

Paid Sick Leave in the Nation's Capital

Washington, D.C. is poised to join San Francisco and New Jersey¹ in requiring employers to provide paid sick leave benefits to employees, but an internal inconsistency in the new D.C. law may make implementation by employers difficult.

The Accrued Sick and Safe Leave Act of 2008 ("ASSLA"), passed by the D.C. Council and approved by Mayor Adrian Fenty in March 2008, was approved by Congress on May 13, 2008. The ASSLA requires that employers in the District of Columbia provide paid leave to employees for illness and for absences associated with domestic violence or sexual abuse. Below, we describe the new law's major provisions and discuss the effective date.

Who Is Subject to the Law?

Under the ASSLA, D.C. employers with any number of employees are required to provide a certain amount of paid leave, as described below, to employees, up to a maximum number of days per calendar year. Although most employers, including for-profit and non-profit businesses, will be covered by the ASSLA, an exemption is available from the Mayor for businesses that can prove hardship as a result of the ASSLA.

How Much Paid Leave Must Employers Provide?

The amount of paid leave required under the ASSLA depends on (1) the number of employees employed by the employer during the prior calendar year and (2) the number of hours an employee works during the calendar year. A full-time employee generally would accrue 7 days of paid leave a year from an employer with 100 or more employees, 5 days of paid leave a year from an employer with 25 to 99 employees, and 3 days of paid leave a year from an employer with 24 or fewer employees. Part-time employees would accrue paid leave on a proportionate basis.

What If Employers Already Offer Paid Leave?

Employers with existing paid leave policies, including paid-time off programs or universal leave policies, which are at least equivalent to the ASSLA in both number of days and right to use leave for the purposes set forth in the ASSLA are not required to modify their existing policies. Until regulations are issued, it may be difficult for employers to determine whether existing paid leave policies satisfy the "at least equivalent" requirement. Importantly, the ASSLA does not diminish an employer's obligations to comply with contracts, collective bargaining agreements, or any benefit program or plan that provides greater paid leave rights than those provided under the ASSLA. If an employer's existing leave policy is not at least equivalent to the benefits granted under the ASSLA, the policy must be amended to comply with the ASSLA.

¹ San Francisco Administrative Code, Chapter 12W; New Jersey Family Temporary Disability Leave (signed by Governor Corzine on May 2, 2008).

Which Employees Are Covered by the Law?

Generally, all employees who have been employed for one year and have worked at least 1,000 hours during the 12 month period immediately preceding the request for leave are covered under the ASSLA, however, the following groups are not considered "employees" under the ASSLA, and therefore, are not entitled to paid leave under the ASSLA: (i) independent contractors, (ii) students (as defined under the ASSLA), (iii) health care workers who choose to participate in a premium pay program which provides for extra pay in lieu of benefits, and (iv) restaurant wait staff and bartenders who work for a combination of wages and tips. Employees of beauty, hair, and nail salons who are paid entirely or partly by commission are considered "employees" under the ASSLA, but are treated slightly differently under the ASSLA with special rules for the calculation of their leave accruals.

When Must Employees Begin Accruing Leave?

As currently written, the ASSLA provides that employees begin accruing leave immediately upon hire and that employees may use paid leave after 90 days of service with the employer. An employee who completes the 90-day period and is discharged and then rehired within 12 months may use paid leave immediately upon being rehired.

What May Paid Leave Be Used For?

The paid leave required by the ASSLA may be used by an employee for the employee's illness or the illness of an employee's family member and for the medical diagnosis or care of the employee or the employee's family member. The paid leave may also be used by an employee who is, or whose family member is, a victim of stalking, domestic violence, or sexual abuse, and who, as a result of such, is seeking medical, social, or legal services relating to the stalking, domestic violence, or sexual abuse.

What Happens to Unused Leave?

Unused accrued leave carries over to the following year. However, unless an employer chooses to provide otherwise, an employee may not use more than the maximum number of paid leave days allowed in one year even if the employee has carried over accrued leave from the previous year. A result of this policy is that an employee may not be able to actually use any carried-over leave. Unused accrued leave is not required to be paid upon the termination of employment of the employee.

