Rhode Island Society for Human Resource Management State Chapter

Statement of Gregory Tumolo, Esq.

On behalf of the Rhode Island Society for Human Resource Management State Chapter

Submitted to the Rhode Island Department of Labor and Training

Paid Sick and Safe Leave Time Regulations – 260-RICR-30-05-5.1 et seq.

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Executive Counsel Fontes:

My name is Gregory Tumolo and I currently serve in the role of Co-Director of State Legislative Affairs for the Rhode Island Society for Human Resource Management State Chapter ("RI SHRM"). RI SHRM is an affiliate of the Society for Human Resource Management ("SHRM"), the world's largest HR professional society representing more than 285,000 members in more than 165 countries around the world. I am grateful for the opportunity to provide public comment to the Rhode Island Department of Labor and Training on the draft paid sick and safe leave time regulations, 260-RICR-30-05-5.1 et seq.

These public comments are offered on behalf of RI SHRM, a volunteer organization representing more than 800 human resource professionals throughout the State of Rhode Island. Our members are a true cross-section of the Rhode Island economy, coming from such diverse sectors as education, government, healthcare, hospitality, manufacturing, non-profit, professional services, small business, and technology. Many of our members will be charged by their employers with implementation of the new paid sick and safe leave mandate that goes into effect on July 1, 2018 and will be looking to the Department for guidance.

As you know, the purpose of the Department's draft regulations was to provide clarity on the paid sick and safe leave provisions of the Healthy and Safe Families and Workplaces Act, G.L. 1956 § 28-57-1 et seq. (hereinafter "Act"). Unfortunately, the draft regulations impose new administrative burdens on HR professionals and leave many important questions unanswered. Below is a summary of the issues that RI SHRM believes need to be addressed before the paid sick and safe leave regulations are finalized.

1. **The draft regulations define "member of the employee's household" in a manner that is overly broad and inconsistent with existing state and federal law definitions**

Pursuant to Section 28-57-3(9), a "member of the employee's household" will be treated as a "family member" for the purposes of the new paid sick and safe leave mandate. However, the Act provides no criteria for determining whether an individual is—or is not—a "member of the employee's household."

The draft regulations have now clarified that a "member of the employee's household" is any person that "resides at the same physical address as the employee or a person that is claimed as a dependent by the employee for federal income tax purposes." Defining a "member of the employee's household" in this manner is problematic for several reasons: (1) such a definition diverges from the widely-accepted definition of household member used across Rhode Island and the United States for tax purposes; (2) such a definition would allow an employee to take paid sick and safe leave time for virtually anyone who resides at the same physical address (e.g. a transient house guest), making it nearly impossible for employers to determine if an employee is abusing protected leave under the Act; (3) such a definition of "family member" is far beyond the intent of the General Assembly in enacting this new paid leave mandate, as reflected in the testimony leading up to passage of the Act.

To remedy these issues, RI SHRM believes that the term "member of the employee's household" should be defined as a person who is claimed by the employee or someone who claims the employee as a dependent when filing year-end tax forms.

2. **The draft regulations do not include a "safe harbor" for employers acting reasonably and in good faith**

The Act incentivizes employers to "front load" by providing their employees with all of their paid sick and safe leave time at the beginning of the benefit year instead of allowing them to accrue it over time. Section 28-57-4(b) provides that employers that provide the statutorily-required amount of paid sick and safe leave time as a lump sum at the beginning of the benefit year "do not need to track accrual, allow any carry-over [from one benefit year to the next], or payout [accrued and unused sick and safe leave time at the end of the benefit year]."

More needs to be done to ensure that employers take advantage of these exemptions from the administrative burdens of tracking accrual, carry-over, and end-of-year payout. The draft regulations should establish a simple, streamlined process for employers to certify or verify to the Department that their paid leave policies are in compliance with Section 28-57-4(b). The regulations also should include a "safe harbor" to shield employers who reasonably and in good faith believe that their paid leave policies are in compliance with the statutory exemptions, even if said policies are non-compliant.

