

San Diego's New Sick Leave Ordinance Is In Effect, And Fixes Are Imminent

7.13.16

On Monday, July 11, the San Diego City Council certified the Minimum Wage and Sick Leave Ordinance passed by voters last month and also passed amendments to the Ordinance. We published a summary of the law when it was passed by the voters last month. Fortunately, the amendments address many of the questions left unanswered by the original bill. Unfortunately, some of the amendments also include increased penalties.

Importantly, while the amendments require a second read in 30 days before they can be effective (which is expected to occur barring any unforeseen developments), the City Council has set July 11, 2016 as the effective date for employers to comply with the Ordinance's original requirements. This is what employers need to know now about the Ordinance and the new forthcoming amendments:

Sick Leave

Employers of employees who work at least two hours in the City of San Diego in one or more weeks of the year are now obligated to provide paid sick leave as follows:

- **Use.** Employees must be allowed to use up to **40 hours** (or five days) per year. The available reasons to take sick leave fall under the same broad reasons currently available under state law. Additionally, employees in the City of San Diego may also use paid sick leave when the employee's place of business is closed due to a public health emergency or the school or child care provider of a child in the employee's care is closed due to a public health emergency. Employers in San Diego may also require that employees take sick leave in two-

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hour increments. Employees may begin using Paid Sick Leave on the 90th calendar day of employment or July 11, 2016, whichever is later.

- **With the amendments, employers now have two methods of providing sick leave:**

- **Accrual.** Employees earn one hour of paid sick leave for every 30 hours worked, and earned unused sick leave carries over to the next year. The Ordinance allows employers to meet their obligation through the use of paid time off, paid vacation, or paid personal days.

NEW – Accrual Now Capped. Originally, the ordinance passed by voters prohibited employers from placing any cap on sick leave accrual. However, the amended Ordinance now allows employers to cap an employee's total earned sick leave at **80 hours**. This change is important because the cap allows employers who choose to utilize combined PTO policies to meet the sick leave requirements to avoid runaway costs. Since PTO must be paid out on termination (unlike sick leave), the original language forced employers to maintain separate sick and vacation policies or else face uncapped PTO and potentially large payouts at termination.

Rollover. It is important to note that accrued but unused paid sick leave must still roll over to the next benefit year. However, with the new amendments, once an employee accrues 80 hours of paid sick leave, the employee will stop accruing until he or she uses that sick leave.

- **NEW – Front Load Now Available.** The amended Ordinance now also provides employers with the option of providing the 40 hours of paid sick leave to employees at the beginning of each benefit year, similar to California's sick leave law. A benefit year is any regular and consecutive 12-month period defined by the employer.
- **NEW – Rate.** The amended Ordinance clarifies that employees who are not exempt from overtime should be paid at their regular rate of pay for the workweek in which the employee uses sick leave. This is the same as one of the two options for nonexempt workers under the California statute. Exempt employees must be paid at the same rate or in the same manner as they are for paid working time.
- **Employee's Notice.** Employers may require reasonable notice (no more than seven days in advance) for the need for foreseeable sick leave. Like the requirement under state law, employers may only require notice "as soon as practicable" where the need for leave is unforeseeable.
- **NEW – Clarity Regarding Employer's Notice.** Employers must provide notice of the new ordinance to employees by (1) posting a poster, and (2) providing written notice to individual employees with details on how the employer satisfies the requirements of the city ordinance.



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Under the Amended Ordinance, the poster will be made available **September 1, 2016**. The written notice to employees must be provided at the employee's date of hire or **October 1, 2016**, whichever is later.

- **Reinstatement.** If a terminated employee is rehired within six months, he or she is entitled to reinstatement of his or her accrued but unused paid sick leave if it was not paid out on termination. If an employee is rehired within one year, he or she will be entitled to his or her accrued but unused sick leave under California state law if it was not paid out on termination.
- **Record-Keeping.** Unfortunately, the Amended Ordinance does not make substantive changes to the employer's record-keeping obligations. Employers must create and maintain written or electronic records of their employees' accrual **and use** of paid sick leave, provide the records to employees on a regular basis, and retain the records for at least three years. While the state statute already requires employers to provide employees with their available sick leave balances each pay period, the requirement that the employer also provide employees with a record of their use of paid sick leave is unique to San Diego and increases the burden for employers.

Minimum Wage

The new minimum wage of \$10.50 per hour for employees who work in the City of San Diego is still effective as of July 11, 2016. This wage applies for each hour an employee works in the City of San Diego.

On January 1, 2017, the minimum wage will increase to \$11.50 per hour. Beginning January 1, 2019, the minimum wage will increase every January 1 based on the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) U.S. City Average. The new rates will be announced each preceding October 1.

Retaliation

The Amended Ordinance strictly prohibits retaliation against employees who exercise their rights to minimum wage and paid sick leave or who report any violation by their employer regarding the same. If an employer takes adverse action against an employee within 90 days of the employee's report of violation or other exercise of rights to sick leave or minimum wage, the employer will have the burden to prove that the adverse action was not related to such report or other exercise of rights.

NEW – Remedies

The Amended Ordinance outlines additional penalties for violation of the statute. Employees claiming harm from a violation of the Ordinance may seek the following remedies:

- Back wages;



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- Damages for denial of the use of accrued sick leave;
- Reinstatement or other injunctive relief;
- Attorneys' fees and costs; and
- Liquidated damages equal to double back wages.

Employees claiming retaliation may also seek liquidated damages that are the **greater** of double back wages or:

- \$1,000 for each violation not resulting in termination; or
- \$3,000 if the employee is terminated.

Additionally, employers who violate the Ordinance may be subject to the following civil penalties:

- \$500 to \$1,000 per violation, where a "violation" is defined as each and every day that an employer fails to pay an employee minimum wage or fails to provide an employee with earned sick leave;
- \$500 per employee who was not given appropriate notice, up to a maximum of \$2,000;
- \$1,000 to \$3,000 per act of retaliation; and
- Cumulative civil penalties against an employer who has not previously violated any provision of the Ordinance are limited to \$10,000.

NEW – Enforcement

The Ordinance will now be enforced by the Office of the City Treasurer or other Office or Department designated by the Mayor, and the Amended Ordinance provides detailed procedures outlining the Enforcement Office's authority.

If you have any questions about this Ordinance, or how it may affect your organization, please contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:

San Diego: 858.597.9600

Irvine: 949.851.2424

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