Insight

IN-DEPTH DISCUSSION

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Minneapolis Becomes the Only City in the Midwest to Mandate Paid Sick and Safe Leave

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On May 31, 2016, Mayor Betsy Hodges signed the Minneapolis Sick and Safe Time Ordinance (the "Ordinance"), an expansive paid leave measure. Under this Ordinance, starting July 1, 2017, employers must allow employees to accrue up to 48 hours of sick and safe time each year. Employers with six or more employees must provide paid sick and safe time, while smaller employers must at least provide unpaid leave. The Ordinance applies to private employers of all sizes, including employers with only one employee, as long one employee works within Minneapolis city limits.

The Ordinance's passage comes as officials from twin city Saint Paul, Minnesota – Minneapolis's neighbor to the east – is exploring its own sick and safe time ordinance.

Covered Employees and Employers

With limited exceptions, the Ordinance applies to all employees, including full-time, part-time and temporary employees, who work within Minneapolis for at least 80 hours in a "calendar" year. An employer may select the calendar year, which is any regular and consecutive 12-month period. The Ordinance excludes independent contractors and government workers, except government workers employed by the City of Minneapolis. It also permits employers in the construction industry to avoid providing leave by paying construction workers or construction worker apprentices at least the prevailing wage or the rate required by the applicable registered apprenticeship agreement.

An employer's business size is based on the average number of employees it employed per week during the previous calendar year, regardless of whether those employees worked on a full-time, part-time or temporary basis, or whether they worked in Minneapolis. Thus, an employer may need to offer sick and safe time to an employee working in Minneapolis even

when the rest of the employer's workforce works outside the city. For new employers, business size is based upon the average number of employees employed per week during the first 90 days after its first employee began work.

To help new businesses manage costs, the Ordinance allows new employers, other than chain establishments,[1] for five years after the effective date of the Ordinance, to provide unpaid sick and safe time for the first 12 months after hiring their first employee, regardless of the number of employees they hire during the first year. After 12 months, the employer must provide paid sick and safe time if it employs six or more employees. Beginning on July 1, 2022, new employers will no longer receive this 12-month grace period.

Unlike paid sick leave laws in some other jurisdictions, the Ordinance does not allow the paid sick and safe time requirements to be waived in a collective bargaining agreement ("CBA"). In fact, the Ordinance fails to address CBAs at all. As a result, employers may need to negotiate with unionized employees about paid sick and safe leave benefits if the leave provisions in their CBA do not satisfy all of the requirements of the Ordinance.

Accrual, Carryover, and Cap Requirements

Under the Ordinance, covered employees will accrue one hour of sick and safe time for every 30 hours worked in the city, beginning on the first day of employment or July 1, 2017, whichever is later. Overtime-exempt employees will accrue sick and safe leave based on a 40-hour workweek unless the employee's normal workweek is less than 40 hours, in which case sick and safe time will accrue based upon the employee's normal workweek.

All accrued but unused sick and safe time carries over from one calendar year to the next. Employers may limit the amount of sick and safe time an employee may accrue to 48 hours in a year and may cap the amount of sick and safe time an employee may have available for use at 80 hours. With such a cap, once an employee has 80 hours in his or her sick and safe time bank, the employee would cease accruing further sick and safe time.

The Ordinance, however, does not appear to allow employers to limit the amount of accrued sick and safe time an employee may use per year or at once. As such, an employee could potentially use more than 80 hours of sick and safe time in a year. For example, if an employee accrues 80 hours by the end of the second year and does not use any of that time, the 80 hours would carry over to the third year. If the employee uses all 80 hours in January of the third year, the employee could accrue up to another 48 hours during that year and use that time during the third year.

Use of Sick and Safe Time

The Ordinance provides that, beginning 90 calendar days after their employment begins, employees are entitled to use accrued sick and safe time for any of the following purposes:

1. For an employee's, or an employee's family member's, mental or physical illness, injury, or health condition, or when an employee or his or her family member needs to obtain diagnosis, care, treatment, or preventive care;

1 "Chain establishment" means an establishment doing business under the same trade name used by two or more establishments, or under the same ownership and doing the same business, whether such other establishments are located in the city or elsewhere and regardless of the type of ownership of each individual establishment.

2. For an absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member, provided the absence is to seek medical attention, obtain services from a victim services organization, obtain psychological or other counseling, seek relocation, or take legal action;
3. When an employee's place of business is closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency;
4. To care for a family member whose school or place of care has been closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency; or
5. To care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure.

