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The Ohio Healthy Families Act appears headed toward the November ballot. If voters pass the proposal, many Ohio employers will be required to provide at least seven days of paid sick leave each year to full-time employees who are absent due to their own illness, or to care for family members who are ill. What should you know (and do) before the measure becomes law?

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Ohio Healthy Families Act (OHFA): Coming Soon to a Ballot Near You?

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Currently, private employers in Ohio are not required to provide paid sick leave to employees. The Ohio Healthy Families Act (OHFA) seeks to change that. If enacted into law, the OHFA will provide full-time employees at least seven days of paid sick leave each year, and part-time employees a pro-rated amount of leave to care for themselves and their families' health needs.

Ohio's proposed paid sick leave law is comparable to measures already passed in San Francisco and Washington, D.C. Additionally, several other states have similar bills pending, and federal paid sick leave legislation has been introduced for the third time. Despite having been defeated twice in Congress, the currently pending federal bill is expected to receive more attention during this election year.

Procedural Background & Status: Where Does It Stand?

The proposed OHFA was introduced by initiative in 2007, a process started when organized labor (coordinated by labor union SEIU Local 1199) submitted more than double the required number of signatures (nearly 270,000 in total) to Ohio's Secretary of State who, in turn, forwarded the proposed legislation to the Ohio General Assembly. The General Assembly failed to act on the proposed measure within the allotted 120-day period, with the deadline closing on May 8, 2008.

Supporters of the proposed statute now have 90 days (until August 6, 2008)

to collect a second set of 120,683 different signatures to place the Act on the November 4, 2008, general election ballot. Ohioans for Healthy Families, a state-wide coalition of 217 organizations supporting the paid-sick-days initiative, alleges that it already has collected more than 50,000 new petition signatures, and that over 70% of Ohioans support the measure. At this point, it appears reasonably likely that the measure will appear on November's ballot.

Key Provisions of OHFA: What You Should Know

The proposed OHFA calls for an expansion of several rights already provided for in the Family and Medical Leave Act (FMLA). The following questions and answers explain the major provisions of the OHFA:

Which Employers Are Covered? As currently drafted, the OHFA applies to all Ohio employers (defined by the Ohio Fair Minimum Wage Amendment) that employ 25 or more employees – including both full-time and part-time employees. (In contrast, the FMLA covers only employers with at least 50 employees within a 75-mile radius.)

What Leave Is Required? The proposed law includes a guarantee of at least seven paid sick days per year to full-time employees (employees working 30 hours or more per week), and a pro-rated number of days to part-time employees working fewer than 30 hours per week or fewer than 1,560 hours per year. If an employee's schedule varies from week to

week, a weekly average over the 12-week period preceding the sick leave will be used to calculate the employee's average workweek for determining the applicable sick leave accrual rate. (In contrast, the FMLA does not require leave to be paid, and it does not provide any leave for employees who work fewer than 1,250 hours per year.)

Can Employees Carry Over Unused Paid Sick Days? Yes – but it's unclear how many days. The proposed Act requires that accrued sick leave be carried over from year to year, with the following caveat: "this Act shall not be construed to require an employer to permit an employee to accumulate more than seven (7) days of sick leave per year." This caveat suggests that an employer can limit total accumulation of sick leave to seven days – even if employees carry over unused paid sick leave from a prior year. However, this interpretation is by no means unanimous.¹ (In contrast, the FMLA does not require any carryover of unused leave.)

What Are Permissible Uses for the Paid Sick Leave? Under the proposed Act, paid sick leave can be used for a physical or mental illness, injury, or medical condition, to obtain a medical diagnosis, a related treatment, or preventive care, for the employee or the employee's child, parent (including in-laws), or spouse. (In contrast, the FMLA only permits leave for serious health conditions.)

Likewise, the OHFA permits visits to any licensed health care professional – including, for example, nurses, chiropractors, or optometrists.

