STATE OF NEVADA

STEVE SISOLAK
GOVERNOR

MICHAEL J. BROWN
DIRECTOR

SHANNON CHAMBERS
LABOR COMMISSIONER

Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER
www.labor.nv.gov

OFFICE OF THE LABOR COMMISSIONER
1818 COLLEGE PKWY., SUITE 102
CARSON CITY, NV 89706
PHONE: (775) 684-1890

OFFICE OF THE LABOR COMMISSIONER
3300 WEST SAHARA AVE., SUITE 225
LAS VEGAS, NV 89102
PHONE: (702) 486-2650

OCTOBER 4, 2019

ADVISORY OPINION - NEVADA ADMINISTRATIVE CODE § 607.650

SENATE BILL 312 PAID LEAVE – 2019 NEVADA LEGISLATIVE SESSION

Pursuant to Nevada Administrative Code (NAC) Section 607.650, the Labor Commissioner is issuing the following Advisory Opinion regarding Senate Bill (SB) 312. The Labor Commissioner has received multiple inquiries, comments, suggestions, and proposals on how SB 312 should be interpreted, implemented, and enforced. The Labor Commissioner also met with various stakeholders on SB 312.

This Advisory Opinion is intended to provide as much guidance as possible on SB 312. However, it must be recognized that not every employment situation and/or employer/employee relationship or working environment may be encompassed by the answers and guidance set forth in this Advisory Opinion. The Labor Commissioner will continue to work with stakeholders, employers, and employees on SB 312 in advance of its January 1, 2020 effective date. SB 312 and its paid leave provisions are new. However, the Labor Commissioner will interpret, implement, and enforce SB 312 based on the plain and unambiguous language of the bill and the intent of the Legislative Sponsors of the bill to ensure that the provisions of SB 312 are followed and paid leave is provided to Nevada employees.

KEY HIGHLIGHTS OF SENATE BILL (SB 312) – EFFECTIVE JANUARY 1, 2020: "Every employer in private employment in the State of Nevada with 50 or more employees in the State of Nevada shall provide paid leave that accrues at a minimum of 0.01923 hours of paid leave for each hour of work performed. An employee is eligible to use leave on the 90th day of employment."

Section 1 – Subdivision 7 – Does not apply to an employer during the first two years of operation.

Subdivision 8. This section does not apply to: (a) An employer who, pursuant to a contract, policy, collective bargaining agreement or other agreement, provides employees with a policy for paid leave or a policy for paid time off to all scheduled employees at a rate of at least 0.01923 hours of paid leave per hour of work performed; and (b) Temporary, seasonal or on-call employees.

Subdivision 9. As used in this section: (a) "Benefit year" means a 365-day period used by an employer when calculating the accrual of paid leave. (b) "Employer" means a private employer who has 50 or more employees in private employment in this State.

SB 312 - https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6553/Text

50 EMPLOYEE-THRESHOLD

Question #1: How should the 50-employee threshold be counted?

Answer: Similar to the Family Medical Leave Act, the Labor Commissioner will determine the 50-employee threshold as a Private-Sector employer with 50 or more employees working in Nevada (out of state employees will not count) in 20 or more workweeks (does not have to be consecutive) in the current preceding calendar year, including a joint employer or successor in interest.

Question #2: Do Part-Time employees count towards the 50-employee threshold?

Answer: Yes. The Labor Commissioner may also impose an Administrative Penalty of up to $5,000.00 against employers who intentionally do not count Part-Time employees as part of the 50-employee threshold or who misclassify employees for the purpose of circumventing the 50-employee threshold.

Question #3: Do temporary employees, seasonal employees, or seasonal employees count towards the 50-employee threshold:

Answer: No.

Question #4: What if I have multiple companies, franchises, or entities that may have different locations, LLC's), Tax Identification Numbers, or other business structures, do they all count together towards the 50-employee threshold?

Answer: It depends on the exact structure, legal formation, tax formation, and any other relevant information that may be available to determine if all of them, or some should count together towards the 50-employee threshold. It is recommended that the Labor Commissioner be contacted with questions regarding various companies, franchises, or entities that need to be considered to determine if the 50-employee threshold applies.

