

Paid Leave Mandates: Navigating the Complex Web of Federal, State and Local Laws

Patricia Pryor

Jackson Lewis P.C. | Cincinnati
pryorp@jacksonlewis.com
(513) 322-5035

Leslie Stout-Tabackman

Jackson Lewis P.C. | D.C. Region
Leslie.Stout@jacksonlewis.com
(703) 483-8345



Disclaimer

The material contained in this presentation was prepared by the law firm of Jackson Lewis P.C. for the attendees' own reference in connection with this webinar. Since the material and related discussions are informational and educational in nature and represent the speakers' own views, attendees should consult with counsel before taking any actions and should not consider these materials or related discussions to be legal or other advice. Professional advice should be obtained before attempting to address any legal situation or problem.

Agenda

- Paid sick leave is spreading: where is it required?
- The symptoms of paid sick leave: what's required?
- Is there a cure? (How do you make it all work?)
- The prescription: what needs to be in your policy?
- Doctor's orders: what actions are prohibited?
- Other requirements.

PAID SICK LEAVE IS SPREADING: WHERE IS IT REQUIRED?

Federal Contractor Paid Sick Leave - Executive Order 13706

- Paid Sick Leave under Executive Order 13706 (signed by Obama on September 7, 2015) requires 1 hour of PSL for every 30 hours worked with annual accrual of up to 56 hours.
- Became effective for certain types of contracts, and subcontracts from solicitations issued, or contracts awarded outside the solicitation process, *on or after January 1, 2017*.
- Current contracts *may be* amended by contracting agency through bilateral modification for renewal, option or extension.

4 Major Categories of Covered Contracts

The federal contractor paid sick leave requirements apply to the following types of contracts, and subcontracts:

- **Procurement contracts for construction** covered by the Davis-Bacon Act (DBA);
- **Service contracts** covered by the Service Contract Act (SCA);
- **Concession contracts**, including any concessions contract excluded from the SCA by DOL's regulations at 29 CFR 4.133(b);
- **Contracts in connection with federal property or lands** and related to offering services for federal employees, their dependents, or the general public (this includes leases).

Who Gets PSL under the Executive Order?

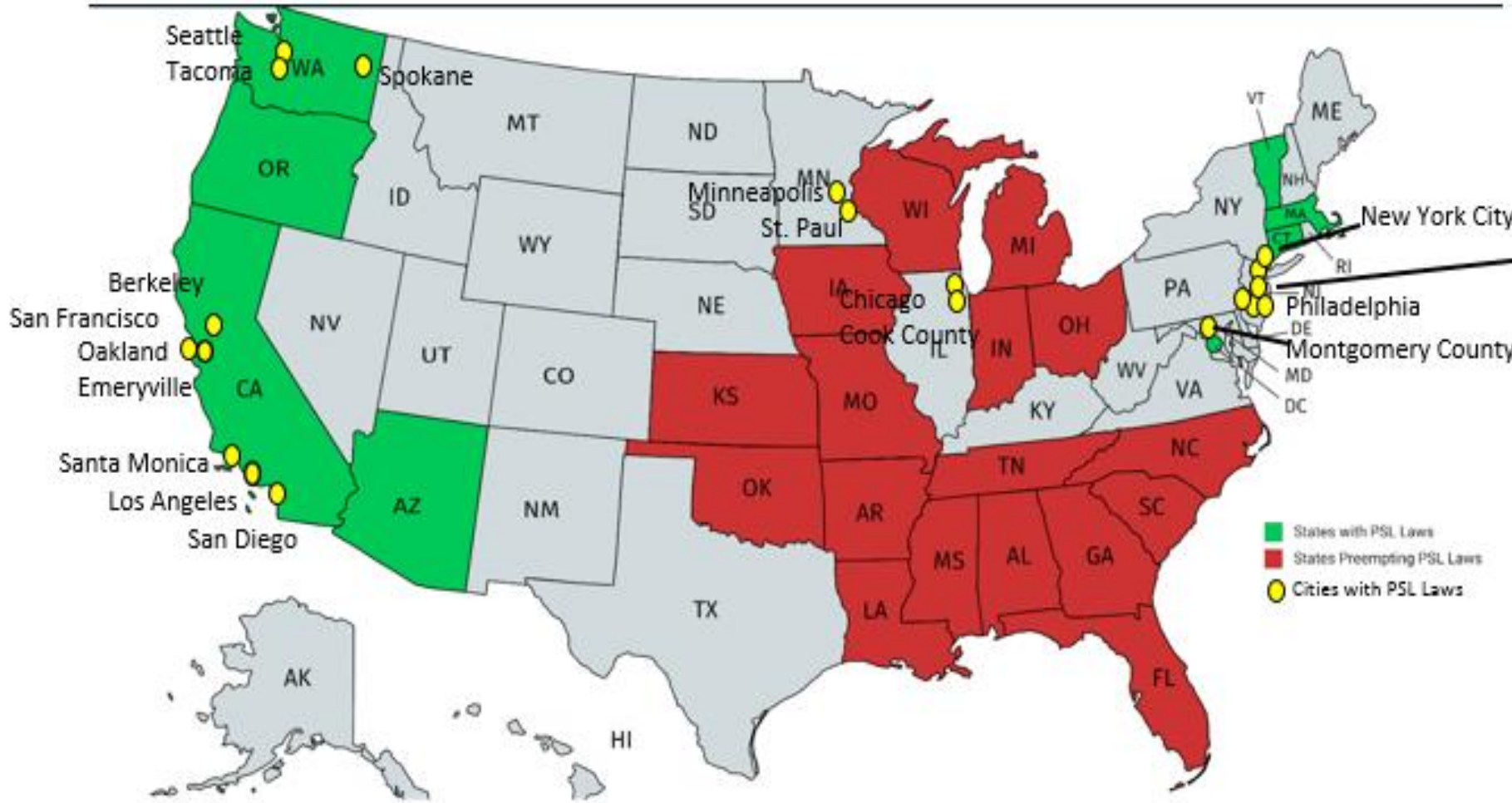
- Any worker who:
 - (1) Performs work
 - **On** a covered contract
 - OR
 - **In connection with** a covered contract
- AND
- (2) Whose wages are governed by the SCA, DBA (*including independent contractors*), or FLSA (*including employees who are exempt under the FLSA*).

