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Compliance Challenges in Three Areas of Current Regulatory Focus; or, It's Not Paranoia If They're Really Out to Get You

After attending the update, you'll know that the National Labor Relations Board is targeting nonunion employers, that state and federal regulators are joining forces to go after independent contractor arrangements, and that Seattle's new paid sick/safe leave law actually impacts many employers who are not located in Seattle. But what should you do with that information? In this session, we'll take a closer look and provide additional practical advice. (This is a 60-minute presentation.)

Session Presenters:

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Enforcement Alert: Independent Contractors

A. Introduction

On February 15, 2012, the U.S. Department of Labor's ("DOL") Wage and Hour Division announced the launch of an enforcement initiative focused on the misclassification of employees as independent contractors at nail salons in the Seattle metropolitan area.[1] The DOL is conducting unannounced investigations and, where it finds violations, it will collect back wages for the affected employees and issue penalties against employers. Nationwide, the DOL has collected more than $688,000 in back wages for employees in the hair, nail and skin care industries alone over the past two years.[2]

The DOL's initiative in Washington is not a one-off. It is part of a much larger anti-misclassification initiative undertaken under a Memorandum of Understanding signed with the Washington Department of Labor & Industries ("L&I") on September 11, 2011. Under this initiative, the DOL and the L&I will share resources and information and conduct joint investigations of potential wage and hour violations in Washington State.

The Washington initiative is part of an even larger anti-misclassification initiative. Washington is one of thirteen states that have entered into memoranda of understanding with the DOL as part of the DOL's "Misclassification Initiative" launched under the auspices of Vice President Biden's Middle Class Task Force. The DOL is continuing its efforts to sign up other states. The DOL has also signed a Memorandum of Understanding with the Internal Revenue Service committing the agencies to a joint effort to reduce target employee misclassification.

The financial problems that some governments face are partly responsible for the recent state and federal attention to the classification of workers as independent contractors. A 2009 report by the Government Accounting Office estimated that misclassification of workers as independent contractors cost the federal government $2.72 billion in 2006. Many state analyses have concluded that misclassification takes a sizeable bite out of state coffers as well.[3]

Given that some governments view misclassification audits as a revenue-generating activity, employers have a new reason to take care when determining whether a given service provider should be treated as an employee or independent contractor. This paper provides an overview of the law governing the classification of workers as independent contractors, with particular attention to the law in Washington State and some practical advice for employers. Part B of this paper outlines the tests applicable in various contexts to the determination of independent contractor/employee status. Part C provides some practical rules of thumb for employers in considering the question.

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[1] http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Western/20120215.xml.

[2] *Id.*

[3] Sarah Leberstein, National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 2011) *available at* http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1.

B. Overview of Independent Contractor Tests

Ensuring that workers are properly classified as independent contractors or employees is made difficult by the fact that different tests apply depending on the specific law or agency at issue. These tests all overlap and diverge to varying degrees. A person may be properly classified as an independent contractor for purposes of one of these tests, but not another. Different states use variants of these tests in different contexts. This paper addresses the test used by the IRS and those utilized by different Washington State agencies for purposes of wage and hour, unemployment and worker's compensation laws.

1. The IRS Test

The IRS uses a detailed analytical framework to determine whether a person must be treated as an "employee" for federal tax purposes.[4] This test was formerly known as the "20 factors." It is now articulated as three categories of factors: behavioral, financial and relational.[5]

a. Behavioral Control

The IRS's behavioral control category largely embodies the common law "right to control" test used by many courts to evaluate employee status.[6]

In considering this element, the important thing is whether the business has the "right" to direct and control the worker's activities, even if the business does not actually exercise that control. In essence, the agency looks to whether the service recipient or the service provider has the right to determine the who, what, where, when, why and how of the work.

> **Who.** An independent contractor relationship is more likely when the service provider is not required to *personally* perform the work. That is, if the service recipient simply contracts to have a service provided, and the worker is free to use substitutes and helpers of his or her choice, it is more likely the worker is an independent contractor. Of course, if the particular worker is engaged for her unique personal qualities, education and expertise, then limits on her ability to delegate work might be defensible.
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> **What.** Whether using employees or contractors, a service recipient retains the right to define the results to be obtained. Results can be specified in some detail without jeopardizing contractor status. For example, a business can tell a computer programming consultant very specifically what functions a program will need to perform and how the user interface should look. On the other hand, if the service recipient has the right to tell the worker *how* the desired result must be obtained, it is more likely the worker is an employee.