EXEMPTIONS FROM SB 312

***Pursuant to Section 1 – Subdivision 7, the requirements of SB 312 do not apply to an employer during the first two years of operation.**

Question #1: Does the intent, language, and exemption set forth in Section 1 - Subdivision 8(a) apply to employers who already provide paid leave at a rate of at least 0.01923 hours of paid leave per hour of work performed pursuant to a contract, policy, collective bargaining agreement or other agreement?

Answer: Yes. The intent and explicit, plain, and unambiguous language of Section 1 - Subdivision 8(a) clearly provides that employers already providing leave that matches or exceeds the 0.01923 hours of paid leave per hour of work performed pursuant to a contract, policy, collective bargaining agreement or other agreement are explicitly exempt from the other requirements of Senate Bill 312.

- **<u>Things to Consider with the Section 1 - Subdivision 8(a) Exemption</u>:**
  - An employee handbook would qualify as a policy or agreement so long as there is language in the handbook about the paid leave policy and paid leave is provided that meets or exceeds the requirements of SB 312.
  - Existing Notice Requirements, Call-Out-Policies, and/or Request for Leave policies/provisions, etc., that are set forth in the contract, policy, handbook, collective bargaining agreement, or agreement are still valid and can be enforced by the employer. However, it is recommended that employers not adopt new policies, handbooks, contracts, agreements, or collective bargaining agreements prior to January 1, 2020, that would discourage and/or prevent the use of paid leave based on the intent of SB 312.
  - The employee should sign and acknowledge the policy, handbook, agreement, contract, or other document specifying and outlining the paid leave policy, including those provisions set forth in a collective bargaining agreement.
  - Existing contracts, policies, handbooks, collective bargaining agreements, or other agreements that match or exceed the paid leave requirements of SB 312 but have a waiting period to utilize the leave would still be exempt under Section 1 - Subdivision 8(a). However, it is recommended that employers recognize the intent of SB 312 to have paid leave available after 90 days of employment.
  - Many employers already offer sick leave or other types of paid leave before 90 days of employment or after 90 days of employment that match or exceed the requirements of SB 312, and this would satisfy the intent of the exemption in Section 1 - Subdivision 8(a).
  - A "Benefit Year" means a 365-day period used by an employer when calculating the accrual of paid leave," and should be considered to start the day the employee starts employment.
  - Leave can be "front-loaded" at the beginning of the Benefit Year or accrue over a Benefit Year pursuant to a policy, handbook, agreement, contract, or collective bargaining agreement, and does not have to be paid out unless that is part of the policy, handbook, agreement, contract, or collective bargaining agreement.
  - Leave may be rolled over but can be limited to 40 hours per Benefit Year.
  - If leave is "paid out" pursuant to a policy, handbook, agreement, contract, or collective bargaining agreement, it does not have to be reinstated.
  - Higher amounts of leave can always be offered to hourly employees, exempt, or salary employees pursuant to a contract, handbook, policy, agreement, or collective bargaining agreement.
  - The notice requirements for leave under the Family Medical and Leave Act (FMLA) and the other requirements of FMLA would still be applicable to FMLA leave.
  - Collective Bargaining Agreements (CBA's), mainly those involving trade, construction, and labor organizations, that have been negotiated or are being negotiated that have current and/or existing language that offer, or previously offered leave that matches or exceeds the requirements of SB 312, but have been modified to provide for a vacation bank/fund, savings plan, vacation plan/vacation savings plan, or other leave plan, or that instead offer the leave to be paid as part of the collective bargaining agreement are exempt from the new requirements of SB 312 based on the exemption in Section 1 – Subdivision 8(a).

- ❖ Because of the exemption for existing contracts, policies, handbooks, collective bargaining agreements, or other agreements, the new record-keeping requirements of SB 312 would not apply. However, it is recommended that employers maintain basic compliance with Nevada Revised Statutes (NRS) Section 608.115. <u>In addition, tracking the accrual of leave, leave taken by employees, hours worked, rates of pay, and other basic employee information is an essential and necessary part of the employee/employer relationship.</u>
- ❖ While not strictly required and/or enforced by the Labor Commissioner, it is recommended that there be some basic record keeping for Salary/Exempt or Executive employees showing that they are entitled to or are receiving leave that matches or exceeds the requirements of SB 312.