What Notification Is an Employee Required to Provide Regarding Use of Leave?

Employees are required to make a reasonable effort to schedule the paid leave in a manner that does not unduly disrupt the employer's operations. In circumstances where the need for leave is foreseeable, the employee is required to notify the employer in writing of the request for leave, including an explanation of the reason for the leave and the expected duration of the leave. Such written notice must be provided at least 10 days in advance, or as early as possible. When the

need for leave is unforeseeable, the employer must make an oral request for leave prior to the start of the work shift for which the employee is requesting leave. In the case of an emergency, the employee must notify the employer of the need for leave prior to the start of the next work shift or within 24 hours of the beginning of the emergency, whichever is sooner.

An employer may require reasonable certification of the need for leave if paid leave is taken for three or more consecutive days. If the employer requires a certification, the employee is required to provide it upon return to work.

What Notice Must Employers Provide About the New Law?

Employers are required to post and maintain notice of the ASSLA in a conspicuous place, and must furnish copies or summaries of the ASSLA upon request. The Mayor is required to prepare the notice and summaries for employers. Once the Mayor has provided employers with a notice describing the ASSLA, failure to post the notice will subject the employer to civil penalties of \$100 a day for each day the notice is not posted with a maximum penalty of \$500.

What Are the Penalties?

Employers are prohibited from interfering with an employee's rights under the ASSLA, and are prohibited from discriminating against or discharging employees who use the paid leave provided under the ASSLA. Employers who violate the ASSLA are subject to civil penalties of \$500 for the first offense, \$750 for the second offense, and \$1,000 for the third and each subsequent offense.

When Is the New Law Effective?

The ASSLA was approved by Congress on May 13, 2008, and will be effective for employers on November 13, 2008. However, because of a conflict between the definition of "employee" and the date on which an employee may first access the paid leave, employers may be uncertain of how to implement the ASSLA.

An internal inconsistency was created in the ASSLA by the addition of a last minute amendment to the act that changed the definition of "employee" from "an individual who . . . has been employed for the same employer for at least 90 days" to the meaning of "employee" set forth in section 2(1) of the District of Columbia Family and Medical Leave Act of 1990. As amended, "employee" now means "any individual who has been employed by the same employer for 1 year without a break in service except for regular holiday, sick, or personal leave granted by the employer and has worked at least 1,000 hours during the 12-month period immediately preceding the request for family or medical leave." The change in definition of employee conflicts with section 3(c)(1) of the ASSLA which provides that "an employee may begin to access paid leave after 90 days of service with his or her employer." This internal inconsistency—limiting paid leave accruals to employees who meet the one year of employment and 1,000 hours requirement, but allowing access to paid leave after 90 days of employment—leaves employers and employees without a clear answer on when an employee is eligible to access leave. The remainder of the ASSLA is internally consistent.

Regulations are being drafted for the ASSLA, and it is hoped that the regulations will answer the question of when an employee is eligible to access leave. The regulations are likely to provide guidance on what an equivalent leave policy is. Regulations are anticipated before November 13, 2008, when the ASSLA becomes effective.

Note that the ASSLA has a delayed application date for employers with collective bargaining agreements. For employers with collective bargaining agreements in effect on November 13, 2008, the ASSLA will apply on the earlier of the date of the termination of the collective bargaining agreement or the date that occurs 18 months after November 13, 2008.

What Should Employers Be Doing Now?

Employers with existing paid leave policies should review the policies to determine whether they comply with the ASSLA in both the number of days that employees must accrue and the right to use leave for the purposes set forth in the ASSLA. Only policies that are not at least equivalent to the ASSLA would need to be amended. Employers without existing paid leave policies should review the ASSLA and begin taking the steps necessary to implement a paid leave policy on November 13, 2008 that complies with the ASSLA.

Because several questions remain unanswered about the ASSLA, we will continue watching the ASSLA and provide an update after regulations are issued.

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