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2
3 INDUSTRIAL COMMISSION OF ARIZONA

4
5 PUBLIC HEARING

6 ON

7 PROPOSED RULEMAKING

8 REPORTER'S TRANSCRIPT OF PROCEEDINGS
9

10
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19 Teri L. Veres, RMR
20 Certified Reporter (AZ 50687)
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24 (ORIGINAL)
25

I N D E X

BOARD MEMBERS PRESENT:

JAMES ASHLEY

JONATHAN HAUER

LISA PADGETT

COURTNEY HAYDEN

STEVEN WELKER

PUBLIC SPEAKERS:

PAT PLAYMAN

STANLEY LUBIN

DENISE BLOMMEL

BETH CALL

PAMELA KINGSLEY

SHAYNA BALCH

ANDREA LOVELL

LORI HIGUERA

1 P R O C E E D I N G S

2 * * *

3 DIRECTOR ASHLEY: Good morning, everyone.
4 Thank you very much for being here this morning.

5 Let's get started. I'd like to welcome
6 you to the oral proceeding concerning the Notice of
7 Supplemental Proposed Rulemaking regarding the
8 amendment of Title 20, Chapter 5, Article 12,
9 specifically R20-5-1201, 1202, 1205, 1206, 1208, 1209,
10 1210, 1211, 1213 and 1218.

11 My name is James Ashley. I'm the Director
12 of the Industrial Commission. Joining me this morning
13 is Jonathan Hauer, he's our Assistant Chief Counsel.
14 Steve Welker is our Director of the Department of
15 Labor. Lisa Padget is our Investigation Supervisor in
16 the Labor Department, and Courtney Hayden is our
17 Program and Project Specialist in the Labor Department.

18 By way of a short summary, Arizona voters
19 approved Proposition 206, the Fair Wages and Healthy
20 Families Act in November of 2016. The Act established
21 a new State minimum wage effective January 1st, 2017,
22 and entitled employees to accrue earned paid sick time
23 effective July 1st, 2017.

24 The Act authorizes the Industrial
25 Commission of Arizona to enforce and implement both

1 the Act's minimum wage and earned paid sick time
2 provisions and promulgate regulations consistent with
3 the articles.

4 In the earned paid sick time context, the
5 Act provides that the Commission shall be authorized
6 to coordinate implementation and enforcement of Article
7 8.1 earned paid sick time and shall promulgate
8 appropriate guidelines or regulations for such purposes.

9 Currently, the rules in Article 12
10 implemented in 2007 after the referendum that created
11 the Arizona Minimum Wage Act addressed only those
12 procedures related to the enforcement and
13 implementation of minimum wage law.

14 Because the Commission is now statutorily
15 tasked with implementing, enforcing and regulating the
16 Act's earned paid sick time provisions, the Commission
17 is proposing to amend existing rules in Article 12 to
18 be consistent with the Act's new provisions.

19 On May 5th, 2017, the Commission published
20 a Notice of Proposed Rulemaking in the Arizona
21 Administrative Register at Volume 23, Issue 18,
22 beginning on Page 1019; and on June 5th, 2017, the
23 Commission held an oral proceeding to hear your
24 comments concerning the proposed rules.

25 Your feedback has been invaluable during

1 this process and has enabled us to better understand
2 our stakeholders' needs and concerns.

3 After reviewing your oral and written
4 comments and in the interest of further clarifying the
5 Act, the Commission published a Notice of Supplemental
6 Proposed Rulemaking on July 7th, 2017, in the Arizona
7 Administrative Register at Volume 23, Issue 27,
8 beginning on Page 1799.

9 Jonathan Hauer will now provide a synopsis
10 of the rulemaking changes found in the supplemental
11 proposal.

12 MR. HAUER: Thank you, Director, and good
13 morning.

14 To reiterate the Director's statements,
15 your feedback has been extremely helpful as we set out
16 to clarify the Act. To address your comments, we have
17 proposed the following new substantive changes to
18 Article 12:

19 Starting with Rule 1202, we amended the
20 preamble to apply definitions found in the Act to
21 Article 12 and apply the definitions in Article 12 to
22 the Act.

23 We added the following definitions: The
24 amount of earned paid sick time available to the
25 employee, amount of earned paid sick time taken by

1 the employee to date in the year, amount of pay the
2 employee has received as earned paid sick time, the
3 employee's regular paycheck, equivalent paid time off,
4 health care professional, and the smallest increment
5 that the employer's payroll system uses to account for
6 absences or other use of -- or use, sorry, of other
7 time.

8 We also amended and reorganized the
9 definition of "same hourly rate" as follows: First,
10 we modified methods for determining same hourly rate
11 to result in hourly rates, not lump sums.

12 Second, we added a reference to minimum
13 wage in each method of determining same hourly rate.

14 Third, we amended the method for
15 determining same hourly rate per salaried employees;
16 and, fourth, we modified and added an option for
17 determining same hourly rate for commission, piece
18 rate or fee-per-service employees.

19 Rule 1205, we deleted a reference to
20 "circumstances" and replaced that with "economic
21 realities."

22 Rule 1206 changed the section title to
23 reflect the addition of a front loading concept and
24 added subsections concerning the effect of front
25 loading earned paid sick time on accrual and carry over.

