

**RHODE ISLAND GOVERNMENT REGISTER**  
**PUBLIC NOTICE OF PROPOSED RULEMAKING**

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**AGENCY:** Department of Labor and Training

**DIVISION:** Labor Standards

**RULE IDENTIFIER:** 260-RICR-30-05-5

**REGULATION TITLE:** Paid Sick and Safe Leave Time

**RULEMAKING ACTION:** Proposed Rulemaking

**TYPE OF FILING:** Adoption

**TIMETABLE FOR ACTION ON THE PROPOSED RULE:**

Public notice date: March 1, 2018.

Comment period ends: April 8, 2018.

**SUMMARY OF PROPOSED RULE:** To provide clarification of the rights and obligations of the Healthy and Safe Families and Workplaces Act, R.I. Gen. Laws § 28-57-1, et seq.

**COMMENTS INVITED:**

All interested parties are invited to submit written or oral comments concerning the proposed regulations by **April 8, 2018** to the addresses listed below.

**ADDRESSES FOR PUBLIC COMMENT SUBMISSIONS:**

**Mailing Address:** Sean M. Fontes, Executive Counsel, Department of Labor and Training, 1511 Pontiac Avenue, Cranston, RI 02920

**Email Address:** sean.fontes@dlt.ri.gov

**WHERE COMMENTS MAY BE INSPECTED:**

**Mailing Address:** Department of Labor and Training, 1511 Pontiac Avenue, Cranston, RI, 02920.

**PUBLIC HEARING INFORMATION:**

**Date:** Monday, April 2, 2018

**Time:** 5PM

**Location:** Department of Labor and Training, Conference Room 73-1, 1511 Pontiac Avenue, Cranston, RI, 02920

The location of the public hearing will be accessible to individuals with disabilities. If communication assistance (readers/interpreters/captioners) is needed, or any other accommodation to ensure equal participation, please call 401-462-8897 or RI Relay 711 at least three (3) business days prior to the meeting so arrangements can be made to provide the requested assistance free of cost to the individual requesting.

**FOR FURTHER INFORMATION CONTACT:**

Sean M. Fontes, Executive Counsel, Department of Labor and Training, 1511 Pontiac Avenue, Cranston, RI 02920, 462-8890, sean.fontes@dlt.ri.gov

**SUPPLEMENTARY INFORMATION:**

Regulatory Analysis Summary and Supporting Documentation:

It is beneficial for the public to be fully informed of the rights and obligations resulting from the passage of the Act. For full regulatory analysis or supporting documentation, see agency contact person above.

**Authority for This Rulemaking:** R.I. Gen. Laws § 28-57-9.

**Regulatory Findings:**

In the development of the proposed adoption consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) significant economic impact on small business. No alternative approach, duplication, or overlap was identified based upon available information.

The Proposed Adoption:

The Department of Labor and Training proposes to adopt the proposed rule, 260-RICR-30-05-5, as follows:

**260-RICR-30-05-5**

**TITLE 260 - DEPARTMENT OF LABOR AND TRAINING**

**CHAPTER 30 - WORKFORCE REGULATION AND SAFETY**

**SUBCHAPTER 05 - LABOR STANDARDS**

**PART 5 - Paid Sick and Safe Leave Time**

## **5.1 Purpose**

The purpose of this regulation is to provide clarity on the paid sick and safe leave provisions pursuant to the Healthy and Safe Families and Workplaces Act, R.I. Gen. Laws Chapter 28-57.

## **5.2 Authority**

This regulation is promulgated pursuant to the authority granted by R.I. Gen. Laws § 28-57-9.

