

August 6, 2015

## Pittsburgh City Council Approves Amended Paid Sick Leave Bill

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On August 3, 2015, less than one month after the introduction of the original bill, the Pittsburgh City Council passed an amended bill requiring virtually all employers within the city to provide paid sick leave. Pittsburgh is the second Pennsylvania city to approve a paid sick leave measure this year, following Philadelphia's enactment of the Promoting Healthy Families and Workplaces Ordinance in February 2015.<sup>1</sup> With the passage of this bill, which Mayor Bill Peduto intends to sign, Pittsburgh will become the 20th major city<sup>2</sup> to mandate that the majority of its employers provide paid sick leave to employees, joining California, Connecticut, Massachusetts and Oregon, and a number of major localities.<sup>3</sup>

### Covered Employees and Employers

The Pittsburgh paid sick leave ordinance ("Ordinance") applies to all full-time and part-time employees working in the City of Pittsburgh. Any employer that is situated or does business in Pittsburgh, and employs one or more persons in exchange for any form of compensation, will be required to provide paid sick leave. The Ordinance excludes independent contractors, state and federal employees, any member of a construction union covered by a collective bargaining agreement, and seasonal employees who are notified in writing when they are hired that they will work no more than 16 weeks during the calendar year.

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- 1 See Barbara Rittinger Rigo and Ben Huggett, *Philadelphia Issues Employer Poster for New Paid Sick Leave Ordinance and Creates New Agency for Enforcement*, Littler Insight (Apr. 30, 2015); Ben Huggett and Barbara Rittinger Rigo, *Philadelphia Enacts Paid Sick Leave Ordinance for Virtually All Employers*, Littler Insight (Feb. 14, 2015).
  - 2 The 19 other cities are: Emeryville, CA; Oakland, CA; San Francisco, CA; Washington, D.C.; Bloomfield, NJ; East Orange, NJ; Irvington, NJ; Jersey City, NJ; Montclair, NJ; Newark, NJ; Passaic, NJ; Paterson, NJ; Trenton, NJ; New York City, NY; Eugene, OR; Portland, OR; Philadelphia, PA; Seattle, WA; and Tacoma, WA.
  - 3 See, e.g., Michelle Barrett Falconer and Pam Salgado, *An Update on the Epidemic: California's Statewide Paid Sick Leave Law*, Littler Insight (Jan. 12, 2015); Christopher Kaczmarek, Carie Torrence and Kevin Burke, *Massachusetts Attorney General Issues Final Sick Leave Regulations*, Littler Insight (June 25, 2015); Doug Parker and Don Stait, *Oregon Becomes Fourth State to Pass Paid Sick Leave Law*, Littler ASAP (June 15, 2015); George O'Brien and Jason Stanevich, *Connecticut Amends Paid Sick Leave Statute to Provide Some Employer-Friendly Changes*, Littler Insight (June 17, 2014); Ben Huggett and Barbara Rittinger Rigo, *Philadelphia Enacts Paid Sick Leave Ordinance for Virtually All Employers*, Littler Insight (Feb. 14, 2015); S. Libby Henninger and Michael L. Childers, *Montgomery County, Maryland Joins the Jurisdictions Requiring Paid Sick Leave, Alters the Employer Tip Credit*, Littler Insight (July 7, 2015); Stacey Adams and Jessica Agarwal, *The Explosion of Paid Sick Leave In New Jersey*, Littler Insight (Jan. 23, 2015); Pam Salgado and Deidra Nguyen, *Tacoma is the Third Washington City to Mandate Paid Leave*, Littler Insight (May 29, 2015); and Nancy Delogu and Libby Henninger, *DC Sick and Safe Leave Act Amendments Take Effect; DC Issues Revised Poster*, Littler Insight (Sept. 25, 2014).

