SEYFARTH SHAW

Management Alert

If Pain, Yes Gain—Part XXI: Saint Paul Passes Paid Sick Leave Ordinance

By Joshua D. Seidman, Anne R. Dana, and Tracy Billows

Seyfarth Synopsis: *On September 7, 2016 the Saint Paul, MN city council unanimously passed a mandatory paid sick leave ordinance — following the lead of Minneapolis, which passed a similar ordinance in May — becoming the second city in the state to do so.*

After months of debate, on September 7, 2016 the Saint Paul city council voted on and unanimously passed a mandatory paid sick and safe time ordinance — the second of its kind in the state.[1] As we previously reported, Minneapolis passed a similar ordinance in May of this year, and Duluth is currently exploring enacting its own ordinance. Upon passage of Saint Paul's law, the city's mayor, Chris Coleman, urged lawmakers to pass a statewide policy.

Saint Paul's Ordinance requires employers to provide earned safe and sick time for workers in Saint Paul and, similar to Minneapolis, is one of the most generous paid sick leave laws in the country. As discussed in greater detail below, some of the primary requirements imposed by the Ordinance include:

- Employers with one or more eligible employees must provide earned sick and safe time to their Saint Paul employees. Unlike the Sick and Safe Time Ordinance passed in Minneapolis, the Saint Paul Ordinance requires even "micro" businesses, i.e., those with fewer than six employees, to provide paid sick time benefits.
- Employers must comply with *both* "annual" and "point in time" earned sick and safe time accrual caps (48 hours and 80 hours respectively), and accrued but unused paid sick and safe time must carryover from one year to the next. However, the Ordinance explicitly includes a carve out for employers who provide covered employees with a lump sum grant of 48 hours in their first year of employment and 80 hours in each subsequent year.
- The law is silent on the amount of earned sick and safe time employees can use per year, meaning there appears to be no cap, unlike what many other paid sick leave laws include related to annual usage.
- Covered family members include "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

1 Saint Paul joins a growing list of states and municipalities that impose paid sick leave ("PSL") obligations on employers. The existing statewide PSL laws include: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; and (5) Vermont. For most covered employers, the Vermont law becomes effective on January 1, 2017. The existing municipal PSL laws include: (1) San Francisco, CA; (2) Washington, D.C.; (3) Seattle, WA; (4) Long Beach, CA; (5) SeaTac, WA; (6) New York City, NY; (7) Jersey City, NJ; (8) Newark, NJ; (9) Passaic, NJ; (10) East Orange, NJ; (11) Paterson, NJ; (12) Irvington, NJ; (13) Los Angeles, CA; (14) Oakland, CA; (15) Montclair, NJ; (16) Trenton, NJ; (17) Bloomfield, NJ; (18) Philadelphia, PA; (19) Tacoma, WA; (20) Emeryville, CA; (21) Montgomery County, MD; (22) Pittsburgh, PA; (23) Elizabeth, NJ; (24) New Brunswick, NJ; (25) Spokane, WA; (26) Santa Monica, CA; (27) Plainfield, NJ; (28) Minneapolis, MN; (29) San Diego, CA; and (30) Chicago, IL. The Los Angeles, CA law became effective on July 1, 2016. In addition, Los Angeles has a separate PSL law that adds further compliance obligations on certain "hotel employers." The Montgomery County, MD law becomes effective on October 1, 2016. The Spokane, WA and Santa Monica, CA laws become effective on January 1, 2017. The Long Beach, CA and SeaTac, WA ordinances only apply to hospitality and/or transportation employers. The Pittsburgh, PA ordinance was enacted on August 3, 2015, however, in December 2015 the law was deemed "invalid and unenforceable" by a Pennsylvania state court (city's appeal is pending).

- *Upon employee request*, employers must provide employees with information containing the employee's then-current amount of accrued and used earned sick and safe time.

For employers with 24 or more employees, the paid sick and safe time ordinance (the "Ordinance") is scheduled to become effective on July 1, 2017 (the same day as the Minneapolis law). For smaller employers, the Ordinance is effective January 1, 2018.[2] The Department of Human Rights and Equal Economic Opportunity (the "Department") will enforce the Ordinance and is responsible for issuing appropriate guidelines and regulations that will further explain employers' sick leave responsibilities.

Which Employers Are Covered Under the Ordinance?

