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New San Francisco Law Mandates Paid Sick Leave for Illnesses of Employees and Family Members

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On November 7, the voters of San Francisco adopted Proposition F, apparently the first law in the United States to require that employers in the private sector provide their employees with paid sick leave for absences due to the sickness of employees or their extended family members. This new law, entitled the "Sick Leave Ordinance," will impose significant new obligations on all employers who have employees within the boundaries of the City and County of San Francisco, not just those employers who have contracts with the City.

THE KEY SICK LEAVE REQUIREMENTS

Under the Ordinance, employers must provide employees with one hour of paid "kin care" sick leave for every 30 hours they work, up to a cap of 72 hours (the equivalent of 9 eight-hour days). Paid sick leave will accrue only in one-hour increments, not fractions of an hour. Unused sick leave will carry over from year to year, subject to the 72-hour cap. Newly hired employees must wait 90 days before beginning to accrue sick leave benefits.

Employees of small businesses can accrue only 40 hours of sick leave before reaching the cap. "Small business" means an employer with fewer than 10 employees during a given week, counting full-time, part-time, and temporary employees, and including those hired through a temporary services or staffing agency. The Ordinance does not specify whether this means fewer than 10 employees working in San Francisco or fewer than 10 employees employed anywhere.

EFFECTIVE DATE

The Sick Leave Ordinance is scheduled to take effect on February 5, 2007, 90 days after the November 7 election. It will have prospective effect only. Sick leave accrual for existing employees will begin immediately as of February 5, 2007. Employees hired after that date will begin accruing benefits 90 days after their hire date.

EMPLOYERS AND EMPLOYEES COVERED

The Ordinance broadly defines a covered "employer" as any "person," including corporate officers or executives, who directly or indirectly, or through an agent or other person (including a temporary services or staffing agency), employs or exercises control over the wages, hours, or working conditions of an employee. Thus, the Ordinance purports to impose liability against individual officers and executives, not only against corporate entities.

"Employee" means any person who is employed within the geographic boundaries of the City by an employer, including part-time and temporary employees and participants in welfare-to-work programs. There is no minimum number of hours that an employee must work in a week to be deemed an "employee" under the Ordinance.

FAMILY MEMBERS COVERED

Employees may use paid sick leave not only when employees themselves are ill or injured, but also to "aid or care for" a sick child, parent, spouse, sibling, grandparent, grandchild, registered domestic partner, legal guardian, or ward. This includes not only biological family members, but also family relationships resulting from adoption, step-relationships, and foster care relationships. "Child" includes a child of a domestic partner and a child of a person standing *in loco parentis*. Employees may use all or any portion of their accrued sick leave to care for these family members.

Moreover, employees who do not have a spouse or registered domestic partner may designate one other person on whose behalf they may use paid sick leave to provide care. Employers must give employees a 10-day window period once they become eligible for benefits, and annually thereafter, to make this designation. This alone imposes a burdensome new administrative and tracking requirement on employers.

DEFINITION OF "PAID SICK LEAVE"

The Ordinance adopts the definition of "sick leave" contained in the California kin care statute, Labor Code section 233(b). That law defines sick leave as accrued increments of compensated leave for employee absences (1) because the employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition; (2) to obtain professional diagnosis or treatment for a medical condition; or (3) for other medical reasons, such as pregnancy or obtaining a physical examination. However, the Sick Leave Ordinance extends this definition beyond the employee's own medical condition to encompass time taken off work to provide care or assistance to family members and other designated persons, as identified above, who have an illness, injury, medical condition, need for medical diagnosis or treatment, or other "medical reason."

VERIFICATION OF SICKNESS

The Ordinance states that an employer may "only take reasonable measures to verify or document that an employee's use of paid sick leave is lawful." The Ordinance does not define "reasonable measures." Presumably, it will not be feasible or lawful to require doctor's notes for every absence related to a family member illness, as such illnesses need not be "serious health conditions" of a type necessitating inpatient or outpatient medical treatment.

