CLASP
policy solutions that work for low-income people

April 28, 2017

Director Elizabeth Smith
Fraud Prevention and Labor Standards
Washington State Department of Labor & Industries
PO Box 44000
Olympia WA 98504-4000

Re: Proposed rules WAC 296-128-600 through 296-128-800 implementing the Paid Sick Leave portion of WA I-1433

Dear Director Smith:

The Center for Law and Social Policy appreciates the opportunity to comment on the Department of Labor and Industry's (L&I's) proposed rules implementing the Paid Sick Leave portion of I-1433, "Minimum Wage and Paid Sick Leave." As an organization dedicated to promoting policy solutions that work for low-income people, we are committed to ensuring that workers are able to fully access the protections guaranteed in Washington's paid sick leave law, without experiencing negative consequences. We are pleased to submit this comment, which includes suggestions to optimize the rules implementing the initiative. Moving forward, we look forward to supporting L&I's efforts to effectively enforce the law and are available to assist as needed.

CLASP's expertise on paid sick leave draws on our research and policy analysis; longstanding advocacy for the passage of federal, state, and local paid sick days laws; and technical assistance to government agencies to guarantee effective enforcement of the laws. For the past two years, CLASP has hosted convenings of paid sick leave enforcement agencies—including such Washington agencies as Seattle, Spokane, and Tacoma—and advocates, bringing them together to develop best practices. We have also developed a website, enforcingsickdays.org, which collects paid sick leave enforcement materials and research so that new enforcement agencies can build from the expertise of their more experienced peers. CLASP further works with individual employers to learn how their businesses are affected by offering paid sick days.

Based on this experience and expertise, CLASP submits the following comments on the L & I's draft rules:

WAC 296-128-620 Usage

L & I has requested feedback regarding the minimum increment of usage. The current draft rules indicate that employers must allow employees to use sick leave in one-hour increments (subsection 4). This should be changed to 15-minute increments, to align with the increments at which many hourly employees are paid. An employee who works 1.25 hours will be paid for 1.25 hours, not 2 hours. Similarly, an employee who is away from work for 1.25 hours should be

able to use 1.25 hours of paid sick leave, not 2 hours. This change would align Washington's incremental use policy with that of other jurisdictions such as Arizona and Massachusetts.[1]

Moreover, regarding the option to set larger minimum use periods (5) when shorter periods would cause undue hardship on the employer, whereas requesting a compliance opinion letter (5c) from L & I regarding an employer's undue hardship exception is currently optional, we suggest that employers wishing to institute a larger minimum usage increment be *required* to first receive approval from L & I.

L & I should further clarify in (5b) what constitutes "readily available." We suggest that employers be required to provide this information in writing upon the hiring of a new employee, post the information in a prominent place in the workplace, and, if applicable, post the information on the company's internal website.

WAC 296-128-630 Reasonable Notice

CLASP suggests that subsection (2) be amended to state that in the case of medical emergencies, the employee may notify the employer as soon as is practicable, not necessarily by the end of the day on which the leave was taken. Additionally, L & I should include a provision that in case of medical emergencies, notification need not come from the employee her/himself, but rather may come from a family member or other designee of the employee.

WAC 296-128-640 Verification

In section (3), we suggest that L & I provide additional alternative acceptable types of verification, such as a signed affidavit from the employee explaining the reason for usage.

L & I has requested feedback regarding the "unreasonable burden or expense provision" in subsection (4). Rather than burdening the employer and employee with negotiating what constitutes an unreasonable burden or expense, L & I should define this clearly in the rules. For example, L & I could dictate that the employer be required to pay half of the costs incurred by the employee in procuring medical verification to comply with the employer policy. Such costs might include any fees charged by a healthcare provider, travel expenses, child care expenses, etc. (As an example, see section SHRR 70-390 of the Seattle Paid Sick and Safe Time Rules.[2])

WAC 296-128-710 Frontloading

L & I has requested feedback regarding written notification of an employer's intent to frontload paid sick leave. CLASP suggests that the rules specify that employers must notify employees in writing of their intent to use either an accrual system or frontloading, both at the time of a new employee's hiring and at any time when the employer makes a change to their system.

