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Saint Paul Becomes the Second City in Minnesota to Mandate Paid Sick and Safe Time

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On September 7, 2016, Saint Paul became the second city in Minnesota to mandate that employers provide earned sick and safe time for their workers. Under Saint Paul's ordinance (the "Saint Paul Ordinance"), covered employers must allow employees who work in Saint Paul to accrue one hour of sick and safe time for every 30 hours worked, up to 48 hours of sick and safe time each year. The Saint Paul Ordinance applies to private employers of all sizes, including employers with only one employee, as long as at least one employee works within Saint Paul city limits. The Saint Paul Ordinance does not exempt small businesses, but it provides them with more time to comply with the paid sick and safe time requirements. The Saint Paul Ordinance is effective July 1, 2017, for employers with 24 or more employees, while it is effective January 1, 2018, for smaller employers.

The Saint Paul Ordinance tracks many of the requirements of the [Minneapolis Sick and Safe Time Ordinance](#) ("the Minneapolis Ordinance"), which Minneapolis passed earlier in the year. However, the Saint Paul Ordinance contains a few significant differences from the Minneapolis Ordinance, forcing employers with employees in both Minneapolis and Saint Paul to decide whether to create different policies for their employees. The Saint Paul City Council and Mayor Chris Coleman have both urged the Minnesota Legislature to enact a statewide law to address the piecemeal, and at times conflicting, local legislation.

Covered Employees and Employers

With limited exceptions, the Saint Paul Ordinance applies to all employees, including full-time, part-time and temporary employees, who work within Saint Paul for at least 80 hours in a year. The Saint Paul Ordinance

excludes independent contractors and government workers, except government workers employed by the City of Saint Paul. It also permits employers in the construction industry to satisfy the requirements of the Saint Paul Ordinance by paying construction industry employees at least the prevailing wage or the rate required by the applicable registered apprenticeship agreement.

To help new businesses manage costs, the Saint Paul Ordinance allows new employers to provide unpaid sick and safe time for the first six months after hiring their first employee. After six months, the employer must provide paid sick and safe time. Beginning on January 1, 2023, new employers will no longer receive the six-month grace period. Saint Paul's six-month grace period is in contrast to the Minneapolis Ordinance, which provides a 12-month grace period for new employers.

Similar to the Minneapolis Ordinance, the Saint Paul Ordinance does not allow the paid sick and safe time requirements to be waived in a collective bargaining agreement ("CBA"). As a result, employers may need to negotiate with unionized employees about paid sick and safe leave benefits if the leave provisions in their CBA do not satisfy all of the requirements of the Saint Paul Ordinance.

Accrual, Carryover, and Cap Requirements

Under the Saint Paul Ordinance, covered employees will accrue one hour of sick and safe time for every 30 hours worked, beginning on the first day of employment or the day the Saint Paul Ordinance becomes effective for the employer, whichever is later. Unlike some other jurisdictions, including Minneapolis, which allow employers to generally assume that their over-time exempt employees work 40 hours per week for purposes of the paid sick leave laws, the Saint Paul Ordinance does not address whether employers must begin tracking the number of hours their overtime-exempt employees work.

Employers may limit the amount of sick and safe time an employee may accrue to 48 hours in a year and may cap the amount of sick and safe time an employee may have available for use at 80 hours. With such a cap, once an employee has 80 hours in his or her sick and safe time bank, the employee would cease accruing further sick and safe time. All accrued but unused sick and safe time carries over from one calendar year to the next, but time carried over is limited to the accrual caps.

The Saint Paul Ordinance, however, does not appear to allow employers to limit the amount of accrued sick and safe time an employee may use per year or at once. As such, an employee could potentially use more than 80 hours of sick and safe time in a year. For example, if an employee accrues 80 hours by the end of the second year and does not use any of that time, the 80 hours would carry over to the third year. If the employee uses all 80 hours in January of the third year, the employee could accrue up to another 48 hours during that year and use that time during the third year.

Frontloading

The Saint Paul Ordinance explicitly permits employers to provide earned sick and safe time in a lump sum at the beginning of the year, rather than have the time accrue over the course of the year. However, the Ordinance creates little incentive for employers to choose a lump-sum method because employers choosing that method must provide at least 48 hours of earned sick and safe time following the initial 90

days of employment for use during the first year, and provide at least 80 hours of earned sick and safe time beginning each subsequent year.

Use of Sick and Safe Time

The Saint Ordinance provides that, beginning 90 calendar days after their employment begins, employees are entitled to use accrued sick and safe time for any of the following purposes:

1. For an employee's, or an employee's family member's, mental or physical illness, injury, or health condition, or when an employee or his or her family member needs to obtain medical diagnosis, care, treatment, or preventive care;
2. For an absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member, provided the absence is to seek medical attention, obtain services from a victim services organization, obtain psychological or other counseling, seek relocation, or seek legal advice or take legal action;
3. When an employee's place of business is closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency;
4. To care for a family member whose school or place of care has been closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency; or
5. To care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure.