The Ordinance defines "employer" as "a person who has one or more employees." The term includes an individual, corporation, partnership, association, nonprofit, or group of persons. However, it specifically excludes the U.S. government, the State of Minnesota, and any county or local government except the City of Saint Paul.

As noted above, the Ordinance does not differentiate between employers based on size, whereas Minneapolis allows businesses with fewer than six employees to provide *unpaid* sick time. Also unlike Minneapolis, under Saint Paul's Ordinance, until January 1, 2023, employers operating in their first six months after hiring their first employee are only required to provide *unpaid* sick and safe time. After six months, new employers will be subject to the full Ordinance. By contrast, the Minneapolis law allows most new Minneapolis employers a 12-month reprieve from providing paid sick time.

The Ordinance expressly states that employers who afford their employees sick and safe time under either a paid time off or a combination of sick and vacation time, and that meets or exceeds the Ordinance's minimum standards and requirements, are *not* required to provide additional sick and safe time. Practically, this means the policy or policies need to meet the substantive, technical requirements of the Ordinance, not just the amount of accrued time.

Which Employees Are Covered by the Ordinance?

The Ordinance defines "employee" broadly. Specifically, the Ordinance covers any individual employed by an employer, including part-time and temporary employees, who perform work within the geographic boundaries of Saint Paul for at least 80 hours in a year for that employer. The Ordinance does not cover independent contractors.

How Much Sick Time Can Employees Accrue, Use, and Carryover?

Employees begin earning sick and safe time at the commencement of employment or on July 1, 2017, whichever is later. The Ordinance notes that new hires are entitled to use accrued sick and safe time 90 calendar days after the commencement of their employment (after which, employees may use the time as it accrues). However, the Saint Paul law is silent on whether this 90-day usage waiting period applies to employees who work for the employer on July 1, 2017.

Employers must allow eligible employees to accrue earned sick and safe time at least as fast as one hour of paid sick and safe time for every 30 hours worked, up to a maximum of 48 hours per calendar or fiscal year (neither term is defined under the Ordinance). The Ordinance also sets an 80 hour "point in time" cap, meaning that employers are only required to allow employees' bank of accrued, unused paid sick and safe time to reach 80 hours at any one time. The Ordinance states that accrued, unused said sick and safe time will carryover from one year to the next, but is limited to these caps. In addition, the Ordinance allows employers to limit employees' use of earned sick and safe time to increments consistent with current payroll practices, as long as such increments do not exceed four (4) hours.

2 This is different than the Minneapolis law, which will not begin full enforcement immediately, but rather the enforcing agency for Minneapolis will only issue warnings and notices to correct to companies that incur first violations through June 30, 2018.

Importantly, just like Minneapolis, the Saint Paul ordinance *is silent* on whether there is an annual cap on how much earned sick and safe time employees can ultimately use in a single year. Assuming no further clarification is provided on this issue, it is possible that an employee *could use up to 128 hours of earned sick and safe time in a single year*, thereby making the Minneapolis and Saint Paul ordinances two of the most pro-employee paid sick leave laws in the country and imposing a significant burden on covered employers.[3]

As noted above, one major difference between the Saint Paul and Minneapolis laws can be seen in the topic of frontloading. While Minneapolis is currently silent on lump sum grants, Saint Paul's ordinance *explicitly allows* employers to provide a lump sum grant of at least 48 hours of earned sick and safe time following the initial 90 days of employment for use during the first year, and provide a lump sum grant of at least 80 hours of earned sick and safe time beginning each subsequent year. Frontloading earned sick and safe time excuses employers' year-end carryover obligations and thus is one way for employers to avoid the possibility of an employee using up to 128 hours of earned sick and safe time in a single year. Despite this advantage, the Ordinance's 80-hour lump grant requirement may deter many employers from adopting a frontloading system.

Under What Circumstances May Employees Use Sick Leave?

An employee may use earned sick and safe time for any of the following reasons:

- The employee's or a covered family member's mental or physical illness, injury or health condition, need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition, or preventive medical care;
- Certain absences of the employee or the employee's family member due to domestic abuse, sexual assault, or stalking;
- Closure of the employee's place of business or a family member's school or place of care by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public health emergency; and
- Closure of a family member's school or place of care due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure.

