ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

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San Francisco enacts the first law mandating paid sick leave for employees. Employers must adopt or adjust paid leave policies, and face several uncertainties.

California Edition

A Littler Mendelson California-specific Newsletter

Employers' New Headache: SF's Paid Sick Leave Law

By Nancy L. Ober and Paul R. Lynd

On November 7, San Francisco voters approved the first law in the nation mandating that employers provide paid sick leave to all employees. The law is effective February 5, 2007. Proposition F provides an important benefit to employees, but poses several vexing and unresolved questions certain to give employers headaches.

The New Law's Provisions

Until now, whether an employer provided paid sick leave or not has been strictly a matter of contract or employer policy. For San Francisco employers, Prop. F will require paid sick leave.

The new law requires that an employee accrue one hour of paid sick leave for every 30 hours worked, with accrual only in full-hour increments. An employee may accrue sick leave up to a cap of 72 hours for most employees, at which point accrual stops until the employee uses some sick leave. Employees of a "small business" can accrue up to 40 hours of unused sick leave. Small businesses may be difficult to identify. The measure defines them as an employer "for which fewer than ten persons work for compensation during a given week," including part-time and temporary employees and persons hired through a temporary services or staffing agency. The "given week" used as a point of measurement is undefined. There is no minimum number of employees required before the mandate applies.

Prop. F applies to all employers within the "geographic boundaries" of the City and County of San Francisco. It does not apply to city contractors (unless their employees are in San Francisco). It also does not extend to employers operating on City-owned property outside San Francisco, such as San Francisco International Airport, which is outside of the City's geographic boundaries.

The law extends to part-time and temporary employees, again including individuals hired through "a temporary services or staffing agency or similar entity."

Sick leave accrual begins on the law's effective date. For new employees who begin work after that date, accrual begins after 90 days of employment. Once accrued, sick leave must be carried over until used. Employers must be careful not to provide for a forfeiture of available sick leave once it has accrued, as can be a common practice at specified intervals under traditional sick leave policies. Unused sick leave does not have to be paid upon termination.

Prop. F requires that paid sick leave be available for the same purposes listed in California's "kincare" law (Lab. Code § 233(b)(4)): for an employee's illness or injury, or for receiving medical care, treatment, or diagnosis, including medical appointments.

To prepare for the new law, employers need to review any current sick leave and paid time off policies. Employers without a paid sick leave policy will need to develop one. Employers who currently have a paid sick leave policy will need to ensure that adequate paid leave is provided for covered purposes. It is difficult to estimate how much paid sick leave might be required in a year, so it might not always be possible to establish a set amount of leave accrual each year designed to comply with the law in all circumstances. An employee working a standard 2,080-hour

year would theoretically accrue 69 hours of paid leave under the law. However, exact accrual will depend on the number of hours an employee actually works. It also can vary based on whether an employee has reached the accrual cap and the amount of leave used.

One result of the law may be to cause employers to combine vacation and paid sick leave into "paid time off" that can be used for either reason. The downside is that, under California law, an employer then would have to cash out any accrued, but unused, paid time off when employment terminates. California law does not otherwise require payment for unused sick leave at the end of the employment. In many cases, employers with paid time off policies already may comply with the law, but the policies will need to be reviewed for compliance.

Prop. F likely will require changes to absence control policies. The new law prohibits an absence control policy that counts paid sick leave taken as an absence that may lead to an adverse action. The result may be that any use of paid sick leave required by Prop. F is a protected absence. In this regard, Prop. F is much broader than California's kincare law, which only prohibits an absence control policy from counting leave taken for kincare purposes. Prop. F also protects an employee's use of sick leave for his or her own care.

No Rules or Regulations

Prop. F will be enforced by San Francisco's Office of Labor Standards Enforcement ("OLSE"). The OLSE can investigate alleged violations, order various forms of relief, and impose penalties. The measure authorizes the OLSE to issue "appropriate guidelines or rules." At this time, the agency advises that it does not anticipate issuing implementing regulations or rules. Thus, official interpretation may not appear soon.