## **5.3 Definitions**

A. As used in this regulation, the following terms shall be defined as follows:

1. “Adverse Action” means the denial of any right guaranteed under the Healthy and Safe Families and Workplaces Act, R.I. Gen. Laws § 28-57-1 et. seq., and these regulations, and any threat, discharge, suspension, demotion, reduction of hours, reporting or threatening to report the citizenship or immigration status of the employee or their family member to a federal, state or local agency, or any other action that would cause harm to the employee in any way.
2. “Employee” means any person suffered or permitted to work by an employer, including those working on a full-time, part-time or per diem basis, except for those exempted from the requirements of R.I. Gen. Laws § 28-57-1 et seq. per R.I. Gen. Laws § 28-57-4 (f) and those not considered employees as defined in R.I. Gen. Laws § 28-12-2. Independent contractors, subcontractors, and work study participants as described pursuant to 42 U.S.C. § 2753.23, and apprenticeships and interns as defined under the Fair Labor Standards Act, 29. U.S.C. § 201 et seq., shall not be considered to be employees, pursuant to R.I. Gen. Laws § 28-57-3 (7).
3. “Food Employee” means any individual working with unpackaged food, food equipment or utensils, or food-contact surfaces, as defined by the “Rhode Island Food Code (216-RICR-50-10-1).”
4. “Member of Employee’s Household” means a person that resides at the same physical address as the employee or a person that is claimed as a dependent by the employee for federal income tax purposes.
5. “New Employer” means any employer that establishes an entity subsequent to January 1 of the requisite calendar year except that a firm or establishment that formerly existed, but has changed ownership, is not to be considered a new employer under these regulations.

6. “Public Employer” means the State of Rhode Island, Rhode Island quasi-public agencies, Rhode Island cities and towns and local public employers not covered by the term “cities and towns,” including, but not limited to: school committees, school districts, regional schools and educational collaboratives, and any other public entity.
7. “Same Hourly Rate” means the following based on the employee’s regular compensation:
- a. For employees compensated on an hourly basis, the same hourly rate means the employee’s regular hourly rate.
  - b. For employees who receive different rates of pay for hourly work from the same employer, the same hourly rate means either:
    - (1) The wages the employee would have been paid for the hours absent during use of paid sick and safe leave time if the employee had worked; or
    - (2) The blended rate, determined by taking the weighted average of all regular rates of pay over the previous pay period, month, quarter or other established period of time the employer customarily uses to calculate blended rates for similar purposes.
  - c. Whichever above method employers elect to determine the same hourly rate must be used consistently by those employers throughout a benefit year.
  - d. For employees paid a salary, the same hourly rate means the employee’s total earnings in the previous pay period divided by their total hours worked during that pay period. Employees who are exempt from overtime requirements under 29 U.S.C. § 213(a)(1), the Fair Labor Standards Act, shall be assumed to have worked forty (40) hours in each week unless their normal work week is less than forty (40) hours, in which case the same hourly rate shall be calculated based on the employee’s normal work week. Under no circumstances may the same hourly rate equal less than the effective minimum wage as required per R.I. Gen. Laws § 28-12-3.
  - e. For employees paid on a piece work or fee-for-service basis, the same hourly rate means a reasonable calculation of the wages or fees the employee would have received for the piece work, service or part thereof, if the employee had worked. Regardless of the basis used, the same hourly rate shall not be less than the effective minimum wage as required per R.I. Gen. Laws § 28-12-3.

- f. For employees paid on commission the same hourly rate means the greater of the base wage or the effective minimum wage as required per R.I. Gen. Laws § 28-12-3.
- g. For tipped employees who ordinarily receive the “tipped minimum wage” or minimum wage for employees receiving gratuities, the same hourly rate means the effective minimum wage as required per R.I. Gen. Laws § 28-12-3.
- h. The same hourly rate shall not include:
  - (1) Sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production;
  - (2) Sums excluded under 29 U.S.C. § 207(e), including contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance, and any other employee benefit plans;
  - (3) Overtime, holiday pay or other premium rates. However, when an employee’s regular hourly rate is a “differential rate,” meaning a different wage paid for the same work performed under differing conditions (hours, etc.), the “differential rate” is not a premium and shall be considered as regular wages for the purpose of determining the same hourly rate.
- 8. “Seasonal Employee” means an employee who is hired into a position for which the customary annual employment is six months or less, pursuant to R.I. Gen. Laws § 28-57-3 (13).
- 9. “Temporary Employee” means persons that are employed by an employment agency or temporary staffing company and are placed for assignment with other entities pursuant to R.I. Gen. Laws § 28-57-3 (18).

