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Connecticut Is First State to Mandate Paid Sick Leave for Service Workers

By Jason Stanevich and Jennai Williams

Connecticut is set to become the first state in the country to mandate that employers provide paid sick leave to employees. After several amendments restricting the scope of the legislation, Connecticut's state senate narrowly passed Senate Bill 913 on May 25, 2011. The house of representatives adopted the bill amidst intense lobbying at 3:04 a.m. on June 4, 2011, and the Governor has pledged to sign it into law. The proposed law, Public Act 11-52 ("P.A. 11-52" or "the Act"), requires certain employers to provide five paid sick days per year to service workers starting January 1, 2012. Covered employees may use paid sick days for their own illness, injury or health condition, for the care or treatment of a spouse or child, or to address personal needs resulting from family violence or sexual assault. Notably, P.A. 11-52 includes a broad anti-retaliation provision that makes it unlawful for any covered employer to discriminate or take any retaliatory personnel action against an employee for requesting or using paid sick leave, whether mandated by the Act or provided for in an employer policy, or for making a complaint to the Labor Commissioner alleging a violation of P.A. 11-52.

Which Employers Are Covered?

P.A. 11-52 affects employers who employ 50 or more individuals in Connecticut during any one quarter of the previous year. Employers are to determine whether they are subject to the Act on January 1 of each year based on wage payment information the employer is required to submit to the state. The threshold is satisfied if the employer has 50 employees in Connecticut regardless of how many of them are service workers who would actually be entitled to sick leave benefits under P.A. 11-52. The proposed paid sick leave law will not apply to employers engaged in certain forms of manufacturing, nor to any nationally chartered tax-exempt organization that provides recreation, child care and education services. The last exemption was reportedly added to meet objections of the Young Men's Christian Association (YMCA), which lobbied against the bill.

The Act defines *employer* to include "any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company or other entity." An analysis provided by the Office of Legislative Research while P.A. 11-52 was under consideration stated that it would apply to the State of Connecticut and its municipalities, although except for the phrase "other entity" the text does not say that expressly.

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What is a Service Worker?

P.A. 11-52 defines employee as any individual engaged in service to an employer in the business of the employer, but limits paid sick leave benefits to employees who are "service workers." Employers should keep in mind that the Labor Department will interpret the term "employee" to include individuals who are classified as independent contractors by the companies for whom they provide services if the Department finds the company's classification to be incorrect under Connecticut's strict "ABC" test for independent contractor status. Thus individuals that an employer improperly classifies as independent contractors could be counted to determine whether the employer is covered by the Act, and could also be considered "service workers" entitled to paid sick leave.

Which employees are considered service workers is a question that will undoubtedly leave many employers searching for answers. P.A. 11-52 defines *service worker* as an hourly, nonexempt employee engaged in an occupation with one of the following "broad or detailed occupation code numbers and titles" as defined by the federal Bureau of Labor Statistics Standard Occupational Classification system:

- Ambulance Drivers and Attendants, Except Emergency Medical Technicians 53-3010
- Baggage Porters, Bellhops and Concierges 39-6010
- Bakers 51-3010
- Barbers, Hairdressers, Hairstylists and Cosmetologists 39-5010
- Bartenders 35-3010
- Building and Cleaning Workers, All Other 37-2019
- Bus Drivers 53-3020
- Butchers and Other Meat, Poultry and Fish Processing Workers 51-3020
- Cashiers 41-2011
- Counter and Rental Clerks 41-2021
- Child Care Workers 39-9010
- Community and Social Service Specialists, All Other 21-1099
- Community Health Workers 21-2094
- Computer Operators 43-9010
- Cooks 35-2010
- Couriers and Messengers 43-5020
- Crossing Guards 33-9091
- Data Entry and Information Processing Workers 43-9020
- Dental Assistants 31-9091
- Dental Hygienists 29-2020
- Desktop Publishers 43-9030
- Dining Room and Cafeteria Attendants and Bartender Helpers 35-9010
- Dishwashers 35-9020
- Emergency Medical Technicians and Paramedics 29-2040

