



Human Resources Department
Gina M. Tapp, SPHR
Director

TO: HHS Committee
FROM: Gina Tapp, Director of Human Resources
DATE: June 22, 2018
RE: Responses to Additional Questions on Paid Sick Leave Ordinance

In response to the question about what benefits are provided to the Per Diem employees on our City workforce, I am providing the following information.

Question #1: Do we provide any employee benefits to Per Diem employees?

Normally, Per Diem employees are not eligible for any employee benefits, other than enrollment into the ICMA-RC PTS (part-time, temporary and seasonal) retirement plan as described below.

However, due to the requirements of The Affordable Care Act (ACA), we must track the hours worked for Per Diem employees and if they exceed a certain number of hours worked per week (after averaging the number of hours worked per week) during a specified period of time, we are required to provide an offer of health care. This law is very complicated and has details that are outside the scope of what you are considering with the Paid Sick Leave ordinance, therefore I am not including them in this memo. For your information, we currently have one Per Diem employee that falls under this ACA provision who actually elected health care coverage when we made the offer.

The only other benefit that Per Diem employees receive is that we do cover them on our ICMA-RC PTS (part-time, temporary and seasonal) retirement plan, which has an employee contribution of 6.5% of gross earnings (pretax federal and state), with a City contribution of 1.0% on the employee's behalf.

Question #2: Would employees possibly get sick time for calling out of a shift they pick up outside of their normal schedule?

It is highly unlikely that this would occur, as we normally would not grant paid hours of any type over and above the employee's normal schedule, unless they actually worked the hours.

Question #3: Are there standard definitions for the following: Employer, Employee (individuals working from home and Independent Contractors), Full-time, part-time, Seasonal, and Tipped employees?

In general, most employers determine what they consider to be their definitions (hourly limits) for full-time and part-time employees. For example, typical full-time schedules are 36, 37.5 or 40 hours per week. It is really up to the employer, based on the needs of their organization. I have previously provided the Committee with definitions of the various types of employees we have on our City workforce. I would refer you to the State of Maine Department of Labor for the employment standard defining "employee vs. contractor", which I have attached to this memo.

Bureau of Labor Standards

Employment Standard Defining Employee vs Independent Contractor

Current law establishes a common "employment" definition for workers' compensation, unemployment insurance and wage & hour coverage. This employment standard replaces the multiple tests previously used by these agencies and seeks to eliminate the prior confusion experienced by businesses when they received different determinations as to whether a worker was an employee or independent contractor from state agencies enforcing employment laws.

For More Information

Matrix for determining independent contractor status

([how_to_determine_independent_contractor_status.shtml](#))

The employment standard was developed collaboratively by a broad representation from Maine's business and labor communities working closely with representatives of the Department of Labor, Maine Workers' Compensation Board and the Attorney General's Office. The goal was to develop an "easy to understand" test that would effectively describe employment relationships across all occupations and industries. It was also hoped that this test could serve as a 'guide' for business owners in deciding the type of business model that best meets their needs as well as in determining whether an individual worker relationship was that of an employee or independent contractor.

The Maine Workers' Compensation Board and the Unemployment Insurance Program will share information about and adopt one another's formal employment determinations to further streamline the audit process for employers. However, this does not include the rebuttable "pre-determination" process used by Workers Compensation (which is a self-declaration process that is fully rebuttable in the event of an injury), as federal law precludes someone from voluntarily giving up their protection under a State's unemployment laws.

Actual Language of the Law (26 M.R.S.A., Chapter 13, 1043, 11, E)

Services performed by an individual for remuneration are considered to be employment subject to this chapter unless it is shown to the satisfaction of the bureau, that the individual is free from the essential direction and control of the employing unit, both under the individual's contract of service and in fact, the employing unit proves that the individual meets all of the criteria in Number 1 and three (3) of the criteria in Number 2 as listed below.

1. The following criteria must be met:

- a. The individual has the essential right to control the means and progress of the work except as to final results;

- d. The individual is customarily engaged in an independently established trade, occupation, profession or business;
- c. The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;
- d. The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and
- e. The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; and

2. At least three (3) of the following criteria must be met:

- a. The individual has a substantive investment in the facilities, tools, instruments, materials, and knowledge used by the individual to complete the work;
 - b. The individual is not required to work exclusively for the other individual or entity;
 - c. The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;
 - d. The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;
 - e. Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual;
 - f. The work is outside the usual course of the business for which the service is performed;
- or
- g. The individual has been determined to be an independent contractor by the federal Internal Revenue Service. *(an SS-8 (<http://www.irs.gov/pub/irs-pdf/fss8.pdf>) determination)

Also included in this new law are clear penalties to deter the intentional misclassification of workers as independent contractors when they are employees per the standard. This practice not only creates a competitive disadvantage for those employers who correctly classify their workers but also increases unemployment tax premiums because fewer employers are paying appropriate taxes. Therefore, penalties ranging up to \$10,000 were included in the new law to deter this practice.

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