## **5.4 Paid Sick and Safe Leave Time – Exemptions**

### **5.4.1 Employers with Paid Time Off Policies**

- A. Any employer with a paid time off policy who makes available at least twenty-four (24) hours during calendar year 2018, thirty-two (32) hours during calendar year 2019 and forty (40) hours per calendar year thereafter of paid time off to employees is exempt from the following requirements of the Healthy and Safe Working Families Act, R.I. Gen. Laws Chapter 28-57:

1. Providing earned or paid sick and safe leave time in accordance with the schedule or formula provided in R.I. Gen. Laws § 28-57-5 (a), (b) and (c); and
  2. Allowing employees to carry over unused sick and safe leave as required per R.I. Gen. Laws § 28-57-5 (e).
- B. Any employer with a paid time off policy who makes available at least twenty-four (24) hours during calendar year 2018, thirty-two (32) hours during calendar year 2019 and forty (40) hours per calendar year thereafter of paid time off to employees that can be used for purposes consistent with the Healthy and Safe Working Families Act, R.I. Gen. Laws Chapter 28-57, and is made available in full at the beginning of each benefit year, is exempt from tracking the accrual of such leave, allowing for carryover, or paying employees for unused time.

#### **5.4.2 Food Employees**

- A. For food employees or someone who manages food employees:
1. If an employee notifies their employer of their intent to use earned sick time, the employer may ask if the reason for the absence would trigger the employer's obligations under the "Rhode Island Food Code (216-RICR-50-10-1)."
  2. If the employee answers in the negative the employer is prohibited from asking further questions about the nature of the illness.
  3. If the employee answers in the affirmative, the employer may inquire about the symptoms on a limited basis to determine what steps they must take in order to remain in compliance with their obligations under the "Rhode Island Food Code (216-RICR-50-10-1)."
  4. If the employee states that they are suffering from any of the symptoms described in the "Rhode Island Food Code (216-RICR-50-10-1)" the employer shall follow any actions as required under the "Rhode Island Food Code".

#### **5.4.3 Public employers**

Public employers are exempt from providing paid sick and safe leave pursuant to R.I. Gen. Laws § 28-57-4.

### **5.5 Accrual of Paid Sick and Safe Leave**

#### **5.5.1 Covered Employers**

- A. Employer Size

1. Employers must provide paid sick and safe leave time to all employees if the employer maintained an average of eighteen (18) or more employees in Rhode Island during the previous payroll year's highest two employment quarters.
2. For the purpose of this determination, employers shall count all unique positions and that total shall represent the number of employees that they employed during that time period.
3. This calculation shall be performed on an annual basis using that year's employment data.
4. Employers must establish by January 1st each year whether they employ eighteen (18) or more employees and are required to provide paid leave. This determination remains in effect, regardless of the size of the employer, for the following twelve (12) months.
5. New employers must provide paid sick and safe leave to all employees once they have a total of eighteen (18) or more employees on their payroll.

#### **5.5.2 Covered Employees/Rhode Island Employees**

- A. An employee is considered to be employed in Rhode Island if their primary place of employment is in Rhode Island regardless of the location of their employer.
- B. An employee need not spend fifty percent (50%) or more of their time working in Rhode Island to be considered a Rhode Island employee, so long as the employee spends more time working in Rhode Island than in any other state.
- C. If an employee is eligible to accrue and use PSSL benefits, all hours worked by that employee and all hours they are paid for, regardless of the location of the work or the employer, shall be counted while accruing PSSL benefits.

#### **5.5.3 Accrual and Discharge**

##### **A. Waiting Period**

1. Employers that impose a waiting period of up to ninety (90) days for new employees, pursuant to R.I. Gen. Laws § 28-57-5(d), shall notify new employees in writing of this requirement upon hire.
2. Employees working for employers that require such waiting period may begin to use sick time on the day following the end of their employer's waiting period, established per their employer policy, or on their ninety-first (91st) day of employment, whichever is sooner.