- Fast Food and Counter Workers 35-3020
- First Line Supervisors of Sales Workers 41-1010
- Food Preparation Workers 35-2020
- Food Servers, Nonrestaurant 35-3040
- Food Service Managers 11-9050
- Health Practitioner Support Technologists and Technicians 29-2050
- Home Health Aides 31-1011
- Hosts and Hostesses, Restaurant, Lounge and Coffee Shop 35-9030
- Hotel, Motel and Resort Desk Clerks 43-4080
- Insurance Claims and Policy Processing Clerks 43-9040
- Janitors and Cleaners, Except Maids and Housekeeping Cleaners 37-2011
- Librarians 25-4020
- Licensed Practical and Licensed Vocational Nurses 29-2060
- Mail Clerks and Mail Machine Operators, Except Postal Service 43-9050
- Medical and Health Services Managers 11-9110
- Medical Assistants 31-9092
- Miscellaneous Food Preparation and Serving Related Workers 35-9090
- Miscellaneous Food Processing Workers 51-3090
- Miscellaneous Office and Administrative Support Workers 43-9190
- Nurse Anesthetists 29-1150
- Nurse Midwives 29-1160
- Nurse Practitioners 29-1170
- Nursing Aides, Orderlies and Attendants 31-1012
- Office Clerks, General 43-9060
- Office Machine Operators, Except Computer 43-9070
- Personal Care Aides 39-9021
- Pharmacists 29-1050
- Physician Assistants 29-1070
- Proofreaders and Copy Markers 43-9080
- Psychiatric Aides 31-1013
- Receptionists and Information Clerks 43-4170
- Registered Nurses 29-1140
- Retail Salespersons 41-2030

- Secretaries and Administrative Assistants 43-6010
- Security Guards 33-9032
- Social and Human Services Assistants 21-1093
- Social Workers 21-1020
- Statistical Assistants 43-9110
- Supervisors of Food Preparation and Serving Workers 35-1010
- Taxi Drivers and Chauffeurs 53-3040
- Tellers 43-3070
- Therapists 29-1120
- Ushers, Lobby Attendants and Ticket Takers 39-3030
- Waiters and Waitresses 35-3030

While many of these descriptions seem self-explanatory, P.A. 1152 provides no additional guidance for employers with employees who perform hybrid tasks or whose placement in one of the listed classifications is not obvious. Each employer will therefore need to determine, often on a case-by-case basis, whether an employee is a "service worker" for purposes of paid sick leave, and, because of the potential penalties involved for non-compliance, employers may choose to err on the side of over-inclusion.

There are also exceptions that may limit whether the statutory sick leave must be provided to employees who are identified as service workers. For example, service workers who receive at least five paid days of leave per year in another form (*i.e.*, vacation, personal days, paid time off) are not covered by the Act if they can use those other forms of paid leave for sick leave, as defined by P.A. 11-52. The Act also excludes "day or temporary" workers who perform work for employers on a per diem, occasional or irregular basis.

Sick Leave Accrual, Covered Events & Eligibility

P.A. 11-52 provides that each covered service worker will accrue one hour of paid sick leave for each 40 hours worked. The employee may accrue up to a maximum of 40 hours of such leave per calendar year. Employees can carry over up to 40 unused accrued hours of paid sick leave from one year to the next, but can use only 40 hours of such paid sick leave in any one year.

The Act permits a service worker to use the paid sick leave for the following reasons:

1. For a service worker's illness, injury or health condition; the medical diagnosis, care or treatment of a service worker's mental illness or physical illness, injury or health condition; or preventive medical care for a service worker;
2. For a service worker's child's or spouse's illness, injury or health condition; the medical diagnosis, care or treatment of a service worker's child's or spouse's mental or physical illness, injury or health condition; or preventive medical care for a child or spouse of a service worker; and
3. Where a service worker is a victim of family violence or sexual assault, for medical care or psychological or other counseling for physical or psychological injury or disability; to obtain services from a victim services organization; to relocate due to such family violence or sexual assault; to participate in any civil or criminal proceedings related to or resulting from such family violence or sexual assault.

P.A. 11-52 does not specify in what increments an employee can use paid sick leave. Because sick leave accrues in hourly increments, it is probable that the Labor Commissioner will require employers to permit paid sick leave to be used in hourly increments. When service workers use statutory sick leave, they must be paid the greater of the state minimum wage or their "normal hourly wage." When a worker's hourly wage "varies depending on the work performed," then "normal hourly wage" means the average hourly wage of that

worker in the pay period prior to the one in which the worker used the paid sick leave. The Act does not expressly indicate whether overtime or other premium pay is a variance "depending on the work performed" that would have to be included in the calculation of the "normal hourly wage."

