

**CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF LABOR STANDARDS ENFORCEMENT**

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**RULES IMPLEMENTING
THE SAN FRANCISCO
PAID SICK LEAVE ORDINANCE (PSLO)**

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INTRODUCTION

The Office of Labor Standards Enforcement ("OLSE") adopts these Rules pursuant to Section 12W.8(a) of the Paid Sick Leave Ordinance (the "Ordinance"). The Ordinance is codified as Chapter 12W of the San Francisco Administrative Code.

These Rules complement the "Frequently Asked Questions" ("FAQ's") issued by OLSE to provide explanations and illustrations of the application of the Ordinance. In January 2007 OLSE issued a series of FAQ's (including, of course, answers to the FAQ's). In March 2007, OLSE issued draft Rules for the Ordinance. Both the Rules and the FAQ's have been vetted through a public process that included public hearings and the opportunity to provide both oral and written comments. Both the Rules and the FAQ's have been updated several times based upon public input. Where applicable, certain FAQ's cross-reference particular Rules, and vice versa. In the unlikely event of a conflict between an answer to an FAQ and a Rule – which OLSE does not envision – the Rule would govern.

In developing these Rules, OLSE has been guided by its understanding of the importance of fulfilling the goals of the Ordinance, providing clear direction to employers and employees, and giving weight to considerations of equity and practicality.

Fulfilling the goals of the Ordinance. In developing these Rules, OLSE has tried to be faithful to the basic goals of the Ordinance. These goals are well established. The Ordinance includes an extensive statement of legislative findings and purpose, explaining the multiple rationales for the Ordinance and articulating its goals. This statement of legislative findings and purpose is found in Section 1 of the Ordinance as submitted to and adopted by the voters. The statement of legislative findings and purpose has the full force and effect of law. Particularly in light of the statement of legislative findings and purpose, the Ordinance should be liberally construed to effect its goals.

Providing clear direction to employers and employees. In developing these Rules, OLSE has also been cognizant that "[a]ny guidelines or rules promulgated by the Agency shall have the force and effect of law and may be relied on by employers, employees, and other persons to determine their rights and responsibilities" under the Ordinance. (S.F. Admin. Code §12W.8(a).) In adopting the Ordinance, the voters intended that OLSE provide clear direction to employers and employees upon which they could rely. Accordingly, these Rules seek to fulfill that mandate.

Giving weight to considerations of equity and practicality. Finally, in developing these Rules, OLSE has been cognizant that "[a]ny guidelines or rules may establish procedures for fair, efficient, and cost-effective implementation of [the Ordinance]." (S.F. Admin. Code §12W.8(a).) In adopting the Ordinance, the voters intended that guidelines or rules take into account considerations of equity and practicality, from both the employee and employer perspective. Accordingly, these Rules are designed to be both fair and workable for employees and employers alike. One aspect of the Rules, though not a dominant feature, is to reduce the possibility of abuses by employees and employers.

While these principles have guided OLSE's judgment in developing these Rules, it must be acknowledged that general principles do not always automatically yield a single, specific result with respect to a particular Rule. Multiple and sometimes conflicting considerations come into play in the development of a Rule. Having been authorized by the Ordinance to promulgate these Rules, OLSE ultimately must exercise its judgment in developing Rules that are reasonable in light of all relevant factors, taking into account both input from the public and its own expertise as a labor standards enforcement office.

RULE #1: EMPLOYEE NOTIFICATION OF PAID SICK LEAVE USE

Current OLSE FAQ:

39. Q: Is it reasonable to require employees to provide advance notification for every use of paid sick leave?

A: What is reasonable depends on the specific situation. An employer's policies or practices should not be so onerous that they deter employees from legitimate use of paid sick leave.

