

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

**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 San Francisco Administrative Code Section 12W.8(a) of the Paid Sick Leave Ordinance ("PSLO" or the "Ordinance"). The Ordinance is codified as Chapter 12W of the San Francisco Administrative Code.

OLSE initially adopted Rules interpreting the Paid Sick Leave Ordinance in May 2007. On March 16, 2018, OLSE released updated proposed Rules and held a public hearing on April 24, 2018. Final revised Rules were published on May 7, 2018, with the effective date of June 7, 2018. In the event of any conflict between the Rules and Administrative Code Chapter 12W, the Administrative Code would govern.

In developing these Rules, OLSE has been guided by the need to fulfill the legislative intent of the Ordinance, provide clear direction to employers and employees, and strive for equity and practicality.

RULE 1: EMPLOYEE NOTIFICATION OF PAID SICK LEAVE USE

Interprets Section 12W.4(g)

Background: An employer may require employees to give reasonable notification of an absence from work for which paid sick leave is or will be used.

Rule 1.1. The employer must establish a procedure for employees to communicate absences to the employer. Whether an employer's notification system is reasonable depends upon the totality of the circumstances.

Rule 1.2. 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 presumptively reasonable. 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.

Rule 1.3. Policies or practices that require notification as soon as practicable for an unforeseeable absence from work for which paid sick will be used are presumptively reasonable. 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.

Rule 1.4. When employees notify their employer of an absence for reasons covered by the Ordinance, they need not 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.

Example: An employee informs her employer that she needs to miss two days of work to undergo a medical procedure. This absence is eligible for paid sick leave time, even though the employee did not explicitly state that she would like to use paid sick leave time.

Rule 1.5. Notification policies approved through a bona fide collective bargaining agreement shall be deemed reasonable, even if the collective bargaining agreement does not explicitly waive or reference Section 12W.4(g). This rule applies whether the collective bargaining agreement was entered into before or after February 5, 2007.

RULE 2: EMPLOYER VERIFICATION OF PAID SICK LEAVE USE

Interprets Section 12W.4(h)

Background: An employer may only take reasonable measures to verify or document that an employee's use of paid sick leave is lawful.

Rule 2.1. A measure is not reasonable if the employer requires the employee to disclose any more information than is necessary for the employer to determine whether the employee's absence was or will be a proper use of paid sick leave time.

Example: An employee indicates that she would like to use one week of paid sick leave. The employer asks the employee to provide documentation of the absence. The employee provides a doctor's note, which states: "The employee will be unavailable for work for one week due to a medical operation." This note is legally sufficient, and the employer may not require the employee to provide any additional detail, whether verbally or in writing, as to the type or purpose of the operation.

Rule 2.2. Employers shall treat all information obtained from employees regarding their use of paid sick leave in a manner that is consistent with applicable federal, state, and local privacy laws.

Rule 2.3. Policies or practices that require a doctor's note or other 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 documentation for the use of paid sick leave of more than three consecutive work days (whether full or partial days) shall be deemed reasonable.

Rule 2.4. In situations of a pattern or clear instance of abuse, an employer may require a doctor's note or other 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.

Rule 2.5. Policies or practices that require a doctor's note or other documentation for instances in which the employee has used paid sick leave to attend an appointment are presumptively reasonable, even if the use of paid sick leave was for three consecutive work days or less.

Rule 2.6. Verification policies approved through a bona fide collective bargaining agreement shall be deemed reasonable, even if the collective bargaining agreement does not explicitly waive or reference Section 12W.4(h). This rule applies whether the collective bargaining agreement was entered into before or after February 5, 2007.

**RULE 3: REQUIREMENTS PERTAINING TO THE AMOUNT OF
PAID SICK LEAVE TAKEN**

Interprets Section 12W.4(f)

Background: Administrative Code Section 12W.4(f) prohibits an employer from requiring, “as a condition of an employee’s taking paid sick leave, that the employee take paid sick leave in increments of more than one hour, unless the Agency, by rule of regulation, authorizes a larger increment in particular circumstances provided that the increment is no larger than the employer may require under state law.”

Rule 3.1. Policies regarding the increments of time in which paid sick leave must be taken that have been approved through a bona fide collective bargaining agreement do not violate the Ordinance. This rule applies whether the collective bargaining agreement was entered into before or after February 5, 2007.

