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Philadelphia Enacts Paid Sick Leave Ordinance for Virtually All Employers

By Ben Huggett and Barbara Rittinger Rigo

After seven years and two previous vetoes, on February 12, 2015, Philadelphia City Council passed, and Mayor Michael Nutter promptly signed into law, the Promoting Healthy Families and Workplaces Ordinance (“the Ordinance”) with a May 13, 2015 effective date. With this action, Philadelphia becomes the 17th major city¹ to mandate that most employers provide paid sick leave to employees, joining several municipalities in neighboring New Jersey, as well as the states of California, Connecticut and Massachusetts.

Under the new Philadelphia law, with some limited exceptions, employers with 10 or more employees will need to provide up to one hour of paid sick time for every 40 hours worked by an employee in the city. Employers with fewer than 10 employees will be required to provide unpaid sick leave on the same terms. Employers will be required to update their employee handbooks and provide notification to employees of these new provisions by the Ordinance’s effective date.

Covered Employees and Employers

The Philadelphia paid sick leave ordinance applies to all full-time and part-time employees who work 40 hours in a year. The Ordinance excludes independent contractors, seasonal workers, adjunct professors, interns, health care professional pool employees, state and federal employees, and employees hired for a term of less than six months. Employees covered by a “bona fide” collective bargaining agreement also are not covered by the Ordinance.² Surprisingly, this provision excluding unionized employees from coverage does not require that they receive equal or greater sick leave than the Ordinance requires.

Any employer that employs at least 10 employees (including full-time, part-time, or temporary employees) for more than 40 weeks a year is obligated to provide paid sick leave. All chain establishments—those with 15 or more establishments doing business under the same trade name—are also required to provide paid sick leave regardless of the number of employees they have at the establishments in Philadelphia.

1 In order of passage, the sixteen other cities are: San Francisco, CA, Washington, D.C, Seattle, WA, Portland, OR, New York City, NY, Jersey City, NJ, Newark NJ, Eugene, OR, San Diego, CA, Passaic, NJ, Paterson, NJ, East Orange, NJ, Irvington, CA, Oakland, CA, Montclair, NJ, and Trenton, NJ.

2 The Ordinance does not address how it would apply to represented employees who have not yet negotiated a first contract or whose contract has expired and is being renegotiated.

Accrual and Caps

Under the law, employees accrue one hour of sick time for every 40 hours worked (including overtime hours). Employees who are exempt administrative, executive, or professional employees accrue sick time based on the employee's normal work week or a 40-hour work week, whichever is less. Employees first become eligible to accrue paid sick time on May 13, 2015. Employees can accrue a maximum of 40 hours of sick time in a calendar year (unless the employer allows more). At its discretion, an employer may loan sick time to an employee in advance of accrual.

While the date on which actual accrual of paid sick time begins is measured from May 13, 2015, the time period for when an employee may use accrued paid sick time is measured by the actual date of employment. Specifically, an employee must be employed for at least 90 days by the employer before being able to use any accrued paid sick leave.

The law also defines "paid sick time" as time that is "compensated at the same hourly rate and with the same benefits, including health care benefits," as the employee earns "at the time the employee uses the paid sick time."

Employers must allow employees to carry over all accrued paid sick time, without limit, to the following year of employment. However, an employer may limit use of sick leave in any single calendar year to 40 hours. An employer may avoid carry-over by granting at least 40 hours of paid sick time at the beginning of each year.

Permitted Uses

Employers must allow employees to use the 40 hours of paid sick time on the employee's oral or written request for his or her own qualifying need, or that of a "family member,"³ for:

- Diagnosis, care, or treatment of an existing health condition;
- Preventative care; or
- Issues related to the employee being a victim of domestic violence, sexual assault, or stalking.

Employers may require that paid sick leave be used in "reasonable minimum" increments of an hour or any smaller increment used by the employer to account for absences.

Cash-Out

Employers are not required to cash out an employee's accrued, but unused, paid sick time at the end of employment.

Use of Existing Leave Banks

Employers may continue to maintain other paid leave policies, such as those combining vacation days, sick days, short-term disability benefits, floating holidays, parental leave, personal days or other paid time off that 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.

³ "Family member" means:

- a. A biological, adopted or foster child, stepchild or legal ward or a child to whom the employee stands in loco parentis;
- b. A biological, foster, stepparent or adoptive parent or legal guardian of an employee or an employee's spouse or a person who stood in loco parentis when the employee was a minor child;
- c. A person to whom the employee is legally married under the laws of Pennsylvania;
- d. A grandparent or spouse of a grandparent;
- e. A grandchild;
- f. A biological, foster, or adopted sibling or spouse of a biological, foster or adopted sibling;
- g. A Life Partner as defined in Section 9-1102 of this Code.

Employee Notice and Documentation

Sick time must be provided upon an employee's oral or written request. Employees must provide "reasonable advance notification" if the need to use sick leave is foreseeable. There is no definition of what constitutes "reasonable advance notice." If the need to use sick time is unforeseeable, an employee must provide the employer with notice as soon as practicable before or even after the employee has reported to work.

