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San Francisco employers must provide paid sick leave beginning in February 2007

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On November 7, 2006, when voters passed Proposition F, San Francisco became the first city in the nation to require companies to provide paid sick leave to their employees.

Virtually all employees (including part-time and temporary employees) who work in the City and County of San Francisco are eligible for paid sick leave. The new law defines “employer” broadly to include any person, association, organization, partnership, business trust, limited liability company, or corporation, “including corporate officers or executives, who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of an employee.”¹ Employers who do not currently provide any paid sick leave will now be required to do so.

The law takes effect 90 days after the November 7, 2006 election. Therefore, paid sick leave shall begin to accrue beginning February 5, 2007.

Every company with employees in San Francisco – even those companies that already provide sick leave to their employees – will likely be affected by this new law. For example, the accrual rates for the new law’s mandatory paid sick leave may be higher than many San Francisco employers currently provide. For every 30 hours an employee works after February 5, 2007, the employee must accrue one hour of paid sick leave. A full-time employee working 2,080 hours per year would accrue 69 hours, or about 8 1/2 days of paid sick leave a year. The law recognizes only full-hour accruals.



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¹ Proposition F, San Francisco Admin. Code, Section 12W.2(d).

For businesses with fewer than 10 persons working in a given week the law establishes a cap of 40 hours of accrued paid sick leave. For businesses with 10 or more employees, the cap is 72 hours. Accrued, but unused, paid sick leave carries over from year to year (subject to the accrual caps). Unlike vacation pay, however, an employee forfeits entitlement to payment for accrued, but unused, paid sick leave upon termination of employment.

Employees will be able to use their paid sick leave for a wide range of absences, including absences due to (1) an employee's physical or mental inability to perform his or her duties due to illness, injury, or a medical condition; (2) an employee obtaining professional diagnosis or treatment for the employee's medical condition; (3) other medical reasons of the employee, such as pregnancy or obtaining a physical examination; (4) an employee providing care or assistance to "other persons" with an illness, injury, medical condition, need for medical diagnosis or treatment, or other medical reason.

The "other persons" for whom an employee may use accrued sick leave include a child, parent, legal guardian or ward, sibling, grandparent, grandchild, spouse, registered domestic partner under any state or local law, or "designated person." Employees who do not have a spouse or registered domestic partner may designate any person; the open-ended term "designated person" could apply to virtually anyone the employee selects. Co-workers could mutually designate each other. The employee must be given a period of 10 days each year to designate a person or change a designation.

Under the new law, an employer may require employees to give "reasonable notification" of an absence from work for which paid sick leave is or will be used. In addition, an employer "may only take reasonable measures to verify or document that an employee's use of paid sick leave is lawful." The law does not define "reasonable notification" or "reasonable measures." Employers cannot require employees to provide a replacement for hours taken as paid sick leave.

The new law does not apply to employees covered by a collective bargaining agreement "to the extent that such requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms."

The new law provides for administrative enforcement and enforcement through private civil actions by any aggrieved person. There is no requirement that employees exhaust their administrative remedies. A prevailing plaintiff in a civil action is "entitled to such legal or equitable relief as may be appropriate to remedy the violation." This includes (1) reinstatement; (2) back pay; (3) payment of sick leave unlawfully withheld from an employee multiplied by three, or \$250, whichever is greater; (4) injunctive relief; and (5) attorney's fees and costs.

Employees have broad protection against employer retaliation for exercising their rights under this new law. Three points are noteworthy in this respect: (1) employers may not use a paid sick leave absence against an employee in enforcing an absence control policy, if that absence would lead, under the policy, to "discipline, discharge, demotion, suspension, or any other adverse action"; (2) activity protected from retaliation includes an employee's good-faith, but mistaken, allegation that the employer has violated the paid sick leave law; and (3) any adverse action taken within 90 days against an employee who exercises rights under the new law is presumed to be retaliatory, though the presumption is rebuttable by the employer.

What should employers with employees in San Francisco do now?

- Employers should examine their current sick leave accrual policies to determine whether their policies permit employees to accrue enough sick leave to comply with the law.
- Employers should also review their policies to ensure that employees are permitted to carry over that portion of accrued sick leave required by the new law.
- Employers should examine their current sick leave policies to determine whether they permit the use of sick leave for all of the reasons the San Francisco law permits.
- Policies that contain waiting periods for new employees before sick leave can be used must be revised to permit the use of paid sick leave as soon as it accrues.
- Employers should designate a 10-day period before February 5, 2007, and at a designated time each year (perhaps during open enrollment) for those employees who do not have a spouse or registered domestic partner to identify a “designated person” for whom they wish to use their sick leave.
- Employers with collective bargaining agreements should consider amending such agreements to clearly and unambiguously waive any entitlements provided by the new law.
- Employers with absence control policies should revise those policies to exclude absences covered by the new law.
- Employers must retain records documenting hours worked by employees and paid sick leave taken by employees for four years. The Office of Labor Standards Enforcement may seek access to employer records to monitor compliance with the new law. Compliance with this record-keeping requirement is onerous but absolutely critical. The failure to maintain or retain adequate records documenting hours worked and paid sick leave taken by the employee raises the presumption that the employer has violated the paid sick leave law. The presumption can only be rebutted by clear and convincing contrary evidence.
- Employers are required to post a notice “in a conspicuous place” at work informing employees of their rights under the paid sick leave law. The notice must be in English, Spanish, Chinese, and any language spoken by at least 5 percent of the employees at the workplace or job site. The Office of Labor Standards Enforcement will publish a notice in multiple languages suitable for this purpose by February 5, 2007.

For more information on this issue or other employment law matters, please contact Marjorie Fochtman (at 415-984-8443 or mfochtman@nixonpeabody.com) or Joshua Henderson (at 415-984-8395 or jhenderson@nixonpeabody.com) or your Nixon Peabody attorney.

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