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3 INDUSTRIAL COMMISSION OF ARIZONA  
4  
5 PUBLIC HEARING  
6 ON  
7 PROPOSED RULEMAKING  
8 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
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10  
11 Phoenix, Arizona

12 June 5, 2017

13 9:00 A.M.  
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18 REPORTED BY:

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20 Certified Reporter (AZ 50687)  
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## I N D E X

**BOARD MEMBERS PRESENT:**

JAMES ASHLEY

JASON PORTER

LISA PADGET

COURTNEY HAYDEN

SCOTT COOLEY

**PUBLIC SPEAKERS:**

DENISE BLOMMEL

JAY ZWEIG

HEIDI NUNN-GILMAN

SANDRA PORTNEY

DEBRA NOVAK-SCOTT

HEIDI KOLTON

CHRIS WINKLER

JILL CHASSON

FRANK PICCIOLI

ABE ARVIZU, JR.

JENNIFER GRONDAHL

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

2 \* \* \*

3 MR. PORTER: Good morning, everyone.  
4 Welcome to the oral proceeding regarding the Notice of  
5 Proposed Rulemaking regarding amendment of Title 20,  
6 Chapter 5, Article 12, specifically Rule 20-5-1201,  
7 1202, 1205, 1206, 1208, 1209, 1210, 1211, 1213 and  
8 1218.

9 My name is Jason Porter. I'm the  
10 Chief Counsel of the Industrial Commission. With me  
11 is James Ashley, Director of the Industrial  
12 Commission; Scott Cooley, staff attorney; Lisa Padget,  
13 Investigation Supervisor in the Labor Department; and  
14 Courtney Hayden, Program Product Specialist in the  
15 Labor Department.

16 This will be your opportunity to  
17 present the Industrial Commission with your oral  
18 comments regarding a proposed rulemaking as published  
19 in the Notice of Proposed Rulemaking.

20 By short way of summary, Arizona  
21 voters approved Proposition 206, the Fair Wages and  
22 Healthy Families Act, in November 2016. The Act  
23 established a new State minimum wage effective January  
24 1st, 2017, and entitles employees to approve earned  
25 paid sick time beginning July 1st, 2017.

1           The Act authorizes the Industrial  
2 Commission of Arizona to enforce and implement both  
3 the minimum wage and earned paid sick time provisions  
4 and to promulgate regulations consistent with the  
5 articles.

6           In the earned paid sick time context,  
7 the Act provides quote, "The Commission shall be  
8 authorized to coordinate implementation and  
9 enforcement of Article 8.1, Earned Paid Sick Time, and  
10 shall promulgate appropriate guidelines or regulations  
11 for such purposes."

12           Currently, the rules in Article 12 --  
13 implemented in 2007 after the referendum that created  
14 the Arizona Minimum Wage Act -- address only those  
15 procedures relating to the enforcement and  
16 implementation of minimum wage law. Because the  
17 Commission is now statutorily tasked with  
18 implementing, enforcing, and regulating the Act's  
19 earned paid sick time provision, the Commission is  
20 proposing to amend existing rules in Article 12 to be  
21 consistent with the Act's new provisions.

22           In addition, the proposed rulemaking  
23 conforms the independent contractor analysis to  
24 factors outlined in A.R.S. §23-902(D) and 23-1601(B);  
25 defines "small employer" and exempts "small employers"

1 from posting requirements; and amends Rule 20-5-1209  
2 to conform to current technologies and includes  
3 various non-substantive amendments.

4           The proposed rulemaking is primarily  
5 intended to be responsive to the Act and, as such, the  
6 Commission anticipates that the rulemaking will create  
7 minimum -- minimal economic, small business or  
8 consumer impact beyond that already created by the  
9 Act.

10           To the extent the proposed rulemaking  
11 creates any impact beyond the Act, the Commission  
12 anticipates that the proposed amendments will reduce  
13 regulatory burden on businesses by aligning Article 12  
14 with current Arizona statutes and providing  
15 clarification that reduces uncertainty for Arizona  
16 businesses and employees.

17           The Notice of Proposed Rulemaking was  
18 published in the May 5th, 2017, Arizona Administrative  
19 Register at Volume 23, Issue 18, beginning on Page  
20 1019. Copies of the Notice of Proposed Rulemaking, as  
21 published in the Register, are available outside the  
22 door.

23           Those wishing to speak may do so by  
24 filling out a speaker slip, which is also available at  
25 the door. I will call each speaker, who will have

1 five minutes to present. Although the oral  
2 proceedings will end when oral comments have  
3 concluded, written comments will be accepted until  
4 5:00 o'clock p.m. today, at which time the public  
5 comment period will end.

6           The Commission will carefully  
7 consider all written comments, along with your oral  
8 comments. The Commission will discuss and take action  
9 on the proposed rules at a regular public meeting of  
10 the Commission.

11           Please keep in mind that this oral  
12 proceeding is for the Commission to receive public  
13 comment on the proposed rulemaking, not on the  
14 provisions of the Fair Wages and Healthy Families Act.

15           If you have specific questions about  
16 the Act, the Commission has previously posted an  
17 extensive list of Frequently Asked Questions on the  
18 website addressing common questions about the Act and  
19 the proposed rules.

20           In the event the FAQs do not answer  
21 your questions, we would advise you to submit  
22 questions to directly to Steve Welker, the Manager of  
23 our Labor division. Mr. Welker's e-mail address and  
24 phone number are available on the Commission's  
25 website.

1           With that, we will now open the floor  
2 to public comment, and we will begin with Denise  
3 Blommel.

4           MS. BLOMMEL: Good morning.

5           MR. PORTER: Good morning.

6           MS. BLOMMEL: My name is Denise  
7 Blommel, and I'm an attorney in Scottsdale. I  
8 represent both employers and employees in my labor law  
9 practice. I am very concerned about the FAQs and  
10 whether we can rely upon them pursuant to A.R.S.  
11 23-365.

12           That law, as you well know, permits  
13 reliance upon substantive interpretation of the law by  
14 the Industrial Commission and enforcement guidance,  
15 and I am concerned because the FAQs, which are  
16 excellent, by the way, and you're to be commended for  
17 doing a good job on those, they do have a disclaimer  
18 on them, however; and so my main concern is, can we  
19 rely upon them.

20           I also have another huge concern  
21 dealing with Worker Compensation, and that is this:  
22 If an employee is going to be granted earned paid sick  
23 time for taking off a few days because of an  
24 industrial injury, does the employer have the right to  
25 request medical information from that employee with

1 respect to return to work?

2 I think that the law permits this, but it  
3 would be very, very good for the Commission to address  
4 this in the rules.

5 Additionally, when an employee is off  
6 work on earned paid sick time under the Americans with  
7 Disabilities Act, the employer does have the  
8 obligation to -- if the employee is disabled, to enter  
9 into what is called the interactive process under  
10 federal law; and so the question is with the  
11 provisions of the Fair Wages and Healthy Families Act,  
12 it's a "don't ask, don't tell" type of situation,  
13 unless the employee is gone for three consecutive work  
14 days, and I think under the ADA there may be issues.

15 The same thing is true with  
16 intermittent leave under the Federal Family Medical  
17 Leave Act. So, again, some guidance from the  
18 Commission, whether in rules or in FAQs that we can  
19 rely on under A.R.S. 23-365 would be in order.

20 I think the biggest question that my  
21 employer clients have for me is dealing with  
22 carry-over, and the question there -- and I think  
23 you've tried to address this in the rules with respect  
24 to limiting carry-over to 40 hours.

25 However, the problem is, is many



1 employers out there are more generous, and so the  
2 carry-over may be more; and the big question I get  
3 from a lot of employer clients is, "Well, our people  
4 already have this huge bank of sick leave. What do we  
5 do with it?" et cetera.

6                   So I think that a possibility for the  
7 Commission would be to address this in terms of  
8 defining the term "available" as that term appears in  
9 the statute. What is available?

10                   A big question that I get, again from  
11 my employer clients is: Well, if they have 80 hours  
12 available or 120 hours available and whatever, they  
13 can only use 40, this creates confusion for the  
14 employee, but it also creates confusion for the  
15 employer.

16                   So I -- I understand, I think, what  
17 you're trying to accomplish with limiting on that 40  
18 hours for the carry-over, but I think the better  
19 possibility may be to define the term "available" with  
20 respect to those kinds of things.

21                   There are some other questions and  
22 concerns I have, which appear in my written comments  
23 to the Commission. I'm happy to answer any questions  
24 you have of me.