1 We added a method for front loading earned
2 paid sick time for partial year employees and employees
3 who are hired after the first of the employer's year,
4 added references to an employer's ability to permit
5 greater carry over than that required by statute and
6 amended subsection H(3), which is now I(3), to
7 reference usage limits in addition to usage rights.

8 In Rule 1210 we added a reference to
9 A.R.S. 23-381 in Subsection (B). That references
10 collective bargaining agreements. We deleted B(13)
11 and B(14) and replaced them with B(13) through B(16).
12 These changes accomplished the following:

13 First, they brought the rules'
14 recordkeeping requirements in line with A.R.S.
15 23-375's notice requirements.

16 Second, they added a requirement that
17 employers maintain records concerning employer --
18 sorry, employees' earned paid sick time balances and,
19 third, they defined the phrase "the employee's earned
20 paid sick time balance." And, finally, we amended
21 Subsection C(1) to reference the changes to B(13)
22 and B(14).

23 Director.

24 DIRECTOR ASHLEY: Thank you, Jon.

25 I just want to reiterate and show our

1 appreciation for all of your involvement, being part
2 of this public transparent process. This feedback is
3 very valuable and our very lengthy and robust FAQs,
4 not to mention what we're doing here with the proposed
5 rulemaking, that's grown because of your feedback.

6 So we just wanted to, once again, thank
7 you very much for your involvement in the process and
8 being here this morning.

9 We now welcome you to present your oral
10 comments regarding supplemental proposed rulemaking
11 with a Notice of Supplemental Proposed Rulemaking.

12 Those wishing to speak may do so. We
13 have a couple of slips already. We have additional
14 slips back at the table with Kara. Please fill out
15 the speaker slips, and I will call each speaker who
16 will each have five minutes to speak.

17 Although the oral proceeding will end
18 when oral comments have concluded, written comments
19 will be accepted until 5:00 p.m. today at which time
20 the public comment period will close.

21 The Commission will carefully consider all
22 written comments, along with your oral comments today.
23 The Commission will discuss and take action on
24 supplemental proposed rules at a regular public meeting
25 of the Commission.

1 Please keep in mind that this oral
2 proceeding is for the Commission to receive public
3 comment on the supplemental proposed rulemaking, not
4 on the provisions of the Fair Wages and Healthy
5 Families Act or the wisdom of the Act.

6 If you have specific questions regarding
7 the Act, the Commission has posted, as I mentioned,
8 an extensive list of FAQs on the website addressing
9 common questions about the Act and the proposed rules.

10 In the event that the FAQs do not answer
11 your questions, we would invite you to submit questions
12 directly to Steve Welker, the Director of our Labor
13 Department. Mr. Welker's email address and phone
14 number are available on the Commission's website;
15 and with that we now open the floor to public comment,
16 and we will begin with Pat Playman.

17 MS. PLAYMAN: You know, I probably don't
18 have comment as much as a question. So you kind of
19 defined the questions relative to the interpretation
20 of the laws is really more what I have, and I don't
21 know that this is the forum for that.

22 DIRECTOR ASHLEY: If this is related to
23 the rulemaking, we'd be -- we'd be happy to hear your
24 thoughts and input even a comment on that or a question.

25 MS. PLAYMAN: It's really more about the

1 record keeping and what we're required to report on
2 paycheck stubs as opposed to even our payroll records
3 in fractions of hours.

4 So we've had multiple interpretations,
5 one hour for every 30 hours worked. If you pay once
6 a week, as an example, on the first week do you make
7 only one hour available to your employees and wait
8 until they've earned another twenty hours or another
9 hour of paid sick leave before recording them?

10 DIRECTOR ASHLEY: We'd be happy to address
11 that to the extent we can at this point and then
12 personally follow up with you with additional details.

13 MS. PLAYMAN: That would be great.

14 MR. HAUER: As yet, we haven't formally
15 answered that question.

16 MS. PLAYMAN: Okay.

17 MR. HAUER: It's a good question.

18 The statute requires that earned paid sick
19 time be available as it is accrued or be able to be
20 used as it is accrued, which would suggest that once
21 you have an hour it's now usable.

22 MS. PLAYMAN: Uh-huh.

23 MR. HAUER: But I think it makes sense to
24 include in our FAQs maybe a more formal answer to your
25 question. So why don't we talk after and see if we

1 can get more information from you and then formalize
2 a response.

3 MS. PLAYMAN: That would be wonderful.

4 DIRECTOR ASHLEY: Thank you.

5 Stanley Lubin.

6 MR LUBIN: Yes, my comments are
7 directed to the question of how to deal with
8 collective bargaining agreements when you have
9 alternate labor.

10 For example, in the construction
11 industry and also in the convention industry where
12 you have people working for one employer for a few
13 days or a few months at a time or even sometimes in
14 convention and staging for a few hours at a time and
15 then they go on to another employer, they may be
16 unemployed for a week, they go on to a third
17 employer or a fourth.

18 They never really accumulate enough
19 hours with an employer -- with one employer to be
20 able to use them before they're gone. For example,
21 if you work a week or two for one employer, you
22 might work, say, 60 hours. You'll pick up two hours
23 of time. You then go on to work for the third
24 employer and you need the time. You can't use it
25 because the first or second employer owes it to you,

1 at least for a period of time thereafter, but the
2 third employer you haven't built up the time yet.

