



ATTORNEYS AT LAW

# Answering the Toughest Paid-Sick Leave Questions in the Twin Cities

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## Sick Leave in the Twin Cities

- Minneapolis Ordinance
  - Passed on May 27, 2016 (amended Sept. 26)
  - Effective July 1, 2017
- St. Paul Ordinance
  - Passed on Sept. 7, 2016
  - Effective July 1, 2017 (23+ employees) or Jan. 1, 2018 (<23 employees)





## Status of Legal Challenges

- *Minn. Chamber of Commerce v. Minneapolis*, 27-cv-16-15051 (Minn. D. Ct. Jan. 19, 2017)
  - District Court enjoined Minneapolis from enforcing its ordinance “***against any employer resident outside the geographic boundaries of the City . . . .***”
- *Minn. Chamber of Commerce v. Minneapolis*, A17-0131 (Minn. Ct. App. Sept. 18, 2017)
  - Affirmed decision and scope of injunction.

## Legal Challenges (cont.)

- Minnesota Supreme Court denied petition for review on Nov. 28, 2017.
- In the District Court case, 27-cv-16-15051, Judge Dickstein:
  - Heard summary judgment motions on April 11, 2018.
  - Trial scheduled for Aug. 20, 2018.

## Legal Challenges (cont.)

- \$15 Minimum Wage Ordinance
  - On Dec. 10, 2017, Judge Burke ruled in *Minn. Chamber of Commerce et al v. City of Minneapolis*, 27-cv-17-17198 that the minimum wage ordinance did **not** have extraterritorial effect.
  - Noted that the minimum wage ordinance applied only to “work actually performed within the city limits of Minneapolis.”



## Legal Challenges (cont.)

- H.F. 600 and S.F. 3 (2017 MN Legislature)
  - Preempts any local regulation of (1) “minimum wages,” (2) “paid or unpaid leave time,” (3) “hours or scheduling of work time” or (4) “requiring an employer to provide an employee a particular benefit, term of employment, or working condition.”
  - H.F. 600 stalled and Gov. Dayton vetoed S.F. 3 on May 30, 2017.
- Bills reintroduced on February 28, 2018

## Coverage

- Minneapolis Ordinance
  - All employers (***of any size***), but ***paid leave*** if employer has 6+ employees.
  - Must work in geographic boundaries of the city for at least 80 hours per year.
- St. Paul Ordinance
  - All employers (***of any size***) who have employees who work in St. Paul for at least 80 hours per year.



## Tough Questions – (Round 1)

- *My employees telecommute, do I have to provide them with sick leave?*
- *Our business is located in St. Louis Park, but my employees make deliveries in Minneapolis each day. Are they covered?*
- *My business is located in Anoka, but we store equipment in a storage unit in Minneapolis and St. Paul, are we covered?*

## Non-Resident Employers

- *Minn. Chamber of Commerce v. Minneapolis*, 27-cv-16-15051 (Minn. D. Ct. Jan. 19, 2017)
  - City is enjoined from enforcing its ordinance “against any employer resident outside the geographic boundaries of the City . . . .”
  - Both cities acknowledge that employer residence is required.



## St. Paul FAQ #4

### *Which employers must provide ESST?*

- *Employers that:*
  - *1) Maintain a physically permanent location in Saint Paul; **AND***
  - *2) Employ one or more individuals that work at least 80 hours or more in a reporting year in the City of Saint Paul.*

## Construction Industry Employers

- MPLS and STP Ordinances exempt employees that are:
  - Paid at least the equivalent prevailing wage for the craft or trade per MNDOLI.
  - Registered in a state registered apprenticeship program and paid at least according to the required rates under the program.



## Tough Questions – (Round 2)

- *I pay my employees Davis-Bacon rates, so that means they're exempt, right?*
- *I have a group of employees called "interns" or pre-apprentices," are they exempt?*
- *We are based in Edina, but we have a construction trailer at a project in Minneapolis, are we covered?*

## Employers with CBAs

- Minneapolis Ordinance
  - Ordinance applies.
  - But, Minneapolis has announced delayed enforcement for **1 year**.
- St. Paul Ordinance
  - Ordinance applies.