25                   MS. HAYDEN: I don't think at this

1 point that we have any questions directly, but thank  
2 you for your feedback, and we'll certainly take it --  
3 take it into account.

4 MS. BLOMMEL: Okay, thank you very  
5 much.

6 MR. PORTER: Thank you very much.

7 Our next request to speak -- and this  
8 is the last one I have. So if there are any among the  
9 group that would like to speak, if you can go ahead  
10 and fill out a Request to Speak form, I think Kara  
11 Dimas, our -- the Commission secretary, has additional  
12 copies in the back.

13 With that, our next comment will be  
14 from Mr. Jay Zweig.

15 MR. ZWEIG: Good morning, Director,  
16 counsel, and staff. A few questions and comments and,  
17 one, I'll start with the carry-over issue as well. I  
18 would be interested in some feedback from the panel  
19 about how carry-over, if an employer chooses to pay it  
20 out, affects accrual rights and the employer needing  
21 to reset the availability after payout.

22 As I read that, there's -- there's a  
23 little bit of an issue there that if you pay this out  
24 at the end of the year to take it off your books as a  
25 liability for an employer, then you may have an

1 obligation to immediately reset if the employee the  
2 next day at the beginning of the next year says,  
3 "Well, I want to take sick leave."

4 MR. PORTER: Then I believe that Prop  
5 206 addresses that question. It gives employers the  
6 opportunity to pay out a balance of unused and accrued  
7 earned paid sick time, but require that company  
8 employers who do that restock, essentially, a bank of  
9 earned paid sick time that would be available for the  
10 employee to use in the -- in the following year, at  
11 the beginning of the year. I believe Prop 206  
12 addresses that question specifically, but that --  
13 that's an option for employers.

14 MR. ZWEIG: So you -- you pay it  
15 out --

16 MR. PORTER: Uh-huh.

17 MR. ZWEIG: -- and what's the  
18 incentive, then, to pay it out if you're restocking  
19 and how does the rule address that?

20 MR. PORTER: I don't believe that our  
21 rules address that particular issue, although in the  
22 carry-over provision of the proposed rules, it does  
23 mention that employers have the opportunity to pay out  
24 pursuant to that provision in -- in the statute.

25 Outside of mentioning that that's an

1 option to employers, I don't believe that the proposed  
2 rulemaking addresses or intended to address that issue  
3 any further.

4 MR. ZWEIG: From the Commission's  
5 perspective, what is the incentive, then, for an  
6 employer to pay it out?

7 MR. PORTER: I'm not sure if that's  
8 an appropriate question for the Commission. The  
9 Commission didn't draft Proposition 206. It was a  
10 voter initiative, as -- as we all know.

11 We've carefully looked at the  
12 carry-over provision in -- in the statute and there  
13 seems to be -- that the statute provides for  
14 carry-over, subject to uses limitations and,  
15 alternatively, gives employers the option to pay out,  
16 and if they do, to restock.

17 Reasons that an employer may choose  
18 to do one or the other are further beyond the purview  
19 of -- of the Commission, I believe.

20 MR. ZWEIG: Okay.

21 DIRECTOR ASHLEY: And also,  
22 Mr. Zweig --

23 MR. ZWEIG: Zweig, FYI.

24 DIRECTOR ASHLEY: Zweig, thank you.

25 MR. ZWEIG: That's fine.

1                   DIRECTOR ASHLEY: This is good --  
2 good comment and feedback, and we would encourage you,  
3 if you haven't already, to submit written comments  
4 that can be considered to incorporate into the  
5 proposed rulemaking as well.

6                   MR. ZWEIG: Absolutely, thank you.

7                   I -- I look at this as an interactive  
8 process with the Commission and appreciate the  
9 opportunity.

10                   The -- the next question that I had  
11 had to do with Paragraph 19 under 20-5-1202, and  
12 that's calculating the regular hourly rate. Let --  
13 let everyone get there, but it includes under  
14 Subsection (d) for employees paid on a commission and  
15 then, as I read it, goes on to describe that you need  
16 to have a reasonable estimate of the wages they would  
17 have made. Am -- am I reading that correctly?

18                   MR. PORTER: I'm sorry, where? Where  
19 are you? Are you in --

20                   MR. ZWEIG: I'm under --

21                   MR. PORTER: Are you under the  
22 proposed rule?

23                   MR. ZWEIG: Yes, I'm under

24 R20-5-1202 --

25                   MR. PORTER: 19?

1           MR. ZWEIG: -- Paragraph 19(d) at the  
2 bottom of the page there. It includes employees paid  
3 on a commission, and if those employees take sick time  
4 accrued -- maybe I should just start with the  
5 question: How's an employer to calculate an employee  
6 who's on a hundred percent commission, what they would  
7 have earned for the period they're taking as sick  
8 time?

9           MR. PORTER: And -- and your  
10 question, the intent of Paragraph 19 in defining "same  
11 hourly rate," particularly subdivision -- subpart (d)  
12 is to provide employers some guidance on how they do  
13 that when it comes to a commission or piece-rate or  
14 fee-for-service employee.

15           In particular, there are four -- four  
16 possible ways to determine what "same hourly rate"  
17 means, and they should be used in the order of  
18 priority that they're listed.

19           So the first would be the hourly rate  
20 of pay agreed upon by the employer and employee, if an  
21 hourly rate of pay was previously established. So if  
22 an employer and employee have agreed on what the  
23 hourly rate will be, say, at the commencement of  
24 employment, then that will be -- that will be binding  
25 and the Commission will defer do that.

1           If that hasn't happened, it will be  
2 the wages that the employer would have been paid, if  
3 known, for the period of time in which the earned paid  
4 sick time was used. If unknown, then an employer  
5 would look to subpart (iii), a reasonable estimation  
6 of the wages that the employee would have been paid  
7 for the period of time in which the earned paid sick  
8 time was used.

9           And then if that's not possible, the  
10 last option is the weighted average of all hourly rate  
11 of pay during the previous 90 days, if the employee  
12 worked regularly during the previous 90 days.

13           So it's intended to give employers  
14 options when they have employees that don't have set  
15 or established wages where the wages may vary  
16 depending on commissions or fee-for-service options to  
17 pursue in order to calculate what the reasonable rate  
18 of pay should be for an employee that is using earned  
19 paid sick time.

20           MR. ZWEIG: And I appreciate that  
21 explanation. I'll just carry my example a little bit  
22 farther.

23           MR. PORTER: Okay.

24           MR. ZWEIG: Let's say that the  
25 employee is outside sales. So they're exempt,

1 correct, and they're a hundred percent commission. I  
2 don't want to answer my own question. So based on  
3 that, that employee understands and the agreement is,  
4 "You don't make a sale, you don't earn wages, you're  
5 exempt, outside sales."

6                   How would this proceed when the  
7 employee says, "I want to take one of my paid sick  
8 days"?

9                   MR. PORTER: So -- so, again, I think  
10 that the answer is -- is found within the language of  
11 subpart (d). So if -- if the employer and the  
12 employee in that circumstance have negotiated an  
13 hourly rate of pay that will be used for earned paid  
14 sick time purposes and they agree upon that, then that  
15 can be used. If not, then you would resort to the  
16 next provision.

17                   So in your example, assuming subpart  
18 (i) isn't satisfied, subpart (ii), the wages that the  
19 employee would have been paid, if known. I assume  
20 they aren't known because they're a hundred percent  
21 commission employed. Moving to (iii), a reasonable  
22 estimation, assuming that you couldn't estimate  
23 because their, you know, wages fluctuate so much, you  
24 would resort to the last provision there, which is the  
25 weighted average of all hourly rates of pay in the



1 previous 90 days.

2 MR. ZWEIG: And assume then -- again,  
3 I'll just finish the question -- they don't have  
4 hourly rates. They make a commission based on a sale.  
5 So you're saying take -- the rule is saying take the  
6 pay period, divide it into an hourly wage?

7 MR. PORTER: Correct.

8 MR. ZWEIG: Okay. For over the last  
9 90 days?

10 MR. PORTER: Correct.

11 MR. ZWEIG: And what's the reasoning  
12 behind that rule?

13 MR. PORTER: So when you're dealing  
14 with a commissioned employee or an employee who's paid  
15 piece-rate or fee-for-service, it's difficult to  
16 assign particular a rate of pay for a period of time  
17 that hasn't been worked; and so the Commission was  
18 simply trying to propose rules that would provide  
19 employers some clarity on how to do that calculation  
20 for those types of employees, you know, in a fair way  
21 for both employers and employees.