When Does Paid Sick Leave Accrue? Sick leave begins to accumulate immediately upon hire, and it must accrue at least monthly.

When Can New Employees Use Accrued Paid Sick Leave? The proposed Act allows employees to take sick leave after 90 days of employment. (In contrast, the FMLA does not provide for leave until after one year of employment.)

What Are the Necessary Steps to Take Leave (Notice, etc.)? Under the proposed Act, an employee can take leave

after providing a written or oral request to the employer that includes the reason and expected duration of the leave. When the need for leave is foreseeable, at least seven days' notice is required; otherwise, notice should be given as soon as practicable. Leave can be taken on an incremental basis – either hourly or in the smallest increment that is used by the employer's payroll system to account for absences or use of other leave.

Do Employees Need to Medically Certify Their Leave? If paid sick leave covers more than three consecutive work days, the employer can request a certification by a health care professional. In such cases, the employee must provide a certification within 30 days after the first day of leave, and the employer may not delay leave in the interim. The certification, along with "any health information," are to be treated as confidential medical records, maintained in a separate file from other personnel information, and are "not [to] be disclosed except to the affected employee or with the express written permission of the affected employee." If the paid sick leave is for three consecutive work days or less, the employer cannot request medical a certification. (In contrast, the FMLA allows employers to request a certification for any FMLA leave.)

What Are Employers' Posting and Recordkeeping Requirements? Employers will be required to post a summary of the Act in a conspicuous and accessible location, subject to a \$100 fine for each separate, willful violation. Employers will be required to retain documents of hours worked and leave taken for a three-year period, and provide access to those records to the Director of the Ohio Department of Commerce, who will be charged with monitoring compliance.

What Are Prohibited Actions by an Employer Under the OHFA? Under the proposed Act, employers may not discharge, discriminate, or retaliate against employees for using their paid sick leave. Likewise, employers may not rely on paid sick leave "as a negative factor in

an employment action, such as hiring, promotion, or a disciplinary action," nor may employers count the use of paid leave against an employee in a no-fault attendance policy.

What Type of Liability Does an Employer Face for Violating the OHFA? Either an employee or the Ohio Attorney General may bring a civil action against an employer to enforce the Act. If an employer discriminates or retaliates against an employee – or denies an employee sick leave to which s/he is entitled – the employer will be liable for lost wages and benefits or, if none, actual monetary damages up to a sum equal to 10 days of wages, treble damages, interest, reasonable attorneys' fees, and equitable relief. (In contrast, the FMLA provides for no more than double damages, and double damages are only available if the violation was intentional.)

How Does the OHFA Affect Current Leave Policies? Importantly, the proposed Act provides that an employer is not required to modify its current leave policy if the current policy offers paid leave that is at least equivalent to the sick leave described in the OHFA. Thus, if an employer currently has a general, multi-purpose "paid time off" (PTO) policy – even if it does not specifically state that such leave may be used for sick leave – the proposed Act's "current leave policies" provision appears to indicate that the employer would not need to modify the policy, so long as the general PTO policy permits employees to use at least seven days of sick leave per year.

However, the proposed Act also provides that an employer "may not eliminate or reduce leave in existence on the date of enactment of this Act, regardless of the type of such leave, in order to comply with the provisions of this Act." Thus, following enactment of the Act, employers apparently will be prohibited from reducing or eliminating current leave in order to offset the extra seven days of paid leave required by the Act. For example, an employer that currently provides four days of sick leave and three days of personal leave may not be permitted to

modify its policy after the enactment of the Act to simply provide seven days of sick leave – as such a change can be considered an unlawful reduction in leave in order to comply with the proposed Act.

Accordingly, it may be preferable for employers to have in place general, multi-purpose “paid time off” policies – as opposed to individual leave policies (e.g., sick leave, personal leave, etc.).

Strategic Recommendations: What Can You Do Today?