RI SHRM proposes that the regulations should be amended so that an employer found not to be in compliance with Section 28-57-4(b) has a reasonable period of time (e.g. 60 days) to bring its policy

into full compliance; provided, however, that the employer was acting under the reasonable, good faith belief that its original policy was, in fact, compliant.

3. **The draft regulations permit eligible employees to continue accruing paid sick and safe leave time while not working**

The Act clearly contemplates that eligible employees will accrue paid sick and safe leave time only while working. Section 28-57-5(1) unambiguously provides that "[a]ll employees employed by an employer of eighteen (18) or more employees in Rhode Island shall accrue a minimum of one hour of paid sick and safe leave time for every thirty-five (35) hours worked up to a maximum of twenty-four (24) hours during the calendar year of 2018, thirty-two (32) hours during calendar year 2019 and up to a maximum of forty (40) hours per year thereafter[.]" (Emphasis added.)

The Department's draft regulations nullify the word "worked" in Section 28-57-5(1) by allowing eligible employees to continue accruing paid sick and safe leave time while not working or otherwise performing any services for the employer's benefit. The draft regulations provide that employees will continue to accrue paid sick and safe leave time for "all hours paid while collecting paid time off benefits, including, but not limited to holiday pay, personal time, sick time and vacation time." (Emphasis added.)

RI SHRM believes that the draft regulations must be harmonized with the Act so that eligible employees will not continue to accrue paid sick and safe leave while off work "collecting paid time off benefits"—including, but not limited to, paid sick and safe leave time.

4. **The draft regulations unduly limit the ability of employers to verify whether an employee's use of paid sick and safe leave time was for a permissible purpose**

Pursuant to §28-57-6(f), an employer may require an employee to provide documentation that his or her use of paid sick and safe leave time of more than three (3) consecutive work days was for a permissible purpose. For example, an employee using more than three (3) consecutive work days of paid sick leave time may be required to produce documentation signed by a health care professional. An employee using more than three (3) consecutive work days of paid safe leave time may be required to produce police reports, court documents, or a signed statement from a victim or witness advocate. Section 28-57-6(g) provides that the employer may request this supporting documentation so long as the request does "not result in an unreasonable burden or expense on the employee . . . ."

The Department has now clarified what constitutes an "unreasonable burden or expense on the employee." In doing so, however, the Department has imposed a substantial limitation on the ability of employers to verify whether an employee's use of paid sick and safe leave time was for a permissible purpose under the law. Under the draft regulations, an employer cannot request supporting documentation from an employee "if the total cost to the employee to obtain certification regarding their absence is more than two times their hourly rate of pay. In determining the total cost to the employee, costs such as administrative, governmental or medical fees, and transportation costs shall be included."

By way of example, if an employee earning $10.00 per hour uses three (3) consecutive work days of paid sick time, the employer cannot request that the employee produce documentation signed by a health care professional if the total cost to the employee to obtain said documentation—including medical records copying costs and mileage to and from the medical provider's office—would exceed the sum of $20.00. Accordingly, even if the employer has reason to believe that the employee's use of paid sick leave time was not for a permissible purpose, the employer will have no recourse due to the *de minimis* financial burden to the employee.

5. **The draft regulations do not permit employers to designate an employee's leave as paid sick and safe leave if not supported by documentation**

Under the Family and Medical Leave Act (hereinafter "FMLA"), an employee does not have to expressly request a FMLA leave for the leave to qualify for the benefits and protections of the statute. The employer's decision to designate the employee's leave as a FMLA-qualifying leave is usually based on information received from the employee or the employee's representative (e.g. a spouse, adult child, physician, etc.). If the employer lacks sufficient information on the reason for the employee's leave, it has the right and the responsibility to inquire further. Once the employer has verified that the employee's leave is for permissible purposes under the FMLA, it will designate the leave as FMLA leave and provide the employee with notice of the designation.

