

Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

To the Members of the Corporate Counsel Section:

Having previously served as your Chair in 2002, it is an honor and a privilege to do so once again in 2014. I want to thank Howard Shafer for a job very well done during his term as Chair in 2013, with special thanks for the most excellent and very well received Fifth Corporate Counsel Institute, ably co-chaired by Anne Atkinson and Steve Nachimson, that the Section presented under his chairmanship last November. It covered such timely and forward-looking topics as "Alternative Fee Arrangements and the Future of the Billable Hour" and "Advertising and Brand Protection in the Digital Age," and featured a Keynote luncheon address by New York State Attorney General Eric Schneiderman as well as a panel of prominent General Counsel who examined ethics issues from an in-house standpoint, ably moderated by the Section's long-time friend and mentor, Robert L. Haig of Kelley Drye & Warren LLP.



There are several topics I would like to bring to your attention as I start my second term.

Annual Meeting 2014

This year on January 29th the Section joined forces with the Business Law Section to present a two-part Annual Meeting program. In the first part the focus was on Ethics in Transactions; in the second part a three-speaker panel examined issues arising for New York lawyers in handling international matters.

KGS Diversity Internship Program

The Section continues its long-standing strong commitment to the Kenneth G. Standard internship program for law students who self-identify as "diverse." The program is named in honor of past NYSBA President Ken Standard because of his commitment to initiatives aimed at increasing diversity in the legal profession. This year's recipient of the New York Bar Foundation Fellowship (funded by the Section) that funds and places a second- or third-year law student as an intern in a charitable or not for profit organization is The Visiting Nurse Service of New York. In addition

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I'm Sick and Can't Come In—State and Local Governments Take the Lead in Requiring Employers to Provide Paid Sick Time

By William P. Perkins, Tara Conroy and Joshua Seidman

I. Introduction

Tired of waiting for Washington to act,¹ cities and states have resorted to legislative vigilantism and in the process they have created a patchwork of paid sick leave laws across the United States. Although the rationale for such action is the fact that some 41 million workers in the U.S. lack access to paid sick leave, with low income workers being least likely to have access,² the laws have created a headache for employers with multiple facilities within the U.S. or even within the same state.

II. Landscape of Paid Sick Leave Activism

A. Rush to Legislate

During the first three months of 2014, four paid sick leave laws have or are scheduled to become effective. As of mid-March 2014, there were pending proposals for paid sick leave legislation in 17 states: Alaska, Arizona, California, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York State, North Carolina, Oregon, South Carolina, Vermont and Washington. Pending bills in many cases differ quite significantly from sick leave laws currently effective either at a state or local level.

For example, some proposed legislation allows for fast accrual of paid sick time. Iowa's proposed legislation sets a sky-high accrual rate of five and fifty-four one hundredths hours of paid leave for every 40 hours worked, with a cap of nearly 18 full work days per year.³ New York State's proposed legislation also allows for fast accrual: one hour of paid leave for every 20 hours worked.⁴ However, New York State's proposed accrual rate is somewhat tempered by its 80- or 40-hour accrual cap.⁵

B. Not in My Backyard—States Attempt to Rein-in Activist Cities

Ten states—Georgia, Wisconsin, Louisiana, North Carolina, Tennessee, Mississippi, Kansas, Arizona, Indiana, and Florida—have enacted preemption laws prohibiting cities, counties, and other state municipalities from passing mandatory paid sick leave laws.⁶

For example, the Louisiana preemption law, which became effective in 2012, restricts local governments from passing any workplace protections regarding minimum wage, employee benefits, vacation days, and sick days.⁷ The stated justification for these preemption laws is two-fold: 1) paid sick leave laws hurt businesses by imposing burdensome costs; and 2) enacting paid sick leave legislation on a city- or county-wide level will create patchwork, inconsistent legislation throughout the state.

State preemption laws may preempt a local government's previously enacted paid sick leave law, as some have been retroactively applied.⁸ It is thus vital for employers and employees alike to track not only laws favoring mandatory paid sick leave, but also laws opposing them since seven of the current ten state preemption laws have gone into effect since 2013.

C. Employer Headaches

Paid sick leave, previously a wholly unregulated area of employment within which employers had free rein, is now becoming highly regulated. This push towards increased regulation means heightened administrative burdens and costs.

