DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: Harrison Medical Center, Citation and Notice of Assessment No. W-496-19 OAH Docket No. 10-2019-LI-01187	No. 2021-003-PL DIRECTOR'S ORDER

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order Granting Appellant's Motion for Summary Judgment and Denying Agency's Motion for Summary Judgment (Initial Order) served on September 11, 2020, the petition for administrative review of the Initial Order filed by the Employment Standards Program of the Department of Labor & Industries (Department), briefing submitted to the Director's office, and the record, issues this Director's Order.

The Director makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Based on a complaint from David Bennett, the Department issued a Citation and Notice of Assessment, W-496-19, to Harrison Medical Center.

2. Harrison timely filed an appeal.

3. The appeal was heard at the Office of Administrative Hearings. There, the issues narrowed to two questions: (1) whether Harrison violated RCW 49.46.210(1)(a) by having a leave policy that consisted of a paid time off (PTO) benefit and an extended illness bank (EIB) benefit; and (2) whether Harrison violated RCW 49.46.210(1), (1)(b),

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and (1)(c) by maintaining a policy that, under certain circumstances, requires employees to use PTO or EIB leave.

4. After hearing the matter on summary judgment, the Administrative Law Judge (ALJ) issued an order setting aside the Department's citation.

5. The Department timely appealed.

6. Harrison has a leave program with two elements, PTO and EIB. Harrison considers its leave program to be a single, integrated policy and has acted consistent with that belief.

7. Harrison employees accrue PTO at different rates depending on their years of service. The lowest accrual rate is .0962 hours for each hour worked. An employee stops accruing PTO once the employee reaches 2080 hours. PTO hours are expected to fund paid holidays, vacation leave, sick leave, and other personal leave.

8. Harrison employees accrue EIB at the rate of .025 hours per hour worked. There is no cap on this accrual. Harrison employees may not access accrued EIB leave until after missing 17 consecutive hours of scheduled work, with exceptions. Those exceptions include the following: leave for in-patient hospitalization or outpatient surgery for the employee or qualifying family-member, authorized leave to provide hospice care to an eligible family-member, and other leave when all PTO leave has been exhausted.

9. The required minimum accrual under Washington's Minimum Wage Act is .025 hours per hour worked.

10. On appeal, the Department admits that "[t]reating the two PTO and EIB banks as one pool or bank would make it compliant with . . . Harrison's obligation to provide paid sick leave at a rate of one hour every forty hours worked under RCW 49.46.210(1)(a) and to allow access to the paid sick leave for all the authorized uses provided by RCW 49.46.210(1)(b), (c) without a waiting period." Dep't's Suppl. Br. 1.

11. Harrison employees must use eligible leave benefits when they cannot work their scheduled shift, unless Harrison directs them not to report to work. In other words, Harrison does not offer leave without pay.

II. CONCLUSIONS OF LAW

1. The Director has jurisdiction to consider this matter.

2. This matter is considered on summary judgment, and there are no material issues of fact. CR 56.

3. The first question is whether it violated RCW 49.46.210 to have a leave policy consist of a PTO benefit and an EIB benefit. The answer is no. This violation presumed that the two benefits did not comprise one program for paid and protected sick leave laws purposes. On appeal, the Department conceded if the two benefits were treated as one pool or bank there would be no violation related to capping and waiting periods. Given this

concession, it is form over substance to consider the PTO and EIB benefits as separate programs.

4. The second question is whether there is a violation of RCW 49.46.210(1), (1)(b), and (1)(c) for Harrison maintaining a policy that, under certain circumstances, requires employees to use their PTO or EIB leave. The answer is yes.

5. The voters adopted the Minimum Wage Act's paid and protected sick leave laws in Initiative 1433 in 2016. Standard rules of statutory construction apply to initiatives. *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 968, 474 P.3d 1107 (2020). In determining intent from the language of an initiative, the court focuses on the language as the average informed lay voter would read it. *Ctr. for Biological Diversity*, 14 Wn. App. 2d at 968.