22 And if the prior provisions (i), (ii)  
23 and (iii) aren't possible, we think that the most  
24 reasonable way to calculate a rate of pay is to look  
25 historically and average out a commissioned employee's

1 pay, over a 90-day period is what we've -- we've  
2 selected here, average it out to figure out what their  
3 rate of pay has been, and then to use that number for  
4 the time that they are taking off for earned paid sick  
5 time.

6 MR. ZWEIG: And -- and I'll just ask  
7 my last question on this one, and I really appreciate  
8 the effort to answer it, but when you have a fully  
9 commissioned outside salesperson, their hours are --  
10 are not tracked, right, under the FLSA. It -- it  
11 doesn't matter if they work five hours or they work 55  
12 hours in a week.

13 So I would just ask -- I can  
14 understand you'd say, "Well, take what commission they  
15 earned over the 90-day period and figure out the  
16 hourly rate," but where's the other half of the  
17 equation?

18 Are we asking the employers for those  
19 employees to assume a 40-hour week or assume a 50-hour  
20 week or a 30-hour week? I -- I think it's -- it's  
21 open to a lot of interpretation and some potential  
22 disputes. So, any response to that or is that  
23 something that --

24 MR. PORTER: It's a -- it's an issue  
25 that I haven't given thought to. It's -- it's a good

1 question and it's certainly one that we can consider  
2 as we're reviewing this rulemaking and perhaps FAQ as  
3 well to determine whether we can give some further  
4 clarity to those types of employees.

5 MR. ZWEIG: Okay, thank you.

6 And, you know, I'm sorry, I probably  
7 have already exceeded my time. Could I ask one more  
8 question?

9 MR. PORTER: You sure can.

10 MR. ZWEIG: The most significant  
11 issue -- and I think this is back to the statute,  
12 Mr. Director and panel -- is for employers who have  
13 historically offered paid time off policies where they  
14 have said, "We don't want to track other than for  
15 Federal law, Family Medical Leave Act, or whatever  
16 purposes, or you've been gone a certain period of time  
17 and we need to ask, 'Are you okay to return? Can you  
18 do your job with reasonable accommodation?' But other  
19 than that, we're giving you a block of time, either  
20 you accrue it or you grant it at the start of the  
21 year, and we're calling it paid time off, and we  
22 combine vacation, sick time, personal time, et  
23 cetera."

24 And as someone who represents medium-  
25 to large-size employers, most employers have something

1 like this in excess of a week a year, and often it's  
2 several weeks a year, depending on seniority, and what  
3 we're finding is that the Act -- and, again, this is  
4 back to the Act, but the Act is wreaking some  
5 challenge on those employers with existing paid time  
6 off policies as to what they should do.

7           Do they need to cut back on the paid  
8 time off and have a second category, earned paid sick  
9 time? Can they modify their existing paid time off  
10 policies? And, again, I realize that's kind of out of  
11 the purview of the Commission in terms of what  
12 individual employers do.

13           You're trying to give guidance, which  
14 we appreciate, but I'm just wondering if the  
15 Commission has had other inquiries about that and has  
16 taken any steps to implement the intent of the Act,  
17 which apparently was to address employers who provide  
18 nothing or too little to people who need time off when  
19 they're ill or one of the other circumstances.

20           So, again, what would you say to  
21 those employers who have paid time off policies where  
22 they're granted at least a week of time? Yet, you  
23 could have a circumstance where the employee takes two  
24 weeks of vacation at the start of the year that they  
25 accrued and then says, "Well, now, I'm ill. I want

1 paid sick time," and the employer says, "Well, we  
2 already gave you two weeks."

3 So, again, I realize the statute and  
4 in the rulemaking you have some very specific tracking  
5 that employers need to do, but are there any  
6 suggestions or thought that was given in the  
7 rulemaking as to how employers who already grant this  
8 benefit are not unfairly impacted?

9 MR. PORTER: Yeah, and Court -- I  
10 guess Courtney and Lisa in our Labor Department are  
11 taking phone calls basically all day, every day --

12 MR. ZWEIG: Sure.

13 MR. PORTER: -- if they're here in  
14 the office.

15 MS. HAYDEN: Yeah.

16 MR. PORTER: So I'll defer to them.  
17 Are we receiving questions on this  
18 PTO issue?

19 MS. HAYDEN: Sure, but first I want  
20 to say I'm -- I'm sympathetic to the areas that you're  
21 raising. You're not the only one who has.

22 What I can say from -- from my view  
23 is I keep detailed records of the calls that I receive  
24 and those concerns that people raise, and then dually  
25 they are provided to the people on that half of the

1 table. So certainly, we're -- we're keeping it in  
2 mind.

3 MR. PORTER: And I -- if I'm right,  
4 and, Courtney, you can correct me, I believe there  
5 were a couple of our FAQs that have addressed the  
6 issue of PTOs where employers give their employees a  
7 stock of time that can be used for earned paid sick  
8 time purposes in compliance with the provisions of the  
9 Act, but can also be used for other purposes.

10 MS. HAYDEN: Yes.

11 MR. PORTER: And I believe our FAQ  
12 has indicated that that's acceptable.

13 MS. HAYDEN: It's allowable. So the  
14 FAQs indicate that an employer can use a PTO program,  
15 as long as it meets or exceeds all of the minimum  
16 mandates of the law. So not to bore you with what I  
17 would say on the telephone, but I always put that with  
18 a caveat you want to make sure that all of the minimum  
19 mandates are met, but I do want to make sure that time  
20 is available for the use as stipulated.

21 There's really specific information  
22 regarding domestic violence. You want to make sure  
23 that posting, notification, some of those  
24 requirements, as it stands currently, for details on  
25 the pay -- the pay stubs. All of those need to be met

1 as well, but there is an allowance for an adoption of  
2 a PTO program that meets or exceeds the expectation.

3 MR. ZWEIG: And -- and, again, I'll  
4 just -- I really do appreciate those responses. How  
5 would you address the response that says, "Okay, we're  
6 just renaming our PTO policy. We're now calling it  
7 the earned paid sick time policy plus," and the  
8 employee gets -- we'll make it simple -- a week a  
9 year, all right, and they have -- they're into the  
10 year, they've accrued it, they have it.

11 And they say, "Well, since it's the  
12 earned paid sick time plus, formally known as PTO, I  
13 want to take a week of vacation." So they take a week  
14 of vacation. They tell the employer it's vacation,  
15 but it's a PTO policy that met the requirements  
16 because it was available for paid sick time and you  
17 put it on the pay stub that way.

18 But then the employee comes back from  
19 vacation and they're ill. They say, "I picked up  
20 something on vacation," or two weeks later, "I'm ill.  
21 I want to use sick time now, and that time I used  
22 before was vacation time, not sick time. So you  
23 haven't complied. I'm heading down to the Commission  
24 or going to call Courtney."

25 So I'm just not sure that the FAQs

1 address that, and, again, I realize this may be a  
2 statutory issue, but I'm wondering what plans there  
3 are to clarify that, because I think there is a lot of  
4 confusion with employers who are just saying, "Well,  
5 we have a PTO policy, we're fine."

6 MS. HAYDEN: So -- so I hear you,  
7 first and foremost. Secondly, I want you to know  
8 that as long as the investigation's going, I'm going  
9 to take a common sense approach. We understand we're  
10 still in the process of really flushing this out.

11 That being said, at risk of repeating  
12 what I said and not meeting it to the full extent of  
13 your question, as an investigator I -- I'm looking at  
14 every -- every single mandate. So whether you call it  
15 the earned paid sick time plus or however you want to  
16 name it and however an employer wants to work with  
17 their counsel to ensure that each bucket of that  
18 minimum mandate is met, I'm just going to be looking  
19 at each individual area as a -- as a specific.

20 So -- so in terms of giving an  
21 overall purview of -- from this purview of is it  
22 acceptable? Is it going to meet the requirement? I  
23 don't think that I could say, per se. However, you  
24 can see everyone, you know, closely reviewing as we  
25 speak, and so I know that this is an area that we're



1 going to dive into with some depth moving forward.

2 MR. PORTER: And I should say I  
3 believe one of our FAQs does address the precise  
4 question that you're asking, which is if an employer  
5 provides their employee with, let's say, 40 hours of  
6 earned paid sick time or EPST plus policy, and that  
7 time can be used for any of the reasons outlined in  
8 the Act, but can also be used for additional reasons,  
9 like vacation, and an employee chooses to use that  
10 time for vacation, does the employer need to provide  
11 additional time for earned paid sick time?