Vexing And Unresolved Questions

1. **Employed in San Francisco**

   Prop. F covers employees within San Francisco, but does not require that the employer be in San Francisco. It is unclear to what extent the ordinance will apply to employees who work partly in San Francisco but whose office or base is elsewhere, or to employees who telecommute from San Francisco to a job elsewhere. The measure intends to require "employers benefiting from the opportunity to do business" in San Francisco to provide paid sick leave. With this objective, it may require employees who work partly in San Francisco to receive at least a prorated benefit.

2. **Temporary Employees**

   Prop. F covers temporary employees, including employees hired through an agency and defines "employer" to include any person who employs an employee through a temporary services or staffing agency, or who exercises control over an employee's wages, hours or working conditions. This provision suggests that the employer using the temporary employee's services may be responsible for providing paid sick leave, although it is usually the agency that pays the temporary employee. Allocation of responsibility for compliance may ultimately depend on contractual arrangements between the employer and agency.

3. **Accrual by Exempt Employees**

   Overtime exempt employees are not excluded from coverage under Prop. F, and like other employees their accrual depends on hours worked. Thus, the ordinance will effectively force employers to keep track of exempt employees' hours, something that they are not otherwise required by law to do. However, keeping such records alone will not jeopardize an employee's exempt status.

4. **What Rate of Pay?**

   The law does not specify the rate at which accrued sick leave must be paid when taken. Typically, the employer's policy or agreement determines the rate. However, with paid sick leave mandated by law essentially as replacement wages, an employer may be wise to pay sick leave taken at the employee's straight time hourly rate.

   To derive an hourly rate for exempt employees, the employer will have to convert annual or monthly salary into a weekly salary, and then determine an hourly rate. State and federal law prescribe different methods for deriving the hourly rate. Under California law, the hourly rate is the weekly salary divided by no more than 40 hours. Under the federal Fair Labor Standards Act, the hourly rate is the weekly salary divided by the employee's actual hours worked in the week. The California method results in a higher hourly rate, which it may be wise to follow.

   Fully commissioned employees present a tougher challenge. Their regular rate always varies, and they usually do not accrue paid leave. Pending further guidance, an employer may have to pay sick leave based on the pay for salespersons who are not fully commissioned, if any.

5. **Relationship of Prop. F to Family And Medical Leave**

   Under state law, an employer may *require* an employee to use any paid sick leave during what would otherwise be unpaid family and medical leave, but only if the leave is for the employee's own serious medical condition. While Prop. F permits paid sick leave to be used to attend to a family member's illness, an employer cannot require an employee to use it for that purpose in lieu of taking unpaid family leave. However, the employer can require an employee to use accrued paid sick leave for the employee's own illness.

6. **Relationship to "Kincare"**

   Like the state kincare law, Prop. F requires that employers also allow employees to use sick leave to provide the same aid and care for a child, spouse, parent, domestic partner, or child of a domestic partner. Yet, the measure goes further, covering siblings, grandparents, and grandchildren, including step-relationships. It further includes domestic partners registered "under any state or local law," rather than only with the State of California, as with the kincare law.

   Prop. F allows an employee without a spouse or registered domestic partner to designate "one person as to whom the employee may use paid sick leave to aid or care for the person." An employee

must be given the opportunity to make this designation no later than the date the employee has worked 30 hours after beginning paid sick leave accrual, after which the employee has 10 workdays to make the designation. Then, employees must be given an annual opportunity to make or change a designation. The law does not address whether this choice must be given a year after the initial designation, or whether an employer may have an annual "open designation period" for all employees at the same time.

Preemption And Union Exemption

Prop. F does not appear to conflict with state or federal law, and thus the headaches it may bring to employers will not be subject to an easy challenge. California has not mandated paid sick leave or signaled an intent to preempt local regulation in this area. The federal Employee Retirement Income Security Act of 1974 preempts state and local regulation of certain benefit plans. However, if sick leave is paid out of an employer's general assets (the usual case), federal regulations treat it as a "payroll practice" excluded from ERISA's preemption. Prop. F specifically exempts employees covered by a collective bargaining agreement if the contract waives the ordinance requirements in "clear and unambiguous terms."

Due to the complexity of the new law, as well as the many as yet unanswered questions that it raises, employer efforts at compliance will likely prove throbbing to human resource professionals and managers alike. Experienced employment counsel can help employers develop personnel policies consistent with Prop. F and can monitor continuing developments in this area.

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