

San Francisco's New Paid Sick Leave Ordinance and Other California Employment Law Issues

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***Breaking News:** Due to complaints from employers that they were not given enough time to get ready for the San Francisco's New Paid Sick Leave Ordinance, the Ordinance was amended on February 27, 2007 to allow employers to delay paying for sick leave until June 6, 2007 and to waive any penalties for such delay in payment. However, the date that existing employees must have started accruing paid sick leave was left unchanged as February 5, 2007.*

In November 2006, voters in San Francisco approved an ordinance that requires employers to provide paid sick leave to employees working within the City and County of San Francisco. San Francisco Administrative Code, Chapter 12W ("Ordinance").

The Ordinance was effective February 5, 2007, so employers should be designing their employment procedures to comply with the Ordinance's new sick pay and record retention requirements. As noted below, there also are a number of other state-specific employment law issues of which California employers should be aware.

New San Francisco Sick Leave Ordinance

Paid sick leave under the new Ordinance began to accrue as of February 5, 2007 for existing employees. For employees hired after February 5, 2007, paid sick leave begins to accrue 90 days after commencement of employment. The San Francisco Office of Labor Standards Enforcement (the "Agency") will be the office responsible for enforcement of the new Ordinance.

Requirements of Ordinance

Under the Ordinance, employees accrue one hour of paid sick leave for every 30 hours worked. The Ordinance applies to all employees, including part-time and temporary employees. The Ordinance caps accrued paid sick leave at 40 hours for employees of "small businesses" and at 72 hours for employees of other businesses. A "small business" is defined as a business employing fewer than ten persons.

Accrued paid sick leave does not expire at the end of the year, and there is no yearly maximum on how much leave an employee can use. For example, an employee may use 72 hours of accrued paid sick leave in January, and the employee may accrue and use more paid sick leave later in the year. Employees may not "cash-out" their unused accrued paid sick leave upon separation from employment.

An employee can use paid sick leave for his or her own illness or to care for family members, including registered domestic partners. An employee with no spouse or registered domestic partner can use his or her paid sick leave to care for a "designated person," such as a roommate or neighbor. Employees must be able to designate an "alternate" person at least once a year.

Employers may require employees to give reasonable notification of an absence. Employers also may take "reasonable measures" to verify that employees are using their leave lawfully. However, a Q&A issued by the Agency indicates that requiring a doctor's note for every absence likely would not be considered "reasonable."

Record Retention Requirements

Employers must retain records documenting hours worked and paid sick leave taken by employees for a period of four years. If not, an employer will be presumed to have violated the Ordinance. Employers also must post a notice informing employees of their rights under the Ordinance in a conspicuous place at the jobsite. This notice must be in English, Spanish, Chinese, and any language spoken by at least 5% of employees of that site.

Enforcement

The Agency may impose an administrative penalty of 3 times the amount of withheld sick pay, or \$250, whichever amount is greater. This amount is payable to the employee who was not provided the required sick pay. The Agency also may impose a fine of \$50 for each employee whose rights under the Ordinance were violated for each day that the violation occurred or continued. In addition, the Agency can request the City's other departments to revoke a violating entity's business licenses and can seek a penalty to reimburse the City for "investigating and remedying" the violation. The Agency, City Attorney, or employee also may bring civil actions for similar penalties.

Coordination with Other Plans

If an employer already has a paid time off or sick leave policy, the employer need not provide additional paid sick leave as long as the employer's current policy complies with the new Ordinance. Employers also may adopt more generous paid sick leave policies.

In addition, the requirements of the Ordinance can be waived in collective bargaining, but only if expressly waived in the collective bargaining agreement in clear and unambiguous terms.

Questions about the Ordinance

Although the new law went into effect February 5, 2007, there has been some confusion over its implementation details. The Agency has provided little additional guidance on the law, and it has been reported that not all San Francisco employers even are aware of the new requirements. In addition, it is not clear how the law should apply to some nontraditional businesses, such as seasonal employers, whose number of employees may differ, or temporary employees, who may work for a variety of "employers" with different pay scales.

It is also not clear how the law may interact with ERISA. Generally, sick pay that is paid from an employer's general assets is not considered an ERISA plan, which means an employer may have a more difficult time arguing that the San Francisco Ordinance is preempted. The answer is less clear if an employer has a funded sick pay plan that is subject to ERISA.

Other California Employment Law Issues

In addition to the new sick pay requirement in San Francisco, employers in California should be aware of number of other employment law requirements—

- California employers generally are subject to minimum wage, meal period, and rest period requirements. For example, employers in California must provide a 30-minute meal period to non-exempt employees for every 5 hours worked. Employers also must "authorize and permit" non-exempt employees to take a 10-minute rest period for every 4 hours worked.

However, several groups of employees are exempt from these laws. "Exempt" employees generally can be classified into three categories—Exempt Executive Employees, Exempt Administrative Employees, and Exempt Professional Employees. Among the factors that distinguish exempt employees from non-exempt employees is that exempt employees customarily and regularly exercise discretion and independent judgment in their jobs.

- Employers in California must pay a minimum wage of \$7.50 per hour as of January 1, 2007 and \$8.00 per hour as of January 1, 2008. Employers in San Francisco must pay a higher minimum wage of \$9.14 per hour, as of January 1, 2007. (Contrast this with the federal minimum wage bills that are working their way through the House and Senate, which require an hourly wage of \$7.25 to be phased in over two years.)
- California has additional restrictions on use of social security numbers. Employers generally are prohibited from printing an employee's social security number on documents mailed to the employee, unless state or federal law requires the social security number to be printed on the documents. Employers also are prohibited from requiring an employee to transmit his or her social security number over the Internet, unless the connection is secure or the social security number is encrypted.
- Under California law, employers generally must allow an employee to use his or her accrued and available sick leave to attend to an illness of a child, parent, spouse, domestic partner, or a child of a domestic partner of the employee.
- Employers having 50 or more employees generally must provide at least two hours of interactive training and education regarding sexual harassment to all supervisory employees every two years, or within six months of an employee's assumption of a supervisory position.

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California appears to be on the forefront of many employment law changes. In addition, we have seen many of California's initiatives later adopted by Congress or other states. So, regardless of where their employees are located, California is an important state for all employers to watch.