12 And I believe that our FAQs say that  
13 they don't, as long as an employee is provided the  
14 required amount of time per the statute for purposes  
15 outlined in the statute and has that opportunity and  
16 chooses to use it for some other reason, that an  
17 employer wouldn't be required.

18 Now, keep in mind an employer can  
19 always exceed the requirements of the Act, but they  
20 wouldn't be required to provide further earned paid  
21 sick time for that employee in that year.

22 MR. ZWEIG: And how would you  
23 recommend that that be reported on the pay stub?

24 MR. PORTER: It's -- it's an  
25 excellent question. I don't think that we've -- we

1 have an answer for that right now, but based on the  
2 Commission's guidance on that issue, I think it's  
3 appropriate for us to think about that question more  
4 and perhaps supplement that FAQ to provide some  
5 guidance to employers on how to document use of PTO  
6 time that's available for earned paid sick time  
7 purposes that's used for other purposes.

8                   MR. ZWEIG: And -- and at this point,  
9 the guidance is if you as an employer are  
10 committed that -- we'll just take the employers who  
11 give one week. If you're committed to say, "You can  
12 use it for all of the reasons under the Act, but you  
13 could also use it for -- attend a funeral or vacation  
14 or purposes that aren't outlined under the Act," if  
15 you addend those to the earned paid sick time policy  
16 that's required under the Act and the employee uses  
17 them for the purposes other than one of the purposes  
18 under the Act, the Commission's position is the  
19 employer has complied?

20                   MR. PORTER: Yes.

21                   MR. ZWEIG: And you don't need two  
22 buckets of time?

23                   MR. PORTER: Correct.

24                   MR. ZWEIG: Okay, all right.

25                   DIRECTOR ASHLEY: I would encourage

1 you to continue to work with the Labor Division and  
2 the Legal Division as well and provide additional  
3 details to that. I imagine you've already provided  
4 something in writing?

5 MR. ZWEIG: We have.

6 DIRECTOR ASHLEY: I would encourage  
7 that --

8 MR. ZWEIG: Okay.

9 DIRECTOR ASHLEY: -- to continue to  
10 elaborate upon this. And I want to thank you for your  
11 comments. Out of respect for everybody that's here,  
12 we're going to have to move on to the next speaker.

13 MR. ZWEIG: Absolutely. Thank you  
14 for being so generous with me and so responsive, and  
15 we are working together on this and realize we're  
16 dealing with what the voters passed; but it is causing  
17 a lot of angst and confusion out there, so thank you.

18 DIRECTOR ASHLEY: Thank you, and we  
19 definitely recognize and appreciate that. The author  
20 of the Prop 206 gave it to the voters, the voters gave  
21 it to us, and that's where we are.

22 MR. ZWEIG: Thank you very much.

23 MR. PORTER: Thank you.

24 Our next commenter will be Heidi Nunn  
25 Gilman.

1 MS. GILMAN: Good morning. First,  
2 I'd like to say thank you for your time and being  
3 diligent to address these important matters and  
4 clarify ambiguities for both the employers and the  
5 employees so the employees get the time that they're  
6 supposed to under this law and the employers aren't  
7 overly burdened with additional requirement.

8 I think a lot of the concerns that  
9 I'm hearing are similar to what Denise and Jay have  
10 heard. One clarification, payment of commission and  
11 piece-rate where it's the hourly rate of pay agreed  
12 upon by employer and employee prior -- previously  
13 established, is that going to allow the employer to  
14 establish a rate in its policy to say, you know,  
15 piece-rate workers will receive \$18 an hour when they  
16 use this leave?

17 What actually is meant by "employer  
18 and employee agreed upon rate"?

19 And then under the subsection (iv)  
20 there where if all else fails, you do a weighted  
21 average of all hourly rates of pay, I have had some  
22 confusion among that because they say, "But my  
23 commissioned person doesn't have an hourly rate of  
24 pay. My piece-rate person doesn't have an hourly rate  
25 of pay."

1           So I believe the intent here is that  
2 you take their piece rate and convert it to an hourly  
3 average, but I think there's -- some people are a  
4 little bit confused about that.

5           Also, to follow up on Denise's  
6 comment on the definition of "available," the law  
7 requires that with your paycheck you list the leave  
8 available, the leave used and then the money paid for  
9 it. So does "available" mean 40 hours if I have 60 in  
10 my bank because I've rolled over 20 from last year?  
11 Or does it mean 40 hours because my employer's policy  
12 says 40 hours is all I can take?

13           And then as far as if I have a PTO  
14 program, what goes on my paycheck? Is that going to  
15 be satisfied if I have the same information, but  
16 instead of earned paid sick time available it says  
17 paid time off available, and my policy has expressed  
18 that it covers all of those paid time off?

19           We would recommend that that be  
20 clarified, maybe in a regulation. The whole issue of  
21 paid time off has been, I think, the biggest confusion  
22 in all of this because the employers are see -- or  
23 employees, the employees are seeing the poster and  
24 they're seeing a list of their rights to this earned  
25 paid sick time, and there's nothing in the notices

1 that gives them information that a PTO program can  
2 satisfy this requirement. That's completely left up  
3 to the employer to do all of the messaging.

4           It might help both the employee and  
5 the employer if the notifications -- either the poster  
6 or the notice -- the form notice that you give at the  
7 time of hire were to have some sort of information to  
8 the employee saying inpaid sick -- unpaid time off  
9 policy can satisfy this requirement.

10           Carry-over, again, is a -- is a big  
11 one. The regulations, we definitely appreciate you  
12 trying to limit carry-over so someone doesn't have 160  
13 hours and can only use 40 and are -- are wondering  
14 why. So that was really beneficial, but the regs say  
15 the carry-over does not affect the accrual rights. We  
16 think it should also clarify it doesn't affect the  
17 limitations of usage when you roll that over.

18           And then, again, we're getting  
19 questions on the reinstatement of hours if they're  
20 rehired and, particularly, again, how this rollover  
21 will impact that.

22           So if an employee has 60 hours  
23 because they've rolled some over, they're let go, six  
24 months later they come back, it says you're supposed  
25 to reinstate their paid sick leave. Do you have to

1 reinstate the full 60 hours, even though they can only  
2 use 40 and they're going to start accruing and going  
3 to use less than that? Or can you limit the  
4 reinstatement to 40 hours, similar to limiting the  
5 rollover to 40 hours?

6                   And then if you -- if you have a  
7 policy that pays out at the end, even though you're  
8 not required to, how does that impact the  
9 reinstatement, because I've already paid for the value  
10 of that time?

11                   So I think those are some of the  
12 outstanding issues to still be addressed regarding the  
13 carry-over; and there are additional comments that we  
14 have submitted in writing, but those are things  
15 that -- that kind of came up, and if you have any  
16 questions I'm happy to. . .

17                   MR. PORTER: Any questions?

18                   MS. HAYDEN: Thank you. We have  
19 received all of the written comments which you  
20 submitted and appreciate your time.

21                   MS. GILMAN: Thank you.

22                   MR. PORTER: Thank you very much.

23                   Our next comment will be -- and I  
24 apologize if I'm mispronouncing this -- Sandra  
25 Portney.

1 MS. PORTNEY: Portney.

2 MR. PORTER: Portney.

3 MS. PORTNEY: Thank you so much for  
4 hearing our comments. There's been a lot of  
5 confusion, a lot of talk on the street, a lot of  
6 rumors about how things are going to work and happen;  
7 and one of the big things, and I think people have  
8 addressed it, and I think maybe this -- getting some  
9 clarification when we talk about employees that  
10 already have a paid time off policy that's more  
11 generous than the statute allows for, are they allowed  
12 to carve it out, in a sense, to say, "Here's our paid  
13 sick time policy, and here's our paid time off  
14 policy"?

15 We've talked -- there's been a lot of  
16 talk about how to track it on your paycheck by  
17 specifically calling it two different categories, but  
18 the concern is, is if I'm offering 80 hours, does this  
19 statute apply to all 80 hours or can we carve out 40  
20 of those hours and have those applicable to the  
21 statute and the other 40 hours kind of sit with just  
22 the employee's policies? And that's, I think, what a  
23 lot of people would like to have some clarification  
24 on.

25 The second thing is with respect to



1 employers that -- once again, you know, it's great if  
2 you don't have this policy in place. It's easy to  
3 start. Where the confusion comes in is to employers  
4 that have had the policies, some more generous, mostly  
5 all more generous.

