



## **Washington Public School Substitutes and Coaches under Initiative 1433**

January 19, 2018

This document responds to the Washington School Personnel Association's request for information regarding the paid sick leave provisions of Initiative 1433 (codified in Chapter 49.46 RCW), which went into effect on January 1, 2018, and the law's impact on unique subsets of public school employees. The new law requires all Washington employers to provide paid sick leave to employees, and establishes minimum standards for accrual, carryover, and use of paid sick leave. The vast majority of school district employees are already entitled to a greater amount of leave for illness, injury and emergencies under RCW 28A.400.300 (the minimum of ten and maximum of twelve days per year in the law since 1980). This document answers questions related to two groups of employees who historically have not been granted paid sick leave: substitutes and extracurricular coaches and advisors.

The information provided below is intended for educational purposes only and not as legal advice regarding any specific set of facts. This document does not attempt to answer all questions which may arise under the new paid sick leave law. School districts should contact their regular legal counsel for advice relevant to their own situations.

### **1. Does the new paid sick leave law entitle classified substitutes to accrue paid sick leave?**

Yes, classified substitutes are entitled to accrue paid sick leave. The same definition of "employee" is used for purposes of the paid sick leave law as is used for coverage under the Washington Minimum Wage Act (WMWA), which defines an employee as anyone who an employer "permit[s] to work," unless that person is specifically excluded under one of the categories in RCW 49.46.010(3). None of the categories listed in RCW 49.46.010(3) would exclude the typical classified employee. *See* RCW 49.46.010(3) (providing exclusions related to employment circumstances such as the following: employment in a private home; employment in a bona fide executive, administrative, or professional capacity; employment in a position relating to selling or distributing newspapers; employment pertaining to forest protection and fire prevention, etc.). Therefore, classified substitutes are employees entitled to accrue paid sick leave at a rate of one hour of sick leave for every forty hours of actual work.

### **2. If a day-to-day classified substitute meets the 90-calendar-day waiting period, does the new paid sick leave law entitle that substitute to use paid sick leave?**

Probably not in a day-to-day substitute position. In interpreting the new paid sick leave law, the Washington State Department of Labor & Industries (L&I) distinguishes between

employees who are entitled to *accrue* paid sick leave and employees who are entitled to *use* accrued paid sick leave. L&I's position is that employees must be "required" to work in order to use their accrued leave for authorized purposes. *WASBO Member Questions on I-1433 – Answered by Department of L & I* (2018). L&I's interpretation is not set out in any regulation or statute, but L&I is the state agency responsible for implementing the new paid sick leave law, *see* RCW 49.46.810. L&I's interpretation will be considered persuasive by courts. In explaining its understanding of paid sick leave usage, L&I offered the following example: "If a substitute is free to decline an offer to substitute for a half day without repercussion, and the employer is free to call other substitutes available, then such substitute is not 'required' to work." In the preceding scenario, the substitute would not be entitled to use accrued paid sick leave.

In contrast, a classified substitute would be entitled to use accrued paid sick leave if that substitute was hired into a regular position in which the employee was required to report to work. Most school districts check for accrued sick leave balances from prior school district employment when employees are hired into regular positions, and thus, paid sick leave coverage for these employees should not be a significant change in practice.

It is also possible that some long-term substitute positions may come with an expectation that the employee report to work or take leave if absent. Most school districts already provide these types of substitutes with sick leave and opportunities to use the sick leave and thus, paid sick leave coverage for these employees should not be a significant change in practice.

### **3. Does the new paid sick leave law entitle certificated substitutes to accrue paid sick leave?**

Yes, certificated substitutes hired on a day-to-day basis are entitled to accrue paid sick leave, unless they meet all of the criteria for the "professional exemption" under the WMWA. As mentioned above in response to question one above, the same definition of "employee" is used for purposes of the paid sick leave law as is used for coverage under the WMWA. The statutory definition of "employee" exempts any individual employed in a "bona fide executive, administrative, or professional capacity . . . as those terms are defined and delimited by the rules of the [L&I] director." RCW 49.46.010(3). L&I rules require "professional" employees, including teachers, to meet a "duties test" and be paid on a salary basis of at least \$170/week. Substitute teachers would likely meet the duties test ("teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge") but a day-to-day substitute is unlikely to meet the salary basis test.

The state test for the professional exemption differs from federal regulations under the Fair Labor Standards Act in one key aspect. Federal regulations exempt teachers without requiring them to meet a "salary basis" test. Thus, substitute teachers generally qualify for the

professional exemption under federal law. However, state law governs the question of whether substitute teachers qualify for the professional exemption under the WMWA and the new paid sick leave law.

