Proskauer

Trends in New Jersey Employment Law

October 2014

Four More New Jersey Cities Enact Sick Leave Laws

Four New Jersey municipalities—Passaic, Paterson, Irvington, and East Orange—recently enacted ordinances requiring employers to provide paid sick leave to their employees (collectively, the "Ordinances"). The Ordinances will take effect in January 2015[1] or, for employees who are covered by a collective bargaining agreement (CBA), upon expiration of the CBA.[2] Similar laws already have taken effect in Newark and Jersey City, as well as several jurisdictions across the country, including the States of Connecticut and California, and localities such as New York City, D.C., Seattle, San Diego, San Francisco, and Portland and Eugene, Oregon. This alert highlights key provisions of the Ordinances regarding employee rights and employer obligations, record-keeping and notice requirements, and enforcement and remedies.

Coverage

Under the Ordinances, an "employer" is any individual or entity except the federal, state, or city government. Equally broad is the term "employee," which includes any individual who works in the particular municipality for at least 80 hours, with the exception of certain public employees and, except for the Irvington Ordinance, members of a construction union who are covered by a CBA. Further, any or all of the requirements of the Ordinances may be waived as to unionized employees, if the waiver is contained in a CBA in express, clear and unambiguous terms.

Rights & Requirements

Accrual of Paid Sick Time

Under the Ordinances, employees accrue at least one hour of paid sick time for every 30 hours worked. 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, however, they accrue sick time based upon their normal workweek. Individuals who work for employers with 10 or more employees[3] in one of the covered municipalities are entitled to accrue up to 40 hours of paid sick time in a calendar year, while individuals who work for employers with fewer than 10 employees are entitled to accrue up to 24 hours of paid sick time in a calendar year, with limited exceptions.[4] Employees begin to accrue sick time upon the effective date of an Ordinance and thereafter upon hire, but are not entitled to use it until the 90th calendar day of employment. At its discretion, an employer may loan sick time to an employee in advance of accrual.

Employees are entitled to carry over up to 40 hours of unused accrued sick leave from one calendar year to the next. Alternatively, the employer may, but is not required, to pay the employee for any unused sick time at the end of the calendar year. In any event, an employee is not entitled to take more than 40 hours of sick leave in a calendar year (although employers may have obligations under other laws to provide additional unpaid leave time). An employer may designate any regular consecutive 12-month period as the "calendar year" to be used for purposes of these laws.

If an employer has a paid leave policy that affords an amount of paid leave sufficient to meet the total annual accrual requirements under a given 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 Ordinances 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 within the municipality, 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 prior employment is counted toward meeting the requirement that the employee have been employed 90 days before using accrued time. Also, employees who remain employed by a successor employer may retain and use the paid sick time accrued with the predecessor 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[5]: mental or physical illness, injury, or health condition ("sickness"), need for medical diagnosis, care, or treatment of a sickness, or need for 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 (with jurisdiction) 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 employer may request that the employee confirm in writing following his or her use of sick time that such time was used for a permissible purpose under any given Ordinance. An employer may require "reasonable advance notice" of the intention to use sick time where the need is foreseeable, but cannot require more than seven days' notice before the date sick time will begin. Where the need to use sick time is not foreseeable, an employer may require an employee to provide notice before the beginning of the employee's work shift or work day or, in cases such as emergencies where advance notice is not possible, as soon as practicable.

After an employee has used sick time for 3 consecutive days or 3 consecutive instances (in cases where the employer determined that paid sick time could be used in increments of less than one day), an employer may require reasonable supporting documentation, including documentation signed by a health care professional, that sick time was for a purpose covered by the law. An employer may not require that the documentation explain the nature of the illness, however, as a condition of providing paid sick time under an Ordinance. Employers in Passaic, Paterson, and East Orange must permit employees to use paid sick time in either hourly increments or the smallest increment of time that the employer's payroll system uses to account for time, whichever is less. Under the Irvington Ordinance, employers can decide whether employees may use sick leave in increments of less than one day.

