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Berkeley Enacts California's Newest Local Paid Sick Leave Law

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On August 31, 2016, the City of Berkeley, California joined the long list of local jurisdictions to create a local sick leave law when it enacted the "Paid Sick Leave Ordinance." Berkeley also amended its minimum wage law¹ and codified a new law concerning hospitality service charges. The Ordinance appears to be an effort by the Berkeley City Council to control the paid sick leave debate because two competing ballot measures – one proposed by advocates and another by the city – will appear on the upcoming November ballot.² Whether this move is a coup de grace or merely the first strike in a prolonged legal battle over which law controls remains to be seen. Until voters weigh in, the Ordinance will be the applicable law employers are required to comply with when it becomes operative on October 1, 2017.³

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- ¹ The most noticeable changes to the minimum wage provisions are set increases in October 1, 2017 (\$13.75) and 2018 (\$15.00), and a separate minimum wage for younger job training participants who were previously excluded from the law. Both rates will be annually adjusted beginning July 1, 2019.
 - ² Both ballot measures can be viewed at http://www.ci.berkeley.ca.us/Clerk/Elections/Election_2016_Ballot_Measures_Page.aspx.
 - ³ The Ordinance takes effect October 1, 2016, though the paid sick leave provisions will not become operative until October 1, 2017. The Ordinance and the city-proposed ballot measure are similar in many ways, but differ on important matters, e.g., the Ordinance creates a small/large employer two-tier system but the ballot measure uses one system for all employers, which impacts accrual and use requirements. The Ordinance and the advocate-sponsored ballot measure also differ in many ways, including but not limited to: the ballot measure incorporates paid sick leave provisions into the minimum wage law whereas the Ordinance creates a standalone paid sick leave law; the ballot measure calls for accrual to begin on the 90th day after voters approve the measure; under the ballot measure small businesses are those with fewer than 10 employees, compared to fewer than 25 under the Ordinance; the costs an employee can incur when providing documentation substantiating the need for leave is far less under the ballot measure; the ballot measure prohibits employers from, e.g., decreasing benefits to offset increased expenses brought about by the minimum wage increase and paid sick leave requirement. If both ballot measures pass and the city-proposed initiative garners more votes, the advocate-backed initiative will be null and void. However, if both measures pass and the advocate-proposed initiative gets more votes, both will take effect but the provisions in the city-sponsored measure will only take effect to the extent they do not conflict with provisions in the advocate-sponsored measure. Regardless of whether one or both ballot measures pass, further legislative administrative action will be required to reconcile the differences between the measure(s) and the Ordinance.

Coverage

The Ordinance applies to all employers employing or exercising control over an employee's wages, hours or working conditions, or that receive or hold a Berkeley business license. However, different standards apply to a "small business" with fewer than 25 persons working for compensation during a given week, including full-time, part-time, or temporary employees, and individuals made available to work through the services of a temporary services or staffing agency or similar entity. Additionally, the law covers any person who, in a calendar week, performs at least two hours of work within Berkeley's geographic boundaries and qualifies as an employee entitled to payment of a minimum wage under state law or is a Welfare-to-Work Program participant. Similar to many other local sick leave laws, Berkeley's Ordinance's requirements may be waived in a bona fide collective bargaining agreement if the waiver is explicitly set forth in clear and unambiguous terms.

Accrual, Caps & Carryover

If an employer has a paid leave policy (e.g., paid time off policy, vacation, or other paid leave policy) that provides employees paid leave that may be used for the same purposes as the Berkeley law and meets the law's accrual, cap, carry-over, cash-out, and use requirements, it is not required to provide additional paid sick leave.

Otherwise, the Ordinance requires that employees who have not accrued State-required paid sick leave before October 1, 2017, must begin to accrue City-required paid sick leave on October 1, 2017 or when employment begins, whichever is later. The Ordinance further provides that employees who have accrued State-required paid sick leave before October 1, 2017 continue to and use such leave in a manner consistent with state law.⁴ Covered employees accrue one paid sick leave hour for every 30 hours worked, which accrues in whole-hour units not fractionally (e.g., employees working 40 hours in a week will accrue one hour, not one-and-one-third hours as required under state law). For small businesses, there is a cap of 48 hours per year; for all other businesses the cap is 72 hours, though employers can set a higher cap or no cap. Accrued but unused leave carries over from year to year – whether calendar or fiscal year – but cannot exceed the cap.

