

Management Alert

San Francisco Enacts Employer Provided Paid Sick Leave Ordinance for Full and Part Time Employees

The San Francisco Forty-Niners may not be the only employer considering locating their business outside that city following the recent passage of San Francisco Proposition F. Supporters referred to this city and county ordinance as a “first of its kind” measure to require employers to provide paid sick leave to all employees. Opponents called it something else. The measure has nuances that will increase its impact beyond what may be immediately apparent. This is particularly the case with respect to the anti-retaliation provisions and presumptions based on timing of discipline decisions. The Proposition passed by a wide margin and becomes effective in early February 2007 absent successful court challenge or action to delay implementation by the Board of Supervisors.

The Benefit

Employers in San Francisco must provide all employees one hour of paid sick leave for every 30 hours of work. Employees employed when the Ordinance becomes effective are immediately eligible. Those hired after the operative date become eligible after 90 days of service.

The maximum accrual amount is 72 hours (40 hours for employers with ten or fewer employees) and the employer must allow for carryover of accrued but unused balances from year to year. Although the Ordinance expressly states that unused sick leave need not be paid out at termination, the anti-retaliation provisions may make it difficult for employers to “hold the line” on employees who seek to use up sick leave at the end of their employment.

Sick leave for purposes of the Ordinance is defined by incorporating and expanding on the definition of the term in Labor Code §233(b)-(4) also known as California’s “Kin Care” law. The Ordinance expands the Labor Code definition by requiring that the leave be fully available to allow the employee to take time off for medical care, treatment or diagnosis for himself, and for the same events if pertaining to a child, parent, legal guardian or ward, sibling, grandparent, grand child, spouse, or domestic partner. These relationships include not only biological relationships but also those that result from adoption, step-relationships and foster relationships. “Child” also includes the children of the employee’s domestic partner and a child of a person “standing *in loco parentis*.” Those with neither spouses nor domestic partners can designate “someone else” within ten days of the point they complete eligibility and work the 30th hour and may change that designation annually.

If the employer provides paid sick leave on terms not less than those required by the Ordinance it need not adopt a new leave program. However, given that the Ordinance applies to part-time employees and temporary workers that may be in the employ of third parties and in many instances requires more generous accommodations than state law, a thorough review is recommended before relying on the existing leave program.

Universal Coverage in a Contained Space

The measure is geographically limited to San Francisco but reaches well beyond traditional notions of an employment

relationship. Covered employers include all employers of employees who operate within the geographic boundaries of the city and county of San Francisco. The definition of “employer” also includes officers and executives of employers creating the specter of personal liability for individuals residing well outside San Francisco or California. The measure also makes these “employers” responsible for the compliance of temporary service agency’s and staffing companies they engage to provide full, part time or temporary employees. There is a lower maximum accrual cap for employers with fewer than ten persons working for compensation during a given week but, all part-time, temporary, and leased employees must be included in the count.

The employees covered by the Ordinance include all full time, part-time and temporary employees working for an employer within the geographic boundaries of the city and county. It also includes Welfare-to-Work program participants. There is no express exception for employees normally deemed exempt from wage and hour laws by virtue of being executive, administrative or professional employees or involved in commissioned sales. There is however a collective bargaining agreement exception.

Prohibited Employer Conduct . . . Employee Self-Renewable Presumptions of Retaliation

In addition to requiring paid sick leave, the Ordinance imposes other restrictions on employer conduct. First, an employer cannot count an absence for which sick leave can be taken under the Ordinance as a chargeable absence under any absence control policy that could lead to discipline of any kind or any other “adverse action.” Second, an employer cannot require the employee to find their own replacement worker for the sick leave being taken. Third, the employer may not make unreasonable demands for notification prior to the absence. Fourth, the employer may only take “reasonable measures” to verify or document that the use of paid leave is lawful.

The Ordinance also expansively protects employees from retaliation. The rights protected include taking the sick leave, filing an agency complaint regarding an alleged violation or “informing any person about an employer’s alleged violation of the Ordinance” or their rights under the Ordinance. The protection expressly extends to persons who mistakenly but in good faith allege violations.

A rebuttable presumption of retaliation is created if an adverse action is taken within 90 days of any behavior protected by the Ordinance. As significant instances of protected behavior can be oral and relatively informal, application of the presumption as a shield by manipulative employees will prove to be a challenge. Whether the employee must do more than simply claim to have engaged in protected activity to force the employer into attempting to rebut the presumption of retaliation remains to be seen.

