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San Francisco's Paid Sick Leave Ordinance

On November 7, 2006, San Francisco voters passed local Proposition F, approving the nation's first Paid Sick Leave Ordinance. Barring any adverse legal action, Proposition F will become law on February 5, 2007. Under the Paid Sick Leave Ordinance, employers will be required to provide all San Francisco employees paid sick leave for absences due to the employee's own illness, a family member's illness, or a "designated person's" illness. Because the sick leave ordinance is intended to provide minimum requirements for paid sick leave, many employers with more generous leave policies will be largely unaffected by the new law. However, each employer should review its policy for full compliance in order to avoid possible liability.¹

Who is Covered?

The Ordinance covers any employee who is employed within the geographic boundaries of the City and County of San Francisco, including part-time and temporary employees. The Ordinance also covers participants in the Welfare-to-Work Program when the participant is engaged in work activity that would be considered "employment" under the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and any applicable U.S. Department of Labor Guidelines.²

An employer is any person or entity (including corporate officers or executives) who directly or indirectly employs or controls the wages, hours or working conditions of an employee. Employers also include any person or entity who uses a staffing agency, temporary staffing agency or other similar entity to employ an employee as defined above.

Under the ordinance, employers who have fewer than ten people work for compensation during a given week are considered a "small business." Because the definition of a small business counts only those employees who "work for compensation" volunteers do not need to be included in the count, unless the volunteer receives monetary or non-monetary compensation.

How it Works

Under San Francisco's Paid Sick Leave Ordinance, an employee will accrue one hour of paid sick leave for every 30 hours worked. Paid leave will only accrue in full hour increments and will not accrue for a fraction of an hour. Employees of small businesses will not accrue more than 40 hours of paid sick leave. Employees of all other businesses will not accrue more than 72 hours of paid sick leave. Once an employee falls below the "cap," he or she will be eligible to begin accruing sick leave up to the cap.

1. The full text of the ordinance can be found in the Administrative Code, Chapter 12W.
2. The Welfare-to-Work program also specifically includes any public assistance program administered by the Human Services Agency, including the CalWORKS and the County Adult Assistance Program and any successor programs that are substantially similar to them, that require a public assistance applicant or recipient to work in exchange for his or her grant.

Paid sick leave will be rolled-over from year to year, subject to the cap. Unused sick leave does not need to be paid out upon the employee's termination, but in the event an employer co-mingles sick leave with other forms of leave, it may need to be paid out (see discussion below).

Paid sick leave may be used for the employee's own illness, injury, medical care, treatment or diagnosis. Paid sick leave may also be used for the illness, injury, medical care, treatment or diagnosis of any child, parent, legal guardian or ward, sibling, grandparent, grandchild, spouse, or registered domestic partner under any state or local law. The relationship may be biological, legal, foster, adoptive or step-relationship.

An employee who has no spouse or registered domestic partner may designate one person as to whom the employee may use paid sick leave to aid or care for that person. An employer must make an offer to the employee to designate such a person within the first 30 hours an employee works after he or she is eligible to begin accruing paid sick leave. Once the offer is extended to designate a person, the employee will have 10 work days in which to designate a person. Thereafter, an employer is required to give an employee an opportunity to designate a person or change a designation on an annual basis. Upon notification of the opportunity, the employee will have 10 work days in which to make or change a designation.

An employer is specifically prohibited from requiring an employee to find a replacement to cover the un-worked hours as a condition of an employee's taking paid sick leave. However, an employer may require employees to give reasonable notification of an absence and may take reasonable measures to verify or document that an employee's use of paid sick leave is lawful.

Employers are also prohibited from retaliating against an employee who uses paid sick leave or who files a complaint with the Agency for a violation of the ordinance. Retaliation includes any action that results in discipline, discharge, demotion, suspension or any other adverse action. Interfering with, restraining or threatening the rights of any employee under the ordinance will also be a violation of the ordinance.

Pre-Existing Plans

If an employer already has an existing paid sick leave plan, including a paid time off plan such as a PTO bank, the employer does not need to change the plan, as long as it is at least as generous as the terms offered under the ordinance. However, if your plan mixes vacation time with sick leave or

any other leave, you may not be able to take advantage of the ordinance's provision which allows an employer not to pay out unused sick leave. In addition, the ordinance is not clear as to whether or not an employer is required to give additional sick leave if an employee has used his or her entire PTO bank for vacation time, although a reasonable reading of the ordinance indicates that additional paid sick leave would not be required. However, if you have concerns regarding whether or not your current sick leave or PTO plan is compliant with the ordinance, you should consult an attorney.

Collective Bargaining Agreements

A bona fide collective bargaining agreement that expressly waives the ordinance, or any provision of the ordinance, will be considered a valid waiver of the provision for covered employees. However, the waiver must be clear and unambiguous.

When will it go into Effect?

Right now, the ordinance will be effective beginning February 5, 2007. Employees who are hired on or before February 5, 2007, will be eligible to begin accruing paid sick leave immediately. Employees hired after February 5, 2007, will begin accruing paid sick leave after they have been employed for 90 calendar days.

Posting and Record-Keeping Requirements

No later than February 5, 2007, the Office of Labor Standards Enforcement (the "Agency") will publish or make available a notice of the paid sick leave ordinance in every language spoken by more than five percent of the San Francisco workforce. Every December 1 thereafter, the Agency will update the notice if there has been a change in the languages spoken by the San Francisco workforce. Employers are required to post the notice in all languages provided in a conspicuous place at any workplace or job site where any employee works.

Employers are required to retain records documenting hours worked by employees and paid sick leave used by employees for at least four years. Failure to keep adequate records or refusal to allow access to such records or to otherwise cooperate with the Agency regarding paid sick days is a violation of the ordinance, punishable by the same remedies listed below.

Violations

Employers who violate San Francisco's Paid Sick Leave Ordinance may be ordered to reinstate an employee who has

been terminated as retaliation for exercising his or her rights under the ordinance, reimburse the employee for back pay (if applicable) and any sick leave unlawfully withheld and pay a penalty to each employee or person whose rights were violated under the ordinance.

If paid sick leave was unlawfully withheld, an employer will pay the employee an administrative penalty equal to the greater of three times the amount of paid sick leave withheld or multiplied by \$250. If the violation resulted in harm to the employee or any other person, including retaliation, termination or failure to post the requisite notice, a daily penalty of \$50 to each employee or person whose rights were violated for each day the violation occurred or continued.

The Agency can also initiate a civil action against an employer who fails to promptly comply with ordinance or who fails to pay a penalty. Continued failure to comply may then result in the suspension or revocation of registration certificates, permits and licenses held or requested by the employer until the violation is remedied. In addition, the employer may be assessed another \$50 per day for each employee or person to whom the violation occurred or is continued.

If you have any questions on whether or not your current leave plan comports with San Francisco's Paid Sick Leave Ordinance or if you have any other questions on this topic please contact any one of the attorneys listed below.

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