REASONABLE NOTICE OF ABSENCES

Employers may require employees to give "reasonable notification" of an absence from work for which paid sick leave is or will be used. Because many illnesses are sudden and unscheduled, however, it is unclear how this provision will benefit employers in practice. An employer may not require employees, as a condition of taking paid sick leave, to search for or find a replacement worker to cover the days or hours that they will be absent.

EMPLOYERS' ATTENDANCE CONTROL POLICIES

It will now be unlawful for an employer, in its absence control policy, to count paid sick leave taken under the Ordinance as an absence that may lead to discipline, discharge, demotion, suspension, or any other adverse action. Thus, in warning or disciplining employees for excessive absences, employers must not take into consideration any such absences.

RELATIONSHIP WITH EXISTING SICK LEAVE OR PTO POLICIES

If an employer already has a paid time off policy that makes available an amount of paid sick leave sufficient to meet the requirements of the Ordinance, the employer is not required to provide additional paid sick leave. However, most existing sick leave policies do not extend to as many family members and other non-family designees as the Ordinance covers. Consequently, it is likely that most employers will need to revise their policies to some degree for their employees in San Francisco.

NO PAYMENT ON TERMINATION

An employer is not required to pay out any unused sick leave at time of termination or resignation.

COLLECTIVE BARGAINING EXEMPTION

The Ordinance does not apply to employees who are covered by a collective bargaining agreement to the extent that the Ordinance's requirements are "expressly waived" in the CBA in "clear and unambiguous terms." However, it is doubtful that many existing CBAs, if any, already contain such express waivers, and it is not likely that unions will grant waivers to employers in the future.

POSTING REQUIREMENT

By the Ordinance's effective date, the San Francisco Office of Labor Standards Enforcement ("OLSE") will publish and make available a Notice describing its requirements for posting on employer bulletin boards. The OLSE will publish the notice in English and all other languages that more than 5% of San Francisco's workers speak. Employers must post the Notice in a conspicuous place at any site where employees work "in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace or job site." Read literally, this could mean that all employers must post notices in Spanish and

Chinese, even if they have no Spanish or Chinese-speaking employees. Alternatively, it may mean that employers must post notices in non-English languages only when more than 5% of their employees speak those languages. The OLSE will need to clarify this provision. The OLSE may assess an administrative penalty of $50 per day for each day that an employer violates the posting requirement.

RECORD RETENTION REQUIREMENTS

Employers must maintain records of the hours worked by employees, and the paid sick leave taken, for a period of four years. Significantly, because the Ordinance protects exempt as well as non-exempt employees, this recordkeeping provision may require employers to track the hours of exempt employees, something that employers are not otherwise required to do under state or federal wage-hour laws. This requirement could significantly change many employers' existing recordkeeping practices.

Employers also must make their records available to the OLSE upon request for compliance-monitoring purposes. If an employer does not have the required records and a dispute arises over the employer's compliance, the law will "presume" that the employer has violated the Ordinance in the absence of clear and convincing evidence to the contrary.

PROHIBITION AGAINST DISCRIMINATION AND RETALIATION

The Ordinance contains extensive anti-discrimination and anti-retaliation provisions. It will be unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of any right protected under the Ordinance. It will be unlawful for an employer or any other person to discharge, in any manner discriminate, or take adverse action against any person in retaliation for exercising rights protected under the Ordinance, including the right to use paid sick leave or to make a complaint about an alleged violation of the Ordinance. Discipline that an employer administers soon after an employee has taken a paid sick day, even if based on unrelated reasons, may be challenged as retaliation due to the proximate timing. As already mentioned, it also will be unlawful for an employer to maintain an attendance policy that counts paid sick leave taken under the Ordinance as an occurrence of absence that may result in discipline.

Moreover, if an employer takes adverse action against an employee within 90 days after an employee files a court or agency complaint alleging a violation of the Ordinance, cooperates in an investigation of an alleged violation, or "opposes any policy, practice, or act that is unlawful" under the Ordinance, this will raise a "rebuttable presumption" that the adverse action was taken for a retaliatory reason in violation of the Ordinance.

