

LABOR & EMPLOYMENT  
UPDATEDECEMBER  
2006*JUST WHAT THE DOCTOR ORDERED?*  
SAN FRANCISCO'S NEW MANDATORY  
PAID SICK LEAVE

Effective February 5, 2007, a new law requires all San Francisco employers to give their employees, even part-time and temporary employees, paid sick leave. The Sick Leave Ordinance is the first of its kind in the United States; no other law requires employers to provide paid sick leave.

The ordinance will affect nearly 25 percent of San Francisco's private-sector workforce. Labor costs are estimated to increase by 3.3 percent for employers who currently do not provide paid sick leave or vacation days. The ordinance will have particular impact on restaurants and those who employ workers in labor-intensive, low-margin operations.

**HOW MUCH PAID SICK LEAVE MUST EMPLOYERS PROVIDE?**

For every 30 hours that an employee works, the employee will accrue one hour of paid sick leave. Paid leave, however, will only accrue in full-hour increments. For example, if an employee works 15 hours, he or she will not accrue half-an-hour of paid leave.

The ordinance treats employers differently based on the number of employees they have. If the employer has

fewer than 10 employees, each of its employees may accrue up to 40 hours, or about five days of paid leave. Employees at all companies having 10 or more employees may accrue a maximum of 72 hours, or about nine days of paid leave.

Under the law, any accrued time carries over from year-to-year, but at no time may an employee have more than 72 hours – 40 for small employers – earned and accrued. For example, suppose that in year one, an employee at a large company accrues 50 hours of paid sick leave but doesn't use any of it. On January 1 of year two, the employee will still have the 50 hours accrued from year one. If the employee again uses no paid sick leave in year two, the employee will stop accruing paid sick leave once she has earned 22 more hours and has reached the cap of 72 hours.

**90-DAY WAIT PERIOD FOR EMPLOYEES HIRED AFTER THE OPERATIVE DATE.**

For those employees hired after February 5, 2007, paid leave will begin to accrue 90 days after the beginning of the employment. The 90-day waiting period allows employers to withhold paid sick leave from short-term temporary workers.

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## USES OF PAID SICK LEAVE.

The provisions concerning the uses for sick leave further broaden existing California law. The ordinance allows for the use of paid sick leave in the usual event of the employee's illness or injury. Consistent with other leave laws it also permits its use to care for a child, a parent, a spouse, and/or a domestic partner. It broadens the existing law, however, by including care for a sibling, grandparent, grandchild, and/or any person "designated" by an employee who is neither married nor in a domestic partnership. Also, while existing state law only requires that employees be permitted to use half of their accrued paid leave to care for other persons, the ordinance allows employees to use all of their time to care for others.

## EMPLOYEES HAVE A 10-DAY WINDOW TO CHOOSE A "DESIGNATED PERSON" ON AN ANNUAL BASIS.

If the employee has no spouse or registered domestic partner, the employee may designate one person for whose care the employee's paid leave may be used. On an annual basis, the employer must provide 10 work days during which employees can choose a designated person.

## EMPLOYEES MUST ONLY GIVE REASONABLE NOTICE OF ABSENCE.

Employers may require that employees give prior "reasonable notification" of their sick leave. The ordinance provides no definition or guidance on what constitutes "reasonable notification." "Reasonableness" will likely depend on whether the reason for the leave is foreseeable or sudden.

## EMPLOYEE NEED NOT FIND A REPLACEMENT.

The employer is expressly prohibited from requiring that the employee find a replacement worker to cover the hours during which the employee is on leave.

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## EMPLOYER ONLY ALLOWED TO MAKE A REASONABLE INQUIRY.

The ordinance permits an employer to take "reasonable measures" to verify or document that the leave is for a legitimate purpose. Again, the ordinance provides no definition or guidance on what constitutes "reasonable measures." Requiring that an employee divulge a specific medical condition, diagnosis or treatment, however, will likely run afoul of the ordinance since that is not permitted under other similar statutes. On the other hand, requesting that the employee provide the general reason for the leave, in writing and signed by the employee, should be permitted in situations where the leave is anticipated.

## NO REIMBURSEMENT FOR ACCRUED BUT UNUSED SICK LEAVE UPON EMPLOYEE'S DEPARTURE.

Unlike California law concerning accrued vacation time, the ordinance expressly provides that employers are not required to pay out or reimburse employees for their accrued, but unused sick leave upon their termination, resignation, retirement, or any other separation from employment.