Anti-Retaliation Protections

The Ordinances provide employees with expansive protections against retaliation for exercising (or attempting to exercise) their rights thereunder, including for (i) filing a complaint or informing any person about an alleged violation of an Ordinance; (ii) cooperating with a municipal agency[6] (hereinafter, an "enforcing agency") empowered to investigate alleged violations of an Ordinance; (iii) participating in any administrative or judicial action regarding an alleged violation of an Ordinance; or (iv) informing any person of his or her potential rights under an Ordinance. An employer also may not require, as a condition of taking sick time, that the employee search for or find a replacement during the employee's absence.

Notice and Posting Requirements

Employers must provide a written notice of rights under the law to each employee individually as soon as practicable when an Ordinance goes into effect, and thereafter to each new hire at the time employment commences. Notice to the individual must be in English and the primary language spoken by that employee, so long as the primary language of the employee also is the primary language of at least 10% of the employer's workforce.

In addition, employers must display a poster in a conspicuous and accessible place in each business establishment covered by a given Ordinance. The poster must be in English and in each language that is the first language of at least 10% of the employer's workforce.

An enforcing agency may issue a form of notice and poster, but is not required to do so. If the City has not issued an official notice and poster by the Ordinance's effective date, employers should prepare their own form of notice and/or poster that includes information specifically required by the Ordinance. Employers may wish to consult with counsel regarding the preparation of such notice and/or posters.

Employer Records

Employers must allow an enforcing agency reasonable access to records to monitor compliance with the requirements of an Ordinance. An employer's failure to maintain or retain adequate records documenting hours worked and paid sick time taken will create a rebuttable presumption that the employer has violated an Ordinance, absent clear and convincing evidence otherwise.

Confidentiality and Non-Disclosure

An employer may not require disclosure of the specific details relating to an employee's or an employee's family member's medical condition as a condition of providing sick time under an Ordinance. Moreover, if the employer possesses 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

In the event that an enforcing agency cannot resolve a complaint, an employee or the agency itself may file suit in municipal court. Submitting a complaint to the agency is neither a prerequisite nor a bar to bringing a private action. An employer who violates one of the Ordinances is subject to varying levels of fines and to payment of restitution in the amount of any paid sick time unlawfully withheld, among other potential penalties. An agency also may publicize online and in other media the names of employers who violate the Ordinance.

Takeaway

Passaic, Paterson, Irvington, and East Orange employers should begin familiarizing themselves with the Ordinances in their respective jurisdictions and should prepare to comply with the requirements therein. This includes:

- determining whether existing paid leave policies and/or attendance policies are consistent with the Ordinance(s) covering their business 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 those who are part-time or temporary;
- updating, revising or issuing new policies as appropriate;
- establishing procedures and forms for loaning sick time in advance of accrual, if the employer in its discretion decides to permit such advances;
- assessing the interplay of the rights and requirements provided under a given Ordinance, the federal Family and Medical Leave Act, the New Jersey Family Leave Act, and the New Jersey Security and Financial Empowerment Act (SAFE Act);
- monitoring for issuance of any new poster and notice forms;
- preparing or obtaining an appropriate poster and notice if the City does not issue an official poster and notice by the law's effective date;
- establishing procedures to comply with individual notice, record-keeping, confidentiality, and non-disclosure obligations; and
- training managers and supervisors to comply with the law.

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

[1] The East Orange, Paterson, and Irvington Ordinances take effect on January 7, 2015, January 10, 2015, and January 28, 2015, respectively. The effective date of the Passaic Ordinance is not clear, but appears to be January 3, 2015.

[2] If the terms of an expired collective bargaining agreement (CBA) provide paid sick leave that is more generous than that of an Ordinance, the terms of the expired CBA apply to the extent required by law.

[3] To determine the number of employees, the Ordinances count all employees who work for compensation on a full-time, part-time, or temporary basis in the municipality. 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 such employees who worked for compensation during the preceding calendar year.

[4] Employees who are child care workers, home health care workers and food service workers are entitled to accrue up to 40 hours of paid sick leave regardless of the size of the employer.

[5] Under the Passaic, Paterson, and Irvington Ordinances, "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 of 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. The East Orange Ordinance adopts a similar definition, but does not define “family member” to include a child to whom the employee stands in loco parentis or a person who stood in loco parentis to the employee when the employee was a minor.

[6] Each Ordinance designates a municipal agency to implement and enforce the law.

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