

One Minute Memo™



Not Exactly a Reprieve-San Francisco Paid Sick Leave Update

As reported last November, San Francisco adopted a mandatory employer paid sick leave requirement that applies to all full time, part time, and temporary employees working in the City and County of San Francisco. [<http://www.seyfarth.com/MA111606/>]. Subsequent to passage, a series of hearings were held identifying a broad spectrum of employer questions and concerns regarding implementation issues with the Ordinance. Shortly before the February 5, 2007 effective date of the Ordinance; the San Francisco Office of Labor Standards Enforcement posted a series of "Frequently Asked Questions" in an effort to address some of the questions. This effort, however, did not resolve all of the issues regarding the Ordinance.

A common theme of employer commentators (apart from the observation that it would have been more prudent for hearings to occur before passage) was that the implementation period leading to the effective date was too short to implement a compliant sick leave program. Ironically, among those who shared this later view were those responsible for implementing a compliance program for San Francisco's own government employees. Rumors circulated that an effort would be made to delay the effective date to sort out the issues and to address them in a more orderly fashion.

In response to employer concerns, one member of the San Francisco Board of Supervisors proposed a separate resolution shortly before February 5 to delay implementation of limited portions of the Paid Sick Leave Ordinance. As of February 27, 2007, the San Francisco Board of Supervisors has passed, and the Mayor has now signed, the limited-delay resolution.

It is important to emphasize first what this resolution does not do. Specifically, it does not change the obligations or rights of employers and employees under the Paid Sick Leave Ordinance (whatever they are as applied), including recordkeeping and the accrual and use of sick leave. Rather, the just-passed resolution makes two temporary changes to the San Francisco Paid Sick Leave Ordinance. They are: (1) employers may choose not to pay for sick leave used by employees between February 5, 2007 and June 6, 2007, and (2) employers are not liable for penalties for a failure to pay for sick leave during this period. This likely means that employers of San Francisco employees must still allow the leave to occur and remain subject to the significant penalties described in the Ordinance for other violations.

Although the reprieve from a payment obligation may be some solace for small employers, it is not an overall enforcement moratorium. Most larger employers have existing sick leave policies and the problem is not the cost of paying for the leave (the small employer argument) but rather the uncertainties and unanswered questions in the administration and differences in accrual rates. For example, employees have and will continue to accrue San Francisco sick leave rights between February 5, 2007 and June 5, 2007. The San Francisco Paid Sick Leave Act, assuming it is enforceable, protects sick leave taken during this period to the same extent as if the delaying resolution had not been passed. Presumptive retaliation also remains an issue for employees who demand the leave, even if unpaid.

Extreme caution is advised as we anticipate that reports and headlines will incorrectly claim the effective date of the entire ordinance has been delayed. That is definitely not the case and many of the more problematic aspects of the sick leave ordinance remain in full effect. For example, employers continue to have questions ranging from how to treat exempt employees, what to do with employees who only occasionally work in San Francisco (such as executives based elsewhere), how to treat breaks in service, and so forth. We have developed materials to assist employers, to the extent possible with many of these issues, but there are still many legal unknowns arising out this new employer sick leave obligation.

If you have any questions concerning this Management Alert, please contact the Seyfarth Shaw LLP attorney with whom you work or any attorney on the website at www.seyfarth.com.

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