

MEMORANDUM

TO: Health and Human Services and Public Safety Committee; Mayor Strimling

FROM: Gina Tapp, Brendan O'Connell, Anne Torregrossa

DATE: September 6, 2018

RE: Additional information regarding proposed paid sick leave ordinance

At the last committee meeting considering the proposed paid sick leave ordinance, the Committee made some revisions to the proposed ordinance and asked for additional information. The most recent red-lined version of the ordinance is attached, and the answers to the Committee's questions are below.

I. Exemptions for Health Care Workers

The Committee requested some examples of language from other jurisdictions exempting health care workers from paid sick leave.

A. Rhode Island

Rhode Island has an exemption for, "Any employee licensed to practice nursing pursuant to chapter 34 of title 5 is not subject to the provisions of this chapter if the employee:

- (1) Is employed by a health care facility;
- (2) Is under no obligation to work a regular schedule;
- (3) Works only when he or she indicates that he or she is available to work and has no obligation to work when he or she does not indicate availability; and
- (4) Receives higher pay than that paid to an employee of the same health care facility performing the same job on a regular schedule."

B. Vermont

The definition of employee in the Vermont legislation does not include, "An employee of a health care facility . . . if the employee only works on a per diem or intermittent basis." Health care facility is defined as:

all persons or institutions, including mobile facilities, whether public or private, proprietary or not for profit, which offer diagnosis, treatment, inpatient, or ambulatory care to two or more unrelated persons, and the buildings in which those services are offered. The term shall not apply to any institution operated by religious groups relying solely on spiritual means through prayer for healing, but shall include:

- (A) hospitals, including general hospitals, mental hospitals, chronic disease facilities, birthing centers, maternity hospitals, and psychiatric facilities including any hospital conducted, maintained, or operated by the State of Vermont, or its subdivisions, or a duly authorized agency thereof;

(B) nursing homes, health maintenance organizations, home health agencies, outpatient diagnostic or therapy programs, kidney disease treatment centers, mental health agencies or centers, diagnostic imaging facilities, independent diagnostic laboratories, cardiac catheterization laboratories, radiation therapy facilities, or any inpatient or ambulatory surgical, diagnostic, or treatment center.

It also includes “a residential care home, nursing home, assisted living residence, home for persons who are terminally ill, or therapeutic community residence” that is required to be licensed by the state.

C. *Washington D.C.*

Washington D.C.’s definition of employee does not include, “a healthcare worker who choose[s] to participate in a premium pay program.” Premium pay program means “a plan offered by an employer pursuant to which an employee may elect to receive extra pay in lieu of benefits.” Healthcare worker is not defined.

II. Maximum Amounts of Sick Leave Use and/or Accrual per Year

The Committee asked for legislative history from other jurisdictions showing the rationale for jurisdictions’ caps on the amount of sick leave an employee could accrue and/or use. The majority of jurisdictions cap the amount of paid sick time that can be used in any given year at 40 hours. The notable exception is California, where the state caps it at 24 hours, but many local jurisdictions cap the amount at 72 hours. Some jurisdictions have varied caps, depending on the number of employees.

Unfortunately, the available legislative history in most jurisdictions does not delve into the specifics of the number of hours chosen. However, the following information might be relevant to the Committee’s decisions.

- *California* – California currently allows an employer to cap the amount of paid sick time a worker can use each year at 24 hours or 3 days. Legislation earlier this year proposed to increase that to 40 hours or 5 days. Testimony in support of this increase cited to CDC information that employees with the severe flu needed at least one week to recover. Opponents cited to increased costs. This proposal died in committee.
- *Oregon* – A few commenters suggested changing the accruals to equal to 40 hours of sick leave a year to match a standard work week.
- *Vermont* – The Vermont bill provides for a phased-in approach, where employers have to provide 24 hours of leave for the first two years and then 40 hours thereafter. The legislature did extend these deadlines during the legislative process to allow businesses “flexibility.”

III. Wait Time to be Eligible for Paid Sick Leave

The most common waiting period for an employee to be allowed to take any accrued sick leave is 90 days, although Vermont has a waiting period of one year, Connecticut has a waiting period of 680 hours, and Rhode Island has a waiting period of 150 days.