Determining when service workers can first use accrued paid sick leave will create administrative challenges for employers. Under P.A. 11-52, a service worker is entitled to use accrued paid sick leave upon the completion of the service worker's 680th hour of employment after January 1, 2012, if the employee was hired prior to January 1, 2012. If the service worker begins employment after January 1, 2012, he or she can use accrued paid sick leave upon the worker's 680th hour of employment from the date of hire, unless the employer agrees to an earlier date. A service worker is not entitled to use accrued paid sick leave, however, if the worker did not work an average of ten or more hours a week for the employer in the most recent complete calendar quarter.

The Act is silent about whether service workers may be required to take statutory paid sick leave concurrently with a leave under the federal Family and Medical Leave Act or its state equivalent, but inasmuch as this is permitted for sick leave under employer benefit programs, the answer is presumably yes. Service workers will not be entitled to payment of unused accrued statutory sick leave upon termination of employment unless an employer policy (referred to as an "employee policy" in P.A. 11-52, presumably through typographical error) or collective bargaining agreement provides for the payment of accrued fringe benefits upon termination.

Requesting and Documenting Paid Sick Leave

Service workers may be required to provide seven days' notice for foreseeable uses of paid sick leave. If the leave is for three or more consecutive days, employers may also request "reasonable documentation" from the service worker showing that the leave is being taken for one of the purposes enumerated in the Act. The documentation requirement will be deemed satisfied if the service worker provides a signed statement from the treating health care provider indicating the need for the number of days of such leave, or, in the case of family violence or sexual assault, a court record or signed documentation from the service worker or a victim services organization, attorney, police officer, or counselor.

Required Notices

P.A. 11-52 will require each covered employer to provide notice to each service worker at the time of hiring: (1) of the entitlement to paid sick leave; (2) that retaliation for requesting or using sick leave is prohibited; and (3) that the service worker has a right to file a complaint with the Labor Commissioner for a violation of the Act. Employers may comply with the notice requirement by displaying a poster *in both English and Spanish* in a conspicuous place accessible to service workers. P.A. 11-52 empowers the Labor Commissioner to adopt regulations "to establish additional requirements concerning the means by which employers shall provide such notice."

Effect of Collective Bargaining Agreements

The Act provides that it shall not be construed to diminish any rights provided to an employee or service worker under a collective bargaining agreement, nor to preempt or override the terms of any collective bargaining agreement "effective prior to January 1, 2012." P.A. 11-52 does not expressly state this, but it appears intended to require that a unionized employer must agree to at least as much sick leave as provided by the Act as part of any collective bargaining agreement that becomes effective after January 1, 2012.

Anti-Retaliation Provision and Connecticut DOL Enforcement

P.A. 1152 contains an anti-retaliation provision that forbids employers from taking retaliatory personnel actions against any service worker or any other employee who requests or uses paid sick leave under the Act or the employer's own policy, or who makes a complaint to the Labor Commissioner alleging a violation of P.A. 11-52. *Retaliatory personnel action* is defined broadly to include termination, constructive discharge, suspension, demotion, denial of promotion, unfavorable reassignment, disciplinary action, or any other adverse employment action.

Employees will be able to file complaints alleging violation of the sick leave law with the Connecticut Department of Labor, which will be empowered to hold hearings and impose civil penalties for violations of the proposed statute. The Act provides for civil penalties of $500 for each violation of the anti-retaliation provision, and $100 for each violation of other provisions of P.A. 11-52. In addition, the Labor Commissioner will be empowered to "award the employee all appropriate relief," including payment for used paid sick leave, rehiring or reinstatement to the employee's previous job, payment of back wages and reestablishment of employee benefits to which the employee would have been eligible but for the retaliation or discrimination.

Although the civil penalties appear primarily to be intended to enforce the right of service workers to receive paid sick leave, they will also apply to violations of other provisions of the Act such as those that regulate the accrual and usage of leave time and the payment of wages during sick leave. On its face, the $100 penalty could also apply to technical violations of P.A. 11-52, such as making improper requests for supporting documentation, requiring more than seven days advance notice in the case of foreseeable leave usage, and failing to provide notice of the Act to service workers at the time of their hire.

What this Means for Employers

Employers should determine whether they are likely to be covered by P.A. 11-52, and, if so, begin to review and revise their leave policies to comply with the Act should it become effective on January 1, 2012. This will require revising employee handbooks and manuals, preparing or obtaining notices for bulletin boards, and revising hiring documents to explain the circumstances under which an employee will be entitled to paid sick leave. Employers should also consider training supervisors regarding documentation and record-keeping, as well as the new anti-retaliation provision.

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