Proskauer

D.C. Expands Paid Sick Leave Law

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Last week, an amendment to the District of Columbia Accrued Sick and Safe Leave Act of 2008 (the "ASSLA") came into effect. The amendment, called the Earned Sick and Safe Leave Amendment Act of 2013 (the "Amendment"), significantly broadens the scope of ASSLA by covering more employees, as well as imposing additional recordkeeping requirements. Though the Amendment is now effective, it will not apply to employers until a statement of its fiscal effect is included in an approved budget and financial plan, as published in the D.C. Register.

This alert summarizes employee rights and employer obligations under the amended version of ASSLA, including the law's recordkeeping and notice requirements, and its enforcement and remedy provisions.

Coverage

One of the key changes to ASSLA concerns the definition of "employee." The Amendment broadens the term to include any individual employed by an employer, eliminating the length of employment and/or number of hours worked criteria under the original version of the law.[1] The Amendment also expands the definition of an "employer" to include those legal entities who directly or indirectly or through an agent or any other person, including through a temporary services or staffing agency, employ or exercise control over wages, hours, or working conditions of an employee.

ASSLA continues to exempt independent contractors and students, as well as health care workers who choose to participate in premium pay programs. The Amendment, however, adds exemptions for volunteers of educational, charitable, religious, or nonprofit organizations; certain religious officials; and casual babysitters. Significantly, the Amendment removes the exemption for "tipped" restaurant employees.

Rights & Requirements

Accrual of Paid Sick Time

Under ASSLA, employees working for an employer with:

- 100 or more employees[2] accrue up to seven paid sick days per year, at a rate of not less than one hour of paid leave for every 37 hours worked;
- 25 to 99 employees earn up to five days per year at a rate of not less than one hour of paid leave for every 43 hours worked; and
- 24 or fewer employees earn up to three days per year, at a rate of not less than one hour of paid leave for every 87 hours worked.[3]

In the case of employees who are exempt from overtime payment under the Fair Labor Standards Act, employees do not accrue leave for hours worked beyond a 40-hour work week.

The Amendment now provides that employees of restaurants or bars who receive tips, commissions, or gratuities to supplement a base wage that is below the D.C. minimum wage accrue one hour of paid leave for every 43 hours worked, not to exceed five days per calendar year. Such leave is to be paid at the minimum wage rate.

Paid leave accrues in accordance with the employer's established pay period. Under the Amendment, however, employees are entitled to accrue leave at the commencement of employment and may use such leave 90 days after employment commences. The Amendment also permits employees to retain accrued leave under new circumstances. For instance, if an employee is transferred to a separate division, entity or location within D.C., or transferred out of D.C. and then transferred back to a division, entity, or location within D.C., but remains employed by the same employer, the employee retains all unused accrued sick time.

Moreover, the Amendment provides that, if an employee is separated from employment, but is then rehired within one year of separation by the same employer, previously accrued but unused paid leave must be reinstated and the employee is entitled to use such time immediately upon re-employment, provided the employee previously was eligible to use paid leave. Employees discharged after completing a probationary period of 90 days or more but rehired within 12 months may access paid leave immediately. If an employee is separated from employment for longer than one year, the employer does not have to reinstate previously accrued sick time.[4]

Use of Sick Time

An employee may use leave for his or her own physical or mental conditions or medical appointments, or for those of a family member,[5] and/or to obtain social or legal services arising from domestic violence, stalking, or sexual abuse suffered by the employee or a family member. The Amendment leaves those rights intact.

The Amendment also did not change the way that employees must request leave under ASSLA. In most circumstances, paid leave is to be provided upon the written request of an employee, which must include a reason for the absence and the expected duration of the leave. If the leave is foreseeable, the request is to be made at least 10 days, or as early as possible, in advance of the leave. If the leave is unforeseeable, an oral request is to be made prior to the start of the work shift for which the leave is requested. In the case of an emergency, the employer must be notified prior to the start of the next work shift or within 24 hours of the onset of the emergency, whichever occurs sooner.

An employer also may require that paid leave for three or more consecutive days be supported by reasonable certification,[6] and that the employee furnish a copy of the certification upon his or her return to work.

It is worth noting that employers with existing paid leave policies providing paid leave options (such as a paid time-off program or universal leave policy) do not have to modify that policy if it offers an employee the option, at the employee's discretion, to accrue and use leave under terms and conditions that are at least equivalent to the leave prescribed in ASSLA.

Anti-Retaliation Protections

Like the prior version of the law, the Amendment prohibits employers from interfering with the exercise of rights under ASSLA, and specifically enjoins employers from discharging or discriminating against employees for certain protected activities. Following the Amendment, the list of activities protected when undertaken pursuant to ASSLA include:

(1) complaining to the employer;

(2) filing a complaint with the Department of Employment Services ("DES");

(3) filing a civil complaint alleging a violation of ASSLA;

(4) informing any person about an employer's alleged violation of ASSLA;

(5) cooperating with the DES or other persons in the investigation or prosecution of any alleged violation of ASSLA;

(6) opposing any policy, practice, or act made unlawful by ASSLA; and

(7) informing any person of his or her rights under ASSLA.

The Amendment also creates a rebuttable presumption of retaliation for the exercise of paid sick leave rights if an employer takes an adverse action against an employee within 90 days of the employee engaging in any of the listed actions. Moreover, the Amendment provides that an employer may not take adverse action on the basis that sick time qualifies as an "absence" if such time is taken pursuant to ASSLA.