This section should also specify the total number of hours that the employer must frontload if they choose this option. We suggest a frontload amount of 50 hours per year, roughly the number of hours that a full-time employee would earn in one year under an accrual system.

The rules should further be expanded to specify the process by which an employer may switch from an accrual system to frontloading or vice versa. For example, if the employee under an accrual system has accrued unused sick leave at the end of a year, and the employer intends to switch to a frontloading system at the start of the new year, the employee should have the option to either carry the unused sick leave forward or have it paid out. We suggest modeling the language on section 839-007-0007 of the sick time rules promulgated by the Oregon Bureau of Labor and Industries.[3]

Additionally, subsection (4), allowing employers to deduct from a separating employee's last paycheck the value of paid sick leave they have used before they would have accrued such leave, should be removed. Employers who, for their convenience, elect to use a frontloading system have decided to forgo tracking accrual; therefore, it does not make sense for them to switch back to tracking accrual solely for the purposes of holding employees liable for sick time they were provided upfront. An employer that prefers that employees not use sick leave they have not yet earned should instead use an accrual system. Moreover, under an accrual system, employees who separate from their employers before making use of all accrued sick time are not entitled to be "paid out" for this unused time. Employees should similarly not be held liable for used sick time under a frontloading system.

WAC 296-128-730 Disciplinary Action

This section should make clear that an employer may not apply absences for legitimate uses of paid sick leave to an absence control policy ("points" system). This not only is in line with the rules promulgated by other jurisdictions,[4] but also ensures that the rules reflect the intent of the initiative in Part II, Section 5, Part (3), which states, "An employer may not adopt or enforce any policy that counts the use of paid sick leave time as an absence that may lead to or result in discipline against the employee."

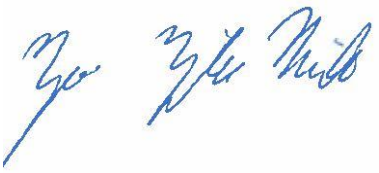
WAC 296-128-750 Retaliation

The rules should clearly establish that the onus is on the employer to demonstrate that any adverse action taken within 90 days of an employee exercising his or her right to sick days is not retaliatory. This is best achieved by including language establishing that there is a "rebuttable presumption" of retaliation in such instances. Similar language is present in section 14.16.055 of Seattle's Paid Sick Time and Paid Safe Time ordinance[5] and section 7-17.b of the New York City Earned Sick Time Act Rules.[6]

Finally, subsection (5) currently limits employees to filing retaliation-based complaints with L & I within six months of the alleged retaliation. This limit should be extended to three years, in accordance with the limit set for complaints regarding other violations laid out in section WAC 296-128-770.

We are grateful for the opportunity to provide these comments. We encourage L & I to contact us with any questions.

Sincerely,



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[1] For Arizona, see section 23-373.F of the Minimum Wage and Earned Paid Sick Time initiative, available at http://apps.azsos.gov/election/2016/general/ballotmeasuretext/I-24-2016.pdf. For Massachusetts, see section 33.03.14 of the Office of the Attorney General Final Regulations for Earned Sick Time, available at http://www.mass.gov/ago/docs/regulations/940-cmr-33-00.pdf.

[2] http://www.seattle.gov/laborstandards/enforcement/rules-and-ordinances/paid-sick-and-safe-time

[3] http://www.oregon.gov/boli/TA/docs/2015%20Sick%20Time%20Rules.pdf

[4] See, for example, section 839-007-0065 of the Oregon Sick Time Rules, and section 9-4106.3 of the Philadelphia Promoting Healthy Families and Workplaces ordinance, available at https://phila.legistar.com/LegislationDetail.aspx?ID=2101250&GUID=5D12D54D-B1A7-4446-B646-95BE528F771C&FullText=1.

[5] https://www.municode.com/library/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.16PASITIPASATI

[6] http://rules.cityofnewyork.us/sites/default/files/adopted_rules_pdf/amendment_of_earned_sick_time_rules_1_27_16_-_final_approval_-_legal_6360439_4.pdf