Again, there is not much legislative history reflecting specifically on this waiting period. The only commentary I found was from a business owner in Oregon who suggested a 180 minimum work period to match the state family medical leave act and to allow for temporary and seasonal help without being subject to the law.

IV. Exemptions for Employees Covered by Collective Bargaining Agreements

The exemptions for employees covered by a CBA vary widely from jurisdiction to jurisdiction. Some do not have any exemption, some exempt only those in the construction industry covered by a CBA, some provide an exemption for employees covered by a CBA only where that CBA explicitly waives the members' rights under the relevant paid sick leave law, and a few exempt all employees covered by a CBA.

It appears that the logic behind these exemptions is giving unions the ability to determine the value of paid sick leave in the context of negotiations. If it makes sense to bargain away paid sick time in exchange for a benefit that is perceived as more valuable, then some laws give unions that flexibility. Reflecting this notion, one commenter from Oregon testified that the legislature should "make it so that essentially any collective bargaining agreement that address sick leave or paid time off in any manner make those employees exempt from the bill. Union members need to be able to negotiate their benefit packages with minimum interference from the government"

V. City Examples of Per Diem Employees

The City uses per diem and on call employees in the following positions:

- Shelter attendants - We schedule per diem staff ahead of time on an "as needed" basis, depending on projected numbers and sites to cover), and call them in to work when spots (shifts) are open. If a per diem employee calls out sick, they try to replace them with another per diem employee, unless that shift would leave to overtime, in which case they then call in a regular, full-time Shelter Attendant. Per diem employees are not paid for any hours they lost due to being out sick.
- Registered Nurses and Certified Nursing Assistants – Per diem RNs and CNAs help supplement our regular nursing staff at the Barron Center. If a regular employee calls out sick, they call in one of the per diem employees. There is a minimum obligation for the per diem staff to be available to work for two weekend shifts per month. If a per

diem employee calls in sick after being scheduled to work a shift, they go back to the list of per diem employees and try to fill the shift. The per diem employee who called in sick does not get paid for the hours they lost due to being out sick.

- Event Staff – We use on call event staff as cashiers and concession workers. Most of these positions are on-call status, as event schedules vary.
- Election Workers – Election workers are considered on call and are only used as needed.
- Restaurant Employees – Many of our restaurant employees are on call, and their shifts vary from week to week.
- Barron Center Support Team Workers – We have some on-call support team workers in housekeeping and in the kitchen who supplement the regular, full-time support team workers as needed to fill vacancies, vacations, sick days, etc.
- Dispatchers – We have a few on call dispatchers who fill in for full time dispatchers, as needed.

Many of our per diem, seasonal, and on-call employees often work these non-scheduled, "work when you can" types of schedules because they are either 1) already work another regular job, and the job with the City is just to supplement their income, or 2) they are students or retired and only want to work a very light schedule, and on their terms (i.e., when they want to work). For our Shelter Attendants, we see that most of our regular hires come from our per diem pool, which shows us that in that work setting, a foot in the door is usually to come on as a per diem employee, then eventually get hired on as a regular employee.

VI. Impact to the City if Recreation and Child Care Workers Were Exempt

The City does employ a large number of non-permanent employees in our Parks & Recreation programs. They are more seasonal, on-call, and contractual employees. If these categories of workers continued to be exempt from required paid sick leave the cost increases expected to result from the ordinance (approximately \$42k within the Parks and Recreation Department per Finance Department memo as updated 6/22/18) would not be incurred. The risk of revenue loss in recreational programs where replacement staff is not always guaranteed would also be reduced. Seasonal, on-call and contractual employees are not provided with any sick leave benefits currently, so an exemption moving forward would be a continuation of existing practice. If an on-call employee cannot work a shift, they simply refuse that shift (without no explanation or doctor's note required) and the City would move on to the next employee on the on-call list.

VII. City's Treatment of Seasonal Camp Workers

The City's seasonal, summer camp workers are terminated each year at the end of their season then re-hire them the following year at the start of their season.

VIII. Examples of Per Diem Employees at Other Employers in Portland

Most healthcare facilities rely on per diem employees to fill shifts. Child care facilities also routinely use per diem employees, and the school systems use substitute teachers on a per diem basis.