## Minneapolis FAQ #77

### **Q: Are CBAs exempt?**

- *No. . . . Employers operating under a CBA that does not meet the minimum requirements of the ordinance on July 1, 2017 may use the first year of enforcement, until **July 1, 2018**, to make necessary changes or new agreements. This does not constitute a legal exemption. Rather, it is more accurately described as a grace period from enforcement action during which the Department of Civil Rights will exercise discretion, provided the employer is negotiating with a labor union in good faith.*



## Tough Questions – (Round 3)

- *I have a group of employees in Minneapolis that just elected a Union to represent them, am I exempted until July 1, 2018?*
- *We've reached impasse with the Union over the sick leave issue for employees in Minneapolis, are we still "exempt"?*

## Accrual

- Minneapolis Ordinance
  - 1 hour for 30 hours worked.
  - Full hours only; can be recorded monthly.
- St. Paul Ordinance
  - 1 hour for 30 hours worked.

## Front Loading

- Minneapolis Ordinance
  - 48 hours after 90 days.
  - 80 hours in each subsequent year.
- St. Paul Ordinance
  - 48 hours after initial 90 days.
  - 80 hours in each subsequent year.

## Accrual & Carryover Caps

	<b>Minneapolis</b>	<b>St. Paul</b>
Annual Accrual Cap	48 hours	48 hours
Maximum Carry-Over Cap	80 hours	80 hours
Maximum Accrual Cap	80 hours	80 hours



## Tough Questions – (Round 4)

- *Our policy caps accrual of sick leave at 100 hours, is this lawful?*
- *We have a “use-it-or-lose-it” sick leave policy, is that OK?*
- *What if the policy provides 100 hours of sick leave on a “use-it-or-lose-it” basis?*

## Hypo #1

- ***Facts:*** Acme credits sick leave two weeks at a rate of 1 hour for every 30 hours worked and rounds to the nearest whole hour.
- ***Questions:***
  - *Is Acme complying with the ordinances?*
  - *If not, how can their practice be adjusted?*



## Hypo #1 (cont.)

- ***Facts:*** Acme changes its policy to provide a lump sum of sick leave (1.846 hours per week) on a bi-weekly basis to all full-time employees.
- ***Questions:***
  - *Does this comply?*
  - *If not, how can their practice be adjusted?*

## Uses

- (1) For employee's own illness, injury, health condition, or preventative care;
- (2) To care for a "family member" for the same reasons;
- (3) Domestic violence or personal safety issues for employee or "family member";
- (4) Certain business closures by order of a "public official";

## Uses (cont.)

- (5) To care for a child whose school or place of care has been closed by order of a public official.
- (6) “To accommodate the employee’s need to care for a family member whose **school** or **place of care** has been closed due to inclement weather, loss of power, loss of heating, loss of water, or **other unexpected closure.**”

## “Family Member”

- Minneapolis Ordinance
  - “Employee’s child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, guardian, ward, members of the employee’s household, or registered domestic partner . . .”
- St. Paul Ordinance
  - Does not include “guardian,” “ward,” or “member of household.”
  - Adds “any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.”



## Tough Questions – (Round 5)

- *Our company has a PTO policy, do we have to list out all of the reasons that an employee can take protected sick leave?*
- *An employee's nanny cannot work because she is sick, is the time off protected?*
- *An employee's au pair quits, is the time off protected? For how long?*

## Minimum Usage

- Minneapolis Ordinance
  - 4-hour increments.
  - Prior version required usage in “the smallest amount of time tracked by the employer’s payroll system.”
- St. Paul Ordinance
  - 4-hour increments.

## Rate of Pay

- Minneapolis Ordinance
  - “Regular rate of pay,” which includes “shift differentials” for hourly employees.
  - Does not include: tips, commissions, OT, bonuses, contributions to benefit plans.
- St. Paul Ordinance
  - “Standard hourly rate” for hourly and “equivalent rate” for salaries.
  - Does not include tips or commissions.