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[4] The IRS provides an array of materials to aid businesses and individuals in making independent contractor determinations. http://www.irs.gov/businesses/small/article/0,,id=99921,00.html.

[5] http://www.irs.gov/pub/irs-pdf/p1779.pdf

[6] *See, e.g.*, *Cristler v. Express Messenger Systems, Inc.*, 171 Cal. App. 4th 72 (2009) (setting out California's version of right to control test, which also requires consideration of a variety of "secondary factors").

Where and when. Contractors typically have the discretion to perform their work where and when they choose without the business' approval or control. This is subject, of course, to the needs of the work; a cleaning company can be retained to clean a particular office outside of usual business hours.

Why. It is the service recipient's prerogative to decide why it wants a given result achieved. It is generally a contractor's prerogative to decide why she is doing one thing instead of another, or one thing first rather than another, toward the completion of the project.

How. A key indicator of contractor status is that a contractor controls the details—the "means and manner"—of how she accomplishes agreed results. This encompasses some of the factors covered above, including where and when to do the work. In addition, contractors typically decide what tasks are required to complete the work, what equipment to use, what methodologies to use, and the sequence in which to perform the tasks.

- If the business *trains* the service provider on how it wants the job done, the IRS will likely view that as an indication that the service recipient wants the work performed in a particular way—and that provides some indication the worker is an employee subject to the business' control.

- If the business *evaluates* the service provider it can, again, indicate a desire to control the means and manner of the work. The dividing line between taking valid efforts to ensure a contractor is fulfilling her end of the bargain and doing performance reviews of the type associated with employees can be murky. A business can validly ensure contractors are performing work of requisite quality, but it may be problematic to focus on how the results were achieved.

b. Financial Control

The IRS's "financial control" factor encompasses a range of factors.

Significant investment. The IRS examines whether the worker makes a substantial investment in his or her business. The more resources the worker brings with her to the job at hand, the more likely it is that she is an independent contractor. If a worker brings nothing but her own skills and labor, it is more likely she is an employee. On the other hand, there is no precise dollar test, and the IRS recognizes that making a significant investment in one's business may not be especially relevant in some circumstances.

Expenses. The IRS looks to whether the worker is reimbursed for some or all of his or her business expenses. Lack of reimbursement indicates independent contractor status, particularly where the unreimbursed business expenses are high and the contractor can affect his profit margins through cost control.

Services available to the market. A service provider looks more like a contractor if she makes her services available to the market, particularly where she has multiple clients simultaneously, and she periodically secures new clients and finishes up with existing clients. Advertisements, a web page or internet presence, business cards and letterhead, attendance at networking events, and other activities would indicate such

availability. It is also significant if the worker is free to (and does) provide services for a business' competitors.

Opportunity for profit and loss. If a worker has the chance to make more money based on her own talent and expertise and faces the corresponding risk of loss by performing work poorly or inefficiently, it is more likely she is an independent contractor. This factor has been described as a contractor's ability "to be an entrepreneur . . . to take economic risk and reap a corresponding opportunity to profit from working smarter, not just harder."[7] It encompasses many of the factors already described, including:

- method of compensation (to what degree can the service provider realize profits through skill in evaluating work, negotiating a favorable fee for the work, and working efficiently to maximize his or her effective compensation/profit per unit of effort?);

- investments and expenses (to what degree can the service provider increase profits by smart equipment purchases, good leases and controlling operating costs?);

- use of employees and subcontractors (to what degree can the service provider increase profits by making good employment or subcontracting decisions, setting assistants' compensation, delegating efficiently and managing well?);

- availability to the market (to what degree can the service provider increase profits through skillful networking or marketing and otherwise increasing the flow of business separate and apart from the needs and dictates of any particular client?);

- The service provider's risk of loss—for example, by overextending the business on equipment purchases or by negotiating fees that are too low to make payroll for the work performed—is also relevant.

c. Type of Relationship

The IRS's third category of analytical factors encompasses additional factors that might make a worker "look" more like an employee or a contractor, including the following:

Written contracts. A written contract delineating the nature of the parties' relationship provides some evidence of contractor status. That said, when the IRS or the courts conclude that an employee has been misclassified as a contractor, they invariably disregard the parties' wishes and understanding, regardless of whether those are memorialized in a written agreement.