Don’t Paint the Break Room Yet . . . Notices, Posting and Record Keeping

What would a new leave right be without a new posting requirement? A rhetorical question in this instance as the Ordinance has posting requirements with draconian enforcement potential. The Ordinance requires the San Francisco Office of Labor Standards Enforcement to generate a notice suitable for posting informing employees of their rights. Variants of the notice will be generated by the Office in all languages spoken by more than 5% of the San Francisco workforce, as a whole. Employers must post the English, Spanish and Chinese versions of the notice (regardless of the languages spoken by employees) and must also post notices in “any language spoken by at least 5% of the employees at the workplace or job site.” Intriguingly, this requirement does not address what an employer is to do if more than 5% of its work force speaks a language that is not among the languages for which the Office of Labor Standards Enforcement generates an approved notice. As discussed below, it is clear that enforcement penalties for inadequate notice are stiff.

The employer is required to maintain records of sick leave accrual and leave taken for four years. It must also allow the Office of Labor Standards Enforcement to inspect those records. Failure to maintain the records or permit reasonable access to them creates a presumptive violation of the record keeping requirement that can only be overcome by clear and convincing evidence by the employer. This suggests that an employer inclined to challenge the Ordinance would be wise to find a mechanism to do so other than challenging the right of the Office of Labor Standards Enforcement to review the records.

Enforcement

The Ordinance provides for both court and administrative enforcement without a requirement for exhaustion of remedies. The court enforcement scheme presents significant class exposure and imposition of material penalties that may prove to be a powerful inducement to professional plaintiffs.

The Office of Labor Standards Enforcement may pursue an administrative claim and impose temporary or interim injunctive relief on its own authority pending completion of the investigation. After a hearing and a finding that a violation has occurred, the Office of Labor Standards Enforcement may order “any appropriate relief” including reinstatement, back pay, or payment of unlawfully withheld leave. It may also order an administrative penalty. If leave was withheld, the penalty should “include” the greater of three times the value of the withheld leave or \$250. If the violation results in harm to the employee (as in a discharge) or a violation of rights (expressly including failure to post proper notice) or an act of retaliation, the administrative penalty will also “include” \$50 per employee *per day* of violation payable to the employee or other person injured and an additional \$50 per employee *per day* payable to the Office of Labor Standards Enforcement to compensate it for investigation costs.

The Ordinance also authorizes practically anyone and expressly includes “any entity whose member is aggrieved

by a violation” and “any entity acting on behalf of the public” to file court actions to enforce the Ordinance. The courts are empowered to grant whatever legal or equitable relief is deemed appropriate. This expressly includes a liquidated damage penalty of \$50 per employee (or person whose rights were violated) per *HOUR* of violation. If the person suing is the Office of Labor Standards Enforcement or an advocacy group the administrative liquidated damage remedy for costs of enforcement is not available but attorney’s fees, costs and other legal and equitable relief are available.

Employer Considerations

There are a number of constitutional and preemption issues with Proposition F and court challenge is almost inevitable. That said, there are some measures short of evacuation from San Francisco that can be undertaken:

- Review existing sick leave policies to determine the extent they may be as generous as Proposition F or could be made so without significant economic impact;
- Assess the degree to which your existing sick leave and short term disability programs are covered under ERISA;
- Review vendor and outside staffing services agreements to determine total extent of exposure and coverage under Proposition F;
- Raise the express waiver in any current collective bargaining negotiations and consider raising the issue as a modification to existing agreements for interim relief.

If you have any questions regarding employer provided paid sick leave, please contact the Seyfarth Shaw attorney with whom you work or any of the Labor & Employment attorneys on our website, www.seyfarth.com.

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E.
Suite 700
Atlanta, GA 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

World Trade Center East
Two Seaport Lane
Suite 300
Boston, MA 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

131 South Dearborn Street
Suite 2400
Chicago, IL 60603-5577
312-460-5000
312-460-7000 fax

HOUSTON

700 Louisiana Street
Suite 3700
Houston, TX 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza, Suite 3300
2029 Century Park East
Los Angeles, CA 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas
Suite 2500
New York, NY 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall
Suite 2350
Sacramento, CA 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

560 Mission Street
Suite 3100
San Francisco, CA 94105-2930
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32) (2) 647 60 25
(32) (2) 640 70 71 fax



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