## Tough Questions – (Round 6)

- *If we require a 4-hour minimum usage, can an employee use 4.5 hours of sick leave?*
- *An employee takes 8 hours of sick leave after working 40 hours. Do I have to pay him OT for the time?*
- *How do I calculate the rate for salaried employees?*



## Tough Questions – (Round 6 – cont.)

- *What if the employee is only paid commissions?*
- *What if the employee is paid a “piece-rate”?*
- *An employee picked up a weekend shift, which is paid at a higher rate, but then called in sick. Do I have to provide sick leave? If so, at what rate?*

## Posters & Handbooks

- Minneapolis Ordinance
  - Must post notice in English and any other language with 5% of workforce.
  - Any handbook must contain “notice of employee rights and remedies.”
- St. Paul Ordinance
  - Must post notice.
  - Any handbook must contain “notice of employee rights and remedies.”



## Notice of Account Balance

- Minneapolis Ordinance
  - Notice of (1) amount accrued and available SST, and (2) amount used.
  - Online system or on each pay stub.
- St. Paul Ordinance
  - Notice of (1) amount of earned and available SST and (2) amount used.
  - Online system or on each paystub.

## Payout at Termination

- Minneapolis Ordinance
  - No.
- St. Paul Ordinance
  - No.



## Tough Questions – (Round 7)

- *We have a PTO policy that complies with the ordinance, do we have to pay out PTO when an employee separates?*
- *What if we don't have an online system and we can't put the balance on employee's paychecks, is there another way to comply?*



## Exception for Current Policies

- Minneapolis Ordinance
  - Must provide paid leave “that meets or exceeds, and does not otherwise conflict, with the ***minimum standards and requirements***” of the ordinance.
- St. Paul Ordinance
  - Must provide paid leave “that may be used for the ***same purposes and under the same conditions*** as [ESST] under” the ordinance.

## Exemption (cont.)

- To satisfy the “exception,” the paid leave policies must provide the minimum accrual, use, carry-over, *etc.*
- To the extent other laws are more favorable to employees, the employer must comply with the more rigorous standard.



## Discrimination and Retaliation

- Minneapolis Ordinance
  - Unlawful to “interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected” by the ordinance, including “*requesting*” and “*using*” leave.
- St. Paul Ordinance
  - Unlawful to “discharge, threaten to discharge, demote, suspend, or in any manner discriminate or take adverse action against any person,” including “*using*” leave.

## Enforcement

- Minneapolis Ordinance
  - 365-day statute of limitations
  - Filing an administrative charge with MPLS Dept. of Human Rights.
- St. Paul Ordinance
  - 365-day statute of limitations
  - File an administrative charge or a lawsuit in state court.

## Private Right of Action

- Minneapolis Ordinance
  - No.
- St. Paul Ordinance
  - Yes, employee can recover “any and all damages recoverable at law, together with costs and disbursements, including ***reasonable attorney's fees***, and may receive injunctive and other equitable relief as determined by the court.”

## Penalties

- Minneapolis Ordinance
  - Reinstatement and backpay;
  - Crediting or paying SSL, or \$250, whichever is greater;
  - \$1,500 penalty for violating retaliation/discrimination and confidentiality protections; and
  - \$50 per day penalty for recordkeeping violations (after notice of violation).

## Penalties (cont.)

- St. Paul Ordinance
  - Reinstatement and backpay;
  - 1<sup>st</sup> violation—damages multiplied by 2 or \$250, whichever is greater;
  - 2<sup>nd</sup> violation—same damages, but also an administrative fine up to \$1,000.
  - 3+ violations—same damages and fine, but could be increased;

## Penalties (cont.)

- St. Paul Ordinance (cont.)
  - Up to \$1,000 fine for violating discrimination / retaliation or confidentiality provision;
  - Up to \$1,000 fine for recordkeeping and notice violations.

## First Settlement in Minneapolis

- Metro Petro gas station employee claimed that his employer tried to force him to find a replacement when he attempted to leave early because he was sick.
- Employee alleged that he was then left off the schedule and thus effectively terminated.
- Employer paid \$11,000 to settle.

## Other Violators

- StarTribune's PTO Policy
  - Not offered to temporary or part-time employees.
  - Defined "family member" more narrowly than the MPLS ordinance.
  - Requires employees to find a replacement.
- In Jan. 2018, city did not issue monetary penalties, but gave Star Tribune 30 days to change its policy.