➢ **<u>Recommendations Regarding the Section 1 - Subdivision 8(a) Exemption</u>:**

- ❖ Employers should review their policies, handbooks, contracts, agreements, and collective bargaining agreements to ensure that they offer paid leave that matches or exceeds the 0.01923 hours of paid leave per hour of work performed and consider the intent of SB 312 to offer leave after 90 days of employment. For Employers who do not currently offer paid leave that matches or exceeds the 0.01923 hours of paid leave per hour of work performed pursuant to a policy, handbook, contract, agreement, or collective bargaining agreement . . . . . .

  <u>IT IS RECOMMENDED THAT THEY DEVELOP A POLICY, HANDBOOK, COLLECTIVE BARGAINING AGREEMENT(S) TO OFFER A PAID LEAVE POLICY THAT MATCHES OR EXCEEDS THE REQUIREMENTS OF SB 312 PRIOR TO JANUARY 1, 2020.</u>

<u>Question #2</u>: Does the intent, language, and exemptions set forth in Section 1 - Subdivision 8(b) apply to temporary, seasonal, or on-call employees, and what are the definitions of temporary, seasonal, or on-call employees?

<u>Answer</u>: Yes. The intent and plain and unambiguous language of Section 1- Subdivision 8(b) clearly provides that temporary, seasonal, or on-call employees are exempt from the requirements of SB 312.

➢ **<u>Things to Consider with the Section 1 - Subdivision 8(b) Exemption</u>:**

- ❖ A "Temporary Employee" would be an employee who works less than 90 days on an occasional or temporary basis whether they are paid by the employer or a Private/Temporary Employment Agency, Training School, or Training Center.
- ❖ A "Seasonal Employee" would be an employee who typically works less than 90 days and/or who is hired for a specific season. For example, pool staff and lifeguards hired for the summer season, ski workers employed at a ski resort for the ski season, or staff hired during the holiday season.
- ❖ An "On-Call Employee" would be an employee who is called out to work on an hourly or daily basis based on employer need. This would also apply to Per-Diem employees.
- ❖ Temporary, seasonal, or on-call/per-diem assignments that exceed 90 days in length may trigger a presumption that the employee is now a Part-Time employee or a Full-Time employee.

- **<u>Recommendations Regarding the Section 1 - Subdivision 8(b) Exemption</u>:**
  - ❖ Employers should track and monitor the hours and days worked for employees that are temporary, seasonal, and on-call/per-diem employees.
  - ❖ Employers could front load or allow the accrual of paid leave at a rate of 0.01923 hours of paid leave per hour of work performed for temporary, seasonal, and on-call/per-diem employees if they anticipate that the assignment will exceed 90 days.
  - ❖ There is no requirement to pay out or allow the carry-over of accrued leave beyond 40 hours per Benefit Year even if the assignment exceeds 90 days.
  - ❖ The Labor Commissioner would discourage employers from intentionally misclassifying employees as temporary, seasonal, or as on-call/per-diem employees for purposes of avoiding the requirement to provide and pay for paid leave. Such actions could result in an Administrative Penalty of up to $5,000.00 per violation.

<u>PART-TIME EMPLOYEES</u>

<u>Question #1</u>: What is a Part-Time employee?

<u>Answer</u>: Typically, a Part-Time employee is an employee who works 20 hours or less than 34 hours per week based on a typical 40-hour work week. The Federal Department of Labor Bureau of Labor Statistics categorizes a Part-Time employee as a person that works between 1-34 hours per week based on a 40-hour work week.

The Labor Commissioner would also consider an employee who works less than Full-Time hours for a period longer than 90 days to be a Part-Time employee.

<u>Question #2</u>: Can I designate an employee as a Part-Time employee if they work less than 20 hours or between 20-34 hours based on a 40-hour work week or less than that based on our designated work week?

<u>Answer</u>: Yes. While not required, an employer can expand and offer the paid leave benefit to employees who may not be fully Part-Time. Because the paid leave accrues at a rate of 0.01923 hours of paid leave per hour of work performed, the leave would accrue based on the hours of work performed. An employer could also offer it to temporary, seasonal, and on-call employees if they chose to.

