

Insight

IN-DEPTH DISCUSSION

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Voters Approve Paid Sick Leave Changes in San Diego and San Francisco

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UPDATE: The San Diego Earned Sick Leave and Minimum Wage Ordinance's effective date is July 11, 2016, the same day the City Council adopted a resolution concerning the election results. Additionally, the City Council is currently considering a second ordinance that will make changes to the law.

After enduring years of drought, California employers find themselves in a phenomenon of equal concern: a cruel summer. In the span of one month, two new local paid sick leave laws were signed and amendments to two existing local measures were approved. On May 10, 2016, Santa Monica amended its law, about two months shy of its scheduled operative date. On June 2, 2016, Los Angeles Mayor Eric Garcetti signed into law a new ordinance that flew through the City Council.¹ Most recently, on June 7, 2016, voters approved amendments to the existing law in San Francisco and a “new” law in San Diego. The San Francisco amendments are not operative until January 1, 2017, allowing employers time to digest the changes and adapt policies. The new San Diego law takes effect virtually immediately (likely sometime in July),² requiring employers to hurriedly determine how to comply with the new law, including harmonizing their policies and procedures with existing state law. Below we summarize the San Diego law from top to bottom, and highlight how amendments will impact San Francisco's law.

¹ Los Angeles' paid sick leave provisions become operative on July 1, 2016. For a full discussion about the Los Angeles ordinance, see Robert Blumberg, [City of Los Angeles Doubles Employees' Sick Leave Entitlement – Effective July 1, 2016](#), Littler Insight (June 14, 2016).

² The County Registrar of Voters has 30 days to certify the recent election results. Once certified, the City Clerk prepares the Clerk Certification, which goes before the City Council for approval (currently anticipated to occur in mid-July). The law will not be operational until the City Council adopts a resolution declaring the election's results unless an earlier date is specified in the resolution. Accordingly, at this time the law's effective and operational dates are unknown. When declared, we will update this summary.

San Diego

The San Diego Earned Sick Leave and Minimum Wage ordinance was originally approved on August 18, 2014, and scheduled to become operative on April 1, 2015. However, one month later opponents filed a petition that suspended the law. The City Council then voted to submit the matter to voters at the June 7, 2016 election, who approved the measure. Although many wondered whether the law would apply retroactively, the City Attorney previously issued a memorandum concluding it would not and that the law would not be operational until the council adopts a resolution declaring the election's results unless an earlier date is specified in the resolution.

Coverage: The San Diego law applies to all employers with covered employees. Employees are covered if they perform at least two hours of work within the City of San Diego's geographic boundaries for an employer in one or more calendar weeks of the year, and are entitled to the state minimum wage or are participants in a State of California Welfare-to-Work Program. But, there are exceptions for: (1) individuals paid a sub-minimum wage under a special license (Cal. Lab. Code §§ 1191, 1191.5); (2) individuals employed under a publicly subsidized summer or short-term youth employment program; (3) student employees, camp counselors, or program counselors of an organized camp; and (4) independent contractors. However, there is no carve-out for unionized workers.

Accrual, Caps & Carryover: An employer providing employees with an amount of paid leave – including paid time off, paid vacation, or paid personal days – sufficient to meet the law's requirements that allows paid leave to be used for the same purposes and under the same conditions as the sick leave law requires, is not required to provide additional sick leave. However, we note that it is unlikely that many employers will have paid time off, paid vacation or paid personal days policies that meet the law's precise requirements as the law does not allow for a cap on accrual or carryover of paid sick leave and most employers place accrual caps on such policies.

Otherwise, sick leave begins to accrue when employment begins or when the law takes effect – whichever is later – at a rate of one sick leave hour for every 30 hours worked. For employees who are overtime-exempt under state law, accrual is based on a 40-hour workweek unless the employee's regular workweek is less than 40 hours, in which case the normal workweek is used. Sick leave accrues in whole hours; employers need not provide leave for fractions of 30 hours worked. There is no annual accrual cap or allowed maximum bank. Although use can be capped at 40 hours per benefit year – a regular and consecutive 12-month period determined by an employer – employees must be allowed to continue to accrue sick leave. Accrued but unused sick leave must be carried over to the following benefit year, but there is no cap on the amount of leave that must be carried over.

Upon an employee's separation from employment, employers are not required to compensate an employee for unused, accrued sick leave. When there is a separation from employment and the employee is rehired within six months³ of separation by the same employer, previously accrued sick leave that was not used or paid out must be reinstated and the employee is entitled to use it.

Payment & Permitted Uses: Sick leave is paid at the same hourly rate or other measure of compensation an employee earns from employment when sick leave is used. Though not specified in the law, arguably this rate cannot be less than the city's minimum wage – which, due to the election, is \$10.50 per hour.⁴

³ Reinstatement of the prior sick leave balance is required for rehires within 12 months under state law.

