

Management Alert



If Pain, Yes Gain — Part III: Eugene and San Diego Pass Paid Sick Time Ordinances

By Colleen M. Regan, Joshua D. Seidman and Samuel Sverdlov

Following the lead set by eight other jurisdictions nationwide,¹ on Monday, July 28, 2014, the Eugene City Council (Eugene, Oregon) passed the Eugene Sick Leave Ordinance.² and the San Diego City Council (San Diego, California) gave final approval to the City of San Diego Earned Sick Leave and Minimum Wage Ordinance.³ While the Eugene ordinance is final after passing through the city council, in San Diego, the mayor, Kevin Faulconer, may veto the ordinance. Even if Faulconer does veto the ordinance, it is still likely to be implemented since the city council can override a veto with six votes, and the ordinance passed by a vote of six to three.

The Eugene and San Diego ordinances require employers, regardless of their number of employees, to provide one hour of paid sick leave for every 30 hours of paid work performed inside the respective cities, up to a maximum of 40 hours (i.e., 5 calendar days) of sick leave in a year. Notably, employers in both cities that maintain a paid leave policy equal to, or more generous than, the ordinances' requirements need not offer additional leave to employees, provided that the time off can be used under the same conditions.

The San Diego and Eugene ordinances become effective on April 1, 2015, and July 1, 2015, respectively. In the meantime, by January 2015, the Eugene City Council will develop and adopt administrative rules meant to provide specific details about the ordinance.

Both ordinances are the second paid sick leave laws to be passed within their states. The Portland Sick Time Ordinance (Oregon) went into effect on January 1, 2014, and the San Francisco Paid Sick Leave Ordinance (California) became effective February 5, 2007.

Before the most recent ordinances take effect, employers with operations in Eugene or San Diego must ensure that their policies are compliant. This alert explains what is required of employers, and addresses some of the main concerns facing affected businesses. Copies of the [Eugene](#) and [San Diego](#) ordinances are available online.

¹ The other jurisdictions include Seattle, San Francisco, Portland, New York City, Newark, Jersey City, Washington D.C., and the state of Connecticut.

² On Monday, July 21, 2014, the Lane County Board of Commissioners passed an ordinance banning any city within Lane County (Eugene included) from passing local laws that mandate any employment conditions, such as wages and benefits. The Board of Commissioners also approved two other laws that could undercut Eugene's Paid Sick Leave ordinance—the first exempts all Lane County businesses from Eugene's ordinance if they are located outside the City's limits, and the other exempts all units of local government within Lane County from the proposed mandate. All three ordinances go into effect immediately, however, given Eugene's "home rule" charter, it maintains the legal right to enact a sick leave requirement within its jurisdiction, regardless of county ordinances. This issue will likely need to be addressed by the Oregon courts or state legislature.

³ The City of San Diego Earned Sick Leave and Minimum Wage ordinance - as the name suggests - also implements an increase in the city's minimum wage to \$11.50 by 2017, with automatic increases for inflation after 2019.

How Do Employees Use Sick Time?

Eugene

Employees⁴ begin to accrue paid sick time at the commencement of their employment (or on July 1, 2015, for existing employees), and can start using the accumulated sick leave 90 days after the accrual begins. Employees can only use earned sick leave during times that they are scheduled to perform work within Eugene. Thus, at minimum, employees must wait until September 29, 2015, to use their paid sick leave.

Even if an employer does not have a physical location inside Eugene, employees may still be eligible for paid sick leave if they perform at least 240 hours of work inside Eugene within a one year period. Once an employee completes the required 240 hours, he or she remains eligible for paid sick leave regardless of the number of hours worked for that employer in subsequent years.

Additionally, if an employee does not use all of his or her accrued sick time within a given year, up to 40 hours of sick leave will carry over to the following calendar year. However, an employer is not required to provide an employee with more than 40 sick leave hours in any single year. Therefore, employees are not able to “stockpile” sick leave hours from year-to-year.

When an employee’s employment relationship ends, whether by termination, resignation, retirement, or otherwise, the employer has no obligation to pay the employee for accrued, but unused sick time. However, if an employee is rehired within six months of separation, the employee is entitled to reinstatement of the previously accrued, unused, sick time.

San Diego

Employees⁵ begin to accrue paid sick time on April 1, 2015, or the commencement of their employment, whichever is later. Employees are entitled to start using their earned sick leave 90 days after they begin their employment or on July 1, 2015, whichever is later. While employees may determine how much accrued sick leave 90 days after they begin their employment or on July 1, 2015, whichever is later. While employees may determine how much accrued sick leave they need to use, employers can set a reasonable minimum increment for use, not to exceed two hours.

The San Diego ordinance is identical to Eugene’s with respect to accumulation and carryover of paid sick time, as well as reinstatement of leave balances upon rehire within six months, and the lack of a requirement to payout accrued, unused, leave upon separation.

Under What Circumstances May Employees Use Sick Time?

Eugene

Under the ordinance, an employee can take sick leave for any of the following reasons:

- Diagnosis, care or treatment of the employee or the employee’s family member’s mental or physical illness, injury, or health condition, including preventative medical care;
- To seek and obtain legal or law enforcement assistance or remedies, medical treatment, or counseling from a licensed mental health professional for the employee or the employee’s minor child or dependent as a result of domestic violence, harassment, sexual assault or stalking;
- To obtain services from a victim services provider for the eligible employee or the employee’s minor child or dependent;

⁴ An “employee” is “[a]n individual who renders personal services to an employer where the employer either pays or agrees to pay for the personal services.”

⁵ An employee is an individual who in one or more calendar weeks performs at least two hours of work within San Diego city limits. Employees who are authorized to work below minimum wage, or student employees, are not included within this definition.

