

Insight

IN-DEPTH DISCUSSION

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Santa Monica Jumps on the Minimum Wage and Sick Leave Bandwagon

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Santa Monica, California, became the latest municipality to enact its own minimum wage and sick leave ordinance (“Ordinance”), proposed by the City Council on January 12, 2016, and approved shortly thereafter on January 26, 2016. The minimum wage provisions largely mirror those enacted by the City and County of Los Angeles, raising the minimum wage to \$15.00 an hour by 2020. Santa Monica is also the first municipality in Southern California to enact its own sick leave legislation, following such Northern California cities as San Francisco, Oakland, and Emeryville in allowing employees to accrue up to 72 hours of sick leave, with mandatory accrual and carry-over requirements. Santa Monica will become the fourth city in California, as well as one of a number of other municipalities nationally, to mandate that the majority of its employers provide paid sick leave to employees in excess of the state requirement. The provisions of the Ordinance are set to go into effect on July 1, 2016.¹

Absent a referendum, the ordinance becomes law after 30 days, and the city will publish the final Ordinance 15 days after its adoption. Even though the Ordinance has been approved, the City Council authorized a working group to discuss and make recommendations for amendments related to some specific concerns raised immediately before the meeting. The working group should present its recommended changes to the City Council in March or April 2016. The City Council will announce the recommended changes when they become available and updates will be posted at <http://www.smgov.net>.

¹ The Effective Date regarding sick leave and other provisions is not set forth in the Ordinance, but was provided by the City Council’s office. We note that paid sick leave begins to accrue as of the “operative” date of the Ordinance. That term, however, is not defined. The “effective date” of the ordinance is 30 days after is adoption or February 25, 2016.

Covered Employees and Employers

With some limited exceptions, the Santa Monica Ordinance applies to all employees who work two or more hours during “a particular week” in the City of Santa Monica. All “hotel workers,” except managerial, supervisory, or confidential employees, whose primary place of employment is at one or more hotels in Santa Monica, regardless of how many hours worked during “a particular week” in Santa Monica, are also covered by the sick leave provision of the Ordinance. The Ordinance excludes government workers (including federal agencies, state agencies, cities, counties, school districts, and all other public entities), allows for waiver for employees subject to collective bargaining agreements, and provides an exemption for some “transitional workers” upon approval. Any other private employer that is situated, or does business, in Santa Monica will be required to meet the minimum wage standards and provide paid sick leave in excess of the requirements under state law.

Paid Sick Leave: Accrual and Caps Differ Significantly From California Law

Similar to state law, under the Ordinance, employees will accrue one hour of paid sick time for every 30 hours worked (including overtime hours) in Santa Monica, unless the employer provides for a faster accrual rate. Sick time accrues only in whole hour increments.

However, the accrual of paid sick time is subject to the following caps, which exceed the state law minimum:

- Employers with 26 or more employees² must permit employees to accrue up to a maximum bank of 72 hours of paid sick time; and
- Employers with 25 or fewer employees must permit employees to accrue up to a maximum bank of 40 hours of paid sick time.

Unlike California’s Paid Sick Leave law, however, there is no annual accrual or annual use limit placed on accrued sick leave. Thus, an employee may accrue paid sick leave up to the 72 hour bank, and carry that over from year to year. If that employee uses the entire 72 hour bank in January, the employee will immediately begin to accrue new sick time, and can use that additional accrued sick time during the same year immediately upon accrual. Significantly, the Santa Monica Ordinance does not expressly allow for front-loading of sick leave, which is similar to the San Francisco ordinance, but different from California law.

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 under the Ordinance beginning on the 90th day of employment. This differs from California law, which requires accrual immediately upon employment, but allows an employer to restrict usage prior to the 90th day of employment. Therefore, because Santa Monica-based employees must accrue sick time during their first 90 days of employment under California law, an employer cannot limit accrual during the first 90 days under the Santa Monica Ordinance.

Permitted Uses and Other Terms

Other than accrual caps, the Ordinance largely incorporates or mirrors the requirements of California law in terms of usage, notice, and anti-retaliation provisions. The Ordinance does not otherwise vary or provide its own definition of family member, the reasons for use, posting, or record keeping.³

² Generally-speaking, “employee” includes any person who in a particular week performs at least two hours of work within the geographic boundaries of the City of Santa Monica. It is not entirely clear from the Ordinance whether the size limit refers only to those working in Santa Monica, or whether it refers to all company employees.

³ Unlike San Francisco, Oakland, and Emeryville, Santa Monica does not allow for the designation of a non-family member.

Impact on Existing Leave Policies

It appears that 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. The requirements of the Ordinance may be waived in a collective bargaining agreement, so long as the waiver is explicitly set forth in the agreement in clear and unambiguous terms.