Employers with pre-existing paid sick leave policies may need to revise their policies to ensure compliance with applicable legislation, while employers without a pre-existing policy need to create an entirely new policy. Concurrent with the adaption or drafting of a policy is the question of how such policies will be administered. For starters, employers must decide how they will record and monitor employees' hours, both for purposes of determining how much paid sick leave an employee accrues and when an employee becomes eligible for paid sick leave.⁹ Employers may also need to consider whether any previously used timekeeping systems are sufficient for these purposes, and whether the individual or department responsible for tracking time can handle this increased workload.

These laws impose new direct costs for some employers who previously did not provide paid sick time, including the cost of the actual paid sick days themselves, and overtime exposure for replacement workers. Even though most large employers already have sick leave policies and are not subject to new cost issues, these employers will face significantly increased administrative burdens resulting from the need to sync the new legal requirements with their existing leave policies. For example, the concept of sick time accrual in hourly units is a foreign concept to most companies that have traditionally dealt in the accrual of sick time in units of days. Carryover of sick days from one year to the next is a new requirement for many employers and, to make it worse, some laws require the employer to provide employees records of current and carryover accrued sick days every payroll day.¹⁰ Most of the laws place significant restrictions on when employers can request documentation of the employee's inability to work, and raise the specter of retaliation claims if the employer uses government-imposed sick days as a basis for disciplinary action.

The list of headaches created by paid sick leave legislation is even longer for multiple-location employers, because of differing and conflicting requirements and the inability to craft a one-size-fits-all policy. For example, this will be especially true for employers with operations in both Jersey City and Newark, New Jersey.¹¹ Although there is some overlap between the two ordinances, there are critical differences. For example, while both require private employers with ten or more employees to provide paid sick time,¹² the Newark ordinance also requires that each calendar year employers with fewer than ten employees provide i) child care, home health care, and food service worker employees with a maximum of five days of paid sick time, and ii) all other employees with a maximum of three days of paid sick time.¹³

These differences will require Newark and Jersey City-based employers to expand their paid sick leave coverage in certain situations, based solely on whether employees work in Newark or Jersey City. The challenge of complying with inconsistent legislation may also create employee dissatisfaction, in the event that employees in different locations are perceived as being offered more favorable paid sick leave than other employees.

In short, the transition from unregulated to regulated begins with it a multitude of headaches for employers.

III. Legislative Activism in the New York Metropolitan Area

A. Jersey City, NJ

There are at least three paid sick leave ordinances currently effective or slated to become effective in the New York City metropolitan area in 2014. The first of these is the Jersey City Earned Sick Time Ordinance ("JCESTO"), which became effective on January 24, 2014.¹⁴ Under JCESTO, employers with ten or more Jersey City employees must provide employees one hour of paid sick leave for every 30 hours worked, up to a maximum of 40 hours each year.¹⁵ Employees of employers with fewer than ten Jersey City employees accrue at the same rate and are subject to the same caps, but the leave is unpaid.¹⁶ Employees are only covered by JCESTO if they work at least 80 hours per year in Jersey City.¹⁷

Additionally, if an employee's accrued sick time goes unused within a given calendar year, up to 40 hours of sick leave will carry over to the following year.¹⁸ However, employees are subject to a usage cap of 40 hours per calendar year.¹⁹

B. New York City, NY

New York City's Earned Sick Time Act ("ESTA"), the next anticipated effective paid sick leave ordinance in the metropolitan area, became effective as of April 1, 2014. ESTA requires employers with five or more New York City employees to provide a minimum of one hour of paid sick time for every 30 hours worked,²⁰ up to a maxi-

mum of 40 hours per calendar year.²¹ ESTA only covers employees who work at least 80 hours per year in New York City.²²

ESTA does not establish usage caps, but does cap employees' carryover of their accrued, unused leave from one calendar year to the next at 40 hours.²³ As an alternative to carrying leave over from one year to the next, employers can pay employees the cash equivalent of their unused, accrued sick time at the end of the year.²⁴

C. Newark, NJ

Finally, Newark's Sick Leave for Private Employees Ordinance (the "Newark Law") will go into effect on May 29, 2014.²⁵ Under the Newark Law, employers with ten or more Newark-based employees must provide up to five days of paid sick leave per year, and employers with fewer than ten employees must provide up to three days of paid sick leave per year.²⁶ An employee must work at least 80 hours in Newark in a single calendar year to obtain the paid leave.²⁷