Employee benefits. Provision of typical employee benefits like insurance, pension plans and paid leave tends to suggest a worker is an employee. The absence of such benefits provides some indication that a worker is an independent contractor.

[7] *St. Joseph News-Press & Teamsters Union Local 460*, 345 NLRB 474 (2005).

Permanency of the relationship. All other things being equal, the longer a relationship lasts, the less likely it is that the service provider is an independent contractor. That is, a worker who performs services for the same business year in and year out looks more like an employee. A worker who performs a discrete job lasting a finite amount of time and then moves on looks more like an independent contractor. Again, there are many exceptions depending on other factors. For example, depending on the full nature of the relationship, a contractor may be validly moved from project to project for the same business without compromising independent contractor status.

Termination provisions. A relationship that has no fixed duration indicates employment status; this is a variation on the concept that contractors are hired for specific projects or needs, not to be available for whatever comes up indefinitely. Similarly, the ability of either party to sever a relationship at will and without cause is sometimes cited as evidence of an employment relationship—sometimes even when the parties agree to provide advance notice of termination. By contrast, contracts lasting for fixed lengths and/or delineating specific circumstances in which a party can terminate early point toward independent contractor status.

Services provided as key activity of the business. If a service provider performs the core work of an organization, the service provider looks more like an employee. The IRS gives an example of a law firm hiring an attorney, saying that the law firm likely "will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship."[8] Stated somewhat differently, someone who performs the ongoing work of running an organization is likely engaged in a "key activity of the business." By contrast, a worker brought in to perform a discrete task outside the ordinary business of a company looks more like an independent contractor; for example, a retailer might bring in an IT security expert to improve its network security.

2. The "Economic Realities" Test (Wage-Hour Laws)

The U.S. Department of Labor uses an "economic realities" to determine whether a worker is an "employee" for purposes of federal wage-hour laws, including overtime and minimum wage laws.[9] Some states, including Washington, use the test for purposes of their own wage-hour laws.[10] The economic realities test examines whether a worker is "economically dependent" on the alleged employer, in which case an employment relationship exists.[11] Relative to the IRS test, the economic realities test de-emphasizes the right to control factor, although the relative weight of the various factors might vary based on the facts of a particular case. "The economic

[8] http://www.irs.gov/pub/irs-pdf/p15a.pdf.

[9] http://ww.dol.gov/whd/regs/compliance/whdfs13.pdf

[10] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 54-55, 244 P.3d 32 (2010).

[11] *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) ("To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.").

realities test focuses on the whole activity surrounding the employment relationship in determining whether the workers are employees" for purposes of federal wage and hour laws.[12]

A common articulation of the economic realities test identifies six factors for consideration, and allows that other factors might be relevant:

> 1) The degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.[13]

As under the IRS test, "[c]ontractual language that labels individuals as 'independent contractors' is not necessarily conclusive."[14]

3. The "ABC" Test (Unemployment Insurance)

A third test, sometimes called the "ABC" test, is used in Washington to determine whether a worker is an employee for purposes of unemployment compensation. It is more difficult to show a worker is an independent contractor rather than employee under this test than under the tests described above. For most industries (a special test applies to the electrical and construction industries), an individual performing services for wages is *presumptively* an employee unless the alleged employer can show that:

- The individual is free from direction and control over the performance of the service; **and**
- The service is either performed (1) outside of the usual course of business for which the service is performed, or (2) outside of all the places of business of the enterprise for which the service is performed; **and**
- The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service contract.[15]

The employer can also rebut the presumption of employee status under an "alternative" test by showing that

- The individual is free from direction and control over the performance of the service; **and**
- The service is either performed (1) outside the usual course of business for which the service is performed, or (2) outside of all places of business of the enterprise for which

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[12] *Spitzmesser v. Tate Snyder Kimsey Architects, LTD.*, 2011 WL 2552606, at *8 (D. Nev. June 27, 2011).

[13] *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748 (9th Cir. 1979); *see also Anfinson*, 159 Wn. App. at 54-55 (articulating same six factors under Washington's Minimum Wage Act).

[14] *Perryman v. Dorman*, 2010 WL 4682580, at *2 (D. Ariz. Nov. 10, 2010).