- 1.1 General rule. An employer may require employees to give reasonable notification of an absence from work for which paid sick leave is or will be used. An employer may not impose unreasonable notification requirements on employees. This general rule is qualified by the rules that follow.
- 1.2 Notification policies approved through a bona fide collective bargaining agreement shall be deemed reasonable. This rule applies whether the collective bargaining agreement was entered into before or after February 5, 2007. This rule shall supersede all other rules adopted by OLSE regarding notification of paid sick leave use.
- 1.3 Policies or practices that require advance notification of a pre-scheduled or foreseeable absence from work for which paid sick leave will be used, such as a doctor's appointment or ongoing injury or illness, are in principle reasonable and thus presumptively lawful. However, in a particular case, an advance notification requirement may be unreasonable because the time required for the advance notification is excessive or the method required for providing advance notification is unnecessarily burdensome.
- 1.4 Policies or practices that require notification as soon as practicable for an unforeseeable absence from work for which paid sick will be used are in principle reasonable and thus presumptively lawful. Employers may define "as soon as practicable" as two hours, or a time period less than two hours, prior to the start of an employee's work shift, recognizing that there are instances such as accidents or sudden illnesses for which such a requirement is unreasonable. An advance notification requirement of greater than two hours is presumptively unreasonable unless the employer can demonstrate by clear and convincing evidence that there is a compelling justification for the longer advance notification requirement.
- 1.5 For employee notification requirements, the employer must establish a procedure for employees to communicate absences to the employer. The employer must be able to demonstrate that the procedure ensures an effective means for the employee to provide notice in a way that can be verified.
- 1.6 Notwithstanding the employee notification provisions listed above, when employees notify their employer of an absence for reasons covered by the Ordinance, they do not need to

explicitly request the use of paid sick leave to have the absence covered by the Ordinance. An employer may inquire further to determine whether the leave qualifies for paid sick leave, provided that such an inquiry does not violate federal, state, or local medical privacy laws.

RULE #2: EMPLOYER VERIFICATION OF PAID SICK LEAVE USE

Current OLSE FAQs:

40. Q: Is it reasonable to require employees to provide a doctor's note for every use of paid sick leave?

A: What is reasonable depends on the specific situation. In general, an employer's policy should not be so onerous that it deters employees from legitimate use of paid sick leave.

41. Q: In situations of a pattern or clear instance of paid sick leave abuse, is it reasonable to require a doctor's note or other verification for that employee's use of paid sick leave on those days?

A: Based on the limited facts presented regarding a pattern of paid sick leave abuse, the requirement appears reasonable. In the case of suspected sick leave abuse, an employer may review sick leave use with heightened scrutiny. Examples of suspected sick leave abuse include but are not limited to: (a) taking paid sick leave on days when an employee's request for vacation leave has been denied; (b) a pattern of taking paid sick leave on days when the employee is scheduled to work a shift that may be perceived as undesirable; and, (c) a pattern of taking paid sick leave on Mondays or Fridays or immediately following a holiday.

2.1 General rule. An employer may only take reasonable measures to verify or document that an employee's use of paid sick leave is lawful. This general rule is modified by the rules that follow.

2.2 Verification policies approved through a bona fide collective bargaining agreement shall be deemed reasonable. This rule applies whether the collective bargaining agreement was entered into before or after February 5, 2007. This rule shall supersede all other rules adopted by OLSE regarding verification of paid sick leave use.

2.3 These rules do not supersede applicable federal or state laws that provide for employer verification for leave taken, including but not limited to the Family Medical Leave Act and the California Family Rights Act.

2.4 After an employee has used paid sick leave, the employer may confirm that the employee's use of paid sick leave was for a reason and for a person specified in Section 12W.4 of the Ordinance. In confirming that an employee's use of paid sick leave was consistent with the Ordinance, employers must abide by all federal, state, and local medical privacy laws.

2.5 Policies or practices that require a doctor's note or other medical documentation for the use of paid sick leave of three or fewer consecutive work days shall be deemed unreasonable. Policies or practices that require a doctor's note or other medical documentation for the use

of paid sick leave of more than three consecutive work days (whether full or partial days) shall be deemed reasonable.