Minimum Wage Rates for Private Sector Employees

The Ordinance incrementally increases the minimum wages for private sector, non-hotel industry employees on the same time schedule as that of the City of Los Angeles and Los Angeles County.⁴ Beginning on July 1, 2016, the minimum wage for non-hotel private sector employers with 26 or more employees will be \$10.50 per hour and will increase annually to \$12.00, \$13.25, \$14.25, and \$15.00 by July 1, 2020. The ordinance sets a similar schedule for non-hotel industry private employers with 25 or fewer employees, but increases would start one year later, on July 1, 2017, reaching \$15.00 per hour by July 1, 2021.

Starting on July 1, 2022, and every year after, Santa Monica's minimum wage rates will increase in lock step with the Consumer Price Index, and will therefore continue to mirror the Los Angeles City and Los Angeles County rates that rely on the same index. Santa Monica will announce the adjusted rates each January 1st, and the new rates will take effect on July 1st of each year.

Employees who qualify as "learners" pursuant to California law and governing wage orders can be paid not less than 85% of the minimum wages for the first 480 hours or six months of employment, whichever occurs first. This provision was adopted by the City Council to incentivize businesses to continue to employ students, who sometimes work for lower wages on a part-time basis.

Minimum Wage Rates for Hotel Workers

The Ordinance also establishes minimum wage rates for hotel workers, but these minimum wage rates do not track the Los Angeles Citywide Hotel Worker Minimum Wage Ordinance,⁵ which does not apply to Santa Monica-area hotels. Starting on July 1, 2016, Santa Monica's minimum wage will be \$13.25 for hotel workers, including those who work in sublet businesses in a hotel facility or in conjunction with a hotel. On July 1, 2017, the minimum wage will increase to \$15.37 per hour and will then mirror the Los Angeles Citywide Hotel Worker Minimum Wage rate, currently in effect. Starting on July 1, 2018, the minimum wage rate for Santa Monica hotel workers will increase in lock step with the Consumer Price Index.

Waivers, Deferrals, and Additional Limitations

The Ordinance expressly provides for the waiver of the minimum wage and paid sick leave requirements in a collective bargaining agreement and allows nonprofit entities with 26 or more employees to apply for the one-year deferral rate provided to employers with 25 or less employees. Non-profit entities that provide short-term jobs or skill development services to certain "hard to employ" employees will be allowed to pay

4 Like the paid sick leave provision in the Ordinance, these minimum wage rates also apply to an "employee" who in a particular week performs at least two hours of work within the geographic boundaries of the City of Santa Monica. Employers with limited business operations in Santa Monica should take note that the minimum wage rates in Santa Monica were intentionally coordinated with the City of Los Angeles' Minimum Wage Ordinance, which similarly defines "employee" as an individual who in a particular week performs at least two hours of work within the City limits.

5 The Los Angeles Citywide Hotel Worker Minimum Wage Ordinance (Ordinance No. 183241) has unique parameters that exceed the scope of this publication and is presently at \$15.37 per hour.

such employees less than minimum wage for the first 18 months of employment and subject to certain procedures that the City will soon implement.

Service Charges and Surcharges

The Ordinance also regulates employers' handling and use of "Service Charges" and "Surcharges" collected for things including gratuity, bag handling services, health benefits, and facility fees. Businesses must distribute all service-related charges, such as banquet fees, room service and bag handling fees, directly to the employees who actually provide the service and employers cannot simply credit these sums against employees' wages. In certain limited circumstances, existing pooling policies will be allowed to continue.

All non-service related fees collected by a business, such as a "health benefit" surcharge charged by some Santa Monica businesses, must be used to pay for employees' benefits, and any excess sums must also be pledged for spending on employee benefits.

The Ordinance also includes consumer protection provisions requiring disclosure of the fees and an opportunity for consumers to affirmatively choose to pay the surcharge, as opposed to automatic charges added to bills and invoices or requiring consumers to opt-out of paying the fees.

Importantly, the Ordinance expressly includes anti-discrimination and anti-harassment provisions and provides employees and "any other person or entity acting on behalf of the public" the right to pursue a private action for violations of these provisions. The Ordinance's anti-retaliation provision includes a rebuttable presumption that any adverse action taken within 180 days of any protected conduct is retaliatory. This could potentially include the use of even a single day of paid sick leave. The Ordinance also provides enforcement remedies and penalties intended to demonstrate Santa Monica's commitment to enforcing violations of the above provisions.

Recommendations

Employers that have employees who perform work in Santa Monica 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 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.
- Review attendance and other disciplinary policies to avoid potential interference and retaliation claims.
- Ensure timekeeping, payroll, and benefits systems will enable you to comply with the law's recordkeeping requirements.
- Carefully review the hourly rates paid to all personnel, including exempt personnel, to ensure compliance with Santa Monica's minimum wage requirements.
- Review and revise all surcharge and tip pooling policies and practices to ensure compliance with the Ordinance.