[15] RCW 50.04.140.

the service is performed, or (3) the individual has a principal place of business and is responsible for the costs; **and**

- The individual (1) is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service contract, or (2) has a principal place of business that is eligible for a federal income tax business deduction; **and**

- On the effective date of the contract of service, the individual is responsible for filing a schedule of expenses with the IRS; **and**

- On the effective date of the contract or within a reasonable period after the effective date of the contract, the individual has (1) an active account with the Department of Revenue, (2) an active account with any other state agency, and (3) a Unified Business Identifier (UBI) number; **and**

- On the effective date of contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business that the individual is conducting.[16]

4. Worker's Compensation

Finally, Washington uses a different standard for purposes of worker's compensation. This is the most difficult test under which to show that a worker is an independent contractor.

Washington's workers' compensation laws cover a person "who is working under an independent contract, the essence of which is his or her personal labor for an employer," unless an exception applies. RCW 51.08.180. Similarly, an "employer" includes a person or entity "who contracts with one or more workers." This definition is not limited to an employer of employees. RCW 51.08.070. Independent contractors are, however, excepted if they satisfy all of the criteria required in the "alternative" test quoted above in Section B.3.[17]

C. Practical Tips for Making the Right Call on Worker Classification

The determination of whether a particular worker can properly be classified as an independent contractor requires a careful evaluation of the whole set of facts specific to that worker. That said, the basic inquiry can be distilled to a few fundamental principles.

L&I sums up the independent contractor inquiry as a set of three questions employers should ask themselves when hiring a worker:

(1) Do they bring more than their personal labor to the job?

- o I.e., do they provide employees working under their supervision or special tools or equipment?

[16] *Id.*

[17] RCW 51.08.195.

(2) Are they working without the employer's supervision?

- A company does not supervise by scheduling and inspecting the work but *does* supervise by telling workers how to do a job, assigning tasks, training, keeping timesheets, paying a wage, or setting regular hours.

(3) Do they have an established, independent business?

- Do they work under the company's supervision?
- Do they maintain a separate business by offering services different than the company provides *or* maintaining and paying for a separate place of business *or* performing their services at a location separate from the company's place of business?
- Did they have an established, existing business when hired by the company?
- Was the service provider responsible for filing a tax return with the IRS for his or her business when hired?
- Does the service provider have an active business under Washington State business registration requirements?
- Does the service provider maintain their own set of books detailing their expenses and earnings?[18]

In fact, an employer is likely to get on the right track simply by asking a "gut check" question: "Does the service provider look like he or she is in business for him or herself?" The starting point is common sense. If a worker is closely integrated into a company's operations and performs a core function of the company for an extended period of time while working for no other companies, the worker looks more like an employee. If he or she works on discrete projects that are tangential to a company's business while performing services for other clients, the worker is more likely to be an independent contractor. For example, if a widget company hires a person who owns a painting business once a year to paint its factory, that person likely is not its "employee." But if it hires a "widget consultant" who aids in the design of the company's widgets on an ongoing basis and works only for that company, it is far more likely the consultant is an employee.

Traditionally, the distinction between employees and contractors has also been framed as a distinction between the service recipient's control over *only* the results to be provided (contractor) or also over the means and manner of achieving the results (employee). This is no longer a complete inquiry, but it remains important and useful in the analysis. An independent contractor agreement between a company and a worker should define the "results to be obtained." The company should, to the extent possible:

- Frame the role in terms of projects, meaning a scope of work that has clear boundaries and a discernable set of deliverables that define when the project has been completed.

[18] http://www.lni.wa.gov/IPUB/101-063-000.pdf.

- Articulate deliverables rather than “duties.” This is another way of saying that the worker’s role should be defined in terms of projects.

- Avoid defining the role to include duties or responsibilities that comprise core, ongoing administration of the business.

- Avoid vague and ill-defined deliverables. For example, “other tasks as needed and requested” is generally not appropriate for a contractor. If the nature of the work requires a “catch-all” category, such a category should be articulated as “other projects if mutually agreed between company and consultant.” Contractors do the work necessary to produce the results that they have agreed to produce; they only do more or different work if they decide that they want to do it. Employees do whatever may be needed, as directed.

- Allow the worker the freedom to determine what is needed to fulfill a commitment/complete a project. It is acceptable and necessary for a business to have some input into and approval authority over the work performed by a contractor, but the more detailed the company’s input is, the less defensible a contractor classification becomes. Note that there is some tension between this concept and the idea of specifically defining deliverables. One way to resolve some of the tension is to think of deliverables as defined in advance in a work order or scope of work, which differs from ongoing or ad hoc suggestions or direction that the worker do x, y or z at any particular time.