RULE 4: BREAKS IN SERVICE

Interprets Section 12W.3(g) and 12W.4(d)

Background: Admin Code Section 12W.3(g) states, “if an employee separates from an employer for any reason and is rehired by the employer within one year from the date of separation, previously accrued and unused paid sick leave shall be reinstated. The employee shall be entitled to use the previously accrued and unused paid sick leave and to accrue additional paid sick leave upon rehiring.” Section 12W.4(d) states, “An employee shall be entitled to use accrued paid sick leave beginning on the 90th day of employment, after which day the employee may use paid sick leave as it is accrued.”

Rule 4.1. If an employee separates from an employer before the 90th day of employment and is rehired by the employer within one year from the date of separation, all prior days of employment shall count toward the 90 days of employment, after which the employee may use paid sick leave as it is accrued.

Example: An employee separates from an employer after working for 45 days. One month later, the employee is re-hired. The employee must work another 45 days before she may begin using her accrued paid sick leave.

RULE 5: RATE OF PAY

Interprets Section 12W.3(h), subsections (1) and (3)

Background: Section 12W.3(h) states that, “For the purposes of this Chapter, an employer shall calculate paid sick leave using any of the following calculations: (1) Paid sick leave for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick leave, whether or not the employee actually works overtime in that workweek. . . . (3) Paid sick leave for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.” The Ordinance does not define the terms “regular rate of pay” or “exempt employee.”

Rule 5.1. “Exempt employees” shall mean employees who are exempt from the overtime provisions of the federal Fair Labor Standards Act (FLSA) and California labor law. “Nonexempt employees” shall mean employees who are employees who are not exempt from the overtime provisions of the federal Fair Labor Standards Act (FLSA) and California labor law.

Rule 5.2. The “regular rate of pay” shall have the same meaning as “regular rate of pay,” as used in California Labor Code Section 510, and as further described in the California Department of Industrial Relations Division of Labor Standards Enforcement (DLSE) Enforcement Manual, Section 49, as it may be amended from time to time.

Rule 5.3. If the employee is an exempt employee, and no other forms of paid leave are provided, the employee’s salary shall continue without deduction for sick time taken, with the time taken applied against the employee’s leave balance.

Rule 5.4. A sick leave rate of pay approved through a bona fide collective bargaining agreement does not violate the Ordinance, even if the collective bargaining agreement does not explicitly waive or reference Section 12W.4(h). This rule applies whether the collective bargaining agreement was entered into before or after February 5, 2007.

RULE 6: ALTERNATIVE & LIMITED SAN FRANCISCO WORK SCHEDULES

Interprets Section 12W.2(c)

Rule 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 6.3, this rule applies only if the employee performs 56 or more hours of work in San Francisco within a calendar year.

Rule 6.2. Employees who work outside of San Francisco and who travel through San Francisco, but do not stop in the City, are not covered by the Ordinance. Employees who travel through San Francisco, but stop in the City to 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 6.3, this rule applies only if the employee performs 56 or more hours of work in San Francisco within a calendar year.

Rule 6.3. Employees who perform work in San Francisco 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

Interprets Section 12W.2(f)

Background: The PSLO defines “small business” as “an employer for which fewer than ten persons work for compensation during a given week. In determining the number of persons performing work for an employer during a given week, all persons performing work for compensation on a full-time, part-time, or temporary basis shall be counted, including persons made available to work through the services of a temporary services or staffing agency or similar entity.”

Rule 7.1. If the number of persons who work for compensation per week fluctuates above and below 10 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.

Rule 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 90 days after its first employee(s) began work.

RULE 8: ACCRUAL OF PAID SICK LEAVE – OVERTIME AND EXEMPT EMPLOYEES

Interprets Section 12W.3(h)

Rule 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.

Rule 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 the Exempt Employee's regular work week is less than 40 hours, paid sick leave accrues based upon that regular work week.

RULE 9: CONTROLLED GROUP OF COMPANIES

Interprets Section 12W.2(d)

Rule 9.1. A “controlled group of corporations”, as defined in Section 1563(a) of the United States Internal Revenue Code, is considered to be a single employer under the PSLO.