<u>Question #3</u>: If I work an employee 19 hours per work week (based on a typical 40-hour work week) or less than half of the designated work week for longer than 90 days, do I still have to provide paid leave?

<u>Answer</u>: Probably, based on the answer to Question #1. If the employee is there longer than 90 days and does not qualify as a temporary, seasonal, or as an on-call employee under the exemption in Section 1 - Subdivision 8(b), then paid leave may need to be paid. The Labor Commissioner would encourage the employer to offer/provide paid leave in situations like this given the intent of SB 312.

FRONT LOADING OR ACCRUAL OF LEAVE; CARRY OVER LEAVE; SEPARATION; AND REINSTATEMENT

Question #1*:* Does SB 312 allow for the front loading of leave?

Answer: Yes. Pursuant to Section 1 - Subdivision 1(b) (1) *"An employee may, as determined by the employer, obtain paid leave by: Receiving on the first day of each benefit year the total number of hours of paid leave that the employee is entitled to accrue in a benefit year."*

Question #2: Does SB 312 allow for the accrual of leave?

Answer: Yes. Pursuant to Section 1 - Subdivision (1)(b)(2) *"An employee may, as determined by the employer, obtain paid leave by: "Accruing over the course of a benefit year the total number of hours of paid leave that the employee is entitled to accrue in a benefit year."*

Question #3: How much accrued leave can be carried over?

Answer: Pursuant to Section 1 - Subdivision (1)(c) *"Paid leave accrued pursuant to subparagraph (2) of paragraph (b) may carry over for each employee between his or her benefit years of employment, except an employer may limit the amount of paid leave for each employee carried over to a maximum of 40 hours per benefit year."*

Question #4: We (the employer) front loaded the leave and now the employee just notified us that they were quitting and taking the two weeks-notice period off as paid leave. Do we have to pay the employee and does this apply to accrued leave as well?

Answer: For paid leave, it depends. If the employer has a policy, contract, agreement, handbook, or collective bargaining agreement for paying out front loaded leave or accrued leave, then it is recommended that the leave be paid out. If there is no policy, contract, agreement, handbook, or collective bargaining agreement, then the employer does not have to pay out the paid leave. However, if the employer decides to terminate the employee prior to the termination date, the employer cannot deduct paid leave from an employee's final paycheck that was not actually taken.

Question #5: An employee terminated employment and then came back and was reinstated. What paid leave needs to be reinstated?

Answer: Pursuant to Section 1 – Subdivision 1(i) *"If an employee is rehired by the employer within 90 days after separation from that employer and the separation from employment was not due to the employee voluntarily leaving his or her employment, any previously unused leave hours available for use by that employee must be reinstated."*

TRACKING THE ACCRUAL AND TAKING OF PAID LEAVE; RECORDKEEPING OF PAID LEAVE; AND EXEMPTIONS

Question #1: How should an employer track the accrual and taking of paid leave?

Answer: Pursuant to Section 1 - Subdivision 1(h) ***"An employer shall provide to each employee on each payday an accounting of the hours of paid leave available for use by that employee. An employer may use the system that the employer uses to pay its employees to provide the accounting of the hours of paid leave available for use by the employee."***

Question #2: As an employer, do we need to maintain a record of the receipt or accrual and use of paid leave?

Answer: Pursuant to Section 1 - Subdivision (5) ***"An employer shall maintain a record of the receipt or accrual and use of paid leave pursuant to this section for each employee for a 1-year period following the entry of such information in the record and, upon request, shall make those records available for inspection by the Labor Commissioner."***

Question #3: If an employer satisfies the requirements for the exemptions set forth in Section 1 – Subdivision 8(a)(b) do they still need to track the accrual and taking of Paid Leave?

Answer: The intent and the explicit, plain, and unambiguous language of Section 1 - Subdivision (8) exempts employers who already have a policy, handbook, contract, agreement, or collective bargaining agreement that matches or exceeds the requirements of SB 312 from the other provisions of SB 312.

However, as stated above, it is recommended that employers comply with NRS Section 608.115.

Question #4: Does an employer need to track the accrual and paid leave taken of Salary or Exempt Employees, such as Executives?