PSL Is In Addition to ...

- PSL *does not count* toward prevailing wage and benefit requirements under DBA or SCA.
- DOL recently adjusted SCA fringe benefit rates to account for federal contractor required PSL, but not the DBA rates!

The Executive Order is not the only place PSL has spread...

The Infection is Spreading



- Jersey City
- City of Newark
- City of Passaic
- City of East Orange
- City of Paterson
- Township of Irvington
- Township of Montclair
- City of Trenton
- Township of Bloom Field
- City of Elizabeth
- City of New Brunswick
- City of Plainfield
- Town of Morristown

THE SYMPTOMS OF PAID SICK LEAVE: WHAT'S REQUIRED?

Common Symptoms



Accrual

Excused absences

Small increments

No retaliation

How Much PSL Must A Contractor Provide?

- Under the Executive Order: 1 hour PSL for every 30 hours worked **on** or **in connection with** a covered contract.
- In other jurisdictions:

1:35

1:52

1:30

1:40

What Cap Can I Use?

- Many jurisdictions have an accrual cap.
- Most generous applicable cap applies.
- Under the Executive Order employees may accrue up to 56 hours (seven days) in a year or at any point in time.
- Unused time is carried over at the end of the year.
- Other jurisdictions:

80

48

72

24

No Accrual Cap

When Can Employees Use PSL?

- Most including the EO allow for the use of PSL for:
 - Their own illness or other health care needs, including preventive care;
 - The care of a family member or loved one who is ill or needs health care, including preventive care;
 - Issues related to domestic violence, sexual assault, or stalking, where the employee or a family member or loved one is a victim, including to obtain counseling, seek relocation, seek assistance from a victim services organization, or take legal action.
- Other uses allowed under some jurisdictions include bereavement, school/work closed for public health emergency, caring for a service animal.



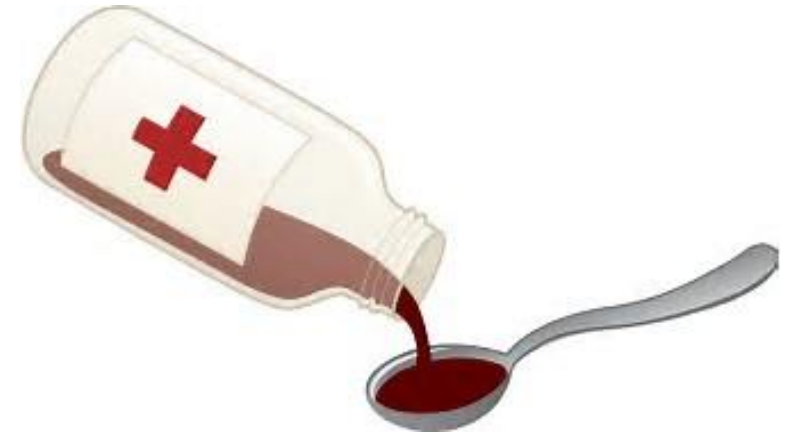
It's a challenge complying if you are in multiple jurisdictions.

But the biggest challenge with PSL...