Under the Newark Law employees' usage of leave and carryover of unused, accrued leave from one year to the next is capped at 40 hours per year. In lieu of carryover, employers can opt to pay employees the cash value of any accrued, unused leave at the end of the year.²⁸

IV. Early Frontrunners of Paid Sick Leave Activism

A. San Francisco, CA

Other states and cities' legislative activism on paid sick leave may have helped pave the way for the recent wave of activism in the New York metropolitan area. On February 5, 2007, the San Francisco Paid Sick Leave Ordinance (the "SF Law") became the first operative paid sick leave law.²⁹ Under the SF Law, employees who perform more than 56 hours of work in San Francisco in a calendar year, regardless of employers' location or size, accrue one hour of paid leave for every 30 hours worked.³⁰ For employers with fewer than ten employees (defined as "small businesses"), employees' accrual is capped at 40 hours. For employers with ten or more employees, employees' accrual is capped at 72 hours.³¹

In addition, under the SF Law, employees' unused, accrued paid leave carries over from one calendar year to the next, but this carryover is capped at the maximum number of hours that employees can accrue.³²

B. Washington, DC

The Washington, DC Accrued Sick and Safe Leave Act (the "DC Law"), with an effective date of November 18, 2008, was the next paid sick leave law to become operative.³³ Under the DC Law, employers with 100 or more employees must provide employees one hour of paid leave for every 37 hours worked, of up to seven days per calendar year. Employers with at least 25, but not more

than 99 employees, must provide employees one hour of paid leave for every 43 hours worked, up to five days per calendar year. Finally, employers with 24 or fewer employees must provide employees one hour of paid leave for every 87 hours worked, up to three days per calendar year.³⁴

The DC Law covers employees who spend more than 50% of their time working in the District of Columbia, regardless of employers' size or location.³⁵ Under the DC Law, employees' unused, accrued leave carries over from one calendar year to the next, with no cap.³⁶ The DC Law does, however, limit employees' usage of paid leave to the maximum number of hours that employees can accrue per calendar year.³⁷

C. Connecticut

The Connecticut Paid Sick Leave Law (the "Conn. Law"), which became effective on January 1, 2012, is currently the only statewide mandatory paid sick leave law. The Conn. Law mandates that employers with 50 or more employees in the state provide employees who are service workers³⁸ one hour of paid sick leave for every 40 hours worked, up to 40 hours per year.³⁹ Employees must work 680 hours in Connecticut during the calendar year to be eligible to use accrued leave.⁴⁰ Under the Conn. Law, employees' usage of leave and carryover of accrued, unused paid sick time from one calendar year to the next is capped at 40 hours per year.⁴¹

D. Seattle, WA

The next effective paid sick leave law was Seattle's Paid Sick and Safe Time Act (the "Seattle Law"), which became operative on September 1, 2012.⁴² Under the Seattle Law, employers with more than four and fewer than 250 employees must provide employees one hour of paid leave for every 40 hours worked.⁴³ Employers with more than 250 employees must provide employees one hour of paid leave for every 30 hours worked.⁴⁴ The Seattle Law covers employees who work at least 240 hours in Seattle in a calendar year for employers with five or more employees, regardless of the employers' location.⁴⁵

The Seattle Law does not limit employees' accrual of paid leave. Although employees are allowed to carry over their accrued, unused leave from one calendar year to the next, there is a carryover cap, which varies between 40 and 72 hours, depending upon the employer's size.⁴⁶ The Seattle Law also establishes usage caps, which generally match the accrual caps.⁴⁷ The Seattle Law also requires employers to give employees notification, either by paystub or online, of their available paid sick and safe leave each time wages are paid.⁴⁸

E. Portland, OR

In addition to the new legislation in the New York metropolitan area, Portland's Protected Sick Time Law is another new ordinance, becoming effective on January 1, 2014 (the "Portland Law").⁴⁹ Under the Portland Law,

employers with six or more employees must provide their employees one hour of paid sick leave for every 30 hours worked. Employers with five or fewer employees must provide their employees one hour of unpaid sick leave for every 30 hours worked.⁵⁰