6. The provisions of I-1433 are reviewed in turn as an average informed lay voter would review them.

7. The average informed lay voter would consider the intent of the initiative as stated in it. "The demands of the workplace and of families need to be balanced to promote public health, family stability, and economic security. It is in the public interest to provide reasonable paid sick leave for employees to care for the health of themselves and their families." RCW 49.46.200. Average informed lay voters would read this provision to mean that employees should receive paid sick leave to care for themselves and their families as a right provided to them.

8. There is no provision in I-1433 that states or implies that employers may require employees to take paid sick leave and limit their right to future use of accrued leave. Paid and protected sick leave is a right to a benefit created by statute and limitations on the use of that right must be authorized by statute. *See Wash. Rest. Ass'n v. Wash. State Liquor Bd.*, 200 Wn. App. 119, 136, 401 P.3d 428 (2017) (unreasonable to read a limit into a statute where no such limit is provided for or alluded to).

9. Initiative 1433 states that an "employer shall *provide* each of its employees paid sick leave." RCW 49.46.210(1) (emphasis added). A dictionary may be used to determine the meaning of a term in an initiative. *E.g.*, *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 619, 192 P.3d 306 (2008). "Provide" means "to supply or make available (something wanted or needed)." PROVIDE, *Merriam-Webster Dictionary*.[1] Supplying or making something available means it is the recipient who decides whether to use it. Under Initiative 1433, "[a]n employee is *authorized* to use paid sick leave" for various statutory purposes. RCW 49.46.210(1)(b) (emphasis added). "Authorized" includes the meaning of "permit[ted]." AUTHORIZED, Merriam-Webster Dictionary.[2] It does not mean "required." *Id.* Because the employee is permitted, not required, to use the paid sick leave, the employer cannot mandate the use of the leave at a certain time. Because the sick leave benefit is made available to the employee, it is the employee's

[1] https://www.merriam-webster.com/dictionary/provide.
[2] https://www.merriam-webster.com/dictionary/authorize.

right to use that leave at the employee's discretion (so long as other statutory conditions are met).

10. RCW 49.46.210 provides that "an employee is *authorized to use* paid sick leave for [listed qualifying purposes]." (emphasis added). By using the phrase "authorized to use," the statute contemplates that the employee has a choice about whether or not to use this benefit when a qualified purpose arises. Harrison argues that the Department's interpretation adds words statute, claiming the Department has changed the statute's language to read: "[a]n employee is authorized to use, *or to not use*, paid sick leave for the following reasons" to RCW 49.46.210(1)(b). Emp'r Resp. Br. 16. But this argument ignores that "authorize" means "permit," which allows, but does not require, the employee to exercise the right to take leave. So the words Harrison says the Department added—"or to not use"—are already part of the statute's meaning. Nothing about the Department's interpretation adds words to the statute or changes its meaning.

11. Although RCW 49.46.210(1)(e) permits employers to allow employees to use paid sick leave for additional purposes not identified in the statute, RCW 49.46.210 does not give the employer the right to restrict the accrued benefit in ways not provided by I-1433. If an employer requires an employee to use sick leave whenever the employee is absent from work for illness or other permitted purpose, this means that the leave will not be available on other occasions when the employee is sick or otherwise unable to work. In other words, leave will not be "provide[d]" when needed, contrary to RCW 49.46.210(1). Requiring the use of accrued leave on one occasion precludes the employee from taking that leave in the future. Under Harrison's proposed policy, the employee could be forced into a situation in which the employee will not have paid sick leave when it is needed, contrary to the "provide" requirement in RCW 49.46.210(1). The employee also would not be permitted or "authorized" to take leave at that time, contrary to RCW 49.46.210(1)(b) and (c).