3 So what I would like to propose is
4 that, for example, that -- if you could put this in
5 your rules somewhere, that they be allowed to
6 accumulate these hours in a trust fund of sorts.

7 The building trades, for example, have
8 trust funds for healthcare and the employers donate
9 money into the trust fund based on the hours of work
10 that an individual works under the Collective
11 Bargaining Agreement.

12 Then when the employee is ill, they can
13 use that time, use it and be paid back out of the
14 trust fund and the employers are credited for the
15 usage. The -- this is a working system that's been
16 working for more than six decades and adding this to
17 it would be almost a non-expense.

18 What can happen, for example, is if
19 somebody is working for me for two weeks, I will owe
20 them two hours, perhaps. If I'm assuming they work
21 60 hours, I will owe them two hours. Now, that -- I
22 would then donate the money -- or contribute the
23 money to the trust fund to pay for the two hours.
24 The trustees would hold that money. Then if that
25 employee gets ill later on that year, they can tap

1 into it.

2 The alternative, of course, is they can
3 opt out of the system under the collective
4 bargaining rules, but they may not want to be opt
5 out. There are going to be times when they're
6 working without a contract. There will be times
7 when they're working with one that opts out. There
8 will be times when they're working with one that
9 does not opt out, and all these things can be
10 handled by the trust fund.

11 It's kind of like a glorified payroll
12 service that now exists -- you know, that many
13 employers use to make their payroll, and I think it
14 might be a good idea to put them into the rules at
15 the appropriate spot so that this can be done. I'd
16 be more than happy to work with somebody in your
17 department to help draft that.

18 In the entertainment industry, other
19 than, for example, employees of the opera, the
20 ballet and symphony, which are long-term employers,
21 the same thing happens except they're working for
22 even shorter periods for a given employer and
23 they're going in and out with the same employer
24 frequently; and, again, they don't have a chance to
25 accumulate the time before they're working

1 elsewhere.

2 In addition, they would lose because of
3 the definition of who is covered and what kind of
4 services can be used -- that the time sick could be
5 used for, they would lose that if they were not able
6 to accumulate it from a group of employers together.

7 Obviously, the employers and the unions
8 would have to agree, and that's something that they
9 could negotiate over over time; but if they're not
10 in the rules, they can't do it. So I would suggest
11 that this be done.

12 MR. HAUER: If I may respond, it's an
13 interesting concept. Two thoughts occur to me.

14 First, we view the -- the Act as a minimum.
15 Employers are always welcome to offer more generous
16 policies than those prescribed by the Act. So though
17 it would not initially, you know, absent a rule be
18 required, employers could certainly agree to do
19 something like this, even if the Act doesn't require
20 it. So that's still an option.

21 The rest, the idea of a trust fund between
22 employers, there's a -- there's a concept that we've
23 recognized in the FAQs regarding commonality, but I'm
24 not sure that addresses what you're talking about.
25 In other words, they wouldn't have common ownership

1 between these employers.

2 So I -- I think perhaps at this point the
3 best thing to do would be to take something like that
4 under advertisement and look at our options and discuss
5 it further.

6 MR. LUBIN: I have no quarrel with
7 that. I think it needs some discussion. The point
8 being that the employers will be reluctant to do
9 this because -- absent some kind of statement in the
10 rules or guidelines authorizing it, because what
11 they're telling us now is that they feel that they
12 would be violating the rules, the law, if they,
13 basically, put the responsibility of this on to the
14 trust fund that they don't have total control over.

15 MR. HAUER: In other words, they're --
16 they're giving up their -- their record keeping
17 requirements and handing them off to another employer
18 via this trust fund?

19 MR. LUBIN: It would be the trust fund,
20 which is controlled by --

21 MR. HAUER: Right.

22 MR. LUBIN: -- both union and employer
23 representatives together or jointly under federal
24 law and it's pretty heavy regulated.

25 MR. HAUER: Right.

1 MR. LUBIN: But the employers are
2 saying to us, "Wait, I have the duty of maintaining
3 these records. I cannot -- and I have the duty of
4 making the payments. I cannot delegate that to
5 somebody that I don't have control over."

6 A payroll service that I use, I have a
7 contract with, they're my agent.

8 MR. HAUER: Uh-huh.

9 MR. LUBIN: This is an agent with a
10 group of us and it makes some changes. So they're a
11 little reluctant to go forward with it, which is
12 causing some of the unions now after end of
13 contracts opting out from the system, which is
14 basically depriving the membership of the right to
15 use the sick time during periods of time when they
16 might need it.

17 MR. HAUER: Right.

18 MR. LUBIN: So -- and I don't think that
19 that was the intent of the drafters to -- to exclude
20 people from it. I think they would like it, as you
21 say, as a minimum and then allow this to be done. It
22 would be part of what they already have, but it would
23 broaden out the terms of use and make it a little bit
24 easier regarding the record keeping and -- and
25 everything else.

1 MR. HAUER: That's a very interesting
2 concept.

3 MR. LUBIN: It would cost the
4 individual employers not one penny more because, in
5 effect, they're paying -- they're all paying the
6 same rate anyway, and as a result if they're
7 basically allowed to do it this way they would be
8 credited for the time that would be used by the
9 employee, would basically reduce what each employer
10 owes.