D. Conclusion

There is no bright line distinguishing independent contractors from employees, and no single rule of thumb that will lead to the correct classification in all instances. Nonetheless, by taking a hard look at a worker and the role that he or she serves for the company before making the decision to treat that worker as an independent contractor, a business can mitigate the risk of unwanted scrutiny from government agencies. In an era of enhanced government focus on worker classification, it is better to measure twice and cut once.

Seattle Paid Sick/Safe Leave: Ten Tips and Traps

by

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In September 2011, the Seattle City Council passed an ordinance ("Ordinance No. 123698) that requires all but the very smallest employers to provide their employees who work in Seattle a minimum amount of paid sick and safe leave, or "PSL." The theory behind the ordinance is that workers who have no paid time off are more likely to come to work when they or their family members are sick, thereby spreading disease and prolonging illnesses and injuries. The "safe leave" provisions of the ordinance recognize that workers without paid time off find it more difficult to obtain legal, medical and other services relating to domestic violence, sexual assault and stalking.

To address these issues, the City Council has created a highly prescriptive and detailed law that takes little account of how most employers operate and that will have impacts well beyond the city limits of Seattle. Some parts of the ordinance will present compliance challenges for all employers, regardless of whether they already offer paid time off. Other parts of the law will require employers to change existing paid leave policies—even policies that provide more total paid leave than the ordinance mandates.

The Seattle Office for Civil Rights has proposed a set of interpretive rules that answer some of the questions that the ordinance leaves open.[19] The Office for Civil Rights is accepting public comments on the proposed rules until June 13, 2012, after which the interpretive rules will be finalized. The final rules may differ from the proposed rules discussed below. The ordinance is effective September 1, 2012.

Important Note: This paper highlights some of the compliance issues that might surprise employers. It is *not* a complete discussion of the potential compliance issues that a given employer might face. In addition, the discussion that follows is based on the ordinance and the proposed interpretive rules as of June 5, 2012; things could still change between now and the effective date of September 1, 2012.

1. Employer Location Is Irrelevant

The ordinance requires that PSL be provided to employees who perform work in Seattle. The ordinance does not distinguish between employees based on where their employer is located. In fact, under the proposed rules, an employer's obligations would begin even before any of its employees performed work in Seattle; one of the proposed regulations requires employers to provide notice to all employees or "to individual employees in applicable situations and reasonably in advance of the employee's first period of work in Seattle."

Telecommuters who perform their work from Seattle are covered by the ordinance, even if their employer is located outside of the city. Conversely, the ordinance does not cover telecommuters who perform their work outside of the city for an employer located in the city

[19] The proposed rules and other information can be found at http://www.seattle.gov/civilrights/sickleave.htm.

(unless the telecommuters sometimes enter the city to work, in which case they might be covered by the ordinance, as described below).

2. Employer Size Is Highly Relevant

The size of the employer determines the rate at which PSL accrues for eligible employees and the amount of PSL that the employer must allow employees to use and carry over each calendar year.

Employer Size	Accrual Rate	Use Per Calendar Year	Carryover to Next Calendar Year
Tier One more than 4 but fewer than 50 FTEs	1 hour PSL / 40 hours worked	40 hours	40 hours
Tier Two at least 50 but fewer than 250 FTEs	1 hour PSL / 40 hours worked	56 hours	56 hours
Tier Three 250 or more FTEs	1 hour PSL / 30 hours worked	72 hours (if separate sick leave and vacation banks)	72 hours (if separate sick leave and vacation banks)
		108 hours (if combined or universal leave policy)[20]	108 hours (if combined or universal leave policy)

Determining size for purposes of the ordinance involves some unusual counting rules.

Size is determined by full-time equivalent, or "FTE," not by number of individual distinct employees. Thus, an employer of ten employees, each of whom works 20 hours per week, has five FTEs *if* FTE at that employer means "40 hours per workweek." FTE does not, however, always mean "40 hours per workweek." The proposed rules state:

- "Full-time" means an eight-hour day and a five-day week or as full-time is defined, in writing or practice, by the employer. There is no minimum number of hours for full-time; it is an employer-specific determination. An employer may define full-time differently for exempt and nonexempt employees.

