



San Diego Sick Leave Amendments: Cure for or Cause of Employer Ills?

BY LISEANNE KELLY AND SEBASTIAN CHILCO ON AUGUST 16, 2016

San Diego's Earned Sick Leave and Minimum Wage Ordinance has been amended less than two months after its July 11, 2016 effective date.¹ The amendments, instituted via the oddly-titled "Implementing Ordinance," plug gaps the original law created, create an administrative enforcement system for receiving and resolving complaints, and impose additional obligations that require employers to review and potentially revise their notices, policies, and procedures. Below we briefly summarize the amendments, which will take effect September 2, 2016.²

Caps, Carry-Over, Frontloading & Existing Policies: Although the original law allowed employers to limit how much leave could be used each year, it did not set a limit on accrual and required accrued but unused leave to carry over to the following year. As amended, employers can cap total accrual at 80 hours. Importantly, the amendments allow employers to frontload 40 sick leave hours at the beginning of each benefit year, thereby eliminating carry-over and accrual requirements. However, the full 40 hours must be provided regardless of an employee's full-time, part-time, or temporary status, so employers cannot prorate for employees with reduced schedules who – if an accrual system were used – might not accumulate 40 sick leave hours in a year. Another potentially beneficial new provision states that employers comply with the law if they provide more paid time off than the law requires – either through a contract, collective bargaining agreement, employment benefit plan, or other agreement – even if they use an alternative method for calculation, payment, and use of sick leave or paid time off that can be used as sick leave. However, given that San Diego employers must comply with both the California paid sick leave law as well as the San Diego ordinance, this provision may only provide limited relief in terms of employers with alternative methods of calculation, payment and/or usage of paid sick leave.

Notice Requirements: The scope of the notice information employers must provide was expanded. Instead of an employer's name, the amendments require notice of the employer's legal name and any fictitious business name. When the amendments take effect, the notice must also include information explaining how employers satisfy the

law's requirements, including their accrual method. Additionally, the notice language has been revised to require it be in English and any employee's primary language if spoken by at least five percent of employees at the workplace, and the county registrar of voters provides translated ballot materials in that language. Finally, originally notice was to be provided at the time of hire or by July 11, 2016, whichever was later. The amendments require notice to be provided at the time of hire or by October 1, 2016, whichever is later.³ For employers that already provided notice, the amendments appear to require that revised notices be provided by October 1, or, at the very least, that notice of newly-required information be provided.

Administrative Complaints, Penalties & Remedies: A primary purpose behind the implementing ordinance was establishing an administrative enforcement scheme, and numerous pages of the revisions detail the enforcement process. Written complaints must be filed with the City Treasurer within two years of an alleged violation. The implementing ordinance provides that exhausting administrative remedies is not required before a private lawsuit can be filed.

The general civil penalty – which applies in the absence of a specific penalty – has been revised from up to \$1,000 to between \$500 and \$1,000 per violation, and specifies each and every day an employer fails to provide sick leave is a separate and distinct violation. The notice / posting penalty will increase from \$100 to \$500 per employee who is not provided appropriate notice. A new anti-retaliation penalty between \$1,000 and \$3,000 has been imposed. Another new provision sets the total cumulative penalties that can be imposed against a first-time offender at \$10,000. Also, a new subsequent violations penalty requires the minimum and maximum penalties to increase by 50 percent for each subsequent violation of the same provision within a three-year period.

The amendments include a liquidated damages provision for retaliation violations: if the violation did not result in employment terminating, the amount of damages will equal double back wages or \$1,000, whichever is greater; if the employee was fired for exercising protected rights, the amount of damages will equal double back wages or \$3,000, whichever is greater. Finally, liability for unpaid remedies will be imposed on successor employers with actual or constructive knowledge of remedies assessed in a city-issued Notice and Order.

Retaliation: Under the implementing ordinance, anti-retaliation protections will apply to employees who mistakenly but in good faith allege non-compliance. Additionally, the amendments create a rebuttable presumption of retaliation if an employer takes adverse action against an employee within 90 days of the employee exercising protected rights.

Providing Records to Employees: A new provision requires employers to provide required records to employees "on a regular basis," though it is unclear how frequently that is and what form the records must take (e.g., wage statement, standalone written notice, electronic access to information).

When Leave Can Be Used: The law provides employees can begin using leave on the 90th calendar day following the start of employment, or July 11, 2016, whichever is later. A recently revised FAQ clarifies this is the 91st day of employment.

Conclusions

The amendments are a mixed bag for employers. Revisions like the ability to frontload and place a cap on accrual make compliance easier. However, some employers may find the benefits outweighed by the administrative burdens of participating in a second round of notices shortly after initial disclosures, and increased penalties. Regardless of where employers stand on the amendments' pros and cons, it is advisable to review existing policies and procedures, and monitor the City Treasurer's [website \(https://www.sandiego.gov/treasurer/minimum-wage-program\)](https://www.sandiego.gov/treasurer/minimum-wage-program) for updates and further guidance.

¹ For a summary of the original law, see Liseanne Kelly, Lucy Anthony, Sebastian Chilco, and Pamela Salgado, *Voters Approve Paid Sick Leave Changes in San Diego and San Francisco* (<http://www.littler.com/publication-press/publication/voters-approve-paid-sick-leave-changes-san-diego-and-san-francisco>), Littler Insight (June 14, 2016).

² Minor amendments were also made to the minimum wage provisions. For example, the amendments remove references to dates that predate the law's effective date, and specify the first minimum wage rate takes effect July 11, 2016. Additionally, concerning required records, the requirement has been changed from wages "earned" to wages "paid." Other protections or requirements referenced in this article also apply to the minimum wage provisions, e.g., retaliation protections, administrative enforcement, and penalties.

³ The City Treasurer posts online a model notice in English and posters in various languages. However, it indicates both will be modified once the Implementing Ordinance takes effect.

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