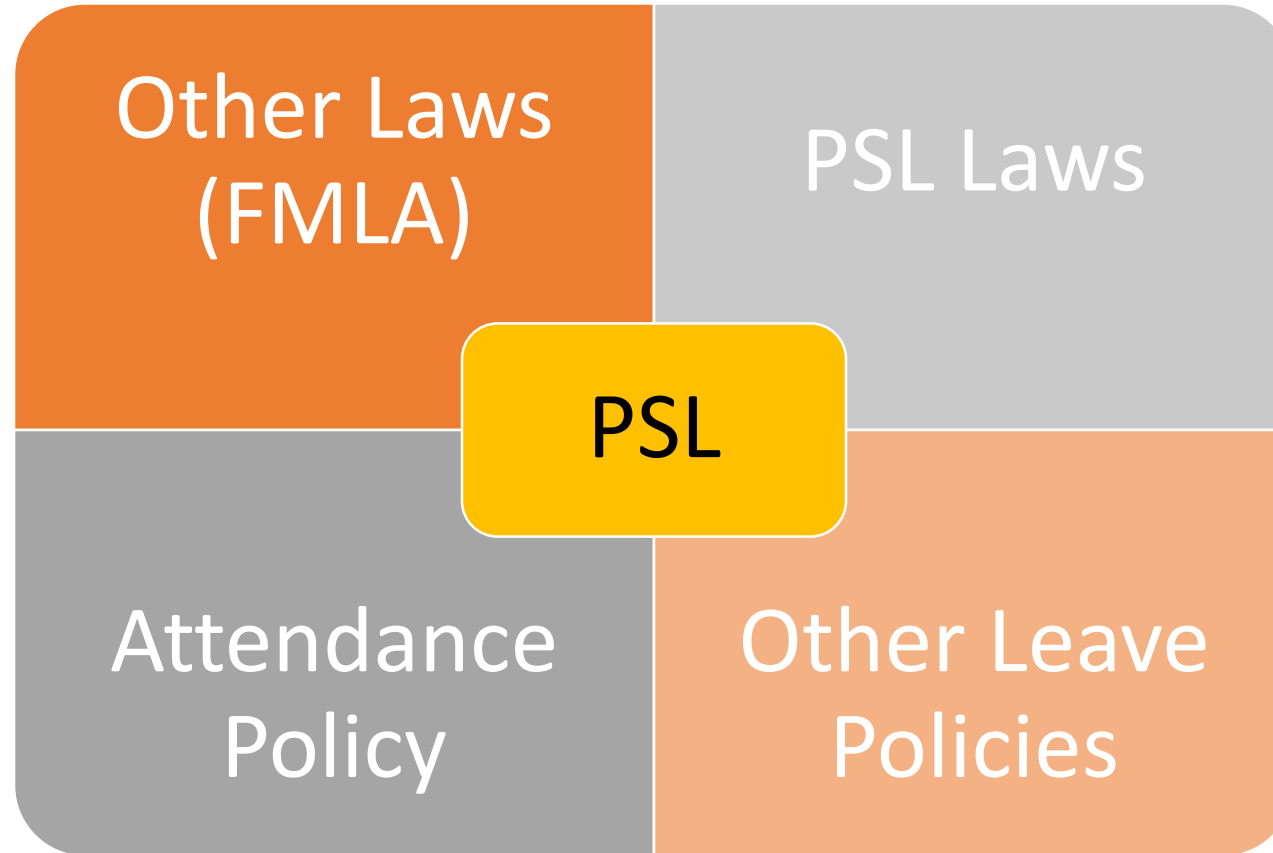
MANAGING ATTENDANCE



IS THERE A CURE? (HOW DO YOU MAKE IT ALL WORK?)



How Do All of the Requirements Fit Together?



