

Philadelphia Enacts Sick Leave Ordinance

Last week, Mayor Nutter signed into law Philadelphia's new "Promoting Healthy Families and Workplaces" ordinance. The ordinance, which will take effect May 13, 2015, has six components which affect all employers with Philadelphia workers.

First, the ordinance requires private employers with 10 or more employees to offer *paid* sick leave and employers with fewer than 10 employees to offer *unpaid* sick leave. An employer meets the threshold for paid leave if it has 10 or more employees for at least forty (40) weeks in a calendar year. Notably, *all* employees – full-time, part-time and temporary – count for this purpose. Also covered by the ordinance are "chain establishments" regardless of the number of employees. A "chain establishment" is one doing business under the same trade name used by 15 or more establishments, regardless of whether all of those establishments are located in Philadelphia and regardless of the ownership of each establishment.

"Employee," in turn, is defined to mean an individual performing work in the City of Philadelphia for at least 40 hours a year. Specifically excluded from the definition of "employee" are "independent contractors, seasonal workers, adjunct professors, employees hired for a term of less than six months, interns, pool employees, State and Federal employees, and employees covered by a *bona fide* collective bargaining agreement." Seasonal workers, interns and pool employees are all narrowly defined terms under the ordinance.

Read more

Second, the ordinance establishes minimum sick leave requirements. Employees are to accrue one hour of sick leave for every 40 hours worked in Philadelphia, subject to a cap of 40 hours per calendar year (although employers can adopt a higher cap). FLSA-exempt employees "will be assumed to work 40 hours in each work week" unless their normal work week is established to be less than that. Employees are entitled to carry over sick leave from year to year unless the employer provides at least 40 hours of sick leave at the start of each year, but use of sick leave is capped at 40 hours per calendar year (unless the employer adopts a higher cap). Employers that provide generic "paid time off" or that permit employees to use other paid time off (such as vacation or personal days) for covered purposes under the ordinance are not required to provide additional sick leave, as long as the paid leave currently offered meets or exceeds the accrual requirements of the ordinance.

Significantly, the ordinance partially does away with "probationary" or "introductory" periods for this benefit. For current employees, sick leave begins to *accrue* on the effective date of the ordinance – May 13. For new employees, sick leave begins to accrue on the first day of employment. However, the ordinance does allow employers to prohibit *use* of sick leave until the employee has reached 90 days of employment.

Employers must allow employees to take accrued sick leave upon oral or written request and to take accrued sick leave in the *smaller of* (i) one hour increments or (ii) the smallest increment the employer's payroll system uses to account for employee time.

Employers *may* – but are not required to – "loan" sick leave to employees in advance of accrual. Employers also are not required to pay out employees for accrued, unused sick leave upon the

termination of their employment. (However, under Pennsylvania law generally, employers who wish to avoid paying out unused sick or other leave time upon termination of employment are well advised to have a written policy to that effect.)

The ordinance specifically prohibits requiring workers to find their own replacement coverage before they may use sick leave.

Third, the ordinance establishes conditions for the use of sick leave and expressly permits use of sick leave for reasons other than the employee's own illness or injury. Employees are entitled to take sick leave for (1) their own mental or physical illness, injury or health condition; need for diagnosis, care or treatment; or need for preventative medical care; (2) care of certain family members (including but not limited to a child, grandchild, parent, grandparent, spouse or sibling) with a mental or physical illness, injury or health condition; need for diagnosis, care or treatment; or need for preventative medical care; (3) absence due to domestic abuse, sexual assault or stalking, if needed to allow the employee to obtain (for him/herself or a family member) medical attention, services from a victim services organization, counseling, relocation, or legal services or remedies (including preparing to participate in a civil or criminal legal proceeding).

For absences of more than two consecutive days, employers are permitted to request "reasonable documentation" that the absence is for a covered reason. What constitutes "reasonable documentation" under the ordinance varies depending on the reason for the absence, and the ordinance imposes limits on the information an employer may obtain as part of the "reasonable documentation" process. Specifically, an employer "may not require that the documentation explain the nature of the illness or the details of the [domestic] violence." (The ordinance also generally prohibits employers from seeking details about a health condition or other situation as a condition for the use of sick leave.) Should the employer nevertheless obtain such information (because the employee volunteers it, for instance), the employer must treat it as confidential and may not disclose it without the permission of the employee.

Fourth, the ordinance prohibits retaliation against employees who exercise their rights. The anti-retaliation provision protects employees who take protected sick leave, complain about violations of the ordinance, cooperate with the enforcing agency (which has yet to be identified by the City), or inform others of their potential rights under the ordinance.

Employers are specifically prohibited from counting absences protected by the ordinance for purposes of discipline, discharge, demotion, suspension or other adverse employment action.

The ordinance also establishes a rebuttable presumption of unlawful retaliation in cases where an employer takes adverse action against an employee within 90 days of a complaint or other protected employee activity.

Fifth, the ordinance establishes recordkeeping and notice obligations. If employers are not doing so already, they must begin documenting employee hours worked and sick leave used. Employers also must begin documenting sick leave payments made under the ordinance.

In addition, employers must provide employees with an English-language notice of their rights under the ordinance. If at least 5% of the workforce speaks a first language other than English,

notice must be given in that language as well. This notice requirement may be satisfied by posting a notice “in a conspicuous and accessible place” or by distributing individual notices to employees. Employers who distribute handbooks to their employees must include the notice in their handbook.

Although the ordinance calls for the enforcing agency to make available posters that will satisfy this notice requirement, they are not yet available.

Employers who violate the ordinance’s notice requirements are subject to a \$100 civil fine for each offense.

Sixth, the ordinance creates a civil cause of action. Individuals alleging a violation of the ordinance have one year from the date they knew (or should have known) of the alleged violation to file a complaint with the enforcing agency. Upon conclusion of the agency’s investigation, or 180 days after filing the complaint (if the complaint remains unresolved), the individual may file suit in court. (The enforcing agency and the City Solicitor may file suit in court without resorting to the administrative complaint process.) An individual who prevails on a claim is entitled to recover the full amount of any unpaid sick leave to which he or she was entitled, any wages, benefits or other damages suffered as a result of the employer’s violation of the ordinance, and an equal amount of liquidated damages (up to a maximum of \$2,000). An individual who prevails on a claim is also entitled to reasonable attorneys’ fees.

* * * *

In anticipation of the May 2015 effective date, employers with employees working in Philadelphia should begin reviewing their existing policies and procedures to ensure they are compliant with the requirements of the new ordinance. Employers should also begin educating managers and supervisors on the requirements of the new ordinance. Lastly, employers will need to coordinate with their personnel, benefits and payroll departments (or outside payroll services) to ensure that the recordkeeping and other requirements of the law can be satisfied by existing systems and/or to identify and implement any changes that will necessary.