11 MR. HAUER: I think it's a very
12 interesting concept. Unfortunately, we don't have a
13 lot of information about the intent of 381 and whether
14 that was intended to give unions a total out if they
15 haven't -- I mean, on its face, it seems like that is
16 what 381 suggests, is that if you have waived the right
17 to earned paid sick time requirements via Collective
18 Bargaining Agreement --

19 MR. LUBIN: Sure.

20 MR. HAUER: -- then you're no longer
21 required to abide by the Act in that -- in that way.

22 A very interesting concept. I think we
23 have to discuss it further.

24 MR. LUBIN: I'd be more than happy to
25 meet with you, if you wish.

1 DIRECTOR ASHLEY: Mr. Lubin, thank you
2 very much. We look forward to continuing this
3 conversation, delving a little deeper into the
4 details, working with both our Legal Division and
5 our Labor Division on this.

6 MR. LUBIN: Sure.

7 DIRECTOR ASHLEY: Thank you.

8 Denise Blommel.

9 MS. BLOMMEL: Good morning. Thank you
10 very much. Can I just sit here and --

11 DIRECTOR ASHLEY: Feel free.

12 MS. BLOMMEL: That's okay? Very good,
13 thank you.

14 First of all, thank you very much for
15 the changes that have been made in the supplemental
16 rulemaking. I appreciate that, and I noticed in
17 your updated FAQs that you had addressed one of the
18 issues that I raised dealing with the documentation
19 of paid sick time as it relates to the Americans
20 with Disabilities Act and the Family Medical Leave
21 Act, both federal law, and I think they're on Page
22 33 of your FAQs you address that.

23 I am still, however, concerned and my
24 written comments address this, about Workers'
25 Compensation. If an employee is off work for two

1 days due to an industrial injury and returns to an
2 employer, that employee, I think, needs to be able
3 -- and the employer needs to be able to ask the
4 employee for a release to return back to work,
5 particularly if there were an industrial injury that
6 interfered with the person's ability to work.

7 Moreover, the physician -- the Workers'
8 Compensation physician may have assigned light duty
9 in which case the employer is required to take a
10 look at that.

11 So the thing is is that I think the
12 rules should address this particular situation so
13 that employers and employees are not confused.

14 MR. HAUER: That -- you're spot on.
15 It's an area of -- of the law that does need to be
16 addressed. What we're looking at right now is
17 whether 23-379(B), which discusses conflict of
18 laws -- actually, (A) discusses federal laws, (B)
19 discusses other laws that extend other protections
20 to employees, whether that is the carve-out that gives
21 us -- or gives employers the ability to look at medical
22 documents under those circumstances, and I think we
23 should have an answer on that one for you soon.

24 So I appreciate you bringing it to our
25 attention. It's a very important point.

1 MS. BLOMMEL: Good. Thank you so much.
2 That's all I have.

3 DIRECTOR ASHLEY: Thank you very much.
4 It looks like we have one more slip.
5 Just a reminder, if anyone would like to make a
6 comment or ask a question regarding the proposed
7 rules, please fill out a Request To Speak slip, and
8 Kara has those in the back of the room.

9 Our next speaker is Beth Call.

10 MS. CALL: Thank you. I have several
11 questions seeking clarity on implementation of the
12 requirements that I do not believe have been
13 addressed, at least to the level that my clients are
14 looking for, either in the FAQs or in the
15 supplemental rulemaking.

16 So tell me if this is not the right
17 place to kind of go into some of them and I'd be
18 happy to have conversations after or submit
19 questions, but if I could kind of go ahead with
20 some of them and then you guys can let me know.

21 DIRECTOR ASHLEY: That will be okay for
22 the benefit of the folks here.

23 MS. CALL: Okay. Some of them, maybe,
24 are easy for you to -- to answer but we're looking
25 for more definitive answers.

1 So several of my clients have
2 historically been offering more generous sick pay to
3 their employees in the amount of 80 hours per year.
4 They find themselves in a situation as of January 1
5 where they've provided that to their employees and
6 several have used all of it up before July 1.

7 My reading of the law and everything
8 that you've provided is that that doesn't matter,
9 starting July 1 we need to let employees begin to
10 accrue. So they're going to get additional time for
11 this year; but they, of course, would like clarity
12 on that because it's a cost, obviously, to them.

13 MR. HAUER: That is correct. That
14 interpretation is correct. At least that is our
15 interpretation of the statute, that accrual begins
16 July 1. This is an issue that we explored and -- and
17 that is our current interpretation, and that's why we
18 offered the prorating option for the remainder of this
19 first year. I think it lends additional credence to
20 it.

21 Not only does it put all employees
22 hopefully on the same footing at the beginning of
23 the -- the effective period, but it also gives
24 employers who have been this generous some relief
25 along those lines.

1 MS. CALL: Okay. And along those same
2 lines, the employers finding themselves in these
3 situations, oftentimes employees have vacation time
4 available to them. So would there be concern with
5 converting vacation time to an equivalent paid time
6 off bucket for this short period of time even though
7 they plan to front load sick pay starting on January
8 1?

9 MR. HAUER: So if I understand correctly,
10 you're saying it's already -- the employee's already
11 accrued vacation time. The employer would then convert
12 that time to earned paid sick time.

13 That's not something we've addressed.
14 My -- actually, I hesitate to give you my initial
15 response just because we haven't formally addressed
16 it. So let's -- let's talk more about that one after.