- 2.6 In situations of a pattern or clear instance of abuse, an employer may require a doctor's note or other medical documentation to verify that an employee's use of paid sick leave was consistent with the Ordinance, even if the use of paid sick leave was for three consecutive work days or less.
- 2.7 Policies or practices that require a doctor's note or other medical documentation for instances in which the employee has used paid sick leave to attend a medical appointment are in principle reasonable, even if the use of paid sick leave was for three consecutive work days or less.
- 2.8 When a doctor's note or other medical documentation for the use of paid sick leave is obtained by the employer, the employer shall treat that information in a confidential manner consistent with federal, state, and local medical privacy laws.

RULE #3: OTHER EMPLOYER REQUIREMENTS PERTAINING TO AMOUNT OF PAID SICK LEAVE TAKEN

Current OLSE FAQs:

43. Q: Can an employer require its employees to use paid sick leave in one hour increments?

A: Yes. However, an employer may choose to permit its employees to use paid sick leave in less than one hour increments if the employer wishes to do so.

44. Q: Can an employer require its employees to take off the full day to use paid sick leave?

A: What is a reasonable requirement depends on the specific situation. Under the Ordinance, employees may use paid sick leave to receive medical care, treatment, or diagnosis, which may only require limited leave. In most employment situations, a requirement that an employee take off more hours than requested would not be considered reasonable.

3.1 General rule. In most employment situations, unless otherwise permitted by state or federal law, employers may not require employees to use more hours of paid sick leave than the employee needs or requests, or require the employee to take unpaid leave in conjunction with paid sick leave. This general rule is qualified by the rules that follow.

3.2 Policies that require employees to use a greater amount of paid sick leave than the employees need or request or that require employees to take unpaid leave in conjunction with paid sick leave, and that have been approved through a bona fide collective bargaining agreement, shall be deemed lawful. This rule applies whether the collective bargaining agreement was entered into before or after February 5, 2007. This rule shall supersede all other rules adopted by OLSE regarding the amount of paid sick leave to be taken by the employee.

3.3 An employer may require employees to use more hours of paid sick leave than the employee needs or requests to the extent that the employer can verify that it had to pay for a replacement employee for the longer period of time. The employee may choose to use paid sick leave or unpaid leave for those hours. However, if an employer requires an employee to use more hours of paid sick leave than the employee needs or requests and the employer cannot verify that it paid a replacement employee for the longer period of time, the additional hours of paid sick leave must be credited back to the employee's paid sick leave balance.

RULE #4: BREAKS-IN-SERVICE

Current OLSE FAQs:

15. Q: When do employees begin to accrue paid sick leave?

A: For employees working for an employer on or before February 5, 2007, paid sick leave begins to accrue on that date. For employees hired by an employer after February 5, 2007, paid sick leave begins to accrue 90 calendar days after the employee's first day of work.

30. Q: Are employers required to pay employees for unused paid sick leave when the employees quit, retire, or are fired?

A: No. The Ordinance does not require an employer to pay employees for accrued unused paid sick leave upon the employee's termination, resignation, retirement, or other separation from employment. However, if an employer is using a Paid Time Off (PTO) or vacation policy to comply with the Ordinance, employers need to comply with other applicable laws, such as California law, which would require the payout of PTO or vacation upon separation of an employee.

4.1 Employees who performed work for an employer prior to February 5, 2007, were separated from employment before that date, and who are rehired by the same employer after that date are subject to the 90 calendar day eligibility period prior to accruing paid sick leave.

4.2 For employees who began work for an employer after February 5, 2007, were separated from employment prior to becoming eligible to accrue paid sick leave, and are rehired by the same employer within one year of separation, the prior period of employment counts towards the 90 calendar day eligibility period. The 90 calendar days do not have to be continuous or consecutive or completed within the same year.

4.3 When there is a separation of employment after an employee began to accrue paid sick leave and the employee is rehired within one year of separation by the same employer, the employee is not subject to the 90 calendar day eligibility period prior to accruing paid sick leave. However, the employer is not required to reinstate previously accrued paid sick leave hours.

RULE #5: RATE OF PAY – PIECE RATE AND COMMISSIONED EMPLOYEES

Current OLSE FAQs:

NOTE: In no case may employees be paid sick leave at a rate of pay that is less than the San Francisco minimum wage.

