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Jersey City Mayor Signs Sick Leave Law, Continues National Trend

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On September 26, 2013, the Mayor of Jersey City, New Jersey signed into law an Ordinance requiring employers to provide sick leave to their employees effective January 24, 2014.[1] Similar laws have been enacted in the State of Connecticut and other localities such as New York City; Washington, D.C.; Seattle; San Francisco; and Portland, Oregon. This client alert highlights key provisions of the Ordinance regarding employee rights and employer obligations, record-keeping and notice requirements, and enforcement and remedies.

Coverage

Under the Ordinance, an "employer" is any individual or entity that operates as a business in Jersey City. Equally broad is the term "employee," which includes any individual employed by an employer, who works in Jersey City for at least 80 hours a year (excluding certain government employees).

Rights & Requirements

Accrual of Paid and Unpaid Sick Time

Individuals who work for employers with 10 or more employees[2] are entitled to paid sick time, while individuals who work for employers with fewer than 10 employees are entitled to unpaid sick time. Under the Ordinance, employees accrue at least one hour of sick time for every 30 hours worked,[3] but no more than 40 hours in a calendar year. Employees begin to accrue sick time on the first day of employment, but are not entitled to use it until they have been employed for 90 days. At its discretion, an employer *may* loan sick time to an employee in advance of accrual.

Employees may use accrued sick time either in hourly increments or the smallest increment that the employer's payroll system allows to account for absences or use of other time, whichever is less. Employers must permit employees to carry over at least up to 40 hours of unused accrued accumulated sick leave from one year to the next. Further, the Ordinance does not entitle an employee to take more than 40 hours of sick leave in a calendar year (although employers may have obligations under other laws to provide additional leave time).

If an employer has a paid leave policy that affords an amount of paid leave sufficient to meet the *total* annual accrual requirements under the Ordinance and permits the leave time to be used in the same circumstances, the employer does not have to provide additional paid sick time. Moreover, nothing in the Ordinance requires an employer to reimburse an employee for unused paid sick time upon termination, resignation, retirement, or other separation from employment.

If an employee is transferred to another division, entity or location, but remains employed by the same employer, the employee retains any unused accrued sick time. Moreover, if an employee is separated from employment but rehired within 6 months of separation, previously accrued but unused sick time must be reinstated and may be used upon recommencement of employment. Employees who remain employed by a successor employer may retain and use the paid sick time accrued with their original employer.

Use of Sick Time

Employees must be allowed to use their sick time for any of the following reasons:

- to care for their own or a family member's[4] mental or physical illness, injury, or health condition, or need for medical diagnosis, care, treatment of a sickness, or preventive medical care;

when the employee's place of business is closed by order of a public official due to a public health emergency ("forced closing") or an employee's need to care for a child whose school or place of care has a forced closing, or to care for a family member when a health authority or a health care provider has determined that the family member's exposure to a communicable disease would jeopardize the health of others in the community (whether or not the family member has actually contracted the communicable disease).

An employee must notify the employer as soon as practicable (orally or in writing) of the need to use sick time. For sick time of more than 3 consecutive days, an employer may require reasonable supporting documentation. An employer may not require that the documentation explain the nature of the illness of the employee or the family member, however, as a condition of providing paid sick time under the Ordinance.

Notice and Posting Requirements

All employers must provide a written notice of rights under this law to each employee individually at the time the Ordinance goes into effect, and thereafter to each new hire at the time employment commences. The Jersey City Department of Health & Human Services ("Department") will be issuing a form of notice. Notice to the individual must be in English and the primary language spoken by that employee (provided that the Department has issued a translation of the notice in that language).

In addition, the Department will be issuing a poster that employers must post in a conspicuous and accessible place. The poster must be in English and in each language that is the first language of at least 10% of the employer's workforce (provided that the Department has made available a translation of the poster into that language).[5]

An employer who violates these notice and posting requirements is subject to a civil fine of no more than $100 for each employee who did not receive appropriate notice and $500 for each establishment that did not display the poster.

Anti-retaliation Protections

The Ordinance provides employees with expansive protections against retaliation for exercising (or attempting to exercise) their rights under the Ordinance, even where the employee mistakenly but in good faith alleges a violation of the law. Protected rights include (but are not necessarily limited to):

- the right to request and use paid sick time pursuant to the Ordinance;
- the right to file a complaint or inform any person about an employer's alleged violation of the Ordinance;
- the right to cooperate with the Department in its investigations of alleged violations of the Ordinance;
- the right to participate in any administrative or judicial action regarding an alleged violation of the Ordinance; and
- the right to inform any person of his or her potential rights under the Ordinance.[6]

An employer also may not take adverse action on the basis that sick time qualifies as an "absence" if taken under the Ordinance. Thus, such absences cannot be counted under an absence control policy for disciplinary purposes. In addition, an employer may not require, as a condition of taking sick time, that the employee search for or find a replacement during the employee's absence.

