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New York City may soon become the fourth city—after San Francisco, Washington D.C. and Milwaukee—to pass legislation requiring employers to provide paid sick leave.

Proposed Legislation Would Require New York City Employers to Provide Paid Sick Leave

By Terri M. Solomon and Adam Malik

A proposal is now pending before the New York City Council to amend the Administrative Code of New York City to require all employers – no matter how small – to provide paid sick leave to employees. If the bill passes, New York City will be the fourth city to enact legislation providing paid sick leave to employees. San Francisco and Washington, D.C. already require employers to provide paid sick leave to those employed within the respective cities. Milwaukee also passed an ordinance mandating paid sick leave, which the New York City proposed legislation closely resembles, but a Milwaukee court recently invalidated that law as unconstitutional.

What the NYC Law Provides

Amount of Paid Sick Time

The proposed law requires employers to provide the following amounts of paid sick leave to their employees:

- Employers with ten or more employees must provide a minimum of one hour of paid sick leave for every 30 hours worked, not to exceed 72 hours of sick time in one calendar year.
- Employers with fewer than ten employees must provide a minimum of one hour of paid sick leave for every 30 hours worked, not to exceed 40 hours of sick time in one calendar year.

The proposed legislation requires that “all persons performing work for compensation on a full-time, part-time, or temporary basis shall be counted” when determining the employer’s size. If an employer’s workforce fluctuates above and below ten employees per week over the course of a year, the employer’s size will be determined based on the average number of persons who worked for compensation per week during the preceding calendar year.

Eligible Employees

Under the proposed legislation, an employee is defined as any person employed for

hire in New York City, who works for more than 80 hours, either on a full-time or part-time basis, in a calendar year. An employee would begin to accrue sick time at the commencement of employment, but would not be entitled to use any of the accrued sick time until 90 days after the commencement of employment.

Use of Paid Sick Leave

The proposed legislation requires that paid sick leave be granted in many circumstances that are not typically covered by voluntary or collectively bargained paid sick leave programs. Thus, it would allow eligible employees to use paid sick time for work absences due to their own, or a relative's, mental or physical illness, injury or health condition, or for preventative care, medical diagnosis or treatment. *Relative* is expansively defined to include not only an employee's spouse, domestic partner, child, or parent, but also grandparent, grandchild, other extended family member (defined as a relative within the third degree by blood or marriage), and any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. The proposed legislation does not address what is meant by either a "relative within the third degree" or an individual related by "blood or affinity whose close association with the employee is the equivalent of a family relationship." Similarly, the legislation does not provide mechanisms for measuring or proving such familial or quasi-familial relationship or otherwise protecting an employer from abuse.

If enacted in its current form, the proposed legislation would permit employees to use accrued sick leave not only for their own or a relative's illness, but also for time off necessitated by closure of the employer's place of business because of a public health emergency or due to the employee's need to care for a child whose school or place of care has been closed because of a public health emergency.

If an employee or a relative is a victim of acts or threats of violence, domestic violence, sex offenses, or stalking, the legislation would allow the employee to use such leave to seek or obtain medical diagnosis, care or treatment, or psychological or other counseling, and to obtain services from a victims services organization, to seek relocation, or to take legal action, including preparing or participating in a civil or criminal proceeding.

As currently drafted, employers would be able to request documentation regarding the use of the paid sick leave only in certain limited instances. For the use of paid sick time relating to illnesses, injuries, health conditions and closures because of public health emergencies, employers may not require documentation until the leave exceeds three consecutive days.

Accrued But Unused Time

The proposed legislation would require employers to carry over accrued but unused time to the following calendar year, but would allow employers to restrict the use of paid sick time to 72 hours in a calendar year or to 40 hours for employers with less than ten employees. Employers would not be required to compensate employees for unused sick time upon separation from employment. If an employee is transferred to a different division or location, however, the employee would be entitled to use all accrued sick leave as long as he or she remained employed by the same employer. Further, employees who are rehired by the same employer within one year of separation would be entitled to have their accrued sick time reinstated and to use such paid sick time at the commencement of employment.

Current Policies and Collective Bargaining Agreements

The proposed legislation does not prohibit an employer from providing more generous policies, provided that the employer allows for the use of leave in accordance with the legislation. This would appear to cover an employer that provides employees with a paid time off (PTO) bank of a designated number of days each year that employees can use for vacation, sick leave or personal use, as long as the PTO bank allows for at least 72 hours (or 40 hours in the case of employers with less than ten employees) and accrues at no less than the rate required by the statute.

