger significant changes to existing leave policies is the broad definition of “family member.” In addition to immediate and extended family, the Ordinance includes “any other individual related by

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blood or affinity whose close relationship with an employee is equivalent to a family relationship.” Under this definition, an employee could request leave to care for a roommate, best friend, or recent partner, for example.

### **Tipped employees**

Colorado minimum wages laws allow employers to apply a \$3.02 "tip credit" to offset the \$7.36<sup>1</sup> minimum wage for tipped employees. The tip credit therefore reduces a tipped employee's base wage to \$4.34. However, if an employee's tips combined with the employer's base wage do not equal the minimum hourly rate, then the employer must make up the difference in cash wages.

The Ordinance requires employers to compensate employees for leave at “the same hourly rate and with the same benefits.” Since state law sets the minimum rate of pay as all compensation, including the tip credit, that means employers would have to pay tipped employees a minimum rate of \$7.36 per hour for paid sick and safe time.

### **Carry over**

The Ordinance allows employees to carry over up to 72 hours of leave to the next calendar year. Under no circumstances, however, is the employer required to provide over 72 hours (or 40 if a small business) of paid leave. Employers with existing leave policies must offer an equivalent or more favorable carry over provision.

### **Recordkeeping and rebuttable presumption**

The Ordinance requires employers to retain records documenting hours worked and paid sick and safe time taken by employees for at least five years. Employers must allow the enforcing Agency “reasonable access” to such records to monitor compliance and investigate any claims.

It is important to note that if any issues arise as to an employee's entitlement to leave and the employer fails to retain adequate records or does not allow the enforcing agency reasonable access to such records, the employer is presumed to have violated the Ordinance. The employer can only overcome this presumption by producing “clear and convincing” evidence to prove otherwise.

The Ordinance prohibits an employer from requiring an employee to disclose information relating to his or her abuse, assault, or stalking, or any “details” of an employee's medical conditions as a condition to providing paid sick and safe time. In the event an employee does provide such information, the employer is required to take necessary measures to keep the information confidential. This presents a risk of liability to the employer if confidential information is subsequently disclosed to an unauthorized source. Employers may have to revamp current recordkeeping and security systems to ensure compliance with these provisions.

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<sup>1</sup> By law, the minimum wage rate must be adjusted each year for inflation. This adjustment will increase the 2012 minimum wage to \$7.64. The tip credit will remain the same.

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## **Separation, rehire, or transfer**

Employers are not required under the Ordinance to reimburse or otherwise pay out accrued sick and safe time when an employee is terminated, resigns, retires, or otherwise separates from employment. When an employer rehires an employee within one year of separation from employment, any previously accrued paid sick and safe time that the employee had not used must be reinstated. The employee is entitled to begin using previously accrued time immediately upon rehire and need not wait 90 days. It would therefore be critical for employers to maintain adequate records relating to employees' accrued and used sick and safe time, even after separation from employment.

Although the Ordinance does not specifically address the issue, the foregoing provisions suggest that an employee would be entitled to take paid leave with them if transferred to a location outside Denver. The employee would not, however, be entitled to continue accruing time. Employers may have to modify their leave policies to account for employees that are relocated.

## **Conditions to use leave**

The Ordinance states that “no documentation may be required before three consecutive days of absence” as a condition to using paid leave. In other words, if an employee is absent just one or two days the employer cannot require documentation to verify time taken. If the employee is absent for three or more consecutive days, an employer can only

require reasonable documentation “of illness.” An employee is not required under any circumstances to disclose information relating to domestic abuse, assault, or stalking, or any “details” of an employee’s medical conditions. If an employer’s existing policy requires documentation as a condition to taking leave, the policy must be revised accordingly.

In addition, employers cannot, as a condition to taking leave, require an employee to find a replacement to cover the hours the employee would have worked. Employers may encourage employees to do so, but cannot deny paid leave if the employee is unable to secure a replacement.

The Ordinance broadly states that an employer may not “impose unreasonable barriers to use of paid sick and safe time.” It would therefore be necessary for employers with existing leave policies to assess whether any terms could be perceived as creating such barriers and then make appropriate modifications.

## **Notice of leave**

The Ordinance does not address whether employees may be required to provide their employer with advance notice before taking leave. If an employer has a current policy requiring an employee to provide advance notice, it would not be an express violation of the Ordinance. However, an employer’s notice policy could be challenged by an employee as imposing an unreasonable barrier to using paid sick and safe time.

## **Notice of rights**

Employers must provide sufficient notice to employees about their rights under the Ordinance. The notice must be written in a language that is the first language spoken by at least 5 percent of the employer’s workforce. Employers who willfully violate the notice and posting requirements are subject to a civil penalty in an amount not to exceed US\$100 for each offense. The enforcing Agency is charged with providing posters to employers that include all the necessary information.

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## Retaliation and rebuttable presumption

In general, the Ordinance prohibits employers from taking any retaliatory action against employees that exercise their rights to use paid sick and safe time. This includes any retaliatory or discriminatory treatment against an employee who “mistakenly but in good faith” alleges that his or her employer violated the Ordinance.

If an employer takes an “adverse action” against an employee within 90 days of when that person files a complaint, alleges a violation, cooperates with an agency investigation of a possible violation, opposes any policy that conflicts with the Ordinance, or notifies someone of his or her rights under the Ordinance, there is a “rebuttable presumption of unlawful retaliation.” That means the enforcing Agency or court can presume or accept as true that the employer committed a violation. The employer has the burden of overcoming that presumption and proving otherwise.

## Enforcement and penalties

The Ordinance provides employees with an express right to file complaints with the enforcing Agency. If an employee files a successful complaint against an employer, the Agency has broad discretion to impose fines, and award damages, equitable relief, or any other appropriate relief. Employees are entitled to have Agency decisions reviewed in court.

If this Ordinance passes, employers should expect to have their existing paid leave policies monitored and enforced by a municipal Agency. Additionally, employers should prepare for new costs related to recordkeeping, legal fees, and potentially penalties and damages arising from employee complaints.

## If you would like further information, please contact:

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