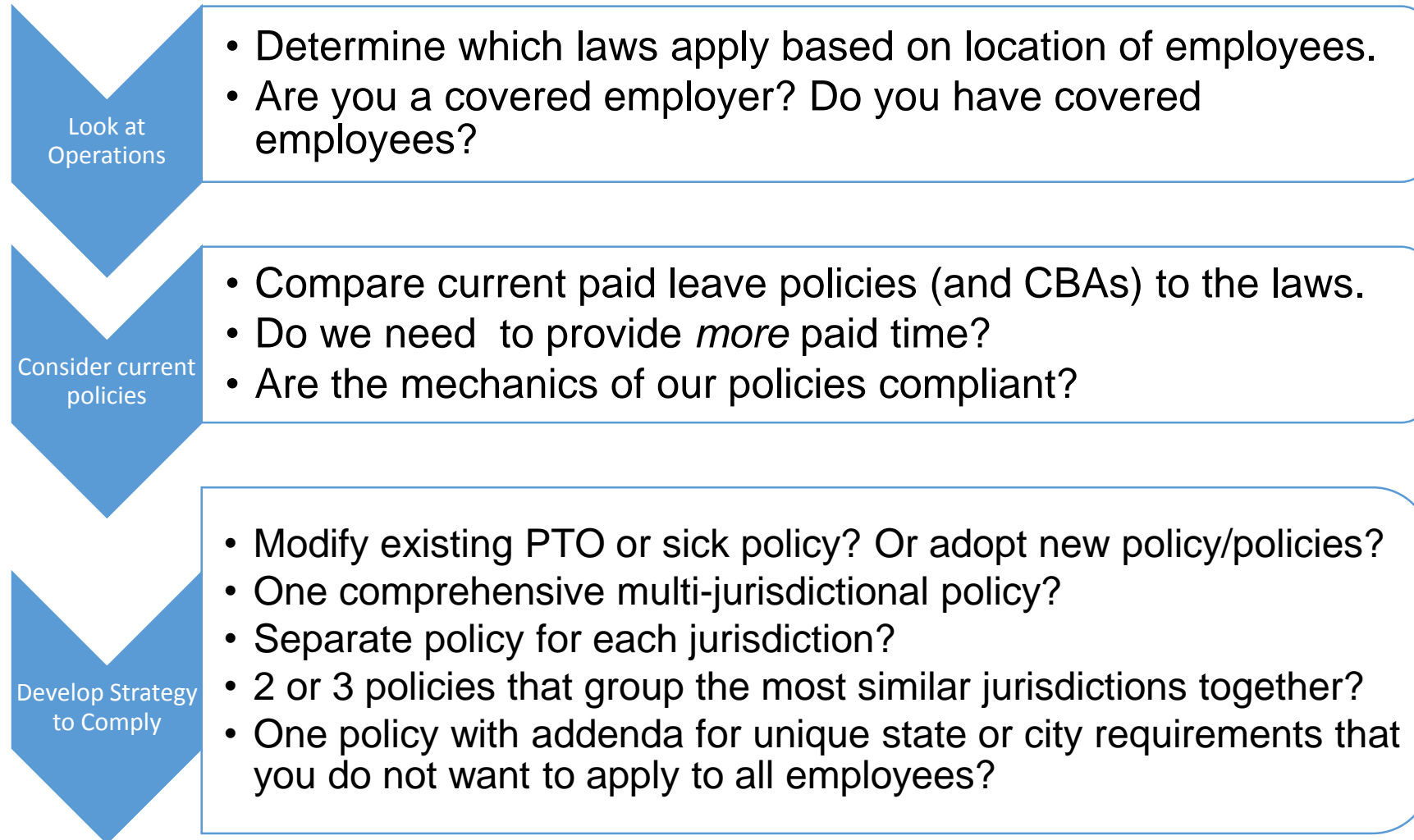
Interplay With PTO

- In most jurisdictions an employer may use its existing PTO policy to comply with the paid sick leave requirements, so long as:
 - The employer provides at least as much PTO as required PSL.
 - PTO can be used for all of the PSL reasons.
 - Unused time is carried over.
 - Unused time at termination is reinstated if the employee leaves work and returns within a year (or it is paid out upon termination).
 - There is no limit on the amount the employee can use (other than the amount the employee has available to him/her).
 - There are no greater requirements in terms of requests or certification of the need for the time off beyond what the regulations require for paid sick leave.
 - The time is protected by the prohibitions against interference, discrimination and recordkeeping violations at least with respect to the PTO used for purposes protected under the paid sick leave regulations.

THE PRESCRIPTION: WHAT NEEDS TO BE IN YOUR POLICY?



Multi-Step Treatment Plan



Decisions, Decisions, Decisions

- Accrue or Frontload?
- If accrue, do you track employee work on, or in connection with, covered contracts or accrue for all hours worked?
- Separate PSL from other paid time off policies or use existing policies to comply?
- If use PTO policy to comply, do you track the time used for PSL purposes and limit the protections to 56 hours or apply the protections to all PTO taken for a PSL purpose?

Attendance Policy

- Also review your attendance policy.
 - Cannot count PSL under no-fault attendance policy.
 - Beware of rules that make it more difficult for employees to use PSL than what the law requires.
 - Example: Requiring employees to report absence 2 hours before shift is likely a violation. Regulations only require as soon as “practicable.”

DOCTOR'S ORDERS: WHAT ACTIONS ARE PROHIBITED?



No Retaliation or Interference

- Employers may not interfere with the accrual or use of PSL.
 - Denying or delaying response to proper request for PSL.
 - Discouraging employee from using.
 - Disclosing confidential information.
 - Transferring employee to non-covered work.
- Employers may not discriminate or retaliate against any employee for exercising PSL rights.
 - Creates a new very broad protected category.
- Can investigate fraud and if based on reasonable investigation determine employee has abused PSL may recoup or discipline, as appropriate.

THANK YOU

With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.