Answer: The Labor Commissioner is not requiring this. However, it is recommended that employers have some basic recordkeeping for these types of employees.

USE OF LEAVE; NOTICE REQUIREMENTS; AND INCRIMENTS OF LEAVE

Question #1: When can an employee start using paid leave? Does an employee have to give a reason? What are the minimum increments of paid leave that can be taken?

Answer: Pursuant to Section 1 – Subdivision 2 (a)(b): ***"An employer shall allow an employee to use Paid leave beginning on the 90th calendar day of his or her employment. An employee may use paid leave available for use by that employee without providing a reason to his or her employer for such use."***

A "Benefit Year" means a 365-day period used by an employer when calculating the accrual of paid leave," and should be considered to start the day the employee starts employment.

Section 1 – Section 1 - Subdivision 1(g) also states: *"An employer may set a minimum increment of paid leave not to exceed 4 hours, that an employee may use at any one time."*

<u>Question: #2</u>: How much notice does an employee have to give to take paid leave?

<u>Answer</u>: Pursuant to Section 1 – Subdivision 2(c): *"An employee shall, as soon as practicable, give notice to his or her employer to use the paid leave available for use by that employee."*

<u>Question #3</u>: What is as soon as practicable and what is a reasonable method for the employee to give notice to take paid leave?

<u>Answer</u>: It depends. In general, and under FMLA rules, an employee must give the employer at least 30 days advance notice of the need to take FMLA leave when the employee knows about the need to take leave in advance.

While 30 days would be optimal notice for events where the employee knows they need to take paid leave, the Labor Commissioner recommends that the employer establish a notice requirement in writing that is provided to and signed for by the employee. For example, a written policy could provide for 3 to 5 days-notice or longer notice period if the employee knows they need to take leave, is going on vacation, or taking a voluntary day off, etc. Leave that is unexpected, requested at the last minute to deal with an emergency, urgent situation, or requested due to an unexpected illness, injury, sickness, etc., should not require advance notice.

The notice requirements for leave under the Family Medical and Leave Act (FMLA) and the other requirements of FMLA would still be applicable to FMLA leave.

Nothing in SB 312 prevents an employer from developing their own notice requirements or applying those already found in a policy, handbook, contract, agreement, or collective bargaining agreement (Section 1 – Subdivision 8) or from engaging in the manager/supervisor role or employee counseling/discipline process if an employee has demonstrated a pattern or failure to give practicable or reasonable notice or has abused the use of leave.

<u>Question #4</u>: Can an employer deny the use of paid leave?

<u>Answer</u>: Yes. However, and pursuant to Section 1 – Subdivision 3(a)(b) and (c): *"An employer shall not: (a) Deny an employee the right to use paid leave available for use by that employee in accordance with the conditions of this section; (b) Require an employee to find a replacement worker as a condition of using paid leave available for use by the employee; and (c) Retaliate against an employee for using paid leave available for use by that employee."*

If the Labor Commissioner received a claim/complaint an investigation would be initiated and a case by case analysis and fact specific analysis would be done that would provide both the employer and the employee the opportunity to present facts and evidence supporting their positions. The Labor Commissioner could then decide to decline jurisdiction, resolve the matter informally, or issue a determination in the matter, which could be objected/appealed and due process provided.

HOW TO CALCULATE THE RATE OF PAY FOR PAID LEAVE?

Question #1: **How should paid leave be calculated?**

Answer: Pursuant to Section 1 – Subdivision 1(d)(1) and (2): ***(1) "Compensate an employee for the paid leave available for use by that employee at the rate of pay at which the employee is compensated at the time such leave is taken, as calculated pursuant to paragraph (e); and (2) Pay such compensation on the same payday as the hours taken are normally paid."***

(e) "*For the purposes of determining the rate of pay at which an employee is compensated pursuant to paragraph (d), the compensation rate for an employee who is paid by:*

(1) Salary, commission, piece rate or a method other than hourly wage must:

(I) Be calculated by dividing the total wages of the employee paid for the immediately preceding 90 days by the number of hours worked during that period;

(II) Except as otherwise provided in sub-paragraph III, include any bonuses agreed upon and earned by the employee; and

(III) Not include any bonuses awarded at the sole discretion of the employer, overtime pay, additional pay for performing hazardous duties, holiday pay or tips earned by the employer."

