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Montgomery County, Maryland Joins the Jurisdictions Requiring Paid Sick Leave, Alters the Employer Tip Credit

BY S. LIBBY HENNINGER AND MICHAEL L. CHILDERS

The Montgomery County, Maryland Council recently passed two amendments to the County Code that impact employers. First, the County has joined in the recent trend of mandatory sick leave laws by requiring employers with one or more employees in the County to provide paid sick and safe leave to covered employees. Second, the County altered the amount of tip credit that employers may use when calculating the minimum wage owed to tipped employees and created a related quarterly reporting requirement.

Paid Sick and Safe Leave

Beginning October 1, 2016, employers in Montgomery County will have to provide most employees in the County with up to 56 hours of paid sick and safe leave.

Covered Employers and Employees

All private businesses and individuals (as well as the County government) who employ one or more persons to work within the County are covered by this amendment. All employees are covered (including domestic service workers) except:

1. Individuals who: (a) do not have a regular work schedule with the employer; (b) contact the employer for work assignments and are scheduled within 48 hours after contact; (c) have no obligation to work for the employer unless they initiate contact; and (d) are not employed by a temporary placement agency;
2. Individuals who regularly work eight or fewer hours each week; and
3. Independent contractors.

Required Sick and Safe Leave

Sick and safe leave under this amendment is earned for all work performed in the County. Employers with five or more employees must provide at least one hour of paid leave for every 30 hours worked, not to exceed 56 hours of earned paid leave in a calendar year. Employers with fewer than five employees must provide leave at the same rate—one hour for every 30 hours

worked—and up to 56 hours of leave per year. However, for these small employers, only 32 hours must be paid and 24 hours can be provided on an unpaid basis. Employees exempt from overtime requirements earn leave pursuant to their normal workweek, up to 40 hours each week.

Employers may either award leave as it accrues throughout the calendar year or grant the full amount of leave to be earned over the course of the calendar year at the beginning of the year. Employers who utilize the accrual method must permit earned unused leave to carry over from year to year, although an annual carryover cap of 56 hours is permitted. Even with carryover, employers may limit the use of paid leave (or the combination of paid/unpaid leave for small employers) to 80 hours a year. Leave taken pursuant to this amendment is paid at the employee's usual rate and with the same benefits. For tipped employees, earned leave must be paid at the County's minimum wage rate, which is currently \$8.40 but will rise to \$9.55 on October 1, 2015 and \$10.75 on July 1, 2016. Leave accrues at the beginning of employment but employers may prohibit use during an initial 90-day probationary period.

Employees may elect to use leave in the smallest increment available under the employer's payroll system and must not be required to take leave in increments of more than four hours. Earned leave does not have to be paid upon termination.

Use of Leave and Required Notice

Earned leave may be used for any of the following circumstances:

1. To care for the employee's mental or physical condition;
2. To care for a family member's mental or physical condition;
3. To care for a family member who presents a risk to the community because of exposure to a communicable disease;
4. To allow the employee or a family member to obtain preventative medical care;
5. If the place of business is closed due to a public health emergency;
6. If the school or childcare center of a family member is closed due to a public health emergency; and
7. To seek any medical attention, legal services or any services provided by victim's organizations or to temporarily relocate due to domestic violence, sexual assault or stalking.

A "family member" as defined by the County Council includes:

1. A biological, adopted, foster, stepchild or grandchild of the employee;
2. A child that the employee has legal or physical custody of or for whom the employee is the primary caregiver;
3. A biological, adoptive, foster or step parent of the employee or the employee's spouse;
4. The legal guardian of the employee or who served as the primary caregiver of the employee when s/he was a minor;
5. A spouse;
6. A grandparent or the spouse of a grandparent of the employee; and
7. A biological, adopted or foster sibling or spouse of a sibling of the employee.

In order to use earned leave, employees must request leave as soon as is practicable, notify the employer of the anticipated duration of required leave, and comply with all reasonable procedures that the employer has established for requesting and taking leave. Employers may require an employee who uses more than three consecutive days of leave to provide reasonable documentation supporting the absence. Employers can permit employees to work additional hours or trade shifts in lieu of using earned sick and safe leave, but cannot make this a requirement of taking leave.

Employers must permit employees who transfer to worksites outside the County to use the earned sick and safe leave accrued while working in Montgomery County, although continued accrual is not required. Unused earned leave must be reinstated to any employee who, after leaving employment, is rehired within nine months after leaving by an employer to work in the County.

Notice to Employees and Recordkeeping

Employers must notify employees of their entitlement to sick and safe leave in a form that includes the following:

1. A statement of how leave is accrued;
2. The permitted uses of leave;
3. A statement that the employer will not retaliate against employees for using leave; and
4. Information about the employee's right to file a complaint for violations of rights granted by the legislation.

A model notice will be prepared by the Executive Director of the Office of Human Rights. Notice may be given by posting the model notice, including the information in an employee handbook, or through distribution to current employees and new hires. Furthermore, employers must provide employees with a written statement of earned sick leave each time wages are paid, or must maintain a system where employees may access their own earned leave balances.

In addition to the above notice requirements, employers are obligated to keep three years of records regarding each employee's accrual and use of leave. These records may be inspected by the Executive Director of the Office of Human Rights upon notice to the employer.

Montgomery County Freezes the Minimum Rate for Tipped Employees

Montgomery County's minimum wage law—which went into effect last year—specified that the maximum tip credit an employer may take for its tipped employees cannot exceed the County minimum wage less 50% of the applicable Maryland state minimum wage. The current Montgomery County minimum wage is \$8.40. On July 1, 2015, Maryland's state-wide minimum wage increased to \$8.25. Under this formula, the minimum required wage tipped employees must receive was set to increase from \$4.00 per hour to \$4.13 per hour.

However, to avoid confusion over the required tipped wage rates and eliminate a current and future increase, the County Council amended the current minimum wage requirement to set a flat \$4.00 per hour minimum wage for tipped employees. This amendment became effective on July 1, 2015. Employers must still ensure that tipped employees earn enough in tips to cover the differential between the \$4.00 minimum wage and the applicable County minimum wage. Even set at \$4.00 per hour, the minimum tipped wage for County employees exceeds Maryland's minimum tipped wage, which is \$3.63 per hour.

The amendment also creates a new reporting requirement for employers of tipped employees. Within 30 days after the end of each quarter, employers must submit to the Director of the Office of Human Rights a wage report certifying that each tipped employee was paid the required minimum wage. To support this reporting obligation, the County Executive has been directed to establish an online system for employers to use to submit their quarterly tipped wage certification.

What Should Employers Do Now?

- Review current sick leave policies that cover Montgomery County employees and determine if revisions are necessary to comply with the earned sick and safe leave requirements;
- Determine the mechanism for providing notice to current and new employees of the earned sick and safe leave requirements; and
- For tipped employees, institute a process to submit the quarterly wage reports to the Director of the Office of Human Rights.