6           If you use a year-end date like the  
7 employee's anniversary, and let's say an employee  
8 started on January 2nd and they're full-time,  
9 technically they might accrue a substantial amount of  
10 hours based on the 30 hours -- one hour for every 30  
11 hours. You're looking at 66.67, 67 hours per year  
12 that you can accrue.

13           So July 1st is the date this starts.  
14 How do you deal with an employer that's been accruing  
15 hours during the year? Do we need to reset at July  
16 1st and say one for every 30?

17           So, technically, I think the number  
18 was 37 hours or 32 hours is what they would accrue for  
19 this half of the year. The minimum's 40. So how do  
20 we comply? Do we have to give them additional hours  
21 on top of what we've given them prior to the  
22 application of the statute?

23           MR. PORTER: So we -- we have --  
24 there's an FAQ that seeks to answer the question of  
25 what should employers who have their year -- their

1 selective year doesn't begin on July 1st. If an  
2 employer's year begins on July 1st, then that's easy.  
3 That's one earned paid sick time kicks in.

4           For an employer who, let's say, their  
5 year begins on January 1st, so they're halfway through  
6 when the time earned paid sick time comes into play,  
7 are they required to allow employees to accrue the  
8 same time amount of time that an employee could accrue  
9 during an entire year?

10           And we've addressed this in a way  
11 that we're trying to be fair to all employees and  
12 employers, regardless of what you're selected year is,  
13 and that's simply to prorate the maximum amount of  
14 time that an employee can accrue by the amount of time  
15 that's left in an employer's year.

16           So it's, you know, for -- just for  
17 sake of ease, if there's 50 percent of a year and it's  
18 an employee who works for an employer with 15 or more  
19 employees, they would be entitled to accrue and use up  
20 to 40 hours in a full year. But because they only  
21 have 50 percent of the year left, they would be  
22 entitled to accrue and use in that, you know, initial  
23 six-month period half of that, so 20 hours.

24           MS. PORTNEY: Twenty hours, yeah.

25           MR. PORTER: And then their year

1 would begin again on -- on January 1st and -- and it  
2 would start over. But you -- you may even have  
3 employers who don't operate on a July 1st to July 4th  
4 -- 1st or January 1st to January 1st.

5           In those situations, there's a few  
6 examples in that FAQ, you know, that basically explain  
7 you do the number of days left in your year after July  
8 1st divided by 365 and -- and do the math, and you can  
9 calculate the maximum amount that an employer -- an  
10 employee should be able to accrue used in that partial  
11 year.

12           MS. PORTNEY: Fair enough.

13           MR. PORTER: But for employees  
14 that -- that FAQ doesn't address the question of  
15 employees who are hired after the beginning of the  
16 year. For that issue, our FA -- our FAQ states that  
17 an employer should allow an employee to accrue time  
18 as -- as the statute requires and, you know, if they  
19 begin in month eleven of a year, then they would be  
20 entitled to accrue as much time as they could and use  
21 that time that they're accruing in those final two  
22 months.

23           If they, you know, begin at the  
24 six-month mark, they would be entitled to accrue as  
25 much time as they could, pursuant to the formula in

1 the Act for those -- for those six months. So you  
2 wouldn't do any sort of proration for employees that  
3 begin after the employer's year begins.

4 MS. PORTNEY: Sure.

5 MR. PORTER: Does that make sense?

6 MS. PORTNEY: Yes, absolutely.

7 Now, on the first one, on the  
8 clarification on the carve-out, is that appropriate to  
9 carve out the paid sick time in 40 hours and then any  
10 other hours as a paid time off not applicable to the  
11 statute?

12 MR. PORTER: I think my initial  
13 reaction would be "yes." As long as an employer is  
14 meeting the minimum requirements of the Fair Wages and  
15 Healthy Families Act, they can do anything in excess  
16 of that.

17 So if an employer offers their  
18 employees 80 hours, as long as they're offering 40  
19 hours pursuant to the requirements of Prop 206, it  
20 would meet the minimum requirement.

21 If an employer wanted to carve out  
22 those additional 40 hours for other purposes and say  
23 that an employee can't use those additional 40 hours  
24 for earned paid sick time purposes, they could  
25 certainly do that, as long as they've met the minimum

1 requirements of the Act.

2 MS. PORTNEY: Well, the -- the  
3 question is so -- is more related to the application  
4 of the -- the -- the rules that state if somebody is  
5 fired, there's a presumption for 90 days that they  
6 were fired because of use of the paid sick time. So,  
7 clearly, all employers want to get that 40 hours done  
8 as fast as they can.

9 Now, I know there's a lot of talk  
10 about how you deal with those hours. For instance, if  
11 an employee calls up and says -- you know, some --  
12 some employers are using a code. "If you want to use  
13 paid sick time, you know, state this code and no  
14 questions asked." If you want to use another, you  
15 have to -- you know, you have maybe notice  
16 requirement.

17 So they don't want some of the  
18 application of -- of the rules of the statute to apply  
19 to paid time off. For instance, one of my employers  
20 wants a two-week notice on paid time off, but paid  
21 sick time doesn't allow that.

22 So if you've used those 40 hours on  
23 paid sick time and somebody doesn't provide notice,  
24 they want to know can they fire that person with  
25 respect to not showing up based on not sick time

1 anymore, but paid time off.

2 MR. PORTER: Yeah --

3 MS. PORTNEY: And that's --

4 MR. PORTER: -- that's a very good  
5 question. You know, we've -- we've heard a lot from  
6 employers on the presumption and the requirement that  
7 there be clear and convincing evidence to overcome the  
8 presumption. But, again, that was in Prop 206 and the  
9 voters passed Prop 206 and handed it to the Industrial  
10 Commission to enforce.

11 Some of the written comments we  
12 received have asked us to eliminate that provision.  
13 Unfortunately, the Industrial Commission doesn't have  
14 authority to change the legislation that the voters  
15 passed, and so we hear the concerns from employers  
16 about that presumption and how to overcome that  
17 presumption but unfortunately --

18 MS. PORTNEY: That's the carve-out  
19 and that's -- as long as we can do the carve-out, I  
20 think we'll feel more comfortable with doing that.  
21 With you guys just saying, "Yes, we're good with the  
22 carve-out," then I think a lot of employers are going  
23 to start doing the carve-out.

24 MR. PORTER: Yeah, so we're  
25 certainly -- we're happy to take a closer look at that

1 question that you posed, and to the extent that --  
2 that we can provide further guidance to employers in  
3 our FAQs, we'll certainly do that.

4 MS. PORTNEY: Thank you so much.

5 MR. PORTER: You bet.

6 Our next commenter will be Debra  
7 Novak-Scott.

8 MS. NOVAK-SCOTT: Thank you. I  
9 mostly have clarification questions. Our attorneys  
10 with Martin Bonnett supposedly sent you a brief, also.

11 We have a question on carry-over. We  
12 represent Unit 3 employees in the City of Phoenix and  
13 it's been -- I've been there over 30 years, but it's  
14 been a longtime practice of the City that you earn  
15 your sick leave, and then you can carry it over to the  
16 next year.

17 On the clarification, we don't see  
18 anything in this law that limits the carry-over to  
19 only 40 hours. How will that be handled for employers  
20 like the City of Phoenix that allow employees to carry  
21 over more than 40 hours?

22 MR. PORTER: Yeah. So, again, the  
23 Act allows employers to be more generous than the  
24 minimum requirements; and in our proposed rule on  
25 carry-over we're seeking to provide some guidance,

1 again, as to the minimum requirement for carry-over.

2           Employers that choose to allow  
3 employees to carry over excess hours can certainly do  
4 that, as long as the minimum requirements of the Act  
5 are being satisfied.

6           MS. NOVAK-SCOTT: So Prop 206 doesn't  
7 require that there's a separate 40-hour bank? It  
8 could be just lumped in with the employee's current  
9 earned sick leave?

10           MR. PORTER: As long as -- and I  
11 think you're referring to maybe a PTO policy?

12           MS. NOVAK-SCOTT: We don't have PTO.  
13 I mean, we have -- we literally have sick leave,  
14 vacation, and then compensatory time.

15           MR. PORTER: So is your question can  
16 an employer -- can that employer lump in earned paid  
17 sick time into the sick leave policy?

18                   Is that your question?

19           MS. NOVAK-SCOTT: Well, what they're  
20 proposing -- and, actually, we are asking because  
21 Human Resources is having a meeting that started at  
22 9:30 on this. They're taking the 40 hours and they're  
23 just going to include it as part of the current earned  
24 sick leave from employees, and we don't know if that's  
25 the correct interpretation of the law or if it's



1 supposed to be an additional 40 hours that's  
2 protected.