## Accrual and Caps

Under the Ordinance, employees will accrue one hour of paid sick time for every 35 hours worked (including overtime hours) in Pittsburgh, unless the employer provides for a faster accrual rate. Employees who are exempt from overtime requirements under the federal Fair Labor Standards Act (i.e., administrative, executive, or professional employees) will accrue paid sick time based on either the employee's normal workweek or a 40-hour workweek, whichever is less.

The accrual of paid sick time is subject to the following caps:

- Employers with 15 or more employees must permit employees to accrue 40 hours of paid sick time per year; and
- Employers with fewer than 15 employees must permit employees to accrue 24 hours of paid sick time per year.

Employers can define what they will use as a "calendar year," as long as it is a regular, 12-month period communicated to employees. Employers may choose to permit their employees to accrue more sick time than the statutory minimums. Employees must be able to carry over accrued sick leave from year to year, but they are not entitled to use more than 40 hours (or 24 hours for employees of small employers) per year. In lieu of permitting employees to carry over accrued, unused leave, employers may frontload the full year's accrual at the beginning of the calendar year.

The Ordinance will not take effect until 90 days after the city publishes regulations and model notices ("Effective Date"). Current employees will begin to accrue sick time on the Effective Date. Employees hired after the Effective Date will begin to accrue paid sick time beginning on their first day of work, but new employees must wait until they have been employed for 90 days before they may use paid sick leave.

Importantly, employers with fewer than 15 employees are only required to provide unpaid sick leave for the first year after the Effective Date of the Ordinance. Unpaid leave will accrue at the same rate – one hour for every 35 hours of work in Pittsburgh.

## Permitted Uses

Employers must allow employees to use accrued paid sick time for any of the following reasons:

- An employee's own mental or physical illness, injury, or health condition, including diagnostic, treatment, and preventative medical care;
- Care of a family member with a mental or physical illness, injury, or health condition, including diagnostic, treatment, and preventative medical care;
- Closure of the employee's place of business by order of a public official due to a public health emergency;
- An employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; and/or
- An employee's need to care for a family member when it has been determined by health care authorities or providers that the family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease.

The Ordinance defines "family member" very broadly. It includes:

- A biological, adopted or foster or stepchild, legal ward, a child of a domestic partner or child to whom the employee stands in *loco parentis*. The Ordinance does not require that the child be a minor.
- A biological, foster, adoptive or stepparent or legal guardian of an employee or an employee's spouse or domestic partner or person who stood in *loco parentis* to an employee when he or she was a minor.
- A spouse or domestic partner.
- A grandparent or spouse or domestic partner of a grandparent.
- A biological, adopted, or foster sibling.
- Any person for whom the employee has received oral permission from the employer to care for at the time the employee requests to use sick leave.

## Increments and Pay During Sick Leave

Employees may use paid sick time in the smaller of one-hour increments or the smallest increment the employer uses for other absences. Sick time is to be based on the employee's base rate of pay at the time the employee takes the leave. There is no pay required for lost tips and commissions. Employers are not required to cash out an employee's accrued, unused, paid sick time at the end of employment.

## Employee Notice and Documentation

Paid sick time must be provided upon an employee's oral request. An employer may maintain a reasonable notification policy that dictates how long before a shift begins employees must make their oral request.<sup>4</sup> If the need to use sick time is unforeseeable, an employee must make a "good faith effort" to provide the employer with notice as soon as possible. If an employee's need for paid sick time is foreseeable, such as a scheduled appointment with a health care provider, employers may require "reasonable advance notice" of intent to use paid sick time (not to exceed seven days).

Employers may require reasonable documentation of the reason for using sick time only if an employee uses paid sick time for three or more consecutive days. In those instances, for personal or family medical treatment, a health care professional's documentation is deemed reasonable. Employers cannot require that the documentation explain the precise nature of the illness.

## Notice and Posting Requirements

Employers must provide written notice to employees of their entitlement to paid sick time, the amount to which they are entitled, the terms under which leave can be used, the guarantee against retaliation, and the right to file a complaint regarding violations of the ordinance.