Use, Notice, Verification, Documentation & Payment

Covered employees can use accrued leave 90 calendar days after employment begins for the following purposes⁵: physical or mental illness, injury, or a medical condition; obtaining professional diagnosis or treatment for a medical condition; other medical reasons, such as pregnancy or obtaining a physical examination. Leave can be used for the employee's own need, or to care for a family member (child, parent, legal guardian, ward, sibling, grandparent, grandchild, spouse, registered domestic partner) or a designated person if the employee does not have a spouse or registered domestic partner and designates a person for whom leave may be used. Notably, leave cannot be used for reasons related to domestic violence, sexual, or stalking, as permitted by state law; however, as employers must comply with all applicable laws, employees will be able to use state-accrued leave for such purposes. Small businesses can limit leave use to 48 hours

⁴ It is unclear whether this means employees covered under the state law are excluded from the city law. Guidance or regulations from the to-be-determined enforcement agency hopefully will clarify this provision.

⁵ The Ordinance provides employees can use leave not only when they are ill or injured to receive medical care, treatment, or diagnosis, but also to aid or care for family members or a designated person. It twice points to California Labor Code section 233(b)(4). Section 233 is California's "kin care" law. Subsection (b)(4) – which provides the reasons for leave we list in this article – no longer exists. It was removed from the statute when California Legislature amended section 233 to align with the state paid sick leave law. We expect this oversight to be addressed by the to-be-determined enforcement agency. Although the state amendments occurred well before the ordinance was enacted, it is not surprising to see the reference because all neighboring Bay Area cities reference 233(b)(4) in their laws.

per calendar year, but other employers cannot limit leave use. Accordingly, for “large” businesses it appears Berkeley will mimic its Bay Area neighbors Emeryville, Oakland, and San Francisco and use a rolling cap system instead of a hard cap system.

If the need for leave is foreseeable, employees must provide reasonable advance notice. However, if unforeseeable, employees must provide notice as soon as practicable. Employers cannot condition leave use on employees searching for or finding a replacement worker to cover their leave hours. Interestingly, Berkeley breaks with the position taken by state enforcement officials and expressly allows employers to take reasonable measures to verify or document that leave was used for a permitted purpose. Employers, however, cannot require employees to incur documentation or verification expenses exceeding \$15.

Sick leave is paid at an employee’s hourly wage. If an employee in the 90 days of employment before taking accrued sick leave had different hourly rates, was paid by commission or piece rate, or was a non-exempt salaried employee, an employer is required to calculate the sick leave pay by dividing the employee’s total wages – excluding overtime premium pay – by total hours worked in the full pay periods of the prior 90 days of employment. Employers must pay employees for sick leave taken no later than the payday for the next regular payroll period after leave was taken. Wage statements or required writings that must be provided when wages are paid must include the number of accrued paid sick leave hours.⁶ Employers are not required to payout accrued but unused paid sick leave when employees are terminated, resign, retire, or otherwise separate from employment.

Notice, Posting & Recordkeeping

Employers must conspicuously post at any workplace or job site in Berkeley where any employee works the city-created notice informing employees of their paid sick leave rights. The notice must be posted in any language spoken by at least five percent of employees at the workplace or job site. If an employee does not have a regular physical location where they perform work, employers must provide a copy of the notice to the employee when they are hired or assigned to complete work in Berkeley, which must be provided before the employee commences work in Berkeley and in the language the employee most easily comprehends.

Employers must keep employee payroll records for a period of 4 years that identify hours worked, wages paid, and paid sick leave accrued. However, unlike state law, the Berkeley Ordinance does not require records to identify paid sick leave used. If an employer does not maintain or retain adequate records documenting accrued paid sick leave or does not allow the City reasonable access to records, an employee’s account of how much he or she was paid is presumed accurate absent clear and convincing evidence otherwise.

Prohibitions,⁷ Penalties & Enforcement

Employers cannot interfere with, restrain, or deny the attempted or actual exercise of a protected right, including but not limited to, using accrued leave taken as a negative factor in any employment action such as evaluation, promotion, disciplinary action or termination, or otherwise subjecting an employee to discipline for using accrued leave. An employer or any other party cannot discriminate in any manner or take any adverse action – including action relating to any term, condition or privilege of employment – against any person in retaliation for exercising protected rights, which include but are not limited to the

⁶ The Ordinance states “Employers shall include the number of hours of Paid Sick Leave accrued to date in such records that they provide to Employees at the end of each pay period,” which we interpret to mean a state-mandated wage statement or other required writing because neither California nor Berkeley law requires employees be provided records at the end of a pay period.