3 MR. PORTER: So I think our FAQs,  
4 again, address the question of can an employer offer a  
5 bank of time for reasons -- for earned paid sick time  
6 purposes, as outlined by Proposition 206, and also  
7 provide for additional uses of that time? And the  
8 Industrial Commission has indicated that an employer  
9 can do that.

10 So an employer wouldn't be required  
11 to take, you know, its sick time, vacation time and  
12 other times and then add on another 40-hour  
13 requirement. If they wanted to revise their sick time  
14 policy, as long as that policy meets the minimum  
15 requirements of the Act, then that policy would --  
16 would satisfy the Act for earned paid sick time  
17 purposes.

18 So a sick time policy that allows  
19 employees to accrue and use time pursuant to the Act  
20 would -- would meet the requirements of -- of the Act,  
21 as well as the regulations.

22 Does that answer your question?

23 MS. NOVAK-SCOTT: I believe so.

24 I have another question, because we  
25 talked to other cities. They aren't imposing any

1 restrictions on any of the earned sick leave. So they  
2 know that under the law it's just the 40 hours that's  
3 protected, but just -- I guess for the ease of dealing  
4 with it, they're allowing all earned sick leave to be  
5 considered protected, which means, you know, employees  
6 are not subject to discipline.

7 Is that something that's in the FAQs  
8 also that we missed?

9 MR. PORTER: I -- I don't believe so.

10 MS. NOVAK-SCOTT: Okay. So that's  
11 kind of up to each city's prerogative, what they want  
12 to do?

13 MR. PORTER: As -- as far as whether  
14 they want to create a separate bank that's only earned  
15 paid sick time and it's subject to the  
16 anti-retaliation provision, is that your question,  
17 whether cities can do that?

18 MS. NOVAK-SCOTT: No. So all the law  
19 is concerned about is that 40 hours. So if other  
20 cities, like Mesa or whoever decide, "Hey, we're just  
21 not going get into this. We're going to allow all  
22 their earned sick leave to be considered protected  
23 under the law," is that -- I mean, they can do that,  
24 obviously, but is that something that is probably a  
25 good idea under the law?

1 MR. PORTER: I don't know that we can  
2 comment on whether it's a good idea, but I -- I think  
3 that it would be permissible for an employer to do  
4 anything that's more generous than the minimum  
5 requirements of the Act.

6 If they want to allow their employees  
7 to have more time than is required by the minimum  
8 requirements of the Act, they can do that; and if they  
9 want to designate that time as protected earned paid  
10 sick time, they can certainly do that as well.

11 MS. NOVAK-SCOTT: Or they can also  
12 just carve out that 40 hours and say, "This part's  
13 protected, and then when you use the rest of your  
14 earned sick leave you could be subject to an  
15 attendance policy"?

16 MR. PORTER: Yeah, as long as that --  
17 as long as the minimum requirements of the Act -- and  
18 to be clear, we're talking about 40 hours in -- in  
19 this situation. This is for an employer who has 15 or  
20 more employees. The numbers are different for smaller  
21 employers.

22 MS. NOVAK-SCOTT: Okay, thank you.

23 MR. PORTER: You're welcome.

24 The last comment I have -- and if  
25 there are additional comment sheets, feel free to pass

1 them up. Our last speaker that I have here is Heidi  
2 Kolton.

3 MS. KOLTON: Yes.

4 Good morning.

5 MR. PORTER: Morning.

6 MS. KOLTON: I'm just looking for a  
7 clarification, and I think this question was posed by  
8 Jay. I -- I have a few clients that are -- have  
9 commissioned -- I'm going back to the commissioned  
10 salesperson. A commissioned salesperson with higher  
11 value items, cars, art, designs, they might not sell  
12 every month.

13 So their, you know, earnings are --  
14 maybe they come up with commissions being paid every  
15 six months, and I have one client where they might  
16 make -- every four months they're paid a commission.

17 How does one average to come out --  
18 income average to come out with an hourly rate for the  
19 paid sick time?

20 MR. PORTER: Yeah, and I think  
21 Mr. Zweig, if I'm saying that right --

22 MS. KOLTON: Yes, yes, that was --  
23 it's near and dear to our heart but --

24 MR. PORTER: Yeah, and I -- I think  
25 one of his concerns was if commissioned employees

1 aren't keeping track of their hours, how are you able  
2 to do a --

3 MS. KOLTON: I think they should.

4 MR. PORTER: Well, I guess after  
5 Mr. Zweig sat down, commissioned employees are still  
6 required to be paid pursuant to minimum wage law. So  
7 if the commissioned employee isn't keeping track of  
8 their hours, I'm not sure how an employer is ensuring  
9 that the requirements of minimum wage are being  
10 satisfied.

11 I think the intent in the language of  
12 the proposed rulemaking was, again, to make it easier  
13 for employers that have commissioned employees to  
14 figure out what rate of pay they use for earned paid  
15 sick time, and if all of the other -- the first three  
16 provisions fail, we thought that it would make sense  
17 to just do a time weighted average.

18 But, again, that would assume that an  
19 employer is keeping track of the number of hours to  
20 take the pay that that commissioned employee has  
21 received over a 90-day period, divide it by the number  
22 of hours to come up with a reasonable rate of pay to  
23 use for earned paid sick time, keeping in mind that in  
24 that week that the employee is -- let's say they use  
25 an entire week for earned paid sick time purposes.

1 Maybe they wouldn't have made any commissions that  
2 week or maybe they would have made their highest  
3 commissions that they made during their employment.

4 MS. KOLTON: Right.

5 MR. PORTER: We simply don't know;  
6 and so, again, the intent of the Commission here was  
7 to provide some clarity and assist employers who have  
8 commissioned employees on figuring out what a  
9 reasonable rate of pay should be.

10 For those employers that don't use --  
11 or keep track of the hours of their commissioned  
12 employees, you can see how that would be a little  
13 difficult; but, again, for minimum wage purposes, I  
14 believe that employers are required to keep track of  
15 those hours to ensure that their employees are meeting  
16 the requirements of the minimum wage laws so. . .

17 MS. KOLTON: Thank you.

18 MR. PORTER: You bet.

19 Our next commenter will be Chris  
20 Winkler.

21 MR. WINKLER: Good morning, thank you  
22 for your time.

23 MR. PORTER: Morning.

24 MR. WINKLER: I have a question  
25 that's kind of a little bit totally different than

1 what everybody else has been asking. I work in the  
2 healthcare industry, and we have a kind of unique set  
3 of employees within healthcare and human services that  
4 does not have the same kind of work scheduling that  
5 most regular employees would have. What I'm talking  
6 about is the use of relief or on-call staff.

7           Employers in healthcare or human  
8 services utilize staff to fill in when  
9 regularly-scheduled staff would not be available. So  
10 if you're providing services to, for example, folks  
11 with developmental disabilities or elder care, there  
12 are needs that need to be met. So there can't be a  
13 set schedule. These folks might need services 24  
14 hours a day.

15           When a regularly-scheduled staff  
16 takes paid sick time that's granted by the law, there  
17 is a need to put another staff in place there; and so  
18 employers like myself will utilize a pool of on-call  
19 staff who have no set schedule, who only work when  
20 they choose to work, when shifts are available.

21           Under the guidance of the law and the  
22 facts that are out there, this employee who chooses to  
23 work one day a month, five days a month, three days a  
24 week every week, would then be granted one hour of  
25 paid sick time for every 30 hours that they work.

1           My concern is how does that person  
2 then utilize that time? They would almost need to  
3 schedule themselves to work in order to call off sick,  
4 and so that's something I'm hoping that the Commission  
5 can provide some guidance into how to deal with and  
6 address those situations and potentially look at that  
7 type of class of employee as not -- maybe not even  
8 required under law be granted such leave time because  
9 they don't have a schedule to work and they don't have  
10 any requirements to report to work except for when  
11 they choose to based on their availability and their  
12 decision to want to work.

13           Is there any --

14           MR. PORTER: Yeah, it's a question  
15 that -- that I haven't thought about before. So I  
16 appreciate you bringing it to our attention. The Act  
17 defines an employee, and we need to follow that --  
18 that definition.

19           MR. WINKLER: Uh-huh.

20           MR. PORTER: The Commission doesn't  
21 have liberty to redefine the term "employee" to  
22 exclude a certain class of employees. So if these --  
23 if this pool of workers are employees of a business  
24 and they provide services, they would be entitled to  
25 the protections of the Act, including the accrual of



1 earned paid sick time.