⁴ San Diego's minimum wage will increase to \$11.50 per hour on January 1, 2017. The city's minimum wage is not set to exceed the state rate until 2019. It remains to be seen whether the city rate will continue to surpass the state rate once annual city adjustments occur in 2019, given the state has established annual increases for each year into the 2020s.

An employee can begin using sick leave on the 90th calendar day following the start of employment or the law's effective date, whichever is later; afterwards, it can be used as accrued. Employees determine how much sick leave they need to use, but employers may set a reasonable minimum increment not to exceed 2 hours. An employee can use accrued leave for him- or herself or to care or assist a family member (child, spouse, domestic partner, parent, parent-in law, grandparent, grandchild, and sibling) for the following sick and safe time purposes: (1) employee is (or caring for or assisting a family member who is) physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition; (2) obtaining (or assisting a family member to obtain) professional diagnosis or treatment for a medical condition; (3) employee's medical reasons, such as pregnancy or obtaining a physical examination; (4) time away from work is necessary due to domestic violence, sexual assault, or stalking, if time is used to allow the employee to obtain for him or herself or a family member one or more of the following: (A) medical attention needed to recover from physical or psychological injury or disability caused by domestic violence, sexual assault, or stalking; (B) services from a victim services organization; (C) psychological or other counseling; (D) relocation due to domestic violence, sexual assault, or stalking; or (E) legal services, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic violence, sexual assault, or stalking; or (5) employee's place of business is closed, or employee is providing care or assistance to a child whose school or child care provider is closed, by order of a public official due to a public health emergency.

An employer may require reasonable notice of the need to use sick leave. If foreseeable, reasonable advance notice of the intention to use sick leave – not to exceed seven days' notice before the date sick leave will begin – can be required. If unforeseeable, an employer may require notice of the need to use sick leave as soon as practicable. Employers cannot require an employee to disclose details related to the employee's or family member's medical condition as a condition for using sick leave, except where disclosure is required or authorized by federal or state law.

If an employee uses sick leave for more than three consecutive work days, an employer may require reasonable documentation that leave was authorized under the law. An employer must accept as reasonable, documentation signed by a licensed health care provider indicating the need for the amount of sick leave taken. However, an employer cannot require that the documentation specify the nature of the employee's or family member's injury, illness, or medical condition. Employers that obtain medical or other personal information about an employee or family member must maintain the information's confidentiality and cannot disclose it, except with the employee's permission or as required by law. It is important to note, however, that even tempered documentation requirements like San Diego's may be viewed as unlawful by the state Division of Labor Standards Enforcement.

Prohibitions: An employer cannot require an employee, as a condition of using sick leave, to search for or find a replacement worker to cover the hours during which the employee is using sick leave.

Additionally, employers cannot threaten, discipline, discharge, demote, suspend, reduce hours, or take any other adverse employment action against any employee for actually or attempting to exercise any rights protected under the law, which include, but are not limited to, the right to: (1) request payment of the minimum wage; (2) request and use sick leave; (3) file a complaint for alleged violations of the law with the city's enforcement agency (TBD) or in court; (4) communicate with any person about any violation or alleged violation of the law; (5) participate in any administrative or judicial action regarding an alleged violation of the law; or (6) inform any person of his or her potential rights under the law. Protections apply to an employee who reasonably and in good faith reports a violation to his or her employer or a governmental agency tasked with overseeing the enforcement of any wage and hour law applicable to the employer.

Notice, Posting & Recordkeeping: At the time of hiring or the law's effective date – whichever is later – employers must provide each employee written or electronic notice of the employer's name, address, telephone number, and requirements under the law. Some employers may wish to utilize their existing Wage Theft Act Notice to meet this requirement by updating it with information about the law. However, because Wage Theft Act Notices are not provided to exempt employees, San Diego employers should ensure they provide a separate notice to exempt employees as required by the law.

Additionally, employers must conspicuously post at any workplace or job site where any employee works the city-created notice informing employees of (among other items) their sick leave rights. The notice and poster must be in English and any other language spoken by at least 5% of the employees at the employee's job site (limited to languages for which the county registrar of voters provides translated ballot materials per federal law).

Employers must create contemporaneous written or electronic records documenting employees' wages earned and accrual and use of sick leave, and retain these records for at least three years. The failure to create and retain such records (or allow the city access to them) creates a rebuttable presumption (a) the employer violated the law, and (b) the employee's reasonable estimate regarding hours worked, wages paid, as well as sick leave accrued and taken, may be relied upon.