17 MS. CALL: Okay, terrific.

18 Another question that's come up -- and
19 I know that you addressed this, to some extent, in
20 your on-call FAQ, but many of my clients have hourly
21 employees who work a regular schedule as well as
22 having the opportunity to work additional time for
23 overtime purposes.

24 If they -- if an employee signs up for
25 overtime work and is scheduled for that, is it

1 correct to interpret your FAQ to say if they've
2 already been scheduled for that time, they can
3 allocate their sick -- paid sick time to that
4 time --

5 MR. HAUER: Correct.

6 MS. CALL: -- even though it's outside
7 their regular schedule?

8 MR. HAUER: Correct, if they -- if they --
9 if they've been scheduled to work, they can use the
10 time.

11 MS. CALL: Okay. And then I -- I have
12 one more question, and then I'll let the next person
13 go ahead.

14 Many of my clients have policies in
15 place that require employees to use all paid time
16 before they go into unpaid time, vacation or sick.
17 I see some language within the law, as well as the
18 supplemental rulemaking, that suggests that we can't
19 require employees to allocate Arizona paid sick time
20 to time.

21 What is your position on that, those
22 type of policies versus the -- you know, the
23 language of the -- of the law?

24 MR. HAUER: That's another one that we
25 have not addressed via FAQ --

1 MS. CALL: Okay.

2 MR. HAUER: -- and it's a great question.
3 Let's discuss that one further and see if can --

4 MS. CALL: Okay.

5 MR. HAUER: -- address it in the future.

6 DIRECTOR ASHLEY: Okay, let's move on.

7 And as a reminder, you have a host of
8 content experts available to all of you on a personal
9 basis in both the Legal and Labor Division that are
10 more than happy to -- to have personal one-on-one
11 conversations regarding a lot of the details regarding
12 the FAQs and then, also, to get your insight and input
13 to expand those.

14 Our next speaker is Pamela Kingsley.

15 MS. KINGSLEY: Thank you. I'm an
16 attorney and I represent both employers and
17 employees. So on the employer drafting side of it,
18 not that it really matters in the long run in terms
19 of application, but I read 372 a little differently
20 than how perhaps the Commission has read it.

21 So where it says "but employees shall
22 not be entitled to accrue or use more than 40 hours
23 of earned paid sick time per year..." just stop
24 there, I take it the Industrial Commission is saying
25 once you get to 40 hours per year, nobody's used any

1 time the first year. They've just kept it right
2 there. Move into the second year, I'm going to
3 front load the second year. So they don't carry
4 over the first 40, I understand that part.

5 Let's say they don't front load. They
6 carry over the 40, they still don't use it. Your
7 interpretation, I take it, is the next year they're
8 carrying over only 40. My interpretation is they're
9 carrying over 80, they would then carry over 120 and
10 they would continue to carry over because you're
11 able to cap every year, but you still have that
12 year.

13 I know it doesn't matter practicality,
14 but when you get the plaintiff's attorney who then
15 comes in -- for the Industrial Commission it's going
16 to be a win-win, but when the plaintiff's attorney
17 comes in and starts to pick it apart, can I have a
18 little thought in terms of the considerations that
19 went on to say that "no" they actually do just cap
20 at 40 and that's it?

21 MR. HAUER: Certainly, and -- so our
22 proposed rules -- let me pull up what I'm looking for.

23 So our proposed rules define -- or
24 consider that the statute is basically saying that you
25 can -- I'm trying find the accrual requirement.

1 Okay, that you are -- you are able to
2 carry over to the following year earned paid sick
3 time subject to limitations on usage; and pursuant
4 to 372(A) and (B) the limitations on usage are either
5 at 24 or 40.

6 So that's the basis for it. So that's the
7 basis for our analysis, that you carry forward what you
8 can use in the current year.

9 MS. KINGSLEY: So any time that you
10 come in and look at record keeping, the maximum
11 number of hours would be 80 hours?

12 MR. HAUER: Correct.

13 MS. KINGSLEY: Ever?

14 MR. HAUER: So if you went into the second
15 year and you would carry forward 40, you're not front
16 loading so you can accrue another 40, get up to 80.

17 MS. KINGSLEY: Okay, so --

18 MR. HAUER: And then you can get 40 in
19 year three.

20 MS. KINGSLEY: And I get that
21 interpretation, I'm just not sure that that's the way
22 I read the statute.

23 MR. HAUER: Sure.

24 MS. KINGSLEY: Great minds differ.

25 MR. HAUER: Well, I think another

1 consideration is that -- well, two things.

2 In any given year an employee can never
3 use more than 40 or 24 hours. So the additional
4 time doesn't get them anywhere.

5 MS. KINGSLEY: Right.

6 MR. HAUER: Additionally, there's no
7 provision in the statute that requires payout at
8 separation. So if you bank hundreds of hours, there's
9 no additional benefit to it.

10 So as you stated -- or mentioned in your
11 question, you'd be accruing hours that were useless,
12 essentially, and -- and so what we'd end up doing is
13 dinging employers on technicalities rather than actual
14 benefit. I think that's problematic.

15 MS. KINGSLEY: I had a criminal defense
16 attorney teach me criminal law and he talked about
17 (inaudible.)

18 So you have an employee who works ten
19 hours a year and leaves every seven months and comes
20 back every seven months.