The Portland Law covers employees who perform any work within Portland's city limits, regardless of the employer's location; however, employees are only eligible to begin using accrued leave when they have worked within Portland's city limits for at least 240 hours in a calendar year.⁵¹ The Portland Law establishes accrual, usage and carryover caps for employees, all of 40 hours per year.⁵²

IV. A Future Common Ground

As evidenced by the above, the frontrunners of paid sick leave activism have enacted patchwork, widely varied legislation which differs with respect to coverage, accrual, and usage. Notwithstanding these differences, this legislation, at baseline, evidences a common desire for employees to have access to paid sick leave, a desire that is echoed by the paid sick leave legislation current pending in roughly 20 states,⁵³ as well as the Healthy Families Act, which has recently received additional support.⁵⁴ The growing statewide push for paid sick leave legislation and renewed support for the Healthy Families Act arguably indicates a trend towards more widespread support for such laws, and corresponding turn away from preemption efforts.

Notwithstanding this apparent trend, it is unlikely the Healthy Families Act will be passed in 2014, opening the door for additional, piecemeal legislation at the city and state level, and perpetuating the employer headaches associated with the compliance obstacles of these laws. Moreover, even if federal legislation is passed in the future, it is doubtful that it will preempt existing state and city laws, but rather, like the federal and state WARN laws, it will just create yet another layer of regulatory compliance imposed on employers.

Endnotes

1. In May 2011, Senator Thomas Harkin and Representative Rosa DeLauro introduced the Healthy Families Act in the Senate and House of Representatives, respectively. S. 984, H.R. 1876 (112th Cong.). The Act would require that employees of employers with at least 15 employees accrue paid sick leave at the rate of one hour for every 30 hours worked, up to 56 hours per calendar year. The Act died in Committee, but was reintroduced in mid-March 2013. S. 631, H.R. 1286 (113th Cong.). After its re-introduction, the Act was referred to Committee, but to date, no official action has been taken, and the future of the Act in 2014 remains uncertain.
2. Fact Sheet, *Institute of Women's Policy Research* (March 2014), <http://www.iwpr.org/publications/recent-publications>.
3. H.F. 149 85th Iowa Leg. Sess. § 4.
4. A3894-2013, S2626-2013, 236th N.Y. Leg. Sess. § 173.
5. *Id.* Employees of employers with fewer than 10 employees are capped at 40 hours per year, whereas all other employees are capped at 80 hours per year.

