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District of Columbia Greatly Expands Paid Sick Leave Coverage, Enforcement, and Penalties with Amendments to the Accrued Sick and Safe Leave Act

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The District of Columbia is poised to implement sweeping new amendments to the Accrued Sick and Safe Leave Act of 2008. The amendment, entitled the Earned Sick and Safe Leave Amendment Act of 2013 (the "Act"), has been signed by D.C. Mayor Vincent Gray and is projected to take effect at the end of February 2014 absent an unlikely veto or amendment by the U.S. Congress as permitted by the D.C. Home Rule Act. However, the Act will not apply fully until a fiscal impact statement is incorporated into the D.C. budget and published in the D.C. Register.

Once fully effective, the law will permit all workers who have worked at least 90 days to use accrued leave, allow former temporary workers to claim credit for time worked with their employer on a trial basis, and require employers to reinstate accrued leave banks for individuals who transfer out of the District and return within one year. The law will also dramatically increase the penalties for noncompliance, create a private right of action to enforce the law (in addition to the existing administrative remedy), and create a rebuttable presumption that any employee who experiences an adverse employment action within 90 days of taking leave or protesting an employer's administration of the leave policy has been the victim of retaliation.

Existing Paid Sick and Safe Leave Coverage Is Expanded and Will Be Available Sooner

Currently, the Accrued Sick and Safe Leave Act requires employers to provide, at a minimum, paid leave to qualifying employees for the purpose of caring for their own or a family member's illness, or taking legal steps to seek protection in the event of domestic violence or sexual abuse. Employers must grant covered employees paid leave on an annual basis, with larger employers to offer more generous amounts of leave:

- an employer with 100 or more employees must provide one hour of paid leave for every 37 hours an employee works, not to exceed 7 days a year;
- an employer with 25 to 99 employees must provide one hour of paid leave for every 43 hours an employee works, not to exceed 5 days a year; and

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- an employer with 24 or fewer employees must provide one hour of paid leave for every 87 hours an employee works, not to exceed 3 days a year.[1]

The Act does not amend these standard provisions. However, the new law expands the group of covered workers to include tipped restaurant employees, regardless of the employer's size. Restaurant employees, who are currently excluded from the law's coverage, will be eligible to earn one hour of paid leave for every 43 hours worked, not to exceed five days per year. Leave for tipped employees will be paid at the current D.C. minimum wage.

Significantly, especially for employers with substantial turnover, the Act eliminates the existing 12 month and 1,000 hours of service threshold for leave eligibility. Instead, the Act provides that workers begin accruing leave on their date of hire and are eligible to take paid leave after 90 days of employment. The Act also expands the definition of "employer" to include any entity that directly or indirectly employs or exercises control over the wages, hours, or working conditions of employment, including through use of temporary workers or a staffing agency.

Once effective, the Act will require employers to reinstate workers' leave in two circumstances: (1) when a District-based employee is transferred out of the District and later is transferred back to a position with any "division, entity, or location" of that employer within the District; and (2) when an employee is rehired by the same employer within one year of separation from employment. In both cases, all previously accrued and unused paid leave is reinstated and can be used immediately upon the employee's re-commencement of employment (or as soon as the employee has completed a total of 90 days' employment, considering both employment periods).

Existing law makes it plain that, although an employee may accrue leave indefinitely, he or she is not entitled to take more paid leave in a year than he or she could accrue while working for that employer. This provision has been removed by the Act. In addition, provisions stating that accrued, unused leave must be carried over from year to year, and that unused leave is not "wages" due and payable at the termination of employment, have been deleted by the amendments. Although not specifically addressed in the Act, there appears to be no bar to an employer policy denying payout of unused time on termination, particularly as accrued and unused leave must be reinstated if an employee is rehired within one year of separation. It remains to be seen whether the existing regulations limiting the amount of paid leave that can be used in a year will be revised.

Who Is Not an "Employee" Covered By the Act

While the Act expands the definition of an "employee," certain individuals are not covered, including:

- Volunteers for educational, charitable, religious or nonprofit organizations;
- Certain elected or appointed officers of religious organizations;
- Casual babysitters;
- Independent contractors;
- Students; and
- Healthcare workers who choose to participate in a premium pay program.

In addition, the Act amends the prior provision regarding collective bargaining agreements (which provides that CBAs must afford at least three paid leave days per calendar year to avoid the paid leave requirements) to exclude from coverage employees in the building and construction industry covered by a bona fide CBA that expressly waives the requirements in "clear and unambiguous terms." This provision clearly favors union shops over non-union construction employers.

