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## Forum

# Legally Sick

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Employment lawyers have long advised their clients that no state or federal law required employers to provide paid vacation or sick leave to California-based employees. If employers voluntarily chose to provide such leave, they had to abide by laws regulating the administration of the benefits, but no law required paid leave in the first instance.

San Francisco voters changed that when they approved Proposition F on Nov. 7, the first law entitling all private employees to paid sick leave. The so-called Sick Leave Ordinance, which takes effect Feb. 5, requires employers to provide paid sick time to all employees working within San Francisco County. The law affects not only San Francisco employers but also companies based elsewhere who employ workers in San Francisco County.

Under the ordinance, all employees working in San Francisco accrue paid sick leave based on the number of hours they work. Even temporary employees are included, once they have been employed for at