Question #2: How should an employer calculate the hourly wage for paid leave?

Answer: Section 1- Subdivision 1(e)(2) "*Hourly wage must be calculated by the hourly rate the employee is paid by the employer."*

Question #3: When should an employer pay agreed upon bonuses?

Answer: It depends. However, an employer should be consistent and should pay agreed upon bonuses at the same time across similarly situated employees and/or employees performing the same job duties depending upon their date of hire and bonus structure.

The employer should develop a written policy on how earned and agreed upon bonuses are paid and when. This should be given to the employee and signed and acknowledged by the employee.

The Labor Commissioner discourages employers from delaying or not paying earned and agreed upon bonuses within a reasonable time for the purposes of not having to pay a higher paid leave rate.

Question #4: How should the rate of paid leave be calculated for Salary or Exempt employees?

Answer: The employer should use a reasonable calculation and be consistent. For example, for salaried employees, the employer could convert the salary to a daily equivalent as follows: (1) Convert the base salary, i.e., weekly, monthly, etc., to an annual salary; (2) Divide the annual salary by 260 (52 weeks x 40 hours per week = 2080 hours per year; (3) 2080 hours per year/8 hours per day = 260 workdays per year); (4) The result should be the daily wage rate that could then be divided into an hourly rate (i.e. 8 hours) or another hourly calculation.

CONCLUSION

In this Advisory Opinion, the Labor Commissioner has attempted to provide guidance on the interpretation and implementation of SB 312. The Labor Commissioner will defer to the legislative intent, plain language, legislative testimony, and intent of the SB 312 sponsors should additional questions arise. The main purpose of SB 312 is to provide paid leave to Nevada employees who are eligible for paid leave under the provisions of SB 312.

The Labor Commissioner has made every effort to address the questions, concerns, and issues raised relating to SB 312. To the extent that a question, concern, or issue is not addressed in this Advisory Opinion, it is recommended that you contact the Office of the Labor Commissioner and submit your question(s) in writing to Mail@labor.nv.gov or contact our office at the phone numbers and address locations listed on the first page of this Advisory Opinion.

Please be advised that the Labor Commissioner may revisit the interpretation and implementation of SB 312 as needed through an additional Advisory Opinion or through the Administrative Rulemaking Process once SB 312 becomes effective on January 1, 2020.

Sincerely,

Shannon M. Chambers
Labor Commissioner
Office of the Labor Commissioner
State of Nevada
Department of Business and Industry

STEVE SISOLAK
GOVERNOR

MICHAEL J. BROWN
DIRECTOR

SHANNON CHAMBERS
LABOR COMMISSIONER

Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER
www.labor.nv.gov

OFFICE OF THE LABOR COMMISSIONER
1818 COLLEGE PKWY., SUITE 102
CARSON CITY, NV 89706
PHONE: (775) 684-1890
FAX (775) 687-6409

October 10, 2019

Mr. Edwin A. Keller, Jr., Esq.
Kamer Zucker and Abbott
3000 West Charleston Blvd. #3
Las Vegas, NV 89102

RE: **Request for Advisory Opinion – Senate Bill 312 Employer Exemption (File No. 1379.19267)**

Dear Mr. Keller:

Pursuant to Nevada Administrative Code (NAC) Section 607.650 you have requested an Advisory Opinion relating to Senate Bill (SB) 312 on behalf of the Mechanical Contractors Association of Las Vegas (MCA), the Sheet Metal and Air Conditioning Contractors' National Association of Southern Nevada, Inc. (SMACNA), and the Southern Nevada Chapter of the National Electrical Contractors Association (NECA).

In your request, the main question is: "The question for which we seek an advisory opinion is reflective of the process and practice by which employers signatory to the one or more of the current labor agreements negotiated by MCA, SMACNA and NECA provide paid time off to covered employees in amounts that exceed the minimum accrual rate set forth in SB 312."