The Saint Paul Ordinance provides broader coverage than the Minneapolis Ordinance, defining "family member" to mean the employee's child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, registered domestic parent, and any individual related by blood or affinity whose close association with the employee is the equivalent to a family relationship.¹

An employer cannot require, as a condition of using leave, that an employee seek or find a replacement worker to cover the hours during which the employee uses sick or safe time. An employer may, however, have a policy that allows employees to exchange hours or trade shifts voluntarily.

Employers must allow an employee to use sick or safe time in increments consistent with the employer's current payroll practices or industry standards for recording time, provided such increment is not over four hours.

Requests for Leave, Limited Certifications, Confidentiality, and Nondisclosure

¹ The Minneapolis Ordinance's definition of "family member" does not include an "individual related by blood or affinity whose close association with the employee is the equivalent to a family relationship"; instead, it includes guardian, ward, and members of the employee's household.

Earned sick and safe time must be provided upon the request of an employee. In contrast to the Minneapolis Ordinance, the Saint Paul Ordinance does not provide different notice requirements for the foreseeable and unforeseeable need for sick and safe time.² Rather, the Saint Paul Ordinance simply provides that an employer may require employees to comply with the employer's usual and customary notice and procedural requirements for absences or for requesting leave, provided that such requirements do not interfere with the purposes for which the leave is needed. Thus, as a practical matter, an employer should avoid strictly enforcing its notice requirements when the need for leave is unforeseeable and the employee is unable to follow the employer's requirements.

When an employee's absence is for more than three consecutive days, an employer may require that the employee provide reasonable documentation to show that the leave is or was for a reason covered by the Saint Paul Ordinance. The Saint Paul Ordinance does not provide guidance regarding the type of documentation that may be "reasonable," but employers should avoid requesting more information than is necessary to verify the reason for the leave.

Additionally, the Saint Paul Ordinance requires employers to treat as confidential all information the employee or others provide in support of an employee's request for sick and safe time, that the employee has requested or obtained sick and safe time, and any written or oral statement, documentation, record, or corroborating evidence the employee provides. Such confidential information may not be disclosed except with the employee's permission, when ordered by a court or administrative agency, or when otherwise required by federal or state law.

Pay During Sick and Safe Time

Employers must provide paid sick and safe time at the same hourly rate as an employee earns from employment, but employees are not entitled to compensation for lost tips or commissions. Compensation is required only for hours that an employee is scheduled to work.

Termination, Reinstatement, Transfer, and Succession

Employers are not required to pay employees for unused earned sick and safe time upon separation from employment. However, an employer must reinstate sick and safe time when it rehires an employee within 90 days. The Saint Paul Ordinance, however, leaves some questions unanswered. For example, it does not address whether the sick and safe time must be reinstated if the employer pays out the sick and safe time upon termination.

The Saint Paul Ordinance also provides that if an employee is transferred to a separate division, entity, or location outside Saint Paul, but remains employed by the same employer, and the employer does not allow the use of accrued paid sick and safe time outside the city, the employer must maintain the employee's accrued sick and safe time on the books for three years from the time of transfer. If the employee transfers

² The Minneapolis Ordinance provides that when the need for sick or safe time use is foreseeable, an employer may require that the employee provide seven days' advance notice. In other cases, the employer may require that the employee provide notice as soon as practicable.

back to a division, entity, or location within Saint Paul within the three-year period, the employee is entitled to all previously accrued and unused sick and safe time.

When an employer succeeds or takes the place of an existing employer, an employee who remains employed by the successor employer is entitled to all the unused sick and safe time the employee accrued with the original employer. If, at the time of the business transfer, the original employer terminates the employment of an employee, but the successor hires the employee within 30 days of the termination, the employer is entitled to all earned sick and safe time accrued but not used when employed by the original employer.

Notice and Posting Requirements

Employers must give employees notice informing them of their rights under the Saint Paul Ordinance. The Saint Paul Department of Human Rights and Equal Economic Opportunity (“Department”) will publish a poster and model notice containing the required information. Employers may comply with the notice requirements by displaying the poster in a conspicuous and accessible place in each establishment where Saint Paul employees are employed. Employers must also include the notice in any employee handbook.

At an employee’s request, the employer must provide a written or electronic notification of the employee’s current amount of: (1) earned sick and safe time available to the employee; and (2) used sick and safe time. Employers may provide the required information on a pay stub, in an online system where employees can access their own information, or through another reasonable system.

Recordkeeping Requirements

For three years, employers must maintain accurate records for each employee showing: (1) hours worked; (2) the accrual of earned sick and safe time; and (3) the use of earned sick and safe time. At an employee’s request, the employer must provide a copy of these records to the employee. Employers must also allow the Department to access the records with appropriate notice and at a mutually agreeable time.