12. Harrison proposes to limit the use of sick leave to that of particular timing: anytime the employee must be absent from work because of an authorized paid sick leave purpose. But I-1433 limits an employee's use of accrued, authorized leave in just two circumstances relating to the timing of the leave: (1) an employee is not entitled to use accrued leave until the 90th day after commencement of employment, and (2) the employee is not entitled to use accrued leave after the employee leaves the employment. RCW 49.46.210(1)(d), (k). The added timing restriction proposed by Harrison impermissibly adds words to the statute. *See City of Seattle v. Fuller*, 177 Wn.2d 263, 269, 300 P.3d 340 (2013) (court does not add words to the statute). Indeed, by specifying limitations on sick leave use based on particular time periods, the voters precluded limitations based on other time periods, such as having to use the leave on dates mandated by the employer. *See State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988) (exceptions listed in statute are exclusive, barring other, unlisted exceptions).

13. Harrison argues that the structure of I-1433 shows that when it means to limit an employer it does so expressly, pointing to RCW 49.46.210(1)(h), which bars employers from requiring employees to find their own replacement when using leave. But this argument ignores that I-1433 allows employers to condition an employee's use of paid sick leave in only two circumstances: under RCW 49.46.210(f), the employer may

require reasonable notice of leave; and under RCW 49.46.210(g), the employer may require verification of illness after three days of leave. These provisions detail the limits of what an employer can require, saying nothing about an employer's purported authority to require the use of sick leave. To express one thing in a law implies the exclusion of the other. *Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Because the statute expressly sets out the ways in which an employer can limit an employee's right to paid sick leave, the statute prohibits the additional, unspecified limitation proposed by Harrison.

14. Initiative 1433 gave the Department rulemaking authority to implement it. RCW 49.46.810. WAC 296-128-630 provides that "an employee is entitled to use paid sick leave for authorized purposes." This regulation demonstrates that an employee has a right to paid sick leave and may take it for the enumerated events in RCW 49.46.210. This is an "entitlement" to the benefit, which allows for use at the employee's discretion. But allowing the employer to require leave be taken turns an entitlement into an obligation.

15. WAC 296-128-700(1)(d) requires a PTO program to provide "[a]ccess to use PTO leave for all the purposes authorized under RCW 49.46.210 (1)(b) and (c)." This regulation confirms that employees should have access when they need it and when it is authorized as provided in RCW 49.46.210(1)(b) and (c). This regulation does not, contrary to Harrison's assertions, show that Harrison is compliant. It is not giving access to the PTO when the employee wants it.

16. The plain language of I-1433 provides for no authority for employers to require employees to take paid sick leave at a time mandated by the employer. Instead, this plain language gives employees the right to take accrued leave at the time they decide to use it. But even if RCW 49.46.210 were considered ambiguous, the same result is compelled. Between two reasonable interpretations, the one that advances the paid and protected sick laws' purposes and policy goals must be used. In *Anfinson v. FedEx Ground Package Systems., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012), the Court emphasized the Minimum Wage Act is a remedial act liberally construed to favor coverage of employees. And RCW 49.46.820 provides that the paid and protected sick leave laws "are to be are to be liberally construed to effectuate the intent, policies, and purposes of [I-1433]."[3] RCW 49.46.200 and .210 confirm that employees have a discretionary right to paid sick leave. Liberally construing RCW 49.46.210 to achieve the ability to take leave at the time the employee needs to take leave in accordance with the employee's discretionary right furthers the purpose I-1433 to provide paid sick leave for the employee.

17. Harrison's interpretation of I-1433 is not reasonable. But even if it were reasonable (and thus showed an ambiguity), it cannot be adopted because it does not liberally interpret I-1433. In ruling for Harrison, the ALJ explained that no statute requires an employee to take leave and no statute prohibits employers from requiring an employee to take leave, weighing the lack of an explicit statute in the employer's favor. But the ALJ's approach

[3] Harrison argues that the statute should be strictly construed because the Minimum Wage Act provides for criminal penalties. RCW 49.46.100. Not only does RCW 49.46.820 require liberal construction to aid employees, but the Court has long liberally interpreted the remedial Minimum Wage Act to benefit workers, despite the possibility of criminal sanctions. *See, e.g.*, *Anfinson*, 174 Wn.2d at 870.