**4. If a day-to-day certificated substitute meets the 90-calendar-day waiting period, does the new paid sick leave law entitle the substitute to use paid sick leave?**

Probably not. As discussed in response to question two above, L&I's position is that employees must be "required" to work in order to use their accrued leave for authorized purposes. *WASBO Member Questions on I-1433 – Answered by Department of L & I* (2018). A day-to-day certificated substitute would not be considered "required" to work because the substitute would be free to decline a school district's offer to substitute for the day and the school district would be free to call other substitutes. This ability to turn down an assignment often remains true even for assignments which last multiple days, unless the employee is placed under a written contract and guaranteed a position for a set term. Therefore, based on L&I's interpretation, a day-to-day certificated substitute would not be entitled to use paid sick leave. In contrast to classified substitutes, a certificated substitute would not be entitled to use accrued paid sick leave if that substitute was hired into a regular teaching position or given a written contract to replace an employee on leave because the regular teaching position would meet the professional exemption (both the duties test and the salary basis test).

**5. Does the new paid sick leave law entitle certificated employees who also coach or advise extracurricular activities to accrue or use paid sick leave for the extracurricular activity?**

No, certificated employees who also coach or advise extracurricular activities are exempt from paid sick leave coverage because coaching athletic teams and advising clubs are teaching activities covered by the "professional exemption":

Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student.

**6. Does the new paid sick leave law entitle classified employees who coach or advise extracurricular activities to accrue or use paid sick leave?**

Some public schools hire current members of their classified staff or other community members without professional educational certification to coach or advise extracurricular activities. There are two theories under which classified employee coaches and advisors could be excluded from the definition of “employee” under RCW 49.46.010 and thus be excluded from entitlement to paid sick leave.

First, school districts may assert that coaches are “volunteers” under the Washington Minimum Wage Act (WMWA) and the Fair Labor Standards Act (FLSA), both of which allow volunteers of a public school to be paid a “nominal” fee or stipend. *See* RCW 49.46.010(3)(d)–(e); L&I Administrative Policy ES.A.1, at p. 3; 29 U.S.C. § 203(e)(4)(A); 29 C.F.R. § 553.106. Although Washington courts have not yet been asked to consider the status of coaching or advising positions under the WMWA volunteer exception, school districts may choose to rely upon a federal circuit court decision holding that a coach who received a \$2,114 per season stipend was a volunteer under the FLSA based on the totality of the circumstances. *See Purdham v. Fairfax Cty. Sch. Bd.*, 637 F.3d 421 (4th Cir. 2011). In *Purdham*, the court took note of the fact that the coach was partially motivated by his stipend, but the court concluded that a volunteer need not be *predominantly* motivated by civic, charitable, or humanitarian reasons. *Purdham*, 637 F.3d at 429. The court also observed that “[i]t is the culture of high school athletics for the coaches to consider themselves volunteers,” an observation supported by the declarations of eighteen high school coaches. *Id.* To the extent that coaches and advisors in a school district have motivations or work cultures similar to the coach in *Purdham*, the case provides a solid foundation for the argument that these employees are volunteers being paid only a nominal stipend. Most stipends for coaching or advising extracurricular activities in Washington public schools are in the same nominal range as the position in this case.

Second, school districts may assert that coaches and advisors meet the “professional exemption” based on state and federal guidance indicating that coaching duties constitute “teaching.” However, in order for coaching and advising to fall within the “professional exemption,” the positions would need to meet all of the criteria set out in state regulations, including a weekly salary of \$170 or more. RCW 49.46.010(3)(c); WAC 296-128-530. The “professional exemption” is a reasonable option for coaches and advisers who hold no other position with a school district and receive a stipend that amounts to at least \$170 a week. This exemption is less useful in the context of an employee who works in both an exempt position and a non-exempt position (i.e., another classified position in the District) because such an employee will not be deemed exempt from paid sick leave unless: (1) the employee’s “primary duty” is the performance of exempt functions; and (2) the employee does not spend more than 20% of his or her time on duties unrelated to the coaching assignment. *See* WAC 296-128-530. For employees

with both a classified position and a coaching/advising position, the volunteer exception will likely serve as a more viable basis for districts to use in the event that employees challenge their exempt status.

Although coaches and substitutes are the categories of employees about whom we have received the most questions, there may be other, rare circumstances in which an individual classified employee with a unique schedule is entitled to more sick leave under Initiative 1433 than the amounts already given under RCW 28A.400.300. For more information or individualized assistance in analyzing the impacts and implications of the paid sick leave initiative, please contact your regular school district counsel or any of the Porter Foster Rorick attorneys listed below at (206) 622-0203.

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