Employer Records

Employers must retain records for 3 years documenting hours worked by employees and paid sick time taken, and allow the Department reasonable access to such records. An employer's failure to maintain or retain adequate records creates a rebuttable presumption that the employer has violated the Ordinance, absent clear and convincing evidence otherwise.

Confidentiality and Non-disclosure

If the employer receives any health information about an employee or the employee's family member, such information must be treated as confidential and only disclosed to the affected employee or with the permission of the affected employee.

Enforcement & Remedy

The Ordinance empowers the Department to receive, investigate, and resolve complaints, and to engage in proactive enforcement of the Ordinance.[7] If the Department finds that an employer has violated the Ordinance, the employer is subject to a fine of no more than $1,250 and/or a period of community service not exceeding 90 days (at the discretion of the court). This penalty applies to each individual infraction of the Ordinance, but does not affect any mandatory minimum penalty otherwise provided in the Ordinance or other applicable law.

The Ordinance also affords aggrieved individuals the right to bring a cause of action in any court of competent jurisdiction; submitting a complaint to the Department is neither a prerequisite nor a bar to a private action.

Takeaway

Jersey City employers should begin familiarizing themselves with the new Ordinance and should prepare to comply with its requirements. This includes:

- determining whether existing paid leave policies and/or attendance policies are consistent with the new Ordinance including, but not limited to, with respect to amount of sick leave provided, accrual rates, purposes for which time may be taken, and sick time afforded to part-time and temporary employees;
- updating, revising or issuing new policies as appropriate;
- assessing the interplay of the rights and requirements provided under the Ordinance, the Family and Medical Leave Act and the New Jersey Family Leave Act.
- monitoring for issuance of the new poster and notice forms before January 24, 2014;
- establishing procedures to comply with the individual notice, record-keeping, confidentiality, and non-disclosure obligations of the Ordinance; and
- training managers and supervisors regarding the requirements of the Ordinance.

Please contact your Proskauer relationship lawyer for further guidance on compliance with this new law.

[1] Where employees are covered by a collective bargaining agreement, the Ordinance will not take effect until the agreement has expired.

[2] To determine the number of employees performing work for an employer, the Ordinance counts all employees who work for compensation on a full-time, part-time, or temporary basis. Where there are fluctuations in the number of employees who work for an employer in any given calendar year, the number of employees may be calculated based upon the average number of employees who worked for compensation during the preceding calendar year.

[3] Employees who are exempt from overtime requirements under the Fair Labor Standards Act are assumed to work 40 hours in each workweek for purposes of paid sick time accrual. If their normal workweek is less than 40 hours, they accrue sick time based upon their normal workweek.

[4] A "family member" is defined as a (a) biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, a child of a civil union partner, or a child to whom the employee stands *in loco parentis*;(b) biological, foster, stepparent or adoptive parent or legal guardian of an employee or an employee's spouse, domestic partner or civil union partner or a person who stood *in loco parentis* when the employee was a minor child; (c) person to whom the employee is legally married under the laws of New Jersey or any other state or with whom the employee has entered into a civil union; (d) grandparent or spouse, civil union partner or domestic partner of a grandparent; (e) grandchild; (f) sibling; (g) domestic partner of an employee as defined by New Jersey law.

[5] The Ordinance requires the Department to issue the notice in English, Spanish, Italian, Chinese, Polish, Portuguese, Tagalog, and any other languages selected by the Department.

[6] Note that there is a rebuttable presumption of unlawful retaliation whenever an employer takes adverse action against a person within 90 days of when that person (a) files a complaint with the Department or a court alleging a violation of the Ordinance; (b) informs any person about an employer's alleged violation of the Ordinance; (c) cooperates with the Department or other persons in the investigation or prosecution of any alleged violation of the Ordinance; (d) opposes any policy or practice made unlawful by the Ordinance; or (e) informs any person of his or her potential rights under the Ordinance.

[7] The Department is required to keep confidential the identity of any complaining person, unless disclosure is necessary for resolution of the investigation.

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