## Other Violators (cont.)

- A Baker's Wife
  - Allegedly did not offer any sick leave.
  - Records showed 41 employees worked between 14 and 670 hours since July 1st.
  - 15 accrued fewer than 1 hour for every 30 hours worked.
- In Nov. 2017, City did not issue monetary penalties, but gave bakery 30 days to correct the error.

## Other Violators (cont.)

- City has sent at least 10 “courtesy letters” to employers reminding employers of compliance obligations.
- At least 5 complaints against employers not located within the “geographic boundaries” of Minneapolis.
  - Minneapolis’ enforcement position will change depending on outcome of litigation.
  - Will St. Paul change its enforcement?

# Practical Strategies and Planning for Employers





## Accrual vs. Front-Loading

- Front-Loading
  - Easy accounting (48 hours; then 80 hours).
  - More favorable to employees if they work less.
  - Employer can choose 12-month period (calendar, fiscal, etc.)

## Accrual vs. Front-Loading

- Accrual
  - Requires more accounting and tracking;
  - Allows limits to hours worked, including hours worked within the City;
  - Employees are not immediately entitled to 80 hours of leave after their first year.



## Tough Questions – (Round 8)

- *Can I do accrual for some employees and front-loading for others?*
- *We have an “unlimited” leave policy for some employee, does this comply with the sick leave ordinance?*

## Multiple Policies?

- Full-Time Employees
  - Unlimited policy for executives?
  - PTO policy for salaried and hourly employees?
- Part-Time Policy
  - Consider a “bare bones” accrual policy.

## Updating Current Policies

- Accrual and Carry-over
  - 48 hours per year;
  - 80 hours of carry-over; and
  - 80 hours cap on accrual.
- Uses
  - PTO policies already comply.
  - Vacation and sick leave policies need to be updated to include all required uses.

## Updating Policies (cont.)

- Procedure
  - Distinguish between “foreseeable” and “non-foreseeable” leave.
  - Do not require medical documentation before three scheduled absences
- Minimum Usage
  - Both ordinances permit a 4-hour minimum usage requirement.

## Updating Policies (cont.)

- Medical Documentation
  - Cannot require documentation before 3 consecutive absences.
- Retaliation/Discrimination
  - Include prohibition on retaliation and discrimination.



## Tough Questions – (Round 9)

- *If I have a PTO policy, do I need to track what uses qualify as “sick leave”?*
- *After an employee uses 48 hours of leave in a leave year, can I deny the leave and/or apply attendance points?*

## “Poisoning the Well”

- Failing to distinguish between sick/safe and PTO (even if they’re from the same “leave bucket”) may cause an employee to argue that **all PTO** is protected by the ordinances.
- However, the employer can argue that, after using 48 (or 80) hours of sick/safe, the employee’s absences would no longer be protected by the ordinances.

**PTO**  
(120 hours)

**Sick/Safe**  
(48 hours)

## Hypo #2

- ***Facts:*** Hank has 120 hours of PTO. His employer assumes 48 hours are sick/safe leave in the first year and 80 hours each year thereafter.
- ***Questions:***
  - *If Hank takes a 1 week vacation, how much PTO does he have left?*
  - *How much of that is sick/safe leave?*



## Hypo #2 (cont.)

- ***Facts:*** Hank is fired shortly after his 1 week vacation.
- ***Questions:***
  - *Can Hank sue for retaliation or discrimination?*
  - *Does Hank get to “cash-out” his remaining PTO balance?*



## Hypo #3

- ***Facts:*** Steve quits his job in December. Steve's employer was using PTO to satisfy the sick leave ordinance. Pursuant to the policy, Steve was able to "cash-out" 80 hours of PTO. Less than 90 days later, Steve was rehired.
- ***Questions:***
  - *Is Steve entitled to have his 80 hours of PTO reinstated?*



## **St. Paul FAQ #125**

***Q: If I have a PTO policy that provides 80 hours of time off or more per year and cashes out unused PTO time when an employee leaves, do I have to reinstate unused PTO if the employee is rehired within 90 days?***