Penalties & Enforcement: An employer that violates any requirement of the law is subject to a civil penalty for each violation of up to, but not to exceed, \$1,000 per violation. An employer failing to comply with the notice and posting requirements is subject to a civil penalty of \$100 for each employee who was not given appropriate notice, up to a maximum of \$2,000.

Aggrieved individuals will be able to file complaints with the city-appointed enforcement agency. However, submitting a complaint is neither a prerequisite nor a bar to bringing a private cause of action against an employer, which is permitted. If successful, an aggrieved individual can recover legal and equitable relief, including, but not limited to: (1) payment of back wages unlawfully withheld; (2) an additional amount equal to double back wages withheld as liquidated damages; (3) damages for an employer's denial of the use of accrued sick leave; (4) reinstatement or other injunctive relief; (5) reasonable attorneys' fees and costs.

The city may also bring an action against the employer in court to enforce the law. Violations cannot be prosecuted as a misdemeanor or infraction, but are declared to irreparably harm the public and covered employees generally.

Comparison of San Diego and California Paid Sick Leave Laws: Employers with San Diego employees should immediately review their paid sick leave policies to determine any changes needed for compliance with the law. In particular, employers should be aware of the areas where the San Diego and California laws differ:

- San Diego includes step-siblings in the definition of a family member.
- San Diego includes time off related to the closure of a workplace or school as the result of a public health emergency.
- San Diego requires paid sick leave to be paid at the rate or other measure of compensation paid at the time the employee uses sick leave, whereas California law requires paid sick leave to be paid to non-exempt employees at a blended rate and to exempt employees at the same rate used for other paid leave time.
- San Diego does not allow for a cap on accrual or carryover of paid sick leave, but will allow usage to be capped at 40 hours per benefit year.
- San Diego requires notice of the law be provided to both exempt and non-exempt employees upon hire.

Employers are advised to comply with the more generous of the two laws.

Finally, employers should confirm whether their facilities fall within San Diego city limits, which stretch north to Rancho Bernardo and South to San Ysidro, excluding certain cities in between.

San Francisco

San Francisco was the first jurisdiction to enact a paid sick leave law, which took effect in February 2007. However, in the ensuing years, various other laws have been enacted, including a state law. As a result, San Francisco sought to expand certain provisions to bring itself in line with more current paid sick leave standards, and to better align its provisions with state law. The amendments become operative on January 1, 2017, and, importantly, have a prospective effect only.

Family Members: The definition of “parent” has been expanded to include a person who stood in loco parentis when an employee was a minor child, and a biological, adoptive, foster or stepparent, or guardian of the employee’s spouse or registered domestic partner.

When Accrual Begins and When Leave Can Be Used: Before the amendments, leave did not begin accruing until 90 days after employment began, but could be used once accrued. The amendments better align San Francisco’s standards with state law. For employees hired on or after January 1, 2017, leave begins to accrue when employment begins, but cannot be used until the 90th day of employment.

Frontloading and Advanced Leave: The amendments confirm that an employer may “frontload” the amount of sick leave an employer would accrue over the course of the year. The amendments specifically provide that, in its discretion, an employer may provide employees a lump sum of sick leave at the beginning of each year of employment, calendar year, or other 12-month period. This will be treated as an advance on leave to be accrued; accrual temporarily halts and the employee does not continue to accrue until after working the number of hours necessary to have accrued the upfront allocation amount, at which point accrual resumes. The amendments state that this does not prevent an employer, in its discretion, from advancing leave to an employee at other times, and does not limit the amount of leave that may be advanced to an employee. Importantly, an advance must occur per an employer’s written policy or, absent an applicable written policy, must be documented in writing to the affected employee. Although frontloading is now specifically allowed by the San Francisco ordinance, provided the employer has a policy or documentation regarding the frontloading, employers must still permit carryover of unused sick time as required by the San Francisco Ordinance.

Incremental Use: Beginning January 1, 2017, an employer cannot require, as a condition of taking leave, that leave be taken in increments of more than one hour, unless San Francisco’s Office of Labor Standards authorizes a larger increment in particular circumstances, provided the increment is no larger than can be required under state law (currently 2 hours).