21 MR. HAUER: Uh-huh.

22 MS. KINGSLEY: So he's not earning any
23 more time, but ultimately after maybe a long period
24 of time will have started to bank -- will be able to
25 start to use some of those additional hours. That's

1 why --

2 MR. HAUER: Yeah.

3 MS. KINGSLEY: Yeah. I mean, we get
4 into the one realistic version, but still.

5 My other thing is --

6 MR. HAUER: Go ahead.

7 MS. KINGSLEY: -- anybody can use up --
8 an employer can use -- make a policy that says
9 anybody can use vacation time for earned paid sick
10 time and anybody can use paid sick time for vacation
11 time.

12 Is there any restriction on that at
13 all, unless other than you have to treat that
14 vacation time under kind of the same rules as earned
15 paid sick time?

16 MR. HAUER: Right. If you have a bucket
17 of time, a pool of time that you've designated as
18 available for all the uses and the same conditions are
19 available under the Act, they can use it for whatever
20 they want to use it for.

21 If they accrue earned paid sick time in
22 this equivalent PTO pool and use it for vacation time,
23 you don't have to give them additional time is really
24 how that works.

25 MS. PLAYMAN: Can I make a comment on

1 that?

2 (Discussion off the record.)

3 MS. PLAYMAN: I'd just like to weigh in
4 on that from a record keeping (inaudible), just
5 looking forward to a potential audit --

6 MR. HAUER: Uh-huh.

7 MS. PLAYMAN: -- that a client might be
8 put through. So would it be the Commission's
9 recommendation to have -- I mean, I'm just trying to
10 figure out how you would look at it in an audit
11 situation.

12 If you allow your employees to use paid
13 sick time for vacation time or personal time or
14 whatever, is it a recommended best practice to have
15 some form of documentation where the employee is
16 giving you written agreement to utilizing that for
17 personal time so that he doesn't come back to the
18 company saying, "Gee you didn't provide me enough of
19 this protected sick leave," for the reasons you list
20 in the law?

21 MR. HAUER: So it's an interesting
22 question. I don't know -- and I'm not sure we can
23 get into this in this forum whether it's a best
24 practice for employers to require that employees
25 certify a specific usage for a specific absence.

1 However -- and I think the Labor
2 Department here would agree -- if you can, as an
3 employer, reference a policy that's been acknowledged
4 by the employee that explains that the time can be
5 used for any purpose under the Act or the other various
6 uses that the employer allows, that would probably
7 satisfy your inquiry.

8 Does that sound correct to you guys?

9 DIRECTOR ASHLEY: Courtney?

10 MS. HAYDEN: I was going to say just to
11 boil it down to the most simple point --

12 MS. PLAYMAN: Yes.

13 MS. HAYDEN: -- as an investigator,
14 right, and as someone who gets calls from both
15 employers and employees, the more an employee
16 understands what they're being provided and why,
17 maybe the less confused calls I get. So I always
18 say error on the side of the employee understanding
19 more.

20 MR. HAUER: You know, when we come -- when
21 it comes back to best practices, an acknowledged policy
22 is always, I think, going to be helpful for the
23 investigators.

24 MS. PLAYMAN: All right, thank you.

25 DIRECTOR ASHLEY: All right, let's move

1 on to Shayna Balch.

2 MS. BALCH: Hello. Thanks for having
3 this meeting. My colleagues back here just have
4 some general questions regarding interpretation
5 and kind of where things are going to go from now.

6 I guess my first question is: Do you
7 guys anticipate any additional supplemental
8 regulations regarding this law?

9 DIRECTOR ASHLEY: That will be taken
10 into consideration by the Commissioners, and we'll
11 evaluate the additional comments and feedback we
12 receive and base it upon that.

13 MS. BALCH: Okay. To that point, one
14 issue that a lot of my clients have been struggling
15 with is regarding usage of sick leave; and I haven't
16 really seen any, you know, guidance on that. The
17 supplemental regulations are silent to that issue,
18 as to specifically the issues of, you know,
19 foreseeable, unforeseeable leave, what type of
20 notice employers can really ask of employees.

21 Specifically, in looking at the
22 language of the law -- flip to it here -- the law
23 states that employees shall make a reasonable effort
24 to schedule the use of earned paid sick time in the
25 effort not to disrupt the operations of the

1 employer; but, yet, what a "reasonable effort" is is
2 not really defined.

3 It's unclear as to whether or not an
4 employer can have a rule, for example, "You need to
5 notify us if it's, like, a doctor's appointment that
6 was scheduled three weeks ago. You need to notify
7 us at least seven days in advance so we can schedule
8 things."

9 My reading is that under that
10 circumstances, if a doctor's appointment was
11 scheduled three weeks earlier and an employer were
12 to deny it and say, "You didn't give us at least one
13 week notice," that they could actually be on the
14 hook for retaliation for denying that leave pursuant
15 to the anti-retaliation provision.

16 And, similarly, with unforeseeable
17 leave, there is a section in there that says if
18 you're going to deny a request, then you need to
19 have a written policy in place; but, yet, there's no
20 guidance for recommendations or regulations on what
21 that policy would look like.