47. Q: What is the sick leave rate of pay for employees who are paid an hourly wage?

A: The sick leave rate of pay for employees who are paid an hourly wage is the employee's hourly wage.

48. Q: If an employer provides benefits on an hourly basis, is the employer required to provide the same benefits when its employees are using paid sick leave hours?

A: Yes.

49. Q: What is the sick leave rate of pay for employees who are paid an annual salary?

A: The sick leave rate of pay for employees who are paid an annual salary is determined as follows:

- Divide the annual salary by 52 to get the weekly salary;
- Divide the weekly salary by the number of hours the employee is regularly scheduled to work.
 - For employees who are **not exempt** from the overtime provisions of the Fair Labor Standards Act (FLSA) and California law, the weekly salary must be divided by 40 or fewer hours, even if the non-exempt employee regularly works more than 40 hours per week;
 - For employees who are **exempt** from the overtime provisions of the FLSA and California law (an Exempt Employee), the weekly salary should be divided by 40 hours, unless there is evidence that the Exempt Employee's regular work week is less than 40 hours. In such instances, the weekly salary should be divided by the number of hours worked during a regular work week.

50. Q: What is the sick leave rate of pay for an employee who has two jobs at different pay rates for the same employer (or an employee whose rate of pay fluctuates for the same job)?

A: For an employee who has two jobs at different pay rates for the same employer, or for an employee whose rate of pay fluctuates for the same job, the employer shall reimburse the employee at a rate of pay equal to the scheduled rate(s) of pay for the job during which sick leave is taken.

51. Q: Are tips included when calculating the sick leave rate of pay for tipped employees?

A: No. The sick leave rate of pay is based only upon compensation paid by the employer.

52. Q: When must employees be paid for sick leave?

A: Sick leave must be paid no later than the payday for the next regular payroll period after the sick leave was taken by the employee. However, if the employer has a reasonable verification requirement, the employer is not obligated to pay sick leave until the employee has complied with the verification requirement.

5.1 In no case may employees be paid sick leave at a rate of pay that is less than the San Francisco minimum wage.

5.2 A sick leave rate of pay approved through a bona fide collective bargaining agreement shall be deemed lawful. This rule applies whether the collective bargaining agreement was entered into before or after February 5, 2007. With the exception of Rule 5.1, this rule shall supersede all other rules adopted by OLSE regarding sick leave rates of pay.

5.3 For employees who are paid by a piece rate (whether piece rate only or base wage plus piece rate) or by commission (whether commission only or base wage plus commission), the sick leave rate of pay shall be calculated as follows: divide the employee's total earnings in base wages and commissions or piece rates for the prior calendar year by the total hours worked as a commissioned or piece rate employee during the prior calendar year. For employees without a prior calendar year's work history, divide the employee's total earnings in base wages and commissions or piece rates since the employee's date of hire by the total hours worked as a commissioned or piece rate employee since that date.

For piece rate and commissioned employees who are exempt from the overtime provisions of the federal Fair Labor Standards Act and California labor law (an Exempt Employee), the sick leave rate of pay shall be based upon a 40-hour work week absent evidence that the Exempt Employee's regular work week is less than 40 hours. Alternatively, employers who do keep records of hours worked by Exempt Employees may calculate the employees' sick leave rate of pay based upon actual hours worked.

In these calculations, the employer is not required to pay a sick leave rate of pay greater than two times the San Francisco minimum wage.

RULE #6: ALTERNATIVE & LIMITED SAN FRANCISCO WORK SCHEDULES

Current OLSE FAQ:

2. Q: If an employer is based outside of San Francisco but has employees who perform work in the city, do the employees accrue paid sick leave for hours worked in San Francisco?