2                   Logistically speaking, how they would  
3 use that is a more difficult question. You know,  
4 perhaps if -- if an employee from that pool is  
5 requested to come in and, you know, becomes ill or a  
6 family member becomes ill or another of the usage  
7 requirements of the Act are satisfied, they could use  
8 their earned paid sick time for that, even though it's  
9 a -- they're only working occasionally.

10                   But it's a good question. We're  
11 certainly willing to take a look at it and see if we  
12 can provide some further guidance to employers that  
13 have that sort of scenario.

14                   MR. WINKLER: Okay. Yeah, because  
15 what I can see is, again, in my field where I need to  
16 have an employee on duty for that hour, if I've had  
17 somebody who's requested time off for legitimate  
18 causes under paid sick policies or paid vacation or  
19 sick time and a staff agrees to work that on an  
20 on-call basis but then calls in sick, I have to go  
21 find yet another person who could call in sick an hour  
22 before the shift, and I may end up paying four people  
23 to work one hour.

24                   My company deals with developmental  
25 disabilities, which is a field that does not have a

1 lot of funding to begin with. Paid sick time and  
2 paying four to five times to give one hour of service,  
3 and we're only paid based on that one hour of service,  
4 can end up creating quite the financial hardship  
5 that's well above and beyond just the basic paid sick  
6 time practices, which -- which my organization already  
7 more than addressed, and we're not concerned about  
8 that with our regular staffing.

9           So it would be very nice to have some  
10 further guidance as to how to address that.

11           MR. PORTER: Happy to look at it, and  
12 we have -- we have your information so --

13           MR. WINKLER: Sure, and I did submit  
14 a written comment as well directed at this exact  
15 issue.

16           MR. PORTER: Thank you very much.

17           MR. WINKLER: Thank you.

18           MR. PORTER: Our next commenter will  
19 be Jill Chas-on, Chase-on.

20           MS. CHASSON: Bonus points for  
21 getting it right the first time.

22           Thank you very much. Mr. Winkler  
23 actually covered one of my questions, which was  
24 exactly about on-call relief, per diem workers. We  
25 represent quite a few employers in the healthcare

1 industry and that's a big concern for them, in  
2 particular, whether someone in that kind of role could  
3 at least be limited to using paid sick time only for  
4 hours they were otherwise already scheduled to work.

5           You know, the idea that someone in  
6 that kind of role could simply call up and say, "Hey,  
7 I'd like to use one of my paid sick time hours today,"  
8 when they're not otherwise scheduled to work is  
9 causing some concern.

10           MR. PORTER: Okay.

11           MS. CHASSON: So that was one.

12           Another question related to a  
13 similar -- that same classification of employees,  
14 these healthcare employers also have people who  
15 sometimes move from a full-time PTO eligible role  
16 where they have a bank of PTO time that's usable for  
17 any purpose and the (inaudible) requirements into a  
18 pier diem or on-call role or some other role where  
19 they're not eligible for PTO and they wouldn't get  
20 that time, and in those situations when they move to  
21 the non-PTO eligible role, the employer's practice has  
22 been to cash out all of the PTO and pay it to the  
23 employee.

24           So the question has arisen in that  
25 situation, may an employer still cash out all of the

1 PTO down to zero or must they leave some time  
2 available for this employee in a bank that would be  
3 usable for paid sick time purposes?

4 MR. PORTER: So at the end of a year  
5 where you have a PTO policy that has hours that can be  
6 used for purposes beyond that prescribed by the Act  
7 and an employer chooses to cash out at the end -- or  
8 can an employer cash out --

9 MS. CHASSON: It's actually a  
10 slightly different situation. It's not the end of the  
11 year. If an employee moves from, say, a full-time  
12 40-hour-a-week job into one of these on-call, per diem  
13 roles that historically has not been eligible for any  
14 kind of paid time off for the reasons Mr. Winkler  
15 alluded to, that the practice has been to take any PTO  
16 that that person accrued in a (inaudible) and pay it  
17 out to them so that they then have no PTO or paid time  
18 off of any time available.

19 These people would now be covered by  
20 a paid sick time program, but the question has arisen  
21 whether it's still permissible to pay out all of the  
22 approved PTO down to zero or do we need to approach it  
23 like a year-end situation where if you cash them out,  
24 you then have to give them an amount of time that they  
25 would immediately be eligible for, and this may not be

1 occurring at the end of the year.

2 MR. PORTER: Yeah, so I -- I don't  
3 think that the Act addresses that question.

4 MS. CHASSON: It doesn't.

5 MR. PORTER: Yeah, it doesn't. It  
6 provides for kind of a cash out at the end of a year.  
7 It states that an employer at the time of separation  
8 of an employee is not required to pay out the employee  
9 for any bank of accrued or unpaid sick time they have;  
10 but it does not, to my knowledge, authorize an  
11 employee to do some sort of cash out or transition of  
12 earned paid sick time mid-year.

13 So as long as an employee is  
14 remaining an employee, although they may go from one  
15 capacity where they're full-time to an on-call type  
16 position, we're certainly happy to look at this  
17 further; but it would seem to me that an employer  
18 would be required to allow that employee to continue  
19 to have access to any accrued earned paid sick time  
20 that they had prior to that transition for the  
21 remainder of that year.

22 But we're certainly happy to give  
23 that question some more thought and potentially update  
24 FAQs to address it.

25 MS. CHASSON: So if -- let's say one

1 of these employees had 80 hours accrued in their PTO  
2 bank and they move to a position where they're no  
3 longer eligible for that, does the employer pay out 40  
4 of those hours or leave 40 in the bank? Can they pay  
5 out all 80 and start them accruing at the one hour of  
6 sick time for 30 hours of work?

7 MR. PORTER: So the -- the second  
8 part of your question, could they pay them out for the  
9 entire 80, I don't believe so if it's mid-year. Could  
10 they pay them out for that portion of the 80 hours  
11 that does not represent earned paid sick time, I think  
12 they could do that because that would be in excess of  
13 the requirements of the Act.

14 But the amount of -- of the time in  
15 that 80 hours that's earned paid sick time and subject  
16 to the provisions of the Act, the employee has accrued  
17 that and is entitled to use it for the remainder of  
18 the -- year, the employer's year, and so if there's  
19 some transition in work during the year, the employee  
20 should be entitled to continue to have that.

21 I think that -- that will be the  
22 answer, but we're certainly happy to look at that  
23 question further; and to the extent that you have  
24 suggestions on how that should be handled pursuant to  
25 the Act, we'd certainly invite you to submit your com

1 -- your thoughts, even if it's outside the context of  
2 the -- the rulemaking.

3 MS. CHASSON: Right.

4 MR. PORTER: If you have comments on  
5 FAQs and things like that.

6 MS. CHASSON: Yeah. No, our working  
7 assumption is that they should not pay them out all  
8 the way down to zero.

9 MR. PORTER: Okay.

10 MS. CHASSON: One last question on a  
11 different subject. The Act itself requires employees  
12 to make a good faith effort to provide notice of the  
13 paid sick time if it's somewhat foreseeable and then  
14 allows employers to implement notice requirements for  
15 unforeseeable leave, but neither the Act nor the  
16 proposed regulations address whether consequences are  
17 permissible if the employee doesn't comply with the  
18 notice requirements.

19 And under the FMLA, for example, an  
20 employee who does not comply with the notice  
21 requirements, an employer's permitted to deny leave or  
22 to at least deny his FMLA; and I think it would be  
23 helpful if guidance could be provided to employers  
24 clarifying whether if an employee doesn't comply with  
25 their notice requirements, whether the time can be

1 denied.

2 MR. PORTER: Okay, we'll happily look  
3 at that.

4 MS. CHASSON: Thank you.

5 MR. PORTER: You bet.

6 Our next commenter -- and I know I'm  
7 going to mispronounce this -- Frank Piccioli.

8 MR. PICCIOLI: Piccioli, close. No  
9 one ever gets it right. It's those Italian names,  
10 too.

11 My name's Frank Piccioli. I'm  
12 president of AFSCME Local 2960, City of Phoenix. My  
13 question is concerning the caps. I'm not a lawyer,  
14 but I couldn't find anything in the law that said that  
15 there's a cap. I see minimums, and then in the  
16 Frequently Asked Questions -- and I think the City is  
17 doing this as well -- you can earn 40, you can carry  
18 over 40 with a maximum of 80.