fails to further I-1433's remedial goals. RCW 49.46.820; *see Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583, 587 (2001) (doubts in remedial wage statute were construed in favor of statutory beneficiary). In *Anfinson*, the Court held that limitations to coverage under the Minimum Wage Act apply "only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." 174 Wn.2d at 870 (quotation omitted). I-1433 does not "plainly and unmistakably" limit an employee to taking leave at a particular time. Instead, as discussed above, its language is to the contrary. Under a liberal interpretation of the statute, as a benefit provided to the employee, it is the employee—not the employer—who is granted the choice about when accrued leave is used. As the ALJ noted, it is "coercive" to require employees to take leave. Initial Order ¶ 5.26. "Coercive[ness]" is not in the "terms and spirit" of I-1433, and it conflicts with RCW 49.46.210(1)(b) and (c), which authorize the use of paid sick leave, but does not require it.

18. The ALJ stated that the requirement that employers may not ask to verify leave until three days has passed (RCW 49.46.210(1)(g)) is open to abuse. And because of this, the ALJ believed the employer must be allowed to require the employee to consume the relevant accrued leave. "Otherwise, the employee has a blank check to take as much leave as he/she wants, whenever he/she wants to do so. Harrison's requirement that the employee must consume the relevant accrued leave prevents that, nothing more." Initial Order ¶ 5.27. Harrison echoes the argument that its policy prevents abuses by employees. But the assumption that employees are abusing sick leave "'because it is 5:00 somewhere'" (Initial Order ¶ 5.27) is not one found in I-1433. An assumption of the worst of motives of employees is not liberally construing the statutes and regulations to effectuate the intent of I-1433 to provide paid sick leave when the employee needs the leave. And an assumption that compelled leave is necessary to prevent abuse adds requirements to the statute based on a public policy that is contrary to a liberal interpretation of the statute.

19. Harrison is incorrect that the Department's interpretation of the statutes and regulations at issue does not deserve deference. Courts defer to an agency's interpretation of a statute (assuming it is ambiguous) when that agency has specialized expertise in dealing with such issues. *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.3d 23 (2014). The courts have repeatedly looked to the Department's interpretations for guidance in reading the statutes and regulations the Department enforces. *E.g.*, *Brady v. Autozone*, 188 Wn.2d 576, 581, 397 P.3d 120 (2017). The Department's FAQ confirms that an employer may not require an employee to take paid sick leave:

> **Can employers require an employee to use their accrued paid sick leave, or deduct paid sick leave from an employee's balance, without the employee's authorization?**
>
> No, it is the employee's right to choose to use accrued, unused paid sick leave for the purposes authorized at RCW 49.46.210(1)(b) and (c). An employer may not require an employee to use accrued, unused paid sick leave. If an employee takes time off for what would otherwise be an authorized purpose under the paid sick leave law, but does not choose to use their accrued, unused paid sick leave for such time, the employer

> cannot require the use of the employee's accrued, unused paid sick leave to cover this absence. In such a circumstance, the employee's absence is not subject to the protections of the MWA (Chapter 49.46 RCW), and the employee could be subject to discipline for the absence.

Administrative Policy, ES.B.1 at 9.

20. Harrison's remaining arguments also lack merit. Harrison's policy mandates the use of paid sick leave, and so it violates RCW 49.46.210, which authorizes employees to use paid sick leave, but does not allow employers to require such use. So the Department is entitled to judgment as a matter of law.

21. The Director finds no willfulness, and no penalty is assessed.

22. Having considered the briefing and the record, the Director has determined that oral argument is unnecessary.

III. DECISION AND ORDER

1. Citation and Notice of Assessment W-496-19 is affirmed as modified with no penalty.

2. Harrison's motion for oral argument is denied.

DATED at Tumwater, Washington this 27 day of April 2021.

Joel Sacks

JOEL SACKS
Director

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SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing, or by emailing to DirectorAppeal@LNI.WA.GOV, or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

NOTE: A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Deck hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 27 day of April 2021 via U.S. Mail, postage prepaid, to the following:

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DATED this 27 day of April 2021 Tumwater, Washington.

Lisa Deck

Lisa Deck