- *No, if you and your employee had previously agreed to this arrangement. However, the employee would continue to accrue ESST once he or she returned.*



## Tough Questions – (Round 10)

- *What if the employee requesting sick leave is the only employee at the location (e.g., gas station at 2 a.m., soccer coach, or nurse)?*
- *Can the employer make special rules with respect to these employees?*



## Minneapolis FAQ #58

***Q: May an employer deny use of SST for particularly "critical" employees or during times of heightened importance?***

- *No. There is no exemption . . . for "critical" employees or exigent business circumstances. Employers should encourage consistent employee attendance and plan for the occurrence of emergency staffing situations regardless of the [Ordinance].*

## Discipline and Attendance

- Both ordinances prohibit “discrimination” and “retaliation” for sick leave use.
  - Rights include “**using**” sick leave.
  - Minneapolis protects “**requesting**” sick leave.
- Do these policies need to be updated?



## Minneapolis FAQ #87

***Q: What happens if an employer's written policies include sick and safe time off work but, in practice, the employer's actions dissuade employees from using it?***

- *Retaliation against an employee for exercising or attempting to exercise any rights available to her under the Sick and Safe Time Ordinance is strictly prohibited. Retaliation is any act that would dissuade a reasonable employee's use of sick and safe time.  
[cont.]*



## **Minneapolis FAQ #87** (cont.)

- . . . *Material changes in job classification, duties or hours, formal disciplinary action such as documented warnings or suspension, the **accumulation of points under an attendance point system**, or employment termination may be considered retaliatory. Aggressive enforcement to protect employees' rights will be pursued by the MDCR in these types of cases.*



## **Minneapolis FAQ #90**

***Q: An employer has an absence control policy that issues an “occurrence point” for each absence. Is that allowed?***

- ***No.*** Employers are allowed to have absence-control or discipline policies, but may not count sick and safe time absences negatively within those policies. Additionally, an employer may not take an employee’s legitimate sick and safe time use into account when rating that employee’s attendance record for the purposes of awarding a benefit, such as a raise, premium or bonus. Such actions would constitute unlawful retaliation.



## Tough Questions – (Round 11)

- *How do we manage employee attendance?*
- *Can we discipline employees who fail to call-in before their shift?*
- *What if they don't tell us why they are taking the day off?*

## Establish and Enforce Call-in Policies

- Think of sick/safe leave as “intermittent FMLA.”
- Under FMLA, employers are able to establish reasonable call-in procedures. 29 C.F.R. § 825.302(d).
  - Any discipline or occurrence point is for the failure to follow the procedure – not for sick/safe usage.

## Call-in Policies (cont.)

- Similar call-in procedures may be implemented and enforced for sick leave usage.
- Make exceptions if employee, for medical reason, cannot comply with the call-in procedure (e.g., car accident).

## Update Leave Docs

- Consider implementing new leave forms that include:
  - Whether the employee is requesting sick/safe leave;
  - Whether it was used for a permissible purpose;
  - Return date; and
  - Medical documentation (after 3 days)



## **Minneapolis FAQ #51**

***Q: May employers ask an employee whether sick and safe time was used for a permissible purpose?***

- *Yes and the employer may ask the employee to state as much in writing.*
- *An employer may:*
  - *Request that an employee confirm verbally or state in writing that he used sick and safe time hours for a permissible purpose*
  - *Ask if an employee has received or will receive any health care or other services and then require documentation of such services for absences of more than three consecutive workdays*
  - *Ask for a date on which the employee will return.*

## Combat Fraud and Abuse

- In FMLA context, “honest belief” defense defeats interference and retaliation claims.
- Employer must show that it reasonably relied on the particular facts at issue, even if the employer is later proven to be mistaken.
  - The employer ***must*** conduct a full and exhaustive investigation into the alleged fraud or abuse.
  - Only then can it show an “honest belief.”