6. Similar preemption laws are currently pending in three additional states—Michigan, Oklahoma, and Pennsylvania.
7. LA. REV. STAT. ANN. § 23:642.A.(3).
8. In 2008, the city of Milwaukee, WI enacted a mandatory paid sick leave law. *See* Milwaukee, Wis. Ordinance 080420 (Nov. 12, 2008). Despite withstanding the state government's initial efforts to block the law, *see Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 798 N.W.2d 287, 294 (Wis. Ct. App. 2011), a May 2011 state statute ultimately preempted the city law, thereby forcing city legislators to repeal its paid sick leave law. *See* Wis. STAT. ANN. § 103.10.
9. As discussed in further detail below, the majority of the paid sick leave legislation requires that employees have worked a set number of hours within the pertinent state or city in order to be eligible for paid sick leave.
10. For example, Seattle's Paid Sick and Safe Time Act requires employers to give employees notification, either by paystub or online, of their available paid sick and safe leave each time wages are paid. *See* SEATTLE MUNICIPAL CODE, § 14.16.030(K).
11. Jersey City currently has a paid sick leave ordinance in effect, and Newark enacted a paid sick leave ordinance earlier this year, which is expected to become effective in May or June 2014. *See infra* Sections 3.A. and 3.C. below for more details.
12. Jersey City, N.J., Ordinance 13.097 § 3-52.A.1-2; Newark, N.J. Ordinance 13-2010 § 1.3(1)-(3).
13. Newark, N.J. Ordinance 13-2010 § 1.3(1)-(3).
14. Jersey City, N.J., Ordinance 13.097 § 3-52.9.
15. *Id.* at § 3-52.A.1-2.
16. *Id.* at § 3-52.B.1-2.
17. *Id.* at § 3-50.
18. *Id.* at § 3-52.A.6 and B.6.
19. *Id.*
20. N.Y.C. Admin Code § 20-913.a.1. and § 20-913.b.
21. *Id.* at § 20-913.b. In addition, employers with one or more domestic workers who have worked for the employer for at least one year and work more than 80 hours a calendar year must provide their employees with up to two days of paid sick leave per calendar year. *Id.* at § 20-913.d.2.
22. *Id.* at § 20-912.f.
23. *Id.* at § 20-913.h.
24. *Id.*
25. Newark, N.J. Ordinance 13-2010 § 1.14.
26. *Id.* at § 1.3(1)-(3).
27. *Id.* at § 1.1(4).
28. *Id.* at § 1.3(7).
29. SAN FRANCISCO ADMINISTRATIVE CODE, § 12W, et seq.
30. City and County of San Francisco, Office of Labor Standards Enforcement, Rules Implementing the San Francisco Paid Sick Leave Ordinance, Rule 6.1-6.4.
31. S.F. ADMIN. CODE § 12W.3(c).
32. *Id.*
33. WASHINGTON D.C. ADMINISTRATIVE CODE § 32.131.01-32.131.17, as amended by District of Columbia Act 20-259. The amendment to the DC Law, effective February 22, 2014, added certain categories of employees who had previously been excluded from the DC Law's purview to now be included in the DC Law's protections.
34. *Id.* at § 32.131.02(a)(1)-(a)(3).
35. *Id.* at § 32.131.01(2)(A).
36. *Id.* at § 31.131.02(c)(2).
37. *Id.*
38. The Conn. Law specifically lists who is considered a service worker—those who fall within the listed occupation codes, as defined by the federal Bureau of Labor Statistics Standard Occupational Classification System. *See* CONN. GEN. STAT. § 31-57r(7).
39. *Id.* at § 31-57s(a).
40. *Id.* at § 31-57s(b).
41. *Id.* at § 31-57s(a).
42. SEATTLE MUNICIPAL CODE, § 14.16.010, et seq.
43. *Id.* at §§ 14.16.020(B)(1), 14.16.010(T).
44. *Id.* at §§ 14.16.020(B)(2), 14.16.010(T).
45. *Id.* at § 14.16.010(J).
46. Employers with more than four and fewer than 50 employees are referred to as "Tier One" employers. Employers with at least 50, but fewer than 250 employees, are referred to as "Tier Two" employers. Employers with 250 or more employees are referred to as "Tier Three" employers. *See id.* at § 14.16.010(T). Tier One employees are subject to a 40 hour carryover cap, Tier Two employees are subject to a 56-hour carryover cap, and Tier Three employees are subject to a 72-hour cap. *Id.* at § 14.16.020(G).
47. However, employees of Tier Three employers are subject to one of two usage caps: 1) where an employer maintains a sick and safe leave policy, which is separate from a vacation policy, employees can use up to 72 hours of paid sick and safe leave per calendar year; or ii) where an employer maintains a universal leave policy, employees can use up to 108 hours of paid leave per calendar year. *See id.* at §§ 14.16.020(C); 14.16.020(I).
48. *Id.* at § 14.16.030(K).
49. CODE OF THE CITY OF PORTLAND, § 9.01.010, et seq.
50. *Id.* at § 9.01.030(A)-(B).
51. Once an employee becomes eligible to use accrued leave, the employee remains eligible to accrue leave in subsequent years, regardless of the number of hours worked. *See id.* at § 9.01.040(A).
52. *Id.* at §§ 9.01.030 (F)-(G), 9.01.040(C)(3).
53. The paid sick leave laws currently in effect also have some significant substantive commonalities. For instance, all allow employers with a paid leave policy, such as PTO, equal to or more generous than the respective law's requirements to forgo offering additional leave to employees, provided that time can be used under the same conditions and for the same purposes. In addition, all permit an employer to require employees to provide advance notice of the use of paid sick leave, typically between seven and ten days, when the absence is foreseeable. If the absence is not foreseeable, the employees typically must provide notice of the leave "as soon as practicable." Furthermore, when an employee uses paid sick leave on more than three consecutive days, employers under all eight laws can require that the employee provide "reasonable documentation" that the sick time was used for a permissible purpose. "Reasonable documentation" includes, for example, a note from a health care professional indicating that paid sick time is necessary.
54. In the House, the Healthy Families Act has 126 co-sponsors, nine of whom just became co-sponsors in 2014. H.R. 1286 (113th Cong.).

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