In what seems like an invitation for employees to commit fraud, only for instances where an employee uses paid sick time of more than two consecutive days, may an employer require reasonable documentation. In those instances, for personal or family medical treatment, a health care professional's documentation is deemed reasonable. For leave related to domestic violence, a health care professional's documentation, a police report, a court order, or a statement from a victim services organization will be reasonable. Employers cannot require documentation of the nature of the illness or details of the violence.

Notice and Posting Requirements

Employers must provide 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. Notice can be given either (a) by written notice in English or in any other languages spoken by five percent of the employees, or (b) by displaying a poster to be prepared by the city. In addition, if the employer has a handbook that is distributed to employees, it must include the notification information. It is expected that the city will publish a model notice.

Recordkeeping

Employers must maintain records documenting hours worked, sick time taken, and payments made to employees for sick time. 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 enforcement agency upon request.

Prohibited Conduct

Under the new law, 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.
- Deny the right to use accrued sick time or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against any employee for using accrued sick time, attempting to exercise the right to use accrued sick time, filing a complaint with the agency or alleging a violation, cooperating in an investigation or prosecution of an alleged violation, or opposing any policy or practice that is prohibited.

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 this law;
- Informs "any person" about an alleged violation of the law;
- 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.

Under this exceedingly broad position, it appears that an employer would be presumed to have retaliated and will be required to defend itself when, for example, an employee posts a complaint about the employer's policy on a social media site and is disciplined 89 days later. 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 Employee Remedies

The Ordinance assesses various penalties for violations of the law:

- Posting. An employer that willfully violates the posting requirements is subject to a civil penalty of not more than \$100 per offense.
- Paid Sick Time Withheld. If paid sick time is withheld, the employee is entitled to the dollar amount equivalent of paid sick time withheld. Liquidated damages in an amount not to exceed \$2,000 and attorney's fees are available for any civil action. Unspecified penalties may be sought by the agency.

Claims for violations by employees may be made up to a year 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 a year after the events involved. The employee must file a complaint with the enforcement agency.⁴ The enforcement agency will have 180 days within which to investigate, mediate, and offer the employer a chance to remedy the claim.

Civil actions by the enforcing agency, the City Solicitor, or any aggrieved individual, may be brought up to two years after the date of the alleged violation. However, employees must wait 180 days after filing an agency complaint before filing a civil action.

Impact on Existing Policies

If an employer has a sick leave or paid time off (PTO) policy that provides an amount of paid time off sufficient to meet the law's requirements and may be used for the same purposes and under the same conditions as paid sick leave under the law, it need not provide additional paid sick time. However, employers should not assume that just having a sick leave PTO policy will be sufficient to comply with the Ordinance. Existing policies must comply with the Ordinance's accrual, cap, and limited documentation rules.

Furthermore, employers should note that the law does not relieve employers of any obligations they have under any existing employment contracts, collective bargaining agreement, employment benefit plan, or other agreement providing more generous paid sick time to employees.

Philadelphia 21st Century Minimum Wage Act Sick Leave

Philadelphia already has in place a requirement that private-sector employers doing business with the city or holding leases with the city provide by contract sick leave to their employees. The Philadelphia 21st Century Minimum Wage Act sick leave provisions require, among other things, a minimum of 56 hours of sick leave. As the new Philadelphia paid sick leave ordinance is a minimum set of requirements, employers subject to the established sick leave mandates will need to comply with the more generous provisions.

Recommendations

Employers that have employees who perform work in Philadelphia are advised to take one or more of the following actions:

- Review and revise, if necessary, paid sick leave and/or PTO policies and procedures to ensure they meet the Ordinance's requirements, including review of carry-over, cap, and reinstatement provisions. Consider whether transitioning to a PTO policy that encompasses a number of different types of leaves, including vacation and paid sick leave, will make compliance easier.
- Review and revise, if necessary, anti-retaliation policies.

⁴ The Ordinance states that the appropriate agency designated to handle such complaints will be identified by the Mayor's office, presumably prior to the effective date of the statute.

- Monitor Philadelphia’s website for model notices workplace posters. Display the necessary posters in a conspicuous and accessible place in each workplace in Philadelphia and determine how to address posting requirements for remote workers.
- Employers should consider creating acknowledgment forms to guard against claims that notice was not provided.
- Review and revise any employee handbook to include a statement of Ordinance’s provisions.
- Ensure timekeeping, payroll, and benefits systems properly calculate, track, and detail the accrual and use of sick time. If a third-party payroll processor is used, ensure it is aware of and complies with the law’s requirements.
- Ensure that all itemized wage statements or other written notices provided at the time of payment to an employee include the amount of paid sick leave paid to the employee.
- Train supervisory and managerial employees, as well as human resources and payroll personnel, on the new law’s requirements.
- Employers with operations in multiple states and/or cities that have paid sick leave laws should formulate a compliance plan and work to craft a policy that will comply with all applicable paid sick leave laws, although reconciling the requirements of these various laws may prove difficult and may necessitate creating policies for one or more specific locations.

[Ben Huggett](#) and [Barbara Rittinger Rigo](#) are Shareholders in Littler’s Philadelphia office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Huggett at tbhuggett@littler.com, or Ms. Rigo at brigo@littler.com.