- "Full-time equivalent" shall mean the number of hours worked for compensation that add up to one full-time employee, based either on an eight-hour day and a five-day week or as full-time is defined, in writing or in practice, by the employer.

[20] "Combined or universal leave" means leave that can be used for any purpose—illness, injury, vacation or other. Such policies are commonly called "PTO" policies.

For benefits eligibility or other purposes, some employers define "full-time" as less than 40 hours per workweek. Such a definition will not affect the tier placement of large employers, but it could affect a smaller employer's "size" for purposes of the ordinance.

"Hours worked" also has a specific meaning under the proposed rules—it means "time that an employee performs work for the employer." It does not include paid or unpaid leave. It *does* include overtime worked by nonexempt employees. Exempt employees' hours are determined based on the "normal workweek" for each employee.

All compensated hours that employees work for the employer count for purposes of tier placement, including hours worked by

- employees who do not work in Seattle;
- temporary agency employees;
- employees of other entities (if two or more entities form an "integrated enterprise"); and
- employees as to whom a business is a "joint employer" (except for certain employee leasing or payroll administration arrangements).

Tier size for a given year is based on "the average number of full-time equivalents paid for per calendar week during the preceding calendar year for any and all weeks during which at least one employee worked for compensation."

3. Any Employee Who Works *at All* in Seattle Is Potentially Covered

At many employers, paid leave policies do not cover certain part-time employees; for example, paid time off may be offered only to employees who work 20 hours or more per week. The ordinance does not permit such exclusions; even an employee working ten hours a week in Seattle will accrue PSL.

An employee need not regularly work in Seattle to be covered by the ordinance. Employees who sometimes work in Seattle and sometimes work elsewhere are covered if they perform more than 240 hours of work in Seattle in a calendar year. Even one full workday in Seattle each week amounts to more than 240 hours well before the end of a calendar year.

Note that "occasionally-in-Seattle" employees, who must work 240 hours in Seattle in a year in order to obtain coverage, are distinct from employees who work less than 240 hours but *only* work in Seattle. An employee who works exclusively in Seattle is covered by the ordinance, even if he or She doesn't work much in a calendar year.

4. PSL Accrues Differently Than Paid Leave Accrues under Some Employer Policies

Many employer policies do not provide paid leave to employees until they have worked for the employer for a certain length of time. PSL, however, begins accruing on day one of the employee's employment. (The employer can, however, require employees to wait until their 180th day of employment to begin *using* their accrued PSL.)

Employer-defined paid leave policies commonly provide a fixed amount of paid leave to full-time employees and a prorated amount to part-time employees. PSL, however, accrues based on hours worked, *not* based on "full-time" or other status. Employers who "frontload" an employee's leave bank by providing a block of leave time at the start of a calendar year will have to monitor the hours that their employees work to ensure that the frontloaded amount

provides each employee with all of the PSL to which he or she is entitled (one hour of PSL per 30 or 40 hours worked, depending on employer tier size).

Caps on PSL accruals appear to be prohibited. Employers can, however, limit use and carryover in amounts that vary depending on the employer's tier placement.

5. There Are Rules About Using PSL

As just noted, employers are permitted to limit the amount of PSL that an employee can use in a given calendar year, the limits being 40 hours in Tier One, 56 hours in Tier Two, and either 72 or 108 hours in Tier Three (depending on whether the employer has a combined or universal leave policy). Importantly, the relevant year for PSL purposes is the calendar year—January 1 through December 31—not any other 12-month period. This is true even if the employer normally grants paid time off on an employee's anniversary date, uses a rolling-12-month period for FMLA leave tracking, etc.

Under the proposed rules, employees are entitled to use their PSL during times that they are scheduled to perform work in Seattle. It appears, therefore, that an employer could adopt a policy permitting *only* such use. In many cases, however, there would be daunting logistical obstacles to enforcing the policy for "occasional" Seattle employees.

Because employees are entitled to use PSL in circumstances that an employer's attendance and leave policies might not otherwise cover, employers should educate themselves and their management teams on the broad range of circumstances in which an employee can use PSL. For example, the ordinance entitles employees to use paid sick leave "to provide care of a family member . . . who needs preventive medical care." "Family member" includes parents-in-law. Unlike the Washington Family Care Act, which entitles employees to time off for parents-in-law only when the parent-in-law has a serious health condition or an emergency condition, the Seattle ordinance does not always require that the parent-in-law suffer from a current medical condition for the employee to be eligible for PSL.