##### **B. Advanced/loaned Paid Sick and Safe Leave time**

1. Employers that have loaned Paid Sick and Safe Leave time to employees, pursuant to R.I. Gen. Laws § 28-57-5(i), that have since separated from employment, are permitted to deduct any monies owed to the employer for this purpose from the final payroll that is to be issued to that employee so long as they have obtained written permission to do so, in accordance with R.I. Gen. Laws § 28-14-3.2.
2. Employers should obtain written permission from their employees at the time that the advance or loan of paid sick and safe leave is made.
3. Employers should clearly state in their employment policies that prior to advancing or loaning paid sick and safe leave time they will require employees to agree, in writing, to allow them to recover any outstanding amounts owed from advanced or loaned paid sick and safe leave time via payroll deductions in the final payroll to be issued to the employee.

C. Accrual of earned sick time/Paid Sick and Safe Leave while on paid leave

1. Employees shall accrue earned sick time or PSSSL benefits for all hours worked and all hours paid while collecting paid time off benefits, including, but not limited to holiday pay, personal time, sick time and vacation time.

## **5.6 Use of Paid Sick and Safe Leave Time**

### **5.6.1 Employee's Right to Access Sick Leave**

A. Adverse Action

1. Employers may not take adverse action against any employee for making use of the rights and protections provided in these regulations or in R.I. Gen. Laws § 28-57-1 et. seq.

### **5.6.2 Notice Requirements**

A. Foreseeable Leave

1. Leave shall be considered foreseeable when it is planned at least twenty-four (24) hours in advance of when it is required.
2. Notice shall be provided by the employee requesting to use PSSSL benefits for a foreseeable leave within a reasonable timeframe.

B. Unforeseeable Leave

1. In instances of unforeseeable leave, consistent with the statutory provisions required per R.I. Gen. Laws § 28-57-6(d), employer's policies must be reasonable.

### **5.6.3 Documentation**

#### **A. Employer requirement to provide reasonable documentation**

- 1. Employers that require reasonable documentation when an employee has been absent for more than three (3) consecutive work days shall notify employees in writing of this requirement in their employee handbook or employment policy**
- 2. Employers shall accept such documentation within a reasonable timeframe.**
- 3. Any expense or burden on an employee shall be considered to be unreasonable if the total cost to the employee to obtain certification regarding their absence is more than two times their hourly rate of pay. In determining the total cost to the employee, costs such as administrative, governmental or medical fees, and transportation costs shall be included.**
- 4. If the total cost to an employee for obtaining documentation is considered unreasonable, employers may require their employees to submit a signed statement indicating that their use of earned sick time or PSSL benefits was for purposes consistent with R.I. Gen. Laws § 28-57-6(a).**

## **5.7 Enforcement**

### **5.7.1 Administrative Enforcement**

#### **A. Penalties**

- 1. Employers who have been found in violation of this chapter by the director or his or her designee shall be liable for a penalty of one hundred dollars (\$100) for a first offense.**
- 2. Subsequent violations will result in a penalty of one hundred to five hundred dollars (\$100-\$500) per offense.**
  - a. Each day of violation shall constitute a separate offense**
  - b. In determining the amount of the penalty, the director or his or her designee shall consider the size of the employer's business; the good faith of the employer; the gravity of the violation; the history of previous violations; and whether or not the violation was an innocent mistake or willful.**

#### **B. Appeals**

1. Any employer or employee aggrieved by a decision of the Department may file an appeal in accordance with the procedure outlined in “Rules of Procedure for Administrative Hearings (260-RICR-10-00-5).”

## **5.8 Confidentiality**

- A. Employers shall keep confidential any information regarding their employees’ use of PSSL or earned sick time benefits.
  1. Employers shall be permitted to disclose, on a limited basis, as part of their defense during any administrative or judicial proceeding, whether or not an employee has accrued, used, or requested to use, the benefits prescribed by this chapter.
  2. Employers shall also be permitted to disclose whether the employee adhered to their previously established and distributed employer policy while using such benefits.
    - a. Employers are not permitted to disclose any details pertaining to their employees’ use of the benefits prescribed by this chapter other than as described in § 5.8 (A) (1) of this Part. This includes, but shall not be limited to: the details of any illness, injury, incident or legal action that pertained to the use of such benefits.