## PAID TIME OFF POLICY INSTEAD OF SICK LEAVE?

Employers may continue to employ an existing general paid time off (PTO) policy (without distinguishing sick leave from vacation time) so long as the policy provides for at least the same paid benefits as those contained in the ordinance. Since the ordinance does not require reimbursement for accrued but unused time upon termination unlike a PTO policy (blending both sick leave and vacation time), however, separate vacation and sick leave policies could be preferable depending on how much paid time off is provided in the employer's PTO plan.

### EMPLOYERS' RECORD-KEEPING OBLIGATIONS.

Employers must keep records showing employees' work hours and any sick leave taken for a period of four years, and allow the Office of Labor Standards Enforcement access to those records if requested. An employer's failure to do either creates a presumption that the employer has violated the ordinance unless there is clear and convincing evidence otherwise.

### POSTING OF PAID LEAVE NOTICE.

Employers must post a notice that will be issued by the Office of Labor Standards Enforcement informing employees of their paid leave rights under the ordinance. The notice must be posted in a "conspicuous place" in English, Spanish, Chinese, and any other language spoken by at least 5 percent of the employees. This is again a departure from existing state law, which requires that similar notices be translated into a language spoken by 10 percent of employees.

### RETALIATION PROHIBITED.

Any adverse action taken against the employee for exercising his or her paid sick leave rights is prohibited. The employee rights that are protected include the right to take paid sick leave, to file a complaint, inform any person of his or her rights under the ordinance or the employer's alleged violations, and to cooperate with the Office of Labor Standards Enforcement in its investigations.

Taking or threatening to take adverse action, including discharge, demotion, suspension or discrimination against an employee within 90 days of the employee's exercise of paid sick leave rights will raise a rebuttable presumption that an adverse action was retaliatory.

### ENFORCEMENT.

Either the Office of Labor Standards Enforcement or a court can enforce the rights under the ordinance.

The Office of Labor Standards Enforcement has broad rights under the ordinance. It may investigate potential violations and order temporary or interim relief pending completion of a full investigation. After a hearing, it may also award appropriate relief and impose penalties, including:

- Reinstatement;
- Back pay;
- Payment of any sick leave unlawfully withheld multiplied by three, or \$250, whichever is greater;
- Payment of an additional sum as an administrative penalty to each employee or person whose rights were violated;
- Payment of an additional \$50 to each employee or person for each day that the violation occurred or continued; and
- Suspension of registration certificates, permits or licenses of the employer where prompt compliance is not forthcoming.

Lawsuits. Standing to sue under the ordinance is extremely broad. The Office of Labor Standards Enforcement, city attorney, any person whose rights under the ordinance were allegedly violated, any entity of which a member is aggrieved, and any other person or entity acting on behalf of the public, may bring a civil suit against the employer.

Remedies in litigation include the same relief outlined above, plus reasonable attorney's fees. A plaintiff need not exhaust administrative remedies before filing a civil suit.

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## WAIVER OF SICK LEAVE RIGHTS THROUGH COLLECTIVE BARGAINING AGREEMENT.

An employee covered by a collective bargaining agreement can waive the requirements of the ordinance only if the waiver is express, and in clear and unambiguous terms.

### RECOMMENDATIONS FOR IMMEDIATE ACTION:

- Review all existing policies that impose discipline for employee absenteeism. Absenteeism policies should be revised to eliminate the potential for giving discipline for leave taken for any of the reasons permitted by the ordinance.
- Employers that have a general paid time off policy in lieu of a separate sick leave policy should make sure that the policy provides enough paid time off to cover the requirements of the ordinance. Note that a PTO policy, unlike a policy specific to paid sick leave, most likely will require that the employer reimburse the employee upon termination for accrued, but unused time.
- Employers having separate vacation and sick leave policies should make sure that the sick leave policy complies with the ordinance. Those considering a reduction in paid vacation time to offset paid sick leave costs should make sure that such modifications are not precluded by an employment agreement or an enforceable policy.
- If considering a reduction in paid vacation time to reduce the cost of compliance, an employer should carefully weigh that reduction in costs against likely employee dissatisfaction.

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- Employers should begin considering how to integrate the requirements of the ordinance into its other mandatory and voluntary leave policies and practices in order to minimize the confusion certain to occur in administering a tangle of paid and unpaid leave requirements covering closely related circumstances.
  - Employers should carefully consider the administrative impact and effect on employee relations of maintaining disparate vacation and sick leave policies covering employees working in other parts of California and in the rest of the country.

If you have any questions on whether your current leave policies comply with the San Francisco Sick Leave Ordinance, or have any other questions on the ordinance or on employee leaves in general, please contact Stephen H. Dye and Nancy S. Paik in Schnader's San Francisco Office, or our national Employment & Labor Law Practice Group Chair, Scott Wenner and Deputy Chair, Mike Wietrzychowski. Contact information appears immediately below.

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