⁷ Employers should also be aware of a relevant provision in Berkeley’s minimum wage law that prohibits employers from funding increases in compensation required by the law, or otherwise responding to the minimum wage law’s requirements by reducing compensation of any non-management employee **or reducing vacation or other non-wage benefits of any such employees**, or by increasing charges to them for parking, meals, uniforms or other items unless the employer demonstrates that its cost for such items have increased by the commensurate amount. If an employer makes such adverse changes, then upon the law taking effect the employer must restore conditions to the status quo. This does not apply to medical benefits.

right to: accrue and use paid sick leave; file a complaint or inform any person about any party's alleged noncompliance with the law; inform any person of his or her potential rights under the law, otherwise educate any person about the law, or assist him or her in asserting such rights. Protections apply to any person who mistakenly, but in good faith, alleges noncompliance with the law. Taking adverse action against a person within 90 days of the individual exercising protected rights raises a rebuttable presumption the act was done in retaliation for exercising those rights. Additionally, outside the union context, any request that an individual employee waive his/her rights is unlawful.

\$500 fines can be imposed for failing to post the notice, failing to maintain payroll records or allow the City access to them, or failing to provide a wage statement with accrued leave hours. A \$1,000 fine can be imposed for each employee against whom retaliatory action was taken. Additionally, a fine equal to the total amount of remedies can be imposed, and repeat offenders can face an additional \$50 civil penalty for each individual whose rights were violated for each day or portion thereof a violation occurred or continued.

Although the Ordinance does not currently address administrative complaints – it is implied – it does provide a private right of action. Any aggrieved person, any entity whose member is aggrieved by a violation, or any other person or entity acting on behalf of the employee and all other employees affected by the employer's violations or on the public's behalf (per state law) can file a civil action against an employer or other person violating the law and, if successful, must be awarded reasonable attorneys' fees and costs, as well as appropriate legal or equitable relief, including, without limitation: back wages unlawfully withheld; \$50 civil penalty to each employee or person whose rights were violated for each day the violation occurred or continued; reinstatement in employment; and injunctive relief. Additionally, available remedies include issuing leave unlawfully withheld.⁸

The City can also file a civil action against an employer. Additionally, the Ordinance allows the City to require an employer to publicly post notice of its failure to comply if the City determines a violation occurs. City agencies or departments can also revoke or suspend any registration certificates, permits or licenses held or requested by an employer until a violation is remedied, and the city cannot renew a license of an employer with outstanding violations until the violation is remedied.

Next Steps for Employers

As with many paid sick leave laws, the enacted Ordinance leaves many unanswered questions, which we anticipate an enforcement agency to address via frequently asked questions or regulations. An enforcement agency is not specifically identified in the Ordinance, but the minimum wage and service charge laws will be enforced by the Department of Finance (or possibly another City-designated agency).⁹ It would make sense to have these related labor laws enforced by the same agency. Additionally, the minimum wage amendments require the Department to create guidelines or rules within 90 days of the law becoming effective; a deadline that is not included in the paid sick leave ordinance, but one that would be welcomed by employers wanting clarification about the law's requirements sooner than later.

However, the elephant in the room is the fact the law could be changed in two months once voters go to the polls. Accordingly, as anxious as employers may be to begin reviewing policies, the prudent decision is to wait and see how the election unfolds. If voters are appeased by the City's action, then the review process can begin. But, if voters approve one of the ballot measures, employers must continue sitting on their hands until any conflict is resolved.

⁸ Any person or entity enforcing the law on the public's behalf is entitled only to equitable, injunctive or restitutionary relief to employees, and reasonable attorneys' fees and costs. The law does not limit an employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards. Exhausting administrative remedies under Berkeley's law is not a prerequisite to asserting any right. The remedies, penalties and procedures are cumulative and not intended to be exclusive of any other available remedies, penalties and procedures established by law which may be pursued to address violations of the law.

⁹ Before the amendments, the minimum wage law was enforced by Housing and Community Services Department.