The Ordinance defines "family member" such that employees may use earned sick and safe time for their child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, or registered domestic partner. Furthermore, and a significant deviation from Minneapolis, the Ordinance allows employees to also use earned sick and safe time for any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

What is the Rate of Pay for Sick Leave?

Employers must compensate an employee who uses earned sick and safe time at the same hourly rate as the employee earns from employment, limited to hours that the employee is scheduled to have worked. Employers do not have to compensate employees for lost tips or commissions.

What Notice Must Employees Provide When Using a Sick Day?

The Ordinance is silent on the notice requirement for foreseeable and unforeseeable absences, and instead simply states that earned sick and safe time shall be provided upon employee request and that "[a]n employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for absences or for requesting leave, provided that such requirements do not interfere with the purposes for which the leave is needed." The law does state that when possible, a request to use earned sick and safe time shall include the expected duration of the absence.

3 Refer to our article summarizing the Minneapolis ordinance for an illustrative example of the 128-hour paid sick leave possibility.

Can Employers Require Employees to Provide a Medical or Other Documentation?

Employers can require reasonable documentation that the employee used earned sick and safe time for a permitted purpose only when the employee is absent for more than three consecutive days. The Ordinance does not explain what it considers to be "reasonable documentation."

What Notice Must Employers Provide?

Employers must provide notice to covered employees that includes: (i) the fact they are entitled to earned sick and safe time; (ii) the amount of earned sick and safe time and the terms of its use; (iii) that retaliation is prohibited; and (iv) that employees have the right to file a complaint or bring a civil action if earned sick and safe time is denied by the employer or the employee is retaliated against for requesting or taking earned sick and safe time.

The Department will issue a poster and model notice in the coming months. One compliance option for employers is to display the poster in a conspicuous place at any workplace or job site. The poster shall be in English and any other languages the Department determines are needed to notify employees of their rights. Employers who provide an employee handbook to their employees must include notice of employee rights and remedies in the handbook.

Further, upon request of the employee, the employer must provide in writing or electronically, the employee's then current amount of: (1) earned sick and safe time available to the employee; and (2) used earned sick and safe time. Employers may choose a reasonable system for providing this notification.

What Records Must Employers Maintain?

The Ordinance requires that employers maintain accurate records for each employee showing accrued and used earned sick and safe time for a period of at least three years.

What Can Employers Do and Not Do?

Employers cannot: (a) interfere with, restrain, or deny the exercise of, or the attempted exercise of, any right protected under the Ordinance, nor take any adverse employment action or discriminate against an employee because the employee has exercised in good faith the rights protected under the Ordinance; (b) fail to maintain the confidentiality of health or medical information regarding an employee or an employee's family member or information pertaining to domestic abuse, sexual assault, or stalking of an employee or an employee's family member; and (c) require, as a condition of an employee using earned sick and safe time, that the employee seek or find a replacement worker.

Must Unused Sick Time Be Paid Upon Employment Separation?

Employers are not obligated to cash out an employee's accrued, unused earned sick and safe time upon separation of employment. However, any accrued, unused earned sick and safe time must be restored to an employee who is rehired within 90 days of separation from employment.

What Should Employers Do Now?

Saint Paul employers should take steps now to ensure that they will be able to achieve full compliance with the Ordinance by the law's July 1, 2017 effective date. These are among the actions to consider:

- Review sick days, sick leave or paid time off ("PTO") policies and procedures immediately to ensure that they meet at least the minimum requirements of the Ordinance no later than the July 1, 2017 effective date. Employers will need to make sure the policy complies not only with the amount of time to be provided to employees but also with usage requirements, increments of use, carryover, etc.
- Develop a new Saint Paul paid sick leave policy that complies with the Ordinance for any employees who are not covered under existing paid sick leave or PTO policies.
- Review and, as necessary, revise anti-retaliation, attendance, conduct, and discipline policies to prevent retaliation against employees for taking time off under the Ordinance.
- Prepare to comply with the Ordinance's posting and notification requirements.
- Monitor the Department's website for template notices and other guidance and updates on the Ordinance.
- Train supervisory and managerial employees, as well as HR, on the Ordinance's requirements.

With the paid sick leave landscape continuing to expand and grow in complexity, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this law and sick leave requirements generally.

If you would like further information, please contact your Seyfarth attorney, Joshua D. Seidman at jseidman@seyfarth.com, Anne R. Dana at adana@seyfarth.com, or Tracy Billows at tbillows@seyfarth.com.