## Fraud and Abuse (cont.)

- *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996 (8th Cir. 2012).
  - “Critical inquiry . . . is not whether the employee actually engaged in the conduct for which he was terminated, but ***whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge.***”

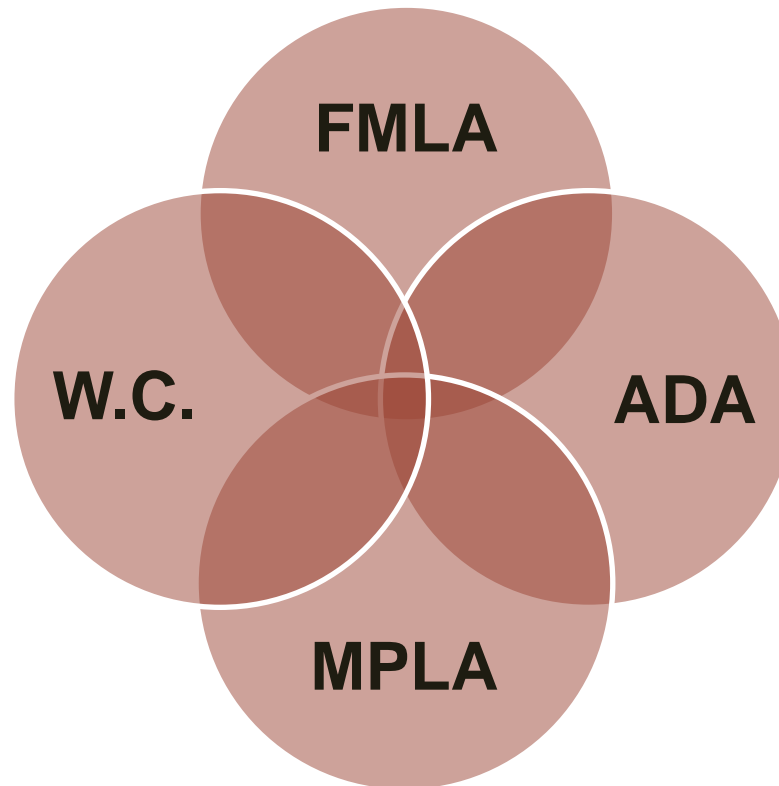


## St. Paul FAQ #130

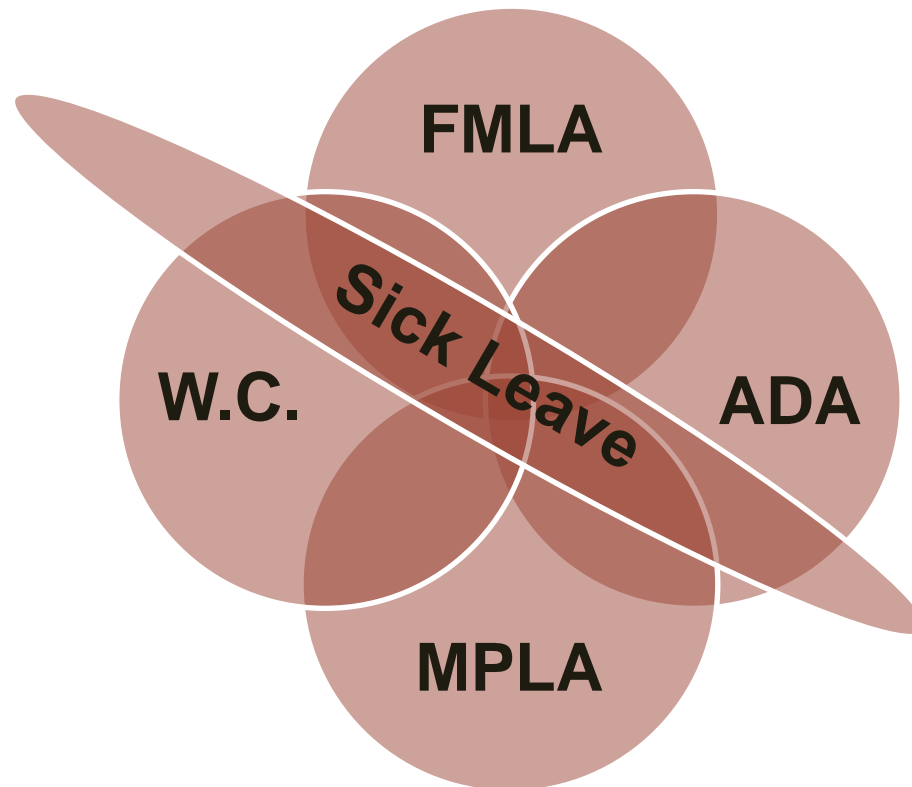
### ***Q: Can employers discipline employees who abuse ESST?***