19 So, for instance, when no one uses  
20 use that amount of sick leave in a three-year period,  
21 my interpretation from the Frequently Asked Questions  
22 is, no, you have a maximum of 80, and I just don't  
23 know where that is in the -- in the law that says  
24 there's caps. I see minimums. I don't see maximums.

25 MR. PORTER: So, again, an employer



1 is permitted to do whatever they want above -- as long  
2 as they're meeting the minimum requirements of the  
3 Act.

4 MR. PICCIOLI: So in a three-year  
5 period, for instance, is that 120 hours -- if they  
6 don't use anything, a minimum of 40 a year, right, I  
7 mean, if you're a full-time employee and earn sick  
8 leave, can you use 120 or -- because I thought I read  
9 something about it being maxed.

10 MR. PORTER: So the statute has  
11 minimum requirements, and for an employer that has 15  
12 or more employees, the minimum requirement is that  
13 employees are permitted to accrue and use 40 hours in  
14 a calendar year.

15 If an employer wants to allow an  
16 employee to, you know, accrue 40 in this year and roll  
17 it over to the next year, and then they have 80 after  
18 the end of year two and then they have 120 after the  
19 end of year three and 160 at the end of year four, and  
20 wants to allow the employee to use that time whenever  
21 they want to up to the entire 160 or whatever they  
22 get.

23 MR. PICCIOLI: Right.

24 MR. PORTER: They're certainly  
25 entitled to do that because it would exceed the

1 requirements of the Act; but if the employer wants to  
2 only do the minimum, they would be required to allow  
3 the employees -- again, I'm speaking in the context of  
4 15 or more employees --

5 MR. PICCIOLI: Sure.

6 MR. PORTER: -- to accrue 40 hours,  
7 to carry over 40 hours so that that's immediately  
8 available. So a hypothetical, if an employee works an  
9 entire calendar year, accrues 40 hours in year one and  
10 doesn't use any of that, they would be entitled to  
11 carry over that 40 hours to the year two so it would  
12 be immediately available. They would then be entitled  
13 to continue to accrue during the period of year two.  
14 So at the end of year two, they would have 80 hours.

15 Now, keep in mind an employer can  
16 restrict an employee's use in year two to 40 hours --

17 MR. PICCIOLI: Right.

18 MR. PORTER: -- even though they --  
19 their bank may be 80 hours, and then at the end of  
20 year two carry over 40, you know, subject to ongoing  
21 approval.

22 MR. PICCIOLI: So you carry over, but  
23 only 40, you're saying, is protected every year?

24 MR. PORTER: Again, so that the Act  
25 is focused on the minimum requirements of an employer.

1 Employees are permitted to be more generous in any  
2 respect than the Act requires.

3 MR. PICCIOLI: So if it doesn't lead  
4 -- if it doesn't cap it and if the law doesn't require  
5 a maximum, then why are we saying only 40? Why are we  
6 saying it's only 40 every year, because in the law it  
7 says minimum? I could understand if the law said up  
8 to, you know, a maximum of 40. It just says minimum  
9 of 40.

10 MR. PORTER: And you're speaking to  
11 the proposed -- the language in the proposed rule?

12 MR. PICCIOLI: Correct.

13 MR. PORTER: So we received some  
14 written comments, and that's an issue that we'll be  
15 looking at to clarify that, again, our -- to the  
16 extent applicable, our proposed rules are also  
17 designed to set the minimum bar for employees -- for  
18 employers; and if the employer wants to go above and  
19 beyond, they certainly can.

20 So we didn't intend in our proposed  
21 rule to say that employees under all circumstances are  
22 restricted to 40 hours carry-over. That would be the  
23 minimum requirement under those circumstances, but if  
24 an employer that wants to permit employees to carry  
25 over in excess of 40 hours and to use in excess of 40

1 hours in a prescribed year can do so.

2 MR. PICCIOLI: Okay. Great, thank  
3 you.

4 MR. PORTER: You bet.

5 Our next commenter Abe -- Abe Arvizu,  
6 Jr.

7 MR. ARVIZU: I just wanted to say  
8 exactly what Frank said.

9 MR. PORTER: If you can't come down  
10 the stairs, we can bring the recorder up. We just  
11 want to make sure that we get your comments on the  
12 recorder.

13 MR. ARVIZU: Okay. Abe Arvizu, Jr.  
14 I'm the vice president of AFSCME Local 2384,  
15 blue-collar workers for the City of Phoenix. I echo  
16 exactly what Frank was saying. Neither we could find  
17 anywhere that states a maximum. So, for the record,  
18 we were hoping that you would reconsider that and take  
19 that into consideration when you review what you have,  
20 the comments that have been submitted.

21 MR. PORTER: Happy to do so.

22 MR. ARVIZU: Thank you.

23 MR. PORTER: Thank you.

24 This was -- Mr. Arvizu was the last  
25 comment I have. Is there anyone else in the group who

1 would like to make any comments?

2 DIRECTOR ASHLEY: We have one more  
3 slip to pick up.

4 MR. PORTER: All right. Our last  
5 comment, subject to anyone else that would like to  
6 make a comment, is Jennifer Grondahl.

7 MS. GRONDAHL: Yes. Thank you for  
8 allowing me. I apologize. I came from the City's  
9 meeting.

10 MR. PORTER: Don't worry about it.

11 MS. GRONDAHL: I work in two states.  
12 I work in California and I work in Arizona, and I  
13 represent government employees in both states.

14 As you are aware, the proposition and  
15 law that passed in California that the Governor signed  
16 here is very similar to the one in Arizona, and it is  
17 our opinion that the 40 hour minimum, which we are  
18 extremely thankful for, I think the voters have chosen  
19 correctly in passing that proposition here; but time  
20 that is beyond the 40 hours would also be protected  
21 from disciplinary action or termination, and that is  
22 our concern with the way it's understood and written.

23 I had a very brief comment.

24 MR. PORTER: Okay, thank you very  
25 much.

1 Are there any other comments?

2 All right, then I'll turn the time  
3 over to our Director.

4 DIRECTOR ASHLEY: We just wanted to  
5 thank everyone for being here this morning. This is  
6 an important part of the process and important  
7 feedback that we're receiving.

8 Proposition 206 did not require us to  
9 engage in rulemaking. It specifically stated we could  
10 engage in guidelines or rulemaking. We chose to  
11 engage in rulemaking to add clarity, clarity to the  
12 process, additional transparencies to the process, and  
13 then also to provide you with enough opportunity to  
14 provide additional feedback.

15 And with that next step in the  
16 process, with the feedback we've received over the  
17 last 30 days, the feedback we've received today at  
18 this hearing, and then additional feedback as a  
19 reminder prior to the deadline at 5:00 p.m. today to  
20 submit written feedback to our Labor Division, the  
21 next step in the process there will likely be changes  
22 to the proposed rulemaking based on all this public  
23 feedback that we've received.

24 So there will be a Notice of  
25 Supplemental Proposed Rulemaking that will be posted

1 on our website, and there will also be the opening of  
2 another 30-day public comment hearing similar to the  
3 last 30 days that will culminate in another oral  
4 hearing, just like this one, 30 days after the opening  
5 of that process.

6           We will have this information posted  
7 on the home page on the website near the prominent  
8 icon for the Frequently Asked Questions; and on the  
9 note of the Frequently Asked Questions, continue to  
10 watch for additional updates on the FAQs based on  
11 feedback, based on additional questions that come to  
12 mind.

13           The FAQ started as a core list of  
14 questions that we felt you'd have concerns about. It  
15 grew based on your feedback. You wanted to -- to  
16 learn more about other aspects of this law. So we  
17 have grown that and will continue to do that, and we  
18 do have a few copies in the back, although a very  
19 printer-friendly PDF version is also available  
20 directly on the website.

21           So we would like to thank you all  
22 very much for being here, and this concludes this  
23 public hearing.

24                           (Whereupon the proceedings were  
25 concluded at 10:16 a.m.)

C E R T I F I C A T E

I HEREBY CERTIFY that the proceedings had upon the foregoing hearing are contained in the shorthand record made by me thereof, and that the foregoing pages constitute a full, true, and correct transcript of said shorthand record; all done to the best of my skill and ability.

DATED at Phoenix, Arizona this 15th day of June, 2017.

*Jen Verd*

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Certified Court Reporter

I CERTIFY that Verbatim Reporting has complied with the requirements set forth in ACJA 7-201. Dated at Phoenix, Arizona, this 15th day of June, 2017.

*Verbatim Reporting*

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Verbatim Reporting  
Arizona RRF No. R1050

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