22 Are you guys going to weigh in on that
23 with supplemental regulations?

24 MR. HAUER: Well, we've currently
25 addressed that in some respect via the Frequently

1 Asked Questions.

2 Have you had an opportunity to look at
3 those?

4 MS. BALCH: Yes, but I think it still
5 leaves some lack of clarity.

6 MR. HAUER: Yeah, the -- the Frequently
7 Asked Questions addressed foreseeable and unforeseeable
8 leave and kind of what we see these policies looking
9 like --

10 MS. BALCH: Uh-huh.

11 MR. HAUER: -- but they don't get as
12 granular as you are discussing --

13 MS. BALCH: Uh-huh.

14 MR. HAUER: -- and the statutes don't
15 either, as we've discussed.

16 MS. BALCH: Yeah.

17 MR. HAUER: So I think the question --
18 well, two questions. One, can we provide additional
19 guidance about what written policies should look
20 like?

21 MS. BALCH: Uh-huh.

22 MR. HAUER: Probably. There may be
23 forthcoming guidance.

24 Is there a forthcoming regulation? I'd
25 defer to Director Ashley. I think that's really a

1 question to the Commissioners at this point.

2 MS. BALCH: Uh-huh.

3 MR. HAUER: However, we're committed to
4 working with our stakeholders to make sure they get
5 the guidance they need, if we can offer it, so they
6 can act with some reasonable understanding of what
7 our investigator is going to look for.

8 MS. BALCH: Okay.

9 DIRECTOR ASHLEY: Thank you.

10 Andrea Lovell.

11 MS. LOVELL: Thank you. Thank you all
12 for having us. I just had a quick question. We
13 have a lot of clients who have Family and Medical
14 Leave Act policies that require employees who use up
15 FMLA to also use any paid time off they have accrued
16 or any vacations and those types of leaves.

17 We wondered if you had a position on
18 whether the same could be made true of the earned
19 paid sick time?

20 MR. HAUER: So in our FAQs we've addressed
21 this to an extent where we've referenced, again, 23-379
22 and said that the statute says that nothing in the Act
23 is intended to conflict with federal law. So if
24 federal law permits it, then we would be on the same
25 page.

1 MS. LOVELL: Okay, thank you.

2 DIRECTOR ASHLEY: Thank you.

3 And our last speaker is Lori Higuera.

4 MS. HIGUERA: Hi. Just a couple
5 questions. With regard to front loading, I don't
6 recall seeing it. So what is the Commission's
7 position on where an employer front loads the earned
8 paid sick time? Can it also allow employees to cash
9 that out, similar to what we do with vacation or
10 PTO, or not?

11 MR. HAUER: So I think this goes back to
12 an earlier question and our -- our position is, again,
13 that the Act provides a minimum for earned paid sick
14 time purposes.

15 So if an employer wishes to cash out front
16 loaded earned paid sick time, they certainly can. They
17 can always pay more than they have to. They can offer
18 more than they're required to. I think that's the best
19 answer.

20 MS. HIGUERA: Okay, so just --

21 MR. HAUER: Is the question whether
22 they're required to restock them with earned paid
23 sick time if all --

24 MS. HIGUERA: No. I mean, obviously,
25 if they cashed out they're not using the unpaid sick

1 time, but they are going to get the value of it and
2 use it for some other purpose.

3 MR. HAUER: Uh-huh.

4 MS. HIGUERA: Don't know if that
5 contradicts the underlying purpose of the law and if
6 that's problematic or we, you know, don't take that
7 paternalistic view and just allow employees to do
8 what they will?

9 MR. HAUER: So our view is that if an
10 employer's interested in front loading in perpetuity
11 each year and every year, then they're basically
12 accomplishing the carry over and accrual requirements
13 of the Act and being more generous than the Act
14 requires in that they're giving them time at the
15 beginning.

16 If they wish to pay out unused earned paid
17 sick time at the end of a year and then front load it
18 at the beginning of the following year, it's
19 permissible.

20 MS HIGUERA: I guess -- I'm sorry, I'm
21 probably not being clear enough.

22 So they front load. On January 1, you
23 know, they have their amount of time, and they allow
24 the employee at any time during the year to cash it
25 out rather than actually use it for paid sick time.

1 Just say, "You know what, I'm not going to be sick
2 all year. Just give me the cash value of that
3 because I'm going on vacation at the end of
4 January."

5 MR. HAUER: Yeah, I -- I understand what
6 you're saying now, and I think that could be
7 problematic. The way we view earned paid sick time
8 is there's really two components to it. There's time
9 and money and you can't -- the Act specifies you can't
10 waive your rights under the Act.

11 Therefore, you know, if you're just gonna
12 take the money associated with the time and lose the
13 ability to use that time --

14 MS. HIGUERA: Right.

15 MR. HAUER: -- I think that could be
16 problematic in the course of an investigation.

17 MS. HIGUERA: Okay. Okay, so that's
18 helpful.

19 This one, I -- I think we can kind of
20 gather the answer to, but I would love to hear the
21 Commission's perspective. You know, because you can
22 offer earned paid sick time in very small increments
23 depending on what your practice is, let's say it's
24 15-minute increments and an employee calls in to use
25 their paid sick time and only has less in their

1 bucket left than the shift.

2 Say it's an eight-hour shift and they
3 only have fifteen minutes left in their bucket. I
4 assume the paid sick time only applies to the
5 fifteen minutes and not the remainder seven hours
6 and forty-five minutes?