Rule 9.2. Employees of businesses that are not incorporated are counted as working for one employer if the businesses satisfy the definition of a “controlled group of corporations”, as defined in Section 1563(a) of the United States Internal Revenue Code, except that one or more of the businesses is not a corporation, but instead, a different type of business entity.

RULE 10: JOINT EMPLOYMENT

Interprets Section 12W.2

Background: An employee may be jointly employed by two or more employers. Joint employment can occur in a variety of situations, including but not limited to when an employer uses a temporary staffing agency, leading agency, professional employer organization, or other entity serving the same or similar functions. OLSE looks to California law when assessing whether an employee is jointly employed.

Rule 10.1. If an employee is jointly employed and at least one employer is covered by the PSLO, each employer shall have an obligation to ensure compliance with the PSLO. Whether an employee is jointly employed by more than one employer shall not impact an employer's responsibilities under the PSLO.

RULE 11: TIME FOR ACTIONS

Establishes Procedures Pursuant to Section 12W.8(a)

11.1. Unless otherwise specified, the time in which any act provided by Rules 12, 13, or 14 is to be performed is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or other legal holiday, and then it is also excluded.

11.2. Unless otherwise specified, when Rules 12, 13, or 14 require performance of an act within a specified number of days, that number refers to calendar days, not business days.

11.3. Unless otherwise specified, if the last day for the performance of any act that is required by Rules 12, 13, or 14 to be performed within a specific period of time falls on a Saturday, Sunday, or other legal holiday, the period is extended to and includes the next day that is not a holiday, Saturday or Sunday.

RULE 12: ENFORCEMENT PROCEDURES

Establishes Procedures Pursuant to Section 12W.8(a)

OLSE has the authority to conduct investigations, monitor compliance, and obtain restitution and penalties for violations of the PSLO. As part of this authority, OLSE may examine employer records, conduct inspections of employment sites, speak with workers and other witnesses, and conduct audits. Where OLSE has reason to believe that a violation has occurred, it may order any appropriate temporary or interim relief to mitigate the violation or maintain the status quo pending completion of a full investigation or hearing. OLSE may send a Notice of Non-Cooperation to an employer who fails to provide OLSE with requested documents within the identified time frame. Such notices may assess penalties of up to \$50 per day as to employee whose records have not been timely provided. The employer shall have 14 days to pay such penalties.

Investigation Procedure

Upon making a preliminary determination that an employer has violated the PSLO, OLSE will send the employer a Notice of Preliminary Determination (“NOPD”). For all alleged violations other than an allegation of retaliation, the employer shall have 15 days to either: (1) resolve the matter by paying the total amount owed (including back pay, interest, and penalties to workers and penalties to the City) and complying fully with the PSLO; or (2) if the employer contests the findings in the NOPD, request an NOPD Review Meeting with OLSE, by sending an email to the OLSE compliance officer identified in the NOPD. For allegations of retaliation, the employer shall have 7 days to respond in one of the two ways described in the previous sentence.

At the NOPD Review Meeting, the employer shall have an opportunity to explain the reasons why the employer believes it has not violated the provisions of the PSLO listed in the NOPD. The employer may provide supporting evidence to prove compliance. The employer is encouraged to provide any supporting evidence to OLSE at least seven days prior to the NOPD Review Meeting to allow OLSE sufficient time to review the evidence. OLSE may request that the employer bring certain categories of documents to the NOPD Review Meeting.

After the NOPD Review Meeting, OLSE will decide whether to issue a Determination of Violation (“DOV”) or conclude the investigation. During this time, OLSE may conduct further investigation of the alleged violation. The issuance of a DOV constitutes OLSE’s final determination that an employer has violated the PSLO.

Failure to Respond: If the employer fails to respond to the NOPD within 15 days of service of the NOPD, OLSE may issue a DOV.

A DOV will include: (1) a list of all PSLO provisions the employer has violated; (2) an explanation of why OLSE has concluded that the employer has violated the specified provisions; (3) the corrective actions the employer must take to remedy its violations, including, but not limited to, making paid sick leave payments and penalties to employees and making sick leave available to employees; (4) the amount of the penalty to cover the cost of the investigation imposed for the violation(s), if applicable; and (5) a timeline for payment of all restitution and penalties, if applicable; and (6) the procedure for appealing the DOV and the deadline for filing the appeal.