The Saint Paul Ordinance does not specifically address the accrual or tracking of sick and safe time for employees who only occasionally perform work in Saint Paul.

Prohibited Acts, Enforcement, Private Right of Action

Employers are prohibited from discriminating or retaliating against employees for exercising their rights protected under the Saint Paul Ordinance. Those rights include, but are not limited to, the right to use earned sick and safe time, to file a complaint or inform any person about an employer’s alleged violation of the Saint Paul Ordinance, to cooperate with the commission in its investigation of alleged violations, and to inform any person of his or her potential rights under the Saint Paul Ordinance.

The Department is responsible for enforcing the Ordinance and has sole discretion to decide whether to investigate or pursue a violation. An employee or other person may report to the Department any suspected violation occurring after the effective date of the Saint Paul Ordinance (i.e., July 1, 2017, for employers with 24 or more employees, and July 1, 2018, for smaller employers), as long as the alleged violation has occurred within 365 days prior to filing the report. If the Department does not investigate or otherwise pursue a report, it must provide the complainant with written notification that the Department is declining to further investigate and the reason for declining. The complainant may, within 21 days, file a request for reconsideration, and the Director of the Department of Human Rights (“Director”) must provide a written response within 10 days.

The Ordinance also details the investigation procedures, steps parties can take to appeal the Director’s violation determination, and the standard of review on appeal. The Department will refer appeals to the Human Rights and Equal Economic Opportunity (“HREEO”) Commission. The HREEO Commission’s decision constitutes the city’s final decision.

In another deviation from the Minneapolis Ordinance, the Saint Paul Ordinance creates a private right of action. Instead of filing a complaint with the Department, employers may bring a civil action in the district court where the retaliation is alleged to have occurred or where the employer resides or has a principal place of business, to recover any and all damages recoverable at law, costs and disbursements, attorney’s fees, and injunctive and other equitable relief as determined by a court.

Remedies and Penalties

The Ordinance provides a non-exhaustive list of potential relief and administrative fines available for the Department to impose when a violation has occurred. The Director may impose any appropriate relief, including but not limited to:

- Reinstatement and back pay.
- For a first violation, payment of any earned leave unlawfully withheld and liquidated damages, which may include payment of the dollar value of the accrued leave withheld multiplied by two or \$250, whichever is greater.
- For a second violation, payment of any earned leave unlawfully withheld and liquidated damages in an additional amount, and payment of the dollar value of the accrued leave withheld multiplied by two or \$250, whichever is greater. Additionally, the employer shall be assessed an administrative fine payable to the city, up to \$1,000.
- For a third or any subsequent violation, in addition to the above, the employer shall be assessed an administrative fine of up to \$1,000 or an amount equal to 10 percent of the total amount of unpaid wages, whichever is greater, payable to the employee.
- An administrative fine of up to \$1,000, payable to the employee, for each violation of the Saint Paul Ordinance’s confidentiality and nondisclosure, discrimination, or retaliation provisions.
- An administrative fine of up to \$1,000, payable to the city, for each violation of the Saint Paul Ordinance’s required notice and posting, required statement to employee, or other recordkeeping

violations. Unlike the Minneapolis Ordinance, the Saint Paul Ordinance does not provide employers with an opportunity to remedy those violations before they may be assessed an administrative fine.³

The potential remedies and penalties are cumulative.

If an employer fails to promptly comply with the final determination of a violation, the Department may refer the action to the city attorney to consider initiating a civil action. Upon prevailing, the city may be entitled to legal or equitable relief.

No Effect on More Generous Policies

If an employer's existing leave policies satisfy the Saint Paul Ordinance's detailed requirements, the employer does not have to provide additional sick and safe time. Employers may continue to maintain other leave policies, such as vacation, sick, or other paid time off (PTO) policies, as long as the policies do not otherwise conflict with the Saint Paul Ordinance.

The Saint Paul Ordinance also explicitly permits employers to have policies that allow employees to use sick and safe time prior to accrual, or to voluntarily donate unused accrued sick and safe time to another employee.

Recommendations

Employers with employees who perform work in Saint Paul should consider the following actions:

- Review and revise sick time or PTO policies and procedures to determine whether they satisfy the Saint Paul Ordinance's requirements, including those pertaining to accrual, use, carryover, and all other provisions.
- Review attendance and other disciplinary policies to ensure that adverse actions are not taken against employees for using accrued sick and safe time.
- Once the Department publishes the poster and model notice of employee rights and remedies, update existing postings and employee handbooks to include the required notice.
- Review and update timekeeping, payroll and benefits systems to verify that they will comply with the law's recordkeeping requirements.
- Review CBAs to determine whether their leave provisions will satisfy the requirements of the Ordinance and prepare for negotiating changes if they do not.

³ The Minneapolis Ordinance provides employers with five business days to remedy a notice, posting, or recordkeeping violation before an administrative fine will be assessed for those reasons.