- To relocate or take steps to secure an existing home to ensure the health and safety of the eligible employee or the employees minor child or dependent;
- Any other reason listed in the forthcoming January 2015 administrative rules.

San Diego

Under the ordinance, an employee can take sick leave for any of the following reasons:

- The employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition of the employee;
- Obtaining professional diagnosis or treatment for a medical condition of the employee;
- Other medical reasons pertaining to the health of the employee, such as pregnancy or obtaining a physical examination;
- Providing care or assistance to a family member, with an illness, injury, or medical condition, including assistance in obtaining professional diagnosis or treatment of a medical condition;
- The employee's absence is for the employee's use of "Safe Time;"⁶
- The employee's place of business is closed by order of a public official due to a public health emergency, or the employee is providing care or assistance to a child, whose school or child care provider is closed by order of a public official due to a public health emergency.

What Employers Can and Cannot Do

Eugene

- Employers shall not (a) interfere with the exercise of any right protected under the paid sick leave law, (b) take retaliatory action or discriminate against an employee because the employee has exercised rights protected under the paid sick leave law; or require an employee to (c) find a replacement worker for his or her shift as a condition for the employee's use of sick leave, or (d) work an alternative shift⁷ in lieu of using accrued sick leave.

Additional obligations and restrictions will be imposed on Eugene employers once the administrative rules are finalized in January 2015.

San Diego

- An employer may require (a) up to seven days advance notice of the need to use earned sick leave when such need is foreseeable, (b) notice of the need to use earned sick leave as soon as practicable when such need is unforeseeable, and (c) reasonable documentation that the use of earned sick leave was authorized for an absence of more than three consecutive days.
- Employers cannot (a) retaliate against an employee for exercising any right under the earned sick leave law, (b) disclose or otherwise breach the confidentiality of medical or other personal information obtained about an employee or his family members for the purposes of complying with the ordinance, or require an employee to (c) disclose details related to the medical condition of the employee's or the employee's family member as a condition for using earned sick leave, or (d) search for or find a replacement worker.

⁶ Safe time includes time away from work that is necessary due to domestic violence, sexual assault or stalking, provided the time is used to allow the employee to obtain for the employee or her family member one or more of the following: (1) medical attention; (2) services from a victim services organization; (3) psychological or other counseling; (4) relocation; or (5) related legal services.

⁷ If the employer allows shift trading, and if an appropriate shift is available, the employee may choose to work additional hours or shifts without using available sick leave for the missed hours or shifts.

What Happens if an Employer Violates the Ordinance?

Eugene

Enforcement of the paid sick leave law will be delegated by the city manager to city staff, the Oregon Bureau of Labor and Industries, or another entity. Enforcement of this law will be subject to the January 2015 administrative rules.⁸ Employers will have a grace period after July 1, 2015, during which time compliance will be sought through education rather than fines and penalties.

San Diego

The San Diego law provides a private right of action for individuals claiming harm under the earned sick leave law. These individuals are entitled to all legal and equitable relief, including, but not limited to, the payment of back wages and an additional amount equal to double back wages withheld as liquidated damages; damages for an employer's denial of the use of accrued earned sick leave; reinstatement of employment or other injunctive relief; and reasonable attorney's fees and costs to any plaintiff who prevails in an action to enforce the earned sick leave law.

Additionally, any employer who violates any requirement of the earned sick leave law is subject to a civil penalty for each violation of up to, but not to exceed, \$1,000 per violation. An employer who fails to comply with the notice and posting requirements is subject to a civil penalty of \$100 dollars for each employee who was not given appropriate notice, up to \$2,000.

What Should Employers Do Now?

Policy Review: Employers with operations in Eugene or San Diego should review their sick leave policies to ensure that they meet at least the minimum requirements of the respective ordinances before they become effective.

Notice and Posting:

Eugene

The Eugene ordinance does not currently contain any notice and posting requirements. However, these provisions may be included in the January 2015 administrative rules and, thus, could exist by the time the ordinance goes into effect.

San Diego

When the ordinance becomes effective, employers must post a notice informing the employees of their rights under the earned sick leave law in a conspicuous place at any workplace or job site where any eligible employee works. The notice must appear in English and any other language spoken by at least 5% of the employees at the particular workplace. The notice, which will be made available to employers by the City, will include information about the accrual and use of sick leave, the right to be free from retaliation, and the right to file a complaint with the Enforcement Office or a court of competent jurisdiction.

In addition, employers must provide each employee at the time of hire, or by April 1, 2015, whichever is later, written notice of the employer's name, address, telephone number and the employer's duties under the earned sick leave law. The notice must be provided to the employee in English and in the employee's primary language if spoken by at least 5% of the employees at the employee's job site. Employers may provide this notice electronically.

⁸ The ordinance states that the administrative rules will establish "enforcement protocols for administrative civil penalties and private rights of action."

Record Retention:

Eugene

The Eugene ordinance does not currently contain any specific record retention requirements. However, this provision will likely be included in the January 2015 administrative rules and, thus, should exist by the time the ordinance goes into effect.

San Diego

In San Diego, employers must create and retain written or electronic records documenting their employees' wages earned and accrual and use of sick leave. These records must be maintained for at least three years.

Colleen M. Regan is a partner in Seyfarth's Los Angeles office, *Joshua D. Seidman* is an associate in Seyfarth's New York office and Samuel Sverdlov is a Fellow in the firm's New York office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Colleen M. Regan at cregan@seyfarth.com, Joshua D. Seidman at jseidman@seyfarth.com or Samuel Sverdlov at ssverdlov@seyfarth.com.

www.seyfarth.com



Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | August 5, 2014

©2014 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.