Service

OLSE may serve NOPDs and DOVs in any of the following manners:

- personal service upon the employer or legal representative;
- posting the document in a conspicuous place at the employer’s place of business or the fixed location within the City from or at which the employer conducts business in the City;
- email, so long as the employer has consented in writing to service by email; or
- first class mail, with postage prepaid and a declaration of service under penalty of perjury by the person mailing the document.

If OLSE effects service by mail, service is effective on the date of the mailing.

RULE 13: CORRECTIVE ACTION AND PENALTIES

Interprets Section 12W.8

Calculating Remedy Payments

If an employer does not have a compliant paid sick leave policy, does not maintain or retain adequate records documenting hours worked by its employees and paid sick leave accrued and used by its employees, or does not allow the OLSE reasonable access to such records, OLSE may calculate the dollar amount of sick leave owed in one of the following two ways:

1. OLSE may presume that the paid sick leave each employee would have used if the employer had provided a compliant paid sick leave policy would have been equivalent to the national average of “frequency of work-loss days” for adults aged 18-55, as published by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC). When using this method, OLSE will subtract any paid sick leave which the employer has paid the employee from the national average for “work-loss days” calculating back wages and penalties due.

Example: An employer with 100 employees had a noncompliant sick leave policy that capped accrual at 24 hours (rather than 72 hours, as required by Section 12W.3). The current CDC average work-loss days for adults ages 18-55 is 3.7 days per year or 29.6 hours for employees working 40 hours per week. One employee used 16 hours of paid sick leave in each year of the audit. For that employee, OLSE may require the employer to pay back wages of 13.6 hours per year (29.6 hours - 16 hours = 13.6 hours).

2. OLSE may consider actual evidence of the number of days that an employee missed work or would have missed work for reasons that would have entitled the employee to use more than the CDC average “work-loss days.”

Calculating Remedy of Hours Available

In addition to the wages owed for paid sick leave unlawfully withheld, as described in Rule 13.1, OLSE may require the employer to provide employees with access to accrued paid sick leave hours to remedy the employer’s noncompliance with the Ordinance. To calculate the number of hours owed to each employee, the OLSE shall calculate the total number of hours worked by each employee, divide those hours by 30 and subtract the total number of hours paid out pursuant to Rule 13.1. If the resulting number of hours is lower than the applicable accrual cap (as set forth in Chapter 12W.3(c)), the employee shall be provided access to that number of paid sick hours, and if the number is higher than the applicable accrual cap, the employee shall be provided paid sick leave hours equal to the accrual cap.

Example: OLSE finds that a company has not permitted employees to accrue or use paid sick leave. A San Francisco employee has worked for the company for one year

and works 40 hours per week. In addition to requiring the employer to pay the employee back wages for 3.7 days for the year (per the current CDC average work-loss days), OLSE may require the employer to restore hours to the employee's sick leave bank. For an employee who worked 2080 hours, OLSE would divide 2080 by 30 to get 69.3 hours. If the employer pays out 29.6 hours in back wages per year as part of the remedy, then the employee's sick leave balance should be set at 69.3 hours - 29.6 hours, or 39.7 hours. Because this number is below the cap for either small or larger employers, no cap is applied.

Penalties

As specified in 12W.8(b), penalties for violations of the PSLO are as follows:

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| Penalties to employees: paid sick leave unlawfully withheld | The dollar amount of paid sick leave withheld from the employee multiplied by three, or \$250.00, whichever amount is greater. |
| Penalties to employees: Other harm to the employee or any other person, such as discharge from employment, or otherwise violated the rights of employees or other persons, such as a failure to post the notice required by Section 12W.5(b), or an act of retaliation prohibited by Section 12W.7 | \$50.00 to each employee or person whose rights under the PSLO were violated for each day or portion thereof that the violation occurred or continued. |
| Penalties to the City to compensate the City for the cost of investigating | Not more than \$50.00 for each day or portion thereof and for each employee or person as to whom the violation occurred or continued. |

The OLSE's DOV will specify the restitution and penalty payments required, the recipients of those payments, and the required timing of payments.

