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Milwaukee joins San Francisco and Washington, D.C., in mandating paid sick leave. Milwaukee enacted its paid sick leave ordinance on November 4, 2008, and will be enforceable on February 10, 2009.

Milwaukee Becomes Third City to Mandate Paid Sick Leave for Employees

By Noah G. Lipschultz

On November 4, 2008, by a referendum vote of 68% of voters, Milwaukee became the third city in the United States, following San Francisco and Washington, D.C., to pass a law mandating that employers provide paid sick leave to employees. Washington, D.C.'s law was passed in March 2008 and has been in effect since November 13, 2008. San Francisco's law has been in effect since February 2007.

Emerging Trend

These recent municipal paid sick leave laws reflect a trend at both the state and municipal level toward heightened obligations on the part of employers to provide paid time off to employees, whether in the form of sick leave or paid family leave. Four states, California, New Jersey, Maine and Maryland, currently have laws requiring that employers provide paid family leave or requiring that employers who otherwise provide PTO make such leave available to use under specified circumstances. A fifth, Washington, passed a similar paid family leave law but has delayed implementation due to budget constraints. Several states have introduced paid sick leave laws, but none have passed. While there is currently no federal legislation mandating paid sick leave, such legislation has been introduced by Senator Ted Kennedy, and the prospects for passing such laws have increased in light of the recent election results. President-elect Obama has already signaled his support for worker-friendly legislation, particularly in the area of sick leave.

Scope and Effective Date of the Milwaukee Sick Leave

Milwaukee's ordinance applies to all private employers (regardless of size) operating within the city's geographic boundaries. The referendum was published on November 12, 2008, which gives employers 90 days (until February 10, 2009) to ensure compliance. Employees will not begin to accrue sick leave until February 10, 2009, at the earliest (assuming full implementation on that date).

Key Provisions of the Sick Leave Ordinance

Amount of Leave

The Milwaukee ordinance requires that employers with 10 or more employees provide a minimum of one hour of paid sick leave for every 30 hours worked, up to a maximum of 72 hours of such leave per calendar year. Employers with fewer than 10 employees are required to provide only up to 40 hours of sick leave per employee per calendar year, but the leave accrues at the same rate.

Eligibility

Employees are defined to include any person employed by an employer within the geographic boundaries of the city of Milwaukee. This includes part-time and temporary employees.

Employees will begin to accrue their paid sick leave immediately upon commencement of employment, and may begin using their accrued leave after their 90th day of employment.

Use of Leave

Employees can use accrued leave for an absence from work for their own, or a family member's, mental or physical illness, injury or medical condition, or for preventative care, medical diagnosis or treatment. *Family member* is broadly defined as a spouse, domestic partner, parents of a spouse, children (including foster, biological and adoptive children and grandchildren), spouses of children, parents, brothers and sisters (including biological, foster, or adopted), and grandparents. Strikingly, *family member* also includes as a catch-all "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

Employees may also use accrued leave for certain purposes if they or a family member are victims of stalking, domestic abuse, or sexual assault. The victim is specifically permitted to use the paid leave required under this ordinance to seek medical attention (physical or psychological) relating to the domestic abuse, stalking or sexual assault. Paid leave may also be used to obtain services and/or counseling from a psychologist or victims' services organization, relocation due to domestic or sexual violence or stalking, or leave to take legal action (criminal or civil) relating to the domestic or sexual violence.

Like the FMLA, leave taken pursuant to this ordinance is protected. This means that employers may not consider such leave when making a disciplinary decision, a demotion, a discharge, or other decisions adverse to the employee.

Yearly Carry Over Capped and Payout on Termination Not Required

The ordinance requires the "carry over" of unused sick leave from year to year, so long as the employee does not use more than 72 hours (or 40 hours, in the case of small employers) of sick leave in a calendar year. The ordinance does not require employers to pay employees for unused sick leave upon termination, resignation, retirement or other separation from employment. However, employees who are rehired within one year of separation will be entitled to reinstatement of their previously accrued, unused sick leave, and their right to use that leave commences immediately upon their re-employment.

Anti-Retaliation and Interference Provisions

The ordinance prohibits employers from imposing "unreasonable barriers" or requiring "unreasonable documentation" of illnesses. An employer may not require, as a condition of taking the leave, that an employee find a replacement worker to cover his or her hours. Nor may an employer otherwise interfere with, restrain, or deny employees' rights under the ordinance. Employers are equally prohibited from retaliating or discriminating against any employee for having used their paid sick leave or for informing others of their rights under the ordinance or filing a complaint about a perceived violation of the ordinance.

Notice and Recordkeeping Requirements

Employers are required to notify employees of their rights under the ordinance in English, Hmong and Spanish. This notice must

include the amount and permitted uses of the leave, and the prohibition against retaliation. The notice requirement may be satisfied by a workplace posting in a conspicuous location or via individual handouts to employees.

Employers are required to maintain records documenting the hours worked and the paid sick leave taken by employees for at least five years.

Effect on Current Leave Policies

An employer who currently has a “paid-time off” policy that provides accrued paid leave that is both at least as generous as the law’s minimum requirements and can be used for the same qualifying reasons as leave under the ordinance, need not modify its existing policy. As the ordinance expressly requires paid leave to employees who themselves or whose family members are victims of domestic violence and crimes of a similar nature, and defines “family member” broadly, many employers will likely need to modify their current leave policies to ensure they expressly incorporate the ordinance’s parameters. In addition, small employers, who may not have any leave policies, will need to create them and the necessary recordkeeping system to help ensure compliance with Milwaukee’s ordinance.

What this Means for Employers

Employers that currently offer paid leave should review their policies to ensure that they clearly communicate each of the qualifying circumstances and meet at least minimum paid leave thresholds. Those employers who operate in the city of Milwaukee that do not currently offer paid sick leave must create and implement compliant sick leave policies by February 10, 2009, when this ordinance will be enforced.

Legal Challenges May Delay Implementation

The Metropolitan Milwaukee Association of Commerce (MMAC) filed a Notice of Claim on November 5, 2008, challenging the legality of the ordinance on the ground that it exceeds the City Council’s legislative powers and conflicts with Wisconsin’s Family Leave Act. The court may delay the enforcement of the ordinance while it considers MMAC’s challenge. In the meantime, employers are advised to develop compliant policies and to be prepared to implement them on February 10, 2009. The city of Milwaukee is currently working on developing rules regarding the implementation of the new ordinance. See www.milwaukee.gov/der/pslo for developments.

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