Expanded Permitted Uses: Before the amendments, leave was limited to sick time purposes. The amendments expand permitted sick time purposes to expressly include preventive care, and will now also allow leave for an employee to donate bone marrow or an organ, or to assist a family member or designated person to do so. Additionally, in line with the California statute, the amendments provide leave may be used for safe time purposes. An employee who is a victim of domestic violence, sexual assault, or stalking may use leave to: 1) obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child; 2) seek medical attention for injuries caused by domestic violence, sexual assault, or stalking; 3) obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence, sexual assault, or stalking; 4) obtain psychological counseling related to an experience of domestic

violence, sexual assault, or stalking; 5) participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, including temporary or permanent relocation.⁵

How and When Sick Leave Must Be Paid: Issues concerning how sick leave must be paid are currently addressed by regulation or FAQ. However, beginning January 1, 2017, the statute itself will address the issue, which will generally mirror state law. Leave cannot be provided at less than the city/county minimum wage. For non-exempt employees, an employer calculates sick leave in either of the following ways: (1) in the same manner as the regular rate of pay for the workweek in which sick leave is used, whether or not the employee actually works overtime in that workweek; or (2) divide the employee's total wages, not including overtime premium pay, by his or her total hours worked in the full pay periods of the prior 90 days of employment. For exempt employees, leave is calculated in the same manner the employer calculates wages for other forms of paid leave time. Additionally, the law now expressly addresses when leave must be paid: no later than the payday for the next regular payroll period after leave was taken (which basically aligns with an existing FAQ). This change will be a significant help to employers who currently have to calculate different paid sick leave rates under existing San Francisco and California laws as the laws will now be aligned.

Wage Statements: If an employer is required to provide written notice to employees regarding available California paid sick leave, beginning January 1, 2017, on the same notice it must set forth the amount of available San Francisco paid sick leave or paid time off provided in lieu of sick leave.⁶ If an employer provides unlimited paid sick leave or paid time off, it satisfies the requirement by indicating on the notice or the employee's itemized wage statement "unlimited." Although an "unlimited" bank is expressly permitted, employers should carefully consider their business operations and the pros and cons before implementing an "untracked" or "unlimited" paid leave policy.

Rehired Employees: Currently, reinstatement and use of sick leave by rehired employees is governed by regulation. Beginning January 1, 2017, if an employee separates from an employer for any reason and is rehired by the employer within 1 year from the date of separation, previously accrued and unused sick leave must be reinstated. The employee can use the previously accrued and unused sick leave and accrue additional leave upon rehiring. However, this does not apply if an employee received cash compensation for previously accrued and unused sick leave at the time of separation.

In many areas, the amendments address and/or change requirements in existing regulations. Until the amendments take effect, however, employers should continue to look to the regulations for guidance. We expect the Office of Labor Standards Enforcement (OLSE) to revise the regulations and FAQs. Given that the statutory amendments will take effect nearly a decade after the regulations were issued in May 2007, it would not be surprising if OLSE completely overhauls the regulations. Alternatively, or additionally, it remains possible the San Francisco Board of Supervisors could amend the law – to further align its provisions with state law – because the power to do so is expressly contained in the ballot measure's amendments.

⁵ The San Francisco amendments provide that "an employee who is a victim of domestic violence, sexual assault, or stalking may use paid sick leave for the purposes described in Sections 230(c) and 231.1(a) of the California Labor Code." Although there is a section 230 (requirements listed in the first bullet point), there is not a section 231.1. Rather, section 230.1 addresses time off from work for victims of domestic violence or sexual assault (bullet points two through five). We expect the Board of Supervisors to correct the oversight before the amendments take effect on January 1, 2017.

⁶ This codifies and strengthens OLSE's current position: "If the employee's wage statement (or separate writing from the employer) shows only the amount of paid sick leave available under the State Law, and that amount differs from what is available to the employee under the PSLO [Paid Sick Leave Ordinance] (as it often will), OLSE would presume that such a communication, because of the likelihood that it would mislead employees, would interfere with their exercise of rights under the PSLO in violation of Section 12W.7 of the PSLO." San Francisco Office of Labor Standards Enforcement, [Frequently Asked Questions Regarding the San Francisco Paid Sick Leave Ordinance and California's New Paid Sick Leave Law](#) (Nov. 17, 2015).

Next Steps

Right now it may feel like the sky is falling, especially for employers with operations in Los Angeles, San Diego, San Francisco, and Santa Monica (more so if they operate in other cities with applicable provisions). But for every perceived problem, there is a solution.

There is decent lead time to comply with the San Francisco and Santa Monica amendments (which delayed the paid sick leave provisions' operative date to January 1, 2017). Unfortunately, Los Angeles and San Diego have provided little compliance lead time.

We recommend employers with operations in Los Angeles, San Diego, San Francisco, and Santa Monica conduct a full review of their paid leave policies to check compliance with any applicable local laws as well as existing state law. Given the complexities of these laws, we recommend employers with entities in multiple paid sick leave jurisdictions seek guidance from outside counsel.

When revising paid sick or other paid leave policies, employers should first determine whether they want to implement multiple paid sick leave policies across California to meet the minimum requirements of each law (in coordination with California law) or if they would prefer the administrative ease of attempting to craft a one-size-fits-all California policy. Once this critical decision has been made, paid leave policies should be revised to meet the new requirements outlined above.