7 MR. HAUER: Correct.

8 MS. HIGUERA: Okay. Um --

9 MR. HAUER: Do you -- do you have any
10 other takes on that issue? That's my understanding
11 as well.

12 MR. WELKER: Yeah, that's correct.

13 MS. HIGUERA: I mean, it's a little bit
14 tricky because I think if the employee is sick,
15 they're going to be sick for more than fifteen minutes.

16 MR. HAUER: Right. The question is
17 whether that --

18 MS. HIGUERA: Right.

19 MR. HAUER: -- entire period then becomes
20 protected?

21 MS. HIGUERA: Right, right.

22 MR. HAUER: And then you have the -- as
23 Ms. Blommel I'm sure is aware, subsequent litigation
24 about whether or not it was fifteen minutes or the
25 remainder of the day.

1 Those are -- those are questions that
2 will still be out there --

3 MS. HIGUERA: Sure.

4 MR. HAUER: -- but our position is then
5 it's the time that is used for earned paid sick time
6 under the Act that is protected and not the remainder.

7 MS. HIGUERA: Yeah, fair.

8 MS. KINGSLEY: Doesn't that then go to
9 the original question of percentages of hours? I
10 mean, I think to me that it says that you earn it
11 as it -- you get it as it's accrued.

12 MR. HAUER: Uh-huh.

13 MS. KINGSLEY: I was a little surprised
14 that you came back and said you hadn't decided because
15 one of your FAQs talks in terms of a twenty hours and
16 two tens --

17 MR. HAUER: Right.

18 MS. KINGSLEY: -- every year.

19 So I've assumed it's incurred -- it's
20 accrued in percentages.

21 MR. HAUER: Okay, all right.

22 MS. KINGLSEY: I mean, is anybody else
23 different?

24 MR. HAUER: I'd like to talk more -- I'd
25 like to talk to you more about that because I'd like

1 to make sure we're on the same page because I'm not
2 sure I understand, but let's -- let's talk after and
3 see if we can find a way to get you some guidance.

4 DIRECTOR ASHLEY: Ms. Higuera, do you have
5 anything you wanted to -- to add to your topic?

6 MS. HIGUERA: Yes, one more question,
7 please.

8 I didn't quite understand it -- at
9 least well enough for me to have confidence in with
10 regard to the on-call issue.

11 If you have an employee who's on-call
12 but the on-call is not necessarily a set shift, like
13 you may be called to serve this eight-hour shift,
14 it's rather more like emergency response-type
15 situations, right.

16 So the -- you call the employee and for
17 the first time learn that they are sick and can't do
18 it. In terms of attributing paid sick time, it's
19 not as if you have a block of eight hours or twelve
20 hours. It's just how long would it take to put that
21 fire out or how long would it take to do something?

22 How does the Commission envision those
23 types of on-call situations?

24 MR. HAUER: Yeah, and this is tricky
25 because I think on-call and the Act don't necessarily

1 jibe --

2 MS. HIGUERA: Sure.

3 MR. HAUER: -- all that well.

4 So the way that we view it is if you have
5 scheduled time, which this -- what we're discussing
6 now is not quite. Certainly, it's applicable. If
7 you're called to actual work, if there's work to be
8 done for which you would otherwise be paid, you could
9 use your unpaid sick time for that time, regardless of
10 the length of time. So it doesn't have to be a
11 scheduled block of time.

12 If you're an emergency responder and it
13 would take you two hours to go out and put out the fire
14 and that's the only work you'd be doing --

15 MS. HIGUERA: Uh-huh.

16 MR. HAUER: -- you could use your time for
17 that as an on-call employee.

18 Does that answer your question?

19 MS. HIGUERA: It does. Would that be
20 up to the employer or the employee to decide how
21 long it would take to -- to do -- I mean, you know,
22 I don't know how long a fire lasts. I don't know
23 how big it is. It's going to be different every
24 time --

25 MR. HAUER: Yeah.

1 MS. HIGUERA: -- with all that
2 situation. I guess as long as we have some sort of
3 reasonable estimate of what we think that time is,
4 that's probably going to work?

5 MR. HAUER: I think for now, yes. We
6 haven't addressed that formally either --

7 MS. HIGUERA: Sure.

8 MR. HAUER: -- but it's another good
9 question and something we'll certainly take into
10 consideration.

11 MS. HIGUERA: All right. Appreciate it,
12 thank you.

13 DIRECTOR ASHLEY: Once again, that was our
14 last speaker slip. Thank you very much. We really
15 appreciate everyone's attendance and participation this
16 morning; and, as I mentioned, our Labor Division stands
17 ready to help you personally one-on-one with any
18 detailed additional questions you have. We're here to
19 work through this with you to add clarity to the
20 process.

21 And this concludes the oral proceeding
22 concerning the Notice of Supplemental Proposed
23 Rulemaking Regarding Amendment of Title 20, Chapter 5,
24 Article 12, specifically R20-5-1201, 1202, 1205, 1206,
25 1208, 1209, 1210, 1211, 1213 and 1218.

1 As a reminder, although the oral
2 proceeding has concluded, written comments will be
3 accepted until 5:00 p.m. today at which time the
4 record will close.

5 Thank you very much.

6
7
8 (Whereupon the proceedings were concluded
9 at 9:42 a.m.)

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