Prior to the Effective Date, the City Controller will determine the mechanism by which employers may comply with these notice and posting requirements and will make all materials necessary for an employer to comply with the Ordinance available on the City of Pittsburgh's website.

## Recordkeeping

Employers must maintain records documenting the hours worked and sick time taken by employees for a period of two years. The failure to maintain or retain adequate records creates a rebuttable presumption the employer violated the law, absent clear and convincing evidence otherwise. In addition, an employer must make these records available to the City Controller's office upon request.

## Prohibited Conduct

Under the Ordinance, an employer cannot:

- Require, as a condition of taking sick time, that an employee search for or find a replacement worker to cover the hours during which the employee is absent.
- Interfere with, restrain, or deny an employee's right to use accrued sick time, and/or discriminate or retaliate against an employee for exercising or attempting to exercise the right to use accrued sick time, filing a complaint with the agency or court, informing any person about any alleged violation of the Ordinance, or informing any person of his or her rights under the Ordinance.
- Count any sick time as an absence under any absence control policy that may lead to discipline or other adverse actions unless an employee does not provide proper notice to use sick leave.

The Ordinance creates a rebuttable presumption of unlawful retaliation automatically when an employer takes adverse action against an employee within 90 days of when the employee:

- Files a complaint or alleges a violation of the Ordinance;
- Informs "any person" about an alleged violation of the law;

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<sup>4</sup> If an employer does not have a policy, employees must provide their oral request for use of sick time at least one hour prior to the start of their shift.

- Cooperates with an investigation or prosecution of an alleged violation of the law;
- Opposes any policy, practice, or act that is unlawful under the law; and/or
- Informs any person of his or her rights under the Ordinance.

The rebuttable presumption of retaliation places the burden on the employer to prove that employment decisions are non-discriminatory, rather than placing the initial burden on an employee to prove retaliation.

## Penalties and Available Remedies

The Ordinance assesses various penalties for violations of the law:

- **Posting Violations.** An employer that willfully violates the notice requirements is subject to a civil penalty of not more than \$100 per offense.
- **Other Violations.** The enforcement agency will have the power to impose penalties and fines for violations of the Ordinance, and provide all appropriate relief, including, but not limited to, full restitution for all lost wages and benefits, as well as reinstatement.

Employees may file a complaint with the Controller's office. Claims for violations of the law must be made within six months after the date the employee knew or should have known of the alleged violation. This provision in the Ordinance will operate as a "discovery rule" provision potentially allowing claims to be initiated more than six months after the events involved.

No fine or penalties will be assessed in the first year after the Ordinance takes effect, but all other remedies will be available.

## Impact on Existing Leave Policies

Employers may continue to maintain other paid leave policies, such as vacation, sick, floating holidays, personal days or other paid time off (PTO), and satisfy the requirements of the Ordinance if those policies meet or exceed the accrual requirements of the Ordinance and allow employees to use the leave for the same purposes and under the same conditions as paid sick leave under the Ordinance. This same rule applies to leave provisions in collective bargaining agreements.

Employers should not assume that simply having a sick leave or PTO policy will be sufficient to comply with the Ordinance. Existing policies must comply with the Ordinance's accrual, cap, usage, and limited documentation rules.

Furthermore, the law does not relieve employers of any obligations they have under any existing employment contracts, collective bargaining agreements, employment benefit plans, or other agreements providing paid sick time to employees.

## Recommendations

Employers that have employees who perform work in Pittsburgh should consider taking one or more of the following actions:

- Review and revise, if necessary, paid sick time and/or PTO policies and procedures to ensure they meet the Ordinance's requirements, including review of the starting date of a leave year, carryover, cap, and all other provisions.
- Consider whether transitioning to a PTO policy that encompasses a number of different types of leaves, including vacation and paid sick time, will make compliance easier.
- Monitor the City of Pittsburgh's website for the required notices.
- Consider creating acknowledgment forms to guard against claims that notice was not provided.
- Ensure timekeeping, payroll, and benefits systems will enable you to comply with the law's recordkeeping requirements.