Notice Requirements

ASSLA requires that each employer post in a conspicuous place a notice of rights and obligations under the law (in the form issued by the Mayor of D.C.) in English and in all languages spoken by its eligible employees with limited or no-English proficiency.[7] Under the prior version of ASSLA, the civil penalty for willfully failing to comply with the notice requirement could not exceed $100 per day and $500 in total. The Amendment, however, permits imposition of the same civil penalties for all violations (willful or otherwise), and maintains the $500 cap for non-willful violations only.

Recordkeeping Requirements

The Amendment codifies a requirement that employers retain records documenting hours worked and paid leave taken by employees for a period of three years. These records must be made accessible for compliance audits upon reasonable notice. Further, if an issue arises as to an employee's entitlement to paid sick leave, the failure to maintain or retain adequate records, or the refusal to allow access to those records, creates a rebuttable presumption that the employer has committed a violation.

Enforcement & Remedy

Under the Amendment, an aggrieved employee (or a group of similarly situated employees) has a private right of civil or administrative action for any violation of ASSLA. [8] Civil complaints are subject to a three-year statute of limitations running from the date of the event on which the complaint is based. The limitations period is tolled (i) when an administrative complaint is filed (within 60 days of the incident) or (ii) during any period that the employer failed to post the required notice.

As for remedies, there are many. An employer who fails to permit an employee to use leave as required by ASSLA is liable to the employee for $500 in additional damage for each accrued day denied, regardless of whether the employee takes unpaid leave or reports to work on that day. Although the prior version of ASSLA had imposed civil penalties for willful violations of the law, the Amendment increased the civil penalties (other than for violation of the notice requirement) to $1,000 for the first offense, $1,500 for the second offense, and $2,000 for the third and each subsequent offense.

Moreover, under the Amendment, if a court or the Mayor finds an employer has violated *any* provision of ASSLA, additional remedies are available, including:

(1) back pay;

(2) reinstatement or other injunctive relief;

(3) compensatory or punitive damages, including at least $500 for every day an employee was denied access to paid leave and required to work;

(4) reasonable attorney's fees and costs.

All such sums awarded civilly or administratively are subject to interest. The Amendment also authorizes D.C. to collect any debt owed to an aggrieved employee under ASSLA. On top of all other penalties, the DES may order an employer to pay a sum of not more than $500 for each day and for each employee as to whom a violation occurred or continued.

Takeaway

D.C. employers should familiarize themselves with the Amendment and comply with its requirements. These include:

determining whether existing paid leave policies and/or attendance policies are consistent with the Amendment 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 all employees, including tipped restaurant workers;

- updating, revising or issuing new policies as appropriate;
- assessing the interplay of the rights and requirements provided under other existing leave laws;
- monitoring for possible issuance of a new poster incorporating the changes of the Amendment;
- establishing procedures to comply with the new recordkeeping obligations of the Amendment; and
- training managers and supervisors regarding the new rights and requirements of the Amendment.

Please contact your Proskauer relationship lawyer for further guidance on compliance with ASSLA.

[1] The prior version of ASSLA defined "employee" as an individual who has been employed by the same employer for one year without a break in service, and has worked at least 1,000 hours during the twelve month period immediately preceding the request for leave.

[2] The number of employees is determined by the average monthly number of full-time equivalent employees for the prior calendar year. The average monthly number is calculated by adding the total monthly full-time equivalent employees for each month and dividing by 12.

[3] ASSLA already prohibits waiver of its paid leave requirements for less than three paid leave days per calendar year under a collective bargaining agreement ("CBA"). The Amendment further provides that the paid leave requirements will not apply to any employee in the building and construction industry covered by a CBA that expressly waives the requirements in clear and unambiguous terms.

[4] It is worth mentioning that, under the prior version of ASSLA, accrued but unused leave was to carry over annually (regardless of total leave accrued, an employee could not exceed the paid sick leave maximums set forth above in any twelve-month period unless the employer otherwise permitted the employee to do so). Employees also were not entitled to payment or reimbursement for accrued but unused sick leave upon termination of employment. The Amendment has removed these two provisions from the text of ASSLA.

[5] ASSLA defines "family member" to include (i) a spouse (including domestic partners); (ii) the parents of a spouse; (iii) children (including foster children and grandchildren); (iv) the spouses of children; (v) parents; (vi) siblings; (vii) the spouses of siblings; (viii) a child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility; and (ix) a person with whom the employee shares or has shared, for not less than the preceding 12 months, a mutual residence and with whom the employee maintains a committed relationship.

[6] Under ASSLA, reasonable certification may include: (1) a signed document from a health care provider affirming the illness; (2) a police report indicating the employee was a victim of stalking, domestic violence, or sexual abuse; (3) a court order; or (4) a signed statement from a victim and witness advocate, or domestic violence counselor, affirming that the employee is involved in legal action relating to stalking, domestic violence, or sexual abuse. Employers are not to disclose such information except where the employee consents, pursuant to a court or administrative order, or if otherwise required by law.

[7] Employers should keep in mind that, given the significant modifications to ASSLA through the Amendment, a revised poster may be forthcoming from the Mayor's Office or the DES.

[8] The Mayor also may commence a civil action and take other steps to secure compliance from employers when compliance is not forthcoming.

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