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Management Alert

Implementing The Amendments To D.C.'s Accrued Sick And Safe Leave Act

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Significant amendments to D.C.'s Accrued Sick and Safe Leave Act of 2008 ("Act") are in effect now that the D.C. Council has approved its 2015 budget. The D.C. Department of Employment Services (DOES) has updated its "Official Notice" to reflect the changes brought about by the amendments. All D.C. employers must conspicuously post the "Official Notice," which is available *here* on the DOES website.

Background

The Act requires employers in the District to provide paid leave to employees for physical or mental illness, preventive medical care, family care, and certain absences associated with domestic violence or sexual abuse. The amount of leave that an employer is required to provide varies depending on its size:

- Employers with 100 or more employees must provide at least one hour of paid leave for every 37 hours worked; up to seven days per year.
- Employers with 25 to 99 employees must provide at least one hour of paid leave for every 43 hours worked, up to five days per year.
- Employers with 24 or fewer employees must provide at least one hour of paid leave for every 87 hours worked, up to three days per year.

While the amendments do not alter the amount of leave to which an employee is entitled under the Act, the Earned Sick and Safe Leave Amendment Act of 2013 does make significant changes to leave accrual, access and retention, strengthens the Act's anti-retaliation provisions, increases enforcement mechanisms and penalties, including a private right of action, creates new recordkeeping requirements, and extends its coverage to tipped and temporary employees. As such, employers should review and revise their paid leave policies as necessary to comply with these new leave requirements.

Reviewing And Revising Your Existing Policies And Procedures

1. Ensure That Leave Is Offered To All Covered Employees.

Coverage of the Act has now been expanded to include:

- Tipped Restaurant and Bar Employees: Tipped employees are now eligible to earn one (1) hour of paid leave for every 43 hours worked (regardless of the number of employees employed by employer), not to exceed five days per year. Leave is paid at the current D.C. minimum wage.

- Indirect Employees: The Act now covers employers that directly or indirectly employs or exercises control over the wages, hours, or working conditions of employment, including through use of temporary workers or a staffing agency.

Conversely, the Act now expressly excludes:

- Volunteers for educational, charitable, religious or nonprofit organizations.
- Certain elected or appointed officers of religious organizations.
- Casual babysitters.
- Independent contractors.
- Students.
- Health care workers who choose to participate in a premium pay program.

2. Ensure That Employees Accrue Leave Immediately Upon Their Employment And Can Access Leave After 90 Days of Employment.

New employees accrue leave immediately and may access leave after 90 days of service. Previously, employees had to be employed for one year and have worked at least 1000 hours during the 12-month period immediately preceding the request for leave to begin accruing and using leave.

For newly-covered tipped employees, the DOES "Official Notice" provides that bar and restaurant employee's accrual is retroactive to February 22, 2014. As such, tipped employees who have been employed more than 90 days since February 22, 2014, must be allowed to use paid leave in accordance with the Act.

3. Revisit Employee Retention of Leave

One of the biggest changes in the Act involves accessing leave upon reemployment. Specifically:

- Employees who are reemployed within 12 months now have immediate access to any leave to which they were entitled at the time of their termination.
- Employees who were not yet eligible to take leave when they terminated because they had not completed 90 days of service can continue the 90-day service period upon reemployment within 12 months.
- Employees who are reemployed after 12 months are treated as new employees for leave accrual and access purposes.
- Employee remaining with the same employer but who are transferred to a separate division, entity, or location within the District, or are transferred out of the District and then transferred back, shall be deemed continuously employed for leave accrual and access purposes.

Also:

- The "Official Notice" resolves confusion introduced by the Earned Sick and Safe Leave Amendment Act of 2013 when it omitted any reference to accrued leave carryover. While some interpreted this omission to mean that leave carryover is no longer required, the "Official Notice" makes clear that employers must still allow carryover of accrued but unused leave from year-to-year.
- But, employers do not have to pay out accrued but unused leave upon termination of employment. The amendments deleted the Act provision stating that accrued but unused leave is not paid out upon termination of employment, meaning that pay out upon termination should be addressed in your policy as necessary.
- Nor do employers have to allow carryover of more than an employee's annual leave entitlement, so long as this is clearly reflected in the employer's policy.

4. Modify Recordkeeping Procedures

Employers must now retain records documenting hours worked by employees and paid leave taken for a period of three

(3) years. Employers must also allow the Office of the District of Columbia Auditor access to such records to monitor compliance. If an issue arises as to an employee's entitlement to paid leave, then the failure to maintain or retain adequate records, or refusal to allow access to the records, creates a rebuttable presumption that the employer has violated the Act.

5. Review Disciplinary Practices And Procedures

The amendments greatly enhance the Act's anti-discrimination and anti-retaliation protections. Significantly, any adverse action taken by an employer within 90 days of an employee engaging in activity protected by the Act creates a rebuttable presumption that the employer violated the Act. In addition to using paid leave and opposing practices made unlawful by the Act, "protected activity" now includes:

- complaining to the employer;
- filing a complaint with the Department of Employment Services ("DOES");
- filing a civil complaint;
- informing any person about an alleged violation;
- cooperating with the DOES or another person's investigation or prosecution of an alleged violation; or
- informing any person of his or her rights under the Act.

The Act also now makes it unlawful to count covered sick and safe leave as an absence for purposes of discipline, discharge, demotion, suspension, or other adverse action.

Penalties For Noncompliance

These new protections are important given that the amended Act now provides employees with the right to pursue a private civil action, in addition to an administrative action through DOES. In both cases, the employer is liable for back pay, reinstatement, or other injunctive relief, compensatory or punitive damages (including at least $500 for every day an employee was improperly denied leave and required to work), plus attorneys' fees and costs.

Employers who willfully violate the Act would be subject to a civil penalty of $1,000 for the first offense, $1,500 for the second offense, and $2,000 for each subsequent offense. These penalties include willful violations of the notice-posting requirement, for which the civil penalty otherwise previously was set at $100 per day with a cap of $500.

Ensuring Compliance With The Amended Act

Employers should examine their current leave policies and take the necessary steps to bring them into compliance with the Act's new requirements. This will be particularly important given the Act's enhanced enforcement provisions. If you have any questions regarding the amended Act, please contact your Seyfarth Shaw attorney.

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