ENFORCEMENT PROVISIONS

The Ordinance contains an extensive scheme of remedies, penalties and enforcement mechanisms. The OLSE may conduct investigations and hold hearings on alleged violations of the Ordinance, and award appropriate remedial relief, including but not limited to reinstatement, back pay, the payment of any sick leave unlawfully withheld, and the payment of administrative penalties. The agency also may initiate a civil action seeking to have City agencies or departments revoke or suspend any registration certificates, permits or licenses that the employer holds until the violation is remedied. The OLSE or City Attorney, or any aggrieved employee, may bring a civil action in state court against the employer or other "person," seeking legal or injunctive relief, liquidated damages, interest, and attorneys' fees. As mentioned, it appears that these remedies may be sought against individual defendants as well as corporate entities.

In an administrative proceeding, the OLSE may award triple damages for any sick leave unlawfully withheld, or $250, whichever amount is greater, as part of an "administrative penalty." The administrative penalty also may include $50 to each employee whose rights were violated for each day that the violation occurred or continued. Likewise, in a license revocation action, the OLSE may seek an award against the "violating employer or person" of $50 for each day the violation occurred or continued, to offset the costs of implementing and enforcing the Ordinance.

Finally, in a court enforcement action, whether brought by the City or by private parties, the plaintiff may seek "liquidated damages" in the amount of $50 to each employee whose rights were violated "for each hour or portion thereof that the violation occurred or continued," the dollar amount of paid sick leave wrongfully withheld multiplied by three, or $250, whichever amount is greater. This is in addition to all

other available remedies, such as reinstatement, back pay, injunctive relief, attorneys' fees and costs.

COMPARISON TO STATE'S "KIN CARE" LAW

The California Labor Code already requires employers to provide paid sick leave for family member illnesses in certain limited circumstances. Labor Code section 233. However, the new Sick Leave Ordinance is broader than Section 233 in several key respects. Section 233 does not require an employer to provide sick leave at all; it merely requires those who already have an accrued sick leave policy covering employee illnesses to make a portion of that existing sick leave benefit – six months' entitlement – available for family member illnesses. By contrast, the Sick Leave Ordinance mandates that all employers provide paid sick leave, and it allows employees to use their full statutory allotment of paid sick days, not just one-half of those days, for family member illnesses. "Family members" under Section 233 include only spouses, parents, children and domestic partners, while the Sick Leave Ordinance encompasses many more family members, relatives, and other "designated persons," as listed above.

RELATIONSHIP TO OTHER FAMILY CARE LEAVE LAWS

There also is some overlap between the Sick Leave Ordinance and California's Paid Family Leave ("PFL") law, as well as the federal Family and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA"). The PFL law gives employees the right to take up to six weeks of paid time off, funded by the State through payroll contributions, to care for a child, spouse, parent, or registered domestic partner who has a serious health condition. The FMLA and CFRA allow eligible employees to take unpaid time off to care for certain family members who have serious health conditions. Thus, for example, if an employee in San Francisco wishes to take 9 days off work to care for an ill parent, the employee could qualify for protection under all four laws: the Sick Leave Ordinance, the PFL law, the FMLA, and the CFRA. Under the PFL law, an employer may require employees to use their accrued vacation pay during the one-week waiting period leading up to the receipt of PFL benefits. Under the FMLA and CFRA, employers likewise may require employees to use their accrued vacation time for qualifying family care absences. The Sick Leave Ordinance, however, appears to disallow this and to require instead that employees be able to use the Ordinance's sick leave benefits before drawing down their vacation time. Reconciling the Sick Leave Ordinance with these other state and federal laws is one of the many interpretive challenges that employers face.

CONCLUSION

Proposition F is the latest manifestation of the recent trend of local governments imposing their own employment laws and regulations on employers, thus requiring that employers administer a myriad of different personnel policies and procedures, not only for the different states in which they operate, but also in the different cities and counties within each state. The San Francisco Sick Leave Ordinance is complex and burdensome. Moreover, the Ordinance is fraught with ambiguities and unanswered questions.

All companies that employ employees in the City and County of San Francisco should begin preparing for the February 5 deadline. Affected employers should revise their sick leave and attendance policies as necessary, train their managers on compliance, and take steps to satisfy the Ordinance's posting and recordkeeping requirements.

If you have any questions, please do not hesitate to contact any of the following attorneys from our San Francisco office:

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