If the employer contests the DOV, the employer is entitled to a hearing before a neutral hearing officer.

RULE 14: ADMINISTRATIVE APPEALS PROCESS

Establishes Procedures Pursuant to Section 12.8

Filing an Appeal

A person or entity who receives a Determination of Violation (“DOV”) and wishes to appeal must file the appeal with the Controller’s Office no later than 30 days after the date the DOV is served. OLSE shall state the date of service on the proof of service accompanying the DOV.

The appeal must: 1) be in writing; 2) state the basis for the appeal; and 3) include a return address.

The appeal must be submitted in person, by U.S. mail, or by other delivery service such as FedEx or UPS, to the Office of the Controller at City Hall, Room 316, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102. Send a courtesy copy of your request for a hearing to OLSE to the attention of the Director of OLSE, City Hall, Room 430, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

The appeal shall set forth in general terms the basis of the appeal, but it need not be a comprehensive statement.

The Controller’s Office must receive the appeal on or before the day of the appeal deadline by close of business (5:00 p.m.). OLSE must also receive the copy of the appeal on or before the day of the appeal deadline by close of business (5:00 p.m.).

The failure to file an appeal that complies with this Rule shall constitute concession to the assessment, and the DOV shall be final upon expiration of the appeal deadline.

Setting a Hearing Date

Within 15 days of receiving a properly filed appeal, or as soon thereafter as is practicable, the Controller or their designee shall appoint a neutral hearing officer (who shall not be employed by OLSE) to hear and decide the administrative appeal. The Controller’s Office shall advise OLSE and the appellant of the appointment of the hearing officer.

The hearing officer shall promptly set a date, time, and place for a hearing on the appeal. The Controller’s Office shall serve by first class mail to the address listed on the appeal and by email (if the appellant has included an email address on the appeal) a written notice of the time and place for the hearing.

Except as otherwise provided by law, the appellant’s failure to receive a properly served notice of the hearing shall not affect the validity of any proceedings under the PSLO.

Pre-Hearing Procedures

No later than ten days prior to the hearing, the parties shall submit the following documents to the hearing officer, with simultaneous service on all other parties: a statement of issues to be decided by the hearing officer, a list all witnesses (other than for impeachment or rebuttal) likely to be

called, a list describing each piece of evidence to be offered at the hearing (other than for impeachment or rebuttal), and any other information or documents requested by the hearing officer.

If a hearing is continued to a later date, a party may request permission to submit an amended witness or exhibit list. Such requests must be made in writing and submitted to the hearing officer and the opposing party at least 15 days before the new hearing date. Such requests shall not be granted unless the hearing officer determines that there is good cause to allow the party to call the new witness or submit the new evidence.

Failure to Appear

An appellant's failure to appear at the hearing shall constitute concession to the assessment in the DOV and a withdrawal of the appeal.

Evidence

A DOV shall constitute *prima facie* evidence of all violations set forth in the DOV.

Absent good cause, and other than impeachment or rebuttal witnesses, a witness who does not appear on the witness list described above may not be called at the hearing.

Absent good cause, an employer may not present evidence at a hearing that it failed to provide to OLSE in response to a request before the issuance of a DOV.

Burden of Proof

The appellant shall have the burden of proving compliance with the PSLO.

Hearing Record

The hearing shall be open to the public and shall be audio-recorded. Any person or entity or OLSE may retain a certified court reporter to record and transcribe the hearing.

Findings and Decision

The hearing officer may continue the hearing and request additional information from either party prior to issuing a written decision. The hearing officer shall make findings based on the record of the hearing and issue a written decision based on such findings within 20 days of the conclusion of the hearing. The hearing officer may affirm or reject any part of the DOV in whole, or in part. The hearing officer may also impose conditions and/or deadlines to correct violations or pay restitution or penalties. OLSE will promptly post the hearing officer's decision on its website.

Finality of Hearing Officer's Decision

The decision of the hearing officer shall be final. The sole means of review of the hearing officer's decision shall be by filing in the San Francisco Superior Court a petition for a writ of mandate under Section 1094.5 of the California Code of Civil Procedure. The hearing officer's decision shall be served on the appellant and OLSE by certified mail.