Like the FMLA, the Act does not require employees to expressly request paid sick and safe leave or invoke the Act for the leave to qualify. Like the FMLA, the employer's decision to designate the employee's leave as a qualifying under the Act will, in most cases, be based on information received from the employee in oral, written, or electronic form. But what happens when an employee requests time off for a period of time less than that required for the production of supporting documentation under the Act (i.e. three consecutive working days) and does not expressly state that the time off will be used for sick or safe leave? Unlike the FMLA, the Act does not permit employers to inquire further to verify whether an employee's leave of less than three (3) consecutive working days is for a permissible purpose.

RI SHRM believes that for any leave that does not require supporting documentation under the Act, the employer should be allowed to designate the leave as paid sick and safe leave if the employee does not expressly state that he or she is taking the leave for a permissible purpose. Employers need flexibility and discretion to manage paid leaves for which documentation is not required.

6. **The draft regulations unduly limit the ability of employers to defend themselves in litigation unrelated to the paid sick and safe leave law**

Section 28-57-11 imposes certain confidentiality obligations on employers in possession of information related to an employee's use of paid sick and safe leave time. This section provides that "[i]f an employer possesses health information or information pertaining to domestic violence, sexual assault, sexual contact, or stalking about an employee or employee's family member, such

information shall be treated as confidential and not disclosed except to the affected employee or with the permission of the affected employee unless required by existing regulation or statute."

The Department has now clarified the scope of the employer's confidentiality obligations. In doing so, the Department has now made it more difficult for employers to defend themselves in litigation unrelated to the paid sick and safe leave law.

The draft regulations permit employers to disclose information regarding whether or not an employee has accrued, used, or requested to use paid sick and safe leave time as part of the employer's defense during an administrative or judicial proceeding. Notably, the regulations do not permit disclosure of the reason or reasons for the employee's absence from the workplace. If information and documentation regarding the reason for the employee's absence from work is included with information and documentation regarding the employee's accrual and use of paid sick and safe leave time in the employee's personnel file, the employer may find it difficult to respond to a request for the employee's entire personnel file pursuant to a subpoena or request for production of documents.

Moreover, employers often rely on information contained in an employee's medical records to craft a legal defense, particularly in cases involving claims of disability discrimination or an alleged failure to provide a reasonable accommodation of a physical or mental disability. Under the Department's draft regulations, the ability of employers to use this information would be severely constrained. For example, if an employee provides documentation from his or her medical provider to support use of paid sick and safe leave time of more than three (3) consecutive working days and subsequently files a claim with the Rhode Island Commission for Human Rights alleging disability discrimination, the employer would not be permitted to disclose <u>any</u> information contained in the employee's personnel file regarding the reason or reasons for the employee's leave, even if that information is relevant to the employer's defense.

7. **The draft regulations fail to provide <u>any</u> guidance to small employers with less than eighteen employees**

Many of RI SHRM's members work for small businesses with less than eighteen (18) employees. Pursuant to §28-57-4, such employers are exempt from the new <u>paid</u> sick and safe leave mandate that goes into effect on July 1st—provided, however, that they do not take an adverse employment action against any employee who takes the same amount of <u>unpaid</u> sick and safe leave time.

Unfortunately, the Department's draft regulations fail to provide <u>any</u> guidance to small employers with less than eighteen (18) employees. While the stated purpose of the regulations is "to provide clarity on the <u>paid</u> sick and safe leave provisions" of the law, the Department must also address how the law's accrual and carry-over provisions apply to employers offering unpaid sick and safe leave time.

Conclusion

RI SHRM stands ready to assist the Department of Labor and Training to address the above shortfalls in the paid sick and safe leave regulations. Thank you for the opportunity to share our views on this important issue.

Respectfully submitted by:

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