A: Yes. All employees who perform work in San Francisco, including on a part-time or temporary basis, accrue paid sick leave for those hours worked in the city, regardless of where their employer is located. However:

- Employees in San Francisco solely to attend or present at a convention or conference are not covered by the Ordinance if they participate in San Francisco conventions or conferences for fewer than 56 hours within a calendar year; and,
- Employees who perform work in San Francisco on an occasional basis are covered by the Ordinance only if they perform 56 or more hours of work in San Francisco within a calendar year.

6.1 Employees who live in San Francisco and perform work for an employer from home, including telecommuting, are covered by the Ordinance for all hours that they perform work from home. However, pursuant to Rule 6.4, this rule applies only if the employee performs 56 or more hours of work in San Francisco within a calendar year.

6.2 Employees who work outside of San Francisco and who travel through San Francisco, but do not stop in the city as a purpose of their work, are not covered by the Ordinance. Employees who travel through San Francisco, and stop in San Francisco as a purpose of their work (for example, to make pickups or deliveries), are covered by the Ordinance for all hours worked in the city, including travel within the city to and from the work site(s). However, pursuant to Rule 6.4, this rule applies only if the employee performs 56 or more hours of work in San Francisco within a calendar year.

6.3 Employees in San Francisco solely to attend or present at a convention or conference are not covered by the Ordinance if they attend or present in San Francisco conventions or conferences for fewer than 56 hours within a calendar year.

6.4 Employees who perform work in San Francisco on an occasional basis are covered by the Ordinance only if they perform 56 or more hours of work in San Francisco within a calendar year.

RULE #7: SMALL BUSINESS DEFINITION: FLUCTUATING BUSINESS SIZE

Current OLSE FAQ:

6. Q: How does an employer determine whether it qualifies as a Small Business if its number of employees changes during the year?

A: A Small Business is an employer for which fewer than 10 persons, including part-time and temporary employees, work for compensation during a given week. In situations in which the number of persons who work for compensation per week fluctuates above and below 10 or more per week over the course of a year, OLSE will calculate business size for the current calendar year based upon the average number of persons who worked for compensation per week during the preceding calendar year.

For example, for a business that operated the entire preceding year, the calculation would be as follows: (a) For each of the 52 weeks during the year, determine the total number of persons who worked for compensation; (b) Add these numbers together; (c) Divide by 52. If this number is below 10, then the employer would qualify as a Small Business for the current calendar year.

For new employers, OLSE will calculate business size for the current calendar year based upon the average number of persons per week who worked for compensation for the first ninety days after its first employee(s) began work.

7.1 In situations in which the number of persons who work for compensation per week fluctuates above and below 10 or more per week over the course of a year, OLSE will calculate business size for the current calendar year based upon the average number of persons who worked for compensation per week during the preceding calendar year.

7.2 For new employers, OLSE will calculate business size for the current calendar year based upon the average number of persons per week who worked for compensation for the first ninety days after its first employee(s) began work.

RULE #8: ACCRUAL OF PAID SICK LEAVE – EXEMPT EMPLOYEES

Current OLSE FAQ:

18. Q: Does paid sick leave accrue on overtime hours worked?

A: It depends on the employee's status under the federal Fair Labor Standards Act (FLSA) and California labor law. For employees who are not exempt from the overtime provisions of the FLSA and California labor law, paid sick leave accrues on all hours worked, including overtime hours worked.

For employees who are exempt from the overtime provisions of the FLSA and California labor law (an Exempt Employee), paid sick leave accrues based upon a 40-hour work week absent evidence that the Exempt Employee's regular work week is less than 40 hours. In instances where there is evidence that the Exempt Employee's regular work week is less than 40 hours, paid sick leave accrues based upon that regular work week.

8.1 For employees who are not exempt from the overtime provisions of the federal Fair Labor Standards Act (FLSA) and California labor law, paid sick leave accrues on all hours worked, including overtime hours worked.

8.2 For employees who are exempt from the overtime provisions of the FLSA and California labor law (an Exempt Employee), paid sick leave accrues based upon a 40-hour work week absent evidence that the Exempt Employee's regular work week is less than 40 hours. In instances where there is evidence that the Exempt Employee's regular work week is less than 40 hours, paid sick leave accrues based upon that regular work week.