The proposed law provides that the specific paid sick leave requirements may be waived by a collective bargaining agreement, provided that such agreement contains an equivalent benefit for covered employees. The statute does not define what would be considered "equivalent."

Anti-Retaliation and Employee Protections

Similar to federal FMLA leave, the proposed legislation would prevent employers from counting paid sick time as an absence that may lead to or result in discipline, discharge, demotion, suspension or any other adverse action. Retaliation against employees who use paid sick leave is expressly prohibited. The legislation even goes as far as to create a rebuttable presumption of unlawful retaliation when an employer takes certain actions against an employee within 90 days of the employee: (1) filing a complaint regarding the statute; (2) informing any person about the employer's violation of the statute; (3) cooperating in the investigation or prosecution of any alleged violations; (4) opposing any policy, practice, or act that is unlawful under the statute; or (5) informing any person of his or her rights under the statute.

Liability

The proposed legislation creates a number of grounds upon which employers may be held liable. First, the legislation allows employees to file suit within three years of an alleged violation by the employer. The legislation empowers courts to award damages and any other appropriate relief including reinstatement and attorney's fees and costs. The legislation provides for civil monetary penalties of not less than \$1,000 for each violation of the law. The statute also provides a civil fine, not to exceed \$100 for each offense, for employers who willfully violate the notice and posting requirements.

Comparison to Washington, D.C., San Francisco and Milwaukee Paid Sick Leave Legislation

While the proposed New York City paid sick leave legislation is in many respects broader than existing laws in other cities, it does bear many similarities to those statutes.

Washington, D.C. provides different accrual rates as well as different amounts of leave time depending on the size of the employer. Specifically, Washington D.C. provides:

- Employers with 100 or more employees must provide one hour of paid leave for every 37 hours worked, not to exceed seven days a year;
- Employers with 25 to 99 employees must provide one hour of paid leave for every 43 hours worked, not to exceed five days a year; and
- Employers with 24 or fewer employees must provide one hour of paid leave for every 87 hours worked, not to exceed three days per year.

Under D.C.'s law, employees may use accrued leave not only for specified conditions relating to themselves, but also for specified conditions relating to family members. Family members are defined as spouse, domestic partner, parents of a spouse, children (including foster children and grandchildren), spouses of children, parents, brothers and sisters, and the spouses of brothers and sisters.

San Francisco also provides different cap levels based on the employer's size. Employees accrue one hour of paid sick leave for every 30 hours worked, with a cap of 72 hours, at which point accrual stops until the employee uses some sick leave. For employers in which fewer than ten persons work for compensation during a given week, the accrual cap is reduced to 40 hours. The law provides that the leave may be used for the specified conditions for the employee or a child, parent, legal guardian or ward, sibling, grandparent, grandchild, and spouse, registered domestic partner under any state or local law, or, a person designated by the employee.

It is noteworthy that the proposed New York City legislation is almost identical to the Milwaukee Paid Sick Leave Ordinance, which was recently found to be unconstitutional. In June 2009, a Milwaukee court invalidated that ordinance, finding that the provisions dealing with domestic abuse and sexual assault far exceeded the common understanding of "sick leave" and, as a result, went beyond the ordinance's stated purpose. Accordingly, the court ruled that these provisions were not rationally related to the overall objectives of the

ordinance and, therefore, the ordinance was unconstitutional. The court also denied the City of Milwaukee's request to sever the parts of the ordinance found to be unconstitutional. An appeal of this decision is currently pending before the Wisconsin Court of Appeals. New York City's proposed statute might arguably survive a similar challenge, since the bill explicitly provides that any portion that is found to be invalid is severable from the legislation.

Future Legislative Process

New York City's proposed legislation is still in its very early stages. The Committee on Civil Service and Labor will hold one or more public hearings and must pass a final version of the bill. If the bill passes, it would be sent to the full City Council for more debate and a final vote. If it passes there, the bill would then be sent to the mayor, who also holds a public hearing. If the mayor signs the bill, it would immediately become law, effective 90 days later, as provided in the bill. If the mayor vetoes the bill, it would be returned to the City Council, which can override the veto or re-pass the bill by two-thirds vote, at which point it would become a local law. As the process does not include a local vote on the law, the public must voice their opinions at one of the open hearings.

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