- *Yes. When there is a clear and articulable pattern of abuse of ESST by the employee, the employer may require reasonable documentation to verify that an employee's use of ESST is consistent with the ESST ordinance, regardless of whether the employee has used ESST for more than three consecutive days. However, employers may not use an investigation as a reason to deny ESST unless the abuse has been proven.*

# Overlapping Standards and Protections



# Sick Leave





## Hypo #4

- ***Facts:*** Katherine takes 12 weeks of FMLA for a knee surgery.
- ***Questions:***
  - *Can the employee use sick/safety leave?*
  - *Can the employer require the employee to use sick/safety leave?*



## Hypo #4 (cont.)

- ***More Facts:*** *After knee surgery, Katherine learns that she is pregnant.*
- ***Questions:***
  - *Can Katherine use sick/safety leave?*
  - *If Katherine has exhausted her paid leave, is she entitled to any other leave?*



## Hypo #4 (cont.)

- **More Facts:** *After her knee surgery and pregnancy, Katherine learns that she needs foot surgery. She has exhausted all FMLA, MPLA, and sick leave. Her doctor's note says she can return to work in 2 weeks.*
- **Questions:**
  - *Is Katherine's absence protected?*
  - *What if her employer failed to designate her initial knee surgery as FMLA?*

## Hypo #5

- ***Facts:*** *Dan's wife just had a baby, and Dan wants to stay home and bond with his child.*
- ***Questions:***
  - *Can Dan use sick/safety leave?*
  - *Are there any other leaves available to Dan?*
  - *Does it matter if Dan is caring for his wife or the child?*



## Minneapolis FAQ #33

***Q. May an employee use sick and safe time hours following the birth of a child?***

- *Yes, an employee may use sick and safe time hours during any period of physical or mental recuperation after she gives birth. An employee may also use sick and safe time hours to care for a covered family member after the family member gives birth. An employee may use sick and safe time hours to care for a covered child's need for medical diagnosis, care, or treatment of an illness, injury, or health condition, or preventive medical or physical care.*



## St. Paul FAQ #77

***Q. Can parents use sick leave following the birth of their child?***

- *Parents can use ESST after the birth of a child if it is for medical or health purposes, but not for parental care for a newborn or bonding purposes. The Family Medical Leave Act (FMLA) does permit unpaid leave for bonding purposes.*

## Hypo #6

- ***Facts:*** *Mary used 80 hours of PTO to obtain an HRO against her ex-husband and to receive counseling.*
- ***Questions:***
  - *Can Mary take 12 weeks of FMLA for back surgery?*
  - *If Mary adopts her ex-husband's stepson, can she take additional leave?*



## Hypo #6 (cont.)

- **More Facts:** *Mary learns that she is pregnant. She has exhausted her 12 weeks of FMLA and any sick leave.*
- **Questions:**
  - *Can Mary take leave?*
  - *If so, is it paid or unpaid?*
  - *Must the employer continue to pay its share of Mary's healthcare?*

## MPLA vs. FMLA

- **Healthcare Coverage**
  - FMLA—employer is required to maintain the employee's health care coverage by paying the employee's share that it would have paid.
  - MPLA—employer must continue to make coverage available (but does ***not*** require the employer cover the cost).



## Hypo #7

- ***Facts:*** *Jack's infant grandson, who lives in AZ, is sick.*
- ***Questions:***
  - *Can Jack use sick/safe leave?*
  - *Can Jack's employer designate the time as FMLA?*

## Key Take-a-Ways

- Update leave policies to ensure all protections are addressed (FMLA, ADA, MPLA, W.C., and sick/safe leave).
- If sick/safe leave qualifies under FMLA or MPLA, ensure that the leave is running concurrently.



# QUESTIONS?

## Thank you.