Enforcement Provisions and Penalties

Implementation of the Act will greatly expand enforcement provisions and penalties for noncompliance. New recordkeeping requirements will obligate employers to maintain records documenting hours worked by employees and accrued and paid leave taken pursuant to the statute for a period of three years.

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1 D.C. Code Ann. § 32-131.02.

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Currently, an employee who believes he or she has been denied paid leave in violation of the law may file a complaint with the District's Department of Employment Services (DOES) within 60 days of the violation. The Act will allow employees to continue to bring claims through the administrative process, but also permits employees to challenge their employer's actions by bringing a civil lawsuit. The statute of limitations for filing a civil complaint is three years, which will be tolled by the period in which (1) an administrative complaint is pending, or (2) an employer does not post the required notice.

Penalties include $500 per day in damages for each accrued day of leave denied, regardless of whether the employee took unpaid leave, or even reported to work on that day, and a potential daily penalty of $1,000 for the first offense, $1,500 for the second offense, and $2,000 for the third and each subsequent offense if the violation is deemed willful. These penalties can be triggered not only by failures to grant employees' leave in accordance with the law, but also by willful violations of the Act's posting requirement, which previously carried a maximum penalty of $500. In addition, an aggrieved worker may be awarded back pay, reinstatement or other injunctive relief, compensatory damages, and punitive damages, including a penalty of at least $500 for every day an employee was denied access to paid leave and was required to work. Attorneys' fees and costs can be awarded to the District or a prevailing plaintiff in a civil action. The Mayor may also take further measures to ensure compliance, including revoking or suspending registration certificates, permits, or licenses until a violation has been remedied.

Retaliation Presumed

The revised law further creates an incredibly broad presumption that an employer has violated the law if an employee suffers an adverse employment action within 90 days of engaging in protected activity, including by taking paid leave. Among the many protected acts that can support a retaliation claim are: making a complaint to the employer; filing a complaint with the DOES; filing a civil complaint; cooperating in an investigation or prosecution of a complaint; opposing any policy, practice, or act made unlawful under the statute; informing any employee of his rights under the law; or informing any person—related to the employer or otherwise—of an alleged violation.

"Effective" Versus "Applicable" Date

Although the Act is slated to take effect by the end of February 2014—once the Congressional review period has elapsed—the law will not actually be "applicable" until a budget statement regarding the impact of the law is inserted into an approved District of Columbia budget, which may occur as late as 2015. Nonetheless, employers should waste no time moving to bring employee leave tracking and recordkeeping into compliance because, regardless of when the District begins to enforce the law, it appears that employers must begin tracking leave for the expanded group of covered employees as soon as the Act takes effect.

Guidance from the DOES

The DOES has yet to issue guidance on when it believes the Act will take effect, but preliminarily it has said:

- The D.C. revised budget will not be submitted until 2015, and it does not appear at this time as though the Act's requirements will take effect until then;
- It will likely promulgate regulations interpreting the Act, although it has yet to develop a timetable for doing so; and
- It will create and publish a new poster advising employees of their rights.

What Should Employers Do?

Although the effective date of the Act is still in question, the District's intent to expand access to paid sick and safe leave and ramp up enforcement is clear. Accordingly, employers with employees in the District should take affirmative steps to ensure compliance with the new requirements sooner rather than later. It is important to ensure that your policy complies with the current law, and it is likely that penalties for noncompliance will expand considerably and may reach back for some purposes—for example, it is not clear whether court actions challenging an employer's application of the law may consider facts about compliance prior to the law's expansion, or whether employers will be held

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responsible for calculating paid leave from the date the law fully takes effect, or from the date the amendment becomes law. Steps employers should take include:

- Review and revise existing sick and universal leave policies, particularly to address groups not previously covered (temporary workers, tipped workers, etc.);
- Ensure the current Accrued Sick and Safe Leave Act poster is posted in a prominent place in the workplace;
- Implement accrual tracking procedures for employees in preparation for future transfers and rehires;
- Take steps to document legitimate non-retaliatory reasons for imposing discipline on employees who have taken leave under the Act or engaged in other protected activity;
- Ensure any paid leave policy includes anti-retaliation provisions conforming to the Act and a mechanism for addressing concerns raised about compliance;
- Develop policies and procedures for creating and retaining records of leave taken under the Act; and
- Conduct training on requirements for managers/human resource professionals.

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