Specifically, the questions you pose/present in your Request for an Advisory Opinion are as follows:

1. Does a private employer's verifiable process or practice of providing paid leave/paid time off as a nondelineated component of the employee base wage rate(s) set forth in a negotiated labor agreement (collective bargaining agreement) in an amount equal to or exceeding 0.01923 hours of paid leave per hour of work constitute the type of "contract, policy, collective bargaining agreement, or other agreement" that renders the employer exempt under Section 1(8)(a) of SB 312?

Answer to Question #1: Yes. It is the opinion of the Labor Commissioner that based on the intent, legislative testimony, and plain and unambiguous language of Senate Bill (SB) 312, specifically, Section 1(8)(a) of SB 312, the verifiable process or practice of providing paid leave/paid time off as a nondelineated component of the employee base wage rate(s) set forth in a negotiated labor agreement (collective bargaining agreement) would constitute a "contract, policy, collective bargaining agreement, or other agreement," that would trigger and allow for the exemption under Section 1(8)(a) of SB 312.

This conclusion is supported by the following information, documentation, and statement(s) in your letter:

"It (paid leave) is nonetheless verifiable by reference to the respective parties' bargaining history and negotiation documents. Additionally, the process and practice of providing paid leave as a component of a negotiated base wage rate is advantageous to covered employees. The paid time off benefit is accrued for each hour of work performed (or fraction thereof). It vests and is paid every payday, allowing employees immediate access to such funds. Thus, when an employer subject to a MCA, SMACNA, or NECA MLA approves a covered employee's time off request, no other action on the part of either the employer or employee is needed for the employee to obtain and use the paid time off benefit."

2. Does the last paragraph of page 3 of the Labor Commissioner's October 4, 2019 Advisory Opinion on SB 312, pertaining to the employer exemption under Section 1(8)(a) of SB 312 as applied to collective bargaining agreements, encompass a private employer's verifiable process or practice of providing paid leave/paid time off as a nondelineated component of the employee base wage rate(s) set forth in a negotiated labor agreement (collective bargaining agreement) in an amount equal to or exceeding 0.01923 hours of paid leave per hour of work?

Answer to Question #2: Yes. It is the opinion of the Labor Commissioner that the exemption under Section 1(8)(a) of Senate Bill (SB) 312 as applied to collective bargaining agreements and/or labor agreements for private employer's would encompass and include the verifiable process or practice of providing paid leave/paid time off as a nondelineated component of the employee base wage rate(s).

In addition, and based on the information, documentation, and statement(s) provided in your letter, the paid leave/paid time off that is a nondelineated component of the employee base wage rate(s) appears to match or exceed the requirements of Senate Bill (SB) 312.

"Further, in comparing the portion of the employees' base wages provided for use as paid time off to the minimum accrual rate under SB 312 (0.01923/1.923% per hour of work performed), the MCA/Local 525 MLA's $3.00 per hour (6.3952% of the current $46.91 hourly wage rate for journeymen) and the SMACNA/Local 88 MLA's $2.50 per hour (5.4921% of the current $45.52 hourly wage rate for journeymen) are substantially higher. See Exhibit 13, MCA and SMACNA PTO Calculations. Likewise, the NECA/Local 357 MLA's 12% of base wage rate(s) provided for paid time off exceeds the minimum required in SB 312."

Therefore, the Labor Commissioner finds that the exemption contained in Section 1(8)(a) of Senate Bill (SB) 312 would apply to the questions you have posed/presented. The Labor Commissioner also acknowledges and understands the negotiations, discussions, and legislative intent behind the exemption set forth in Section 1(8)(a), and the "contract(s), policies/policy, collective bargaining agreement(s), or other agreement(s)," such as labor agreement(s), negotiated by MCA, SMACNA and NECA, not only satisfy the exemption requirements of Section 1(8)(a), but the intent of Senate Bill 312.

This Advisory Opinion is made on the information, statements, and representations made to the Labor Commissioner as presented. Should additional information be presented to the Labor Commissioner, statutory or regulatory changes occur and/or any legal proceedings and/or decisions occur after the date of issuance that could change the opinions contained in this Advisory Opinion, the Labor Commissioner may modify it accordingly.

If you have any questions or wish to discuss this matter further, please do not hesitate to contact me at your earliest opportunity at (775) 684-1891.

Sincerely,

Shannon M. Chambers
Labor Commissioner
State of Nevada