The Ordinance defines "family member" to mean the employee's child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, guardian, ward, members of the employee's household, or registered domestic partner.

An employer cannot require, as a condition of using leave, that an employee seek or find a replacement worker to cover the hours during which the employee uses sick or safe time. An employer may, however, have a policy that allows employees to exchange hours or trade shifts voluntarily.

Employers must allow an employee to use sick or safe time in increments consistent with the employer's current payroll practices or industry standards for recording time, provided such increment is not over four hours.

Requests for Leave, Limited Certifications, Confidentiality, and Nondisclosure

When the need for sick or safe time use is foreseeable, an employer may require that the employee provide seven days' advance notice. In other cases, an employer may require that the employee provide notice as soon as practicable.

Only when an employee's absence is for more than three consecutive days may an employer require that the employee provide reasonable documentation to show that the leave is or was for a reason covered by the Ordinance. The Ordinance does not provide guidance regarding the type of documentation that may be "reasonable," but employers should avoid requesting more information than is necessary to verify the reason for the leave.

Additionally, the Ordinance requires employers to treat as confidential all 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. Such confidential information may not be disclosed except with the employee's permission, when ordered by a court or administrative agency, or when otherwise required by federal or state law.

Pay During Sick and Safe Time

If an employer has six or more employees, it must provide paid sick and safe time at the same hourly rate with the same benefits as the employee was scheduled to earn during the time the employee uses his or her accrued sick and safe time, as long as the rate is not less than the rate requirement in the state minimum wage statute, Minn. Stat. § 177.24. Smaller employers may provide unpaid sick and safe time.

The Ordinance also provides that employees are not entitled to compensation for lost tips or commissions, and compensation is required only for hours that an employee is scheduled to work. Under the Ordinance, a

health care provider[2] is not considered to be "scheduled to work" for shifts that the provider requests within 24 hours, or for shifts for which the provider has been asked to remain on call, unless the provider has been asked to remain on the employer's premises.

Termination, Reinstatement, Transfer, and Succession

Employers are not required to pay employees for unused earned sick and safe time upon separation from employment. However, an employer must reinstate sick and safe time when it rehires an employee within 90 days. The Ordinance, however, leaves some questions unanswered. For example, it does not address whether the sick and safe time must be reinstated if the employer pays out the sick and safe time upon termination.

The Ordinance also provides that if an employee is transferred to a separate division, entity, or location outside Minneapolis, but remains employed by the same employer, and the employer does not allow the use of accrued paid sick and safe time outside the city, the employer must maintain the employee's accrued sick and safe time on the books for three years from the time of transfer. If the employee transfers back to a division, entity, or location within Minneapolis within the three-year period, the employee is entitled to all previously accrued and unused sick and safe time.

When an employer succeeds or takes the place of an existing employer, an employee who remains employed by the successor employer is entitled to all the unused sick and safe time the employee accrued with the original employer.

Notice and Posting Requirements

By July 1, 2017, the Minneapolis Department of Civil Rights ("Department") will publish a notice informing employees of their rights under the Ordinance. Employers will have to post the notice in a conspicuous place at the workplace or job site where any employee works. The notice must be in English and any language (if published by the Department) spoken by at least 5% of the employees at the workplace or job site. Employers must also include the notice in any employee handbook.

At an employee's request, the employer must provide a written or electronic notification of the employee's current amount of: (1) accrued and unused sick and safe time; and (2) used sick and safe time. Employers may provide the required information on a pay stub, in an online system where employees can access their own information, or in another reasonable manner.

Recordkeeping Requirements

Besides other required employment and payroll records, employers must maintain accurate records for each employee showing accrued sick and safe time and used sick and safe time for each day of the workweek, and retain those records for at least three years beyond the current calendar year. Employers must allow employees to inspect the records at a reasonable time and place.

An employer with employees who occasionally perform work in Minneapolis must track those hours each employee works in the city. Tracking where the hours are worked is likely crucial only for employers that do not allow the accrual or use of paid sick and safe time outside Minneapolis.

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2 "Health care provider" means a person licensed in good standing in Minnesota to provide medical or emergency services and employed in that capacity at an hourly rate of at least four times the federal minimum wage, including, but not limited to doctors, nurses and emergency room personnel.

The Ordinance imposes significant consequences for recordkeeping violations. Absent clear and convincing evidence otherwise, the Department will presume that an employer has violated the Ordinance if the employer fails to maintain or retain the required records or does not provide the Department with reasonable access to the records when an issue regarding an alleged violation arises.

Prohibited Acts, Enforcement, Remedies, and Penalties

Employers are prohibited from interfering with or discriminating against employees for exercising, or attempting to exercise, their rights protected under the Ordinance. Those rights include, but are not limited to, requesting or using accrued sick and safe time, informing any person about an employer's alleged violation of the Ordinance, and making a complaint or filing an action to enforce a right to accrued sick and safe time.

The Department is responsible for enforcing the Ordinance and has sole discretion to decide whether to investigate or pursue a violation. An employee or other person may report to the Department any suspected violation occurring after July 1, 2017, as long as the alleged violation has occurred within 365 days prior to filing the report. If the Department does not investigate or otherwise pursue a report, it must provide the complainant with written notification that the Department is declining to further investigate and the reason for declining. The complainant may, within 21 days, file a request for reconsideration, and the Department of Civil Rights Director ("Director") must provide a written response within 10 days.

The Ordinance also details the investigation procedures, steps parties can take to appeal the Director's violation determination, and the standard of review on appeal. The Department will refer appeals to an administrative hearing officer. The hearing officer's decision constitutes the city's final decision. The parties, however, may appeal the hearing officer's decision to the Minnesota Court of Appeals.

The Ordinance provides a non-exhaustive list of potential relief and penalties available for the Department to impose when a violation has occurred. For claims other than alleged interference or retaliation, if an employer's alleged first violation of the Ordinance occurs between July 1, 2017 and June 30, 2018, the Department must mediate the dispute. If it finds a violation, the Department can only issue warnings and notices to correct the violations. For subsequent violations arising before July 1, 2018, and for all violations that arise on or after July 1, 2018, the Director may impose other relief and penalties, which include, but are not limited to:

- Reinstatement and back pay.
- Crediting the employee with leave accrued but not credited, plus payment of the dollar value of the accrued leave withheld multiplied by two or $250, whichever is greater.
- Payment of accrued leave unlawfully withheld, plus payment of that amount multiplied by two or $250, whichever is greater.
- A penalty up to $1,500 payable to the employee for each violation of the Ordinance's confidentiality and nondisclosure, interference, or retaliation provisions.
- A fine of up to $50 for each day, or portion thereof, for failure to provide the required notice and posting or the required statement to employee, or for other recordkeeping violations, if the employer does not remedy them within five business days of notice from the Department.
- Interest.

The potential remedies and penalties are cumulative.

If an employer fails to promptly comply with the final determination of a violation, the Department may refer the action to the city attorney to consider initiating a civil action. Upon prevailing, the city may appropriate legal or equitable relief, including, without limitation, payment of lost wages, a civil penalty not to exceed twice the amount awarded for lost wages, reinstatement, injunctive relief, and reasonable attorneys' fees and costs.

No Effect on More Generous Policies

If an employer's existing leave policies satisfy the Ordinance's detailed requirements, the employer does not have to provide additional sick and safe time. Employers may continue to maintain other leave policies, such as vacation, sick, or other paid time off (PTO) policies, as long as the policies do not otherwise conflict with the Ordinance.

The Ordinance also explicitly permits employers to have policies that allow employees to use sick and safe time prior to accrual, and policies that allow employees to donate unused accrued sick and safe time to another employee.

Recommendations

Employers with employees who perform work in Minneapolis should consider the following actions:

- Review and revise sick time or PTO policies and procedures to determine whether they satisfy the Ordinance's requirements, including those pertaining to accrual, use, carryover, and all other provisions.
- Review attendance and other disciplinary policies to ensure that adverse actions are not taken against employees for using accrued sick and safe time.
- Once the Department publishes the notice of employee rights and remedies, update existing employee handbooks to include the required notice.
- Review and update timekeeping, payroll and benefits systems to verify that they will enable you to comply with the law's recordkeeping requirements.
- Review CBAs to determine whether their leave provisions will satisfy the requirements of the Ordinance and prepare for negotiations if they do not.

Finally, employers with employees in both Minneapolis and Saint Paul may want to delay revising their policies to see whether Saint Paul also passes a sick and safe time ordinance this year.