6. There Are Rules About Pay During PSL

The general principle is that an employee is entitled to be paid while using PSL at the rate at which the employee would have been paid had he or she worked as scheduled. Initially, the Office for Civil Rights proposed that an employee would also receive any overtime or other premium that the employee would have earned during the lost time. The agency has modified that position in the latest set of proposed rules, stating that overtime premium pay is only required when the employee uses PSL during scheduled, mandatory overtime.

The ordinance says that employees are not entitled to lost tips or commissions during PSL usage. The proposed rules, however, require that tipped employees and employees who are compensated on a piecework or commission basis must, during PSL, be paid at the greater of their base pay rate (if any) or the state minimum wage rate.

Note that the ordinance requires employers to pay an employee during PSL only for time that the employee was *scheduled* to work. (Special rules apply to indefinite shifts and on-call time.)

7. Attendance Policies Do Not Apply to PSL

The ordinance and proposed rules make clear that an absence that qualifies as PSL can't be the basis for any adverse action against the employee, even if the employer has a so-called "no fault" attendance policy.

8. Most Reasonable Notice Requirements Are Permissible

Borrowing conceptually from the FMLA, the ordinance permits employers to require compliance with their usual and customary notice requirements for absences if the requirements are not unduly burdensome and don't interfere with the purposes for which PSL is taken. The proposed rules distinguish between foreseeable and unforeseeable leave, and generally require employees to provide as much advance notice as possible under the circumstances. However:

- an employer can inquire to determine whether an absence qualifies as PSL and can require employees to state whether they are using time off for a PSL purpose, but the employer can't insist that the employee describe the nature of the illness or other condition necessitating an absence;

- ten days' advance notice arguably is the maximum amount of notice that an employer can require for any PSL absence;

- two hours' notice prior to the start of a shift arguably is the maximum amount of advance notice that an employer can require for an unforeseeable PSL absence; and

- the employer must make exceptions to its notice rules if circumstances prevent an employee from complying with the employer's usual and customary notice procedures.

9. Some Reasonable Documentation Requirements Are Not Permissible

Employers who habitually ask for documentation confirming the need for sick leave will have to rethink their practices after September 1, 2012. The ordinance prohibits employers from requiring employees to provide documentary proof of their need for PSL until they have been absent for three consecutive days. (The proposed rules create a necessary exception for clear instances or patterns of abuse.)

An employer who does not offer health insurance to an employee must pay for part of the cost of obtaining any required documentation.

Documentation suffices under the ordinance if it states that time off is needed for a purpose covered by the ordinance. The employer can require almost nothing by way of additional detail. The employer can, however, ask for additional detail if another law authorizes such inquiry. (The FMLA often would permit the inquiry.) According to the proposed rules, if the employee declines to respond to such a request, the employee's entitlement to the benefits of the other law may be affected. The employee would, however, still be entitled to the benefits of the Seattle ordinance.

10. Tier Three Employers Must Evaluate Potential PTO Policies

The ordinance imposes a rather dramatic penalty on Tier Three employers who offer paid time off that can be used for any purpose instead of separate sick leave and vacation banks; these employers must allow 50% more PSL usage and 50% more PSL carryover as compared to other Tier Three employers. This aspect of the ordinance won't impact employers who already

offer large amounts of PTO. Other Tier Three employers, however, might inadvertently subject themselves to the ordinance's special PTO rules by offering more flexible forms of paid time off.

Two situations present obvious risks. First, an employer that offers both sick time and vacation time, but not enough sick time to comply with the ordinance, might permit employees who run out of sick leave to use vacation time as PSL. By commingling the two forms of paid leave, the employer might have a PTO policy for purposes of the ordinance. Second, some employers offer both vacation time and a separate bank of "flex time" that works like PTO—it can be used for sick leave, but also for other last-minute personal needs or as a supplement to vacation time. Such a flex time policy might be deemed a PTO policy, subjecting a Tier Three employer to the 108-hour use and carryover minimums for which the ordinance provides.[21]

[21] A good argument could be made that neither of these scenarios describes a true "combined or universal leave policy" as defined by the ordinance. Absent clarification in the final rules, however, some risk will nonetheless be present in this area.