As we approach election season, it appears likely that the OHFA will be placed on Ohio’s November ballot. We make this prediction based on the fact that proponents of the Act had little trouble collecting the requisite number of valid signatures to forward the draft OHFA to the General Assembly earlier this year, and are well on their way toward collecting the second set of different signatures necessary to put the issue on the ballot this fall. Likewise, preliminary polling data suggest that a majority of eligible Ohio voters (possibly as high as 65-70%) support paid sick leave. Although past performance is no guarantee of future returns, Ohio’s indoor smoking ban and minimum wage law initiatives (both passed by voters in 2006) can be viewed as reliable predictors of the chance that the Healthy Families Act will pass in November and soon become law. If voters approve the proposed OHFA, it takes effect 30 days after the election. (The Governor may not veto a law that was proposed by petition and approved by voters.)

Of course, it also bears noting that the OHFA is not a “sure thing.” The proposed Act is subject to change prior to enactment, if it indeed is enacted. To date, no proposed implementing regulations for the proposed Act have been issued, nor has there been any official interpretation offered by state government representa-

tives. Likewise, the Legislative Service Commission – the state’s nonpartisan body that assists lawmakers in drafting legislation – publicly has stated that it has some significant interpretational questions with regard to certain provisions of the current draft of the OHFA. Thus, even if the Act passes, it is not clear exactly how the Act will be interpreted or enforced.

With that in mind, employers with employees in Ohio should consider a review of their current sick leave policies to determine whether they comply with the proposed Healthy Families Act. If current policies – whether leave is designated as sick leave or as combined, multi-purpose PTO – comply with the requirements of the proposed law, no further action is required.

Employers with noncompliant policies – or no policy – should consider preparing or revising their policies to conform with the proposed Act. For example, if an employer currently has a sick leave policy in place that only permits employees to take paid sick leave for their own health needs, the employer should consider expanding the definition of “qualifying events” or “coverage” to include employees’ family members (including an employee’s children, parents (including in-laws), and spouse), consistent with the currently drafted OHFA.

If payroll, timekeeping, recordkeeping, and other applicable procedures must be modified, replaced, or expanded, those required changes should be investigated and examined.

Employers with PTO programs that currently do not cover sick leave should consider establishing separate sick leave programs (with or without a parallel vacation program) for certain employees, where the alternative arrangement would prove advantageous. Conversely, some employers facing implementation of paid

sick leave may be better positioned by combining separate vacation and sick leave programs into a general, multi-purpose PTO program. The analysis will differ, depending on the employer’s current programs and potentially eligible categories of employees.

Employers with workers located both in Ohio and in other locations will want to consider implementing a separate policy for employees in Ohio and other jurisdictions where paid sick leave initiatives either already have become law or are likely to become law in the near future.

Employers using temporary staffing agency workers in Ohio should require agency compliance with the proposed Act for temporary workers dispatched to the employer, and should review the terms of the agency contract to minimize risk resulting from noncompliance. In addition, such employers should analyze their usage patterns to determine whether risk could be reduced in other ways.

Andrew C. Meyer is a Shareholder and Richard L. Sloane is an Associate in Littler Mendelson’s Cleveland office. Bradley A. Sherman, Barry Y. Freeman and Timothy S. Anderson, Shareholders in the Cleveland office all provided helpful comments and insights during the preparation of this ASAP. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Meyer at ameyer@littler.com, or Mr. Sloane at rsloane@littler.com.

¹ An analysis of the proposed Act conducted by Ohio’s Legislative Service Commission notes that the “intent of [the accumulation provision] is not entirely clear. For example, if an employee accumulates seven sick days in 2009, and uses three of those in 2009, and then does not use any sick days in 2010, does the employee have a total of 11 sick days at the end of 2010, or does the employee accumulate only three new days of sick leave during 2010, for a total of seven days at the end of 2010?” See http://www.legislature.state.oh.us/analysis.cfm?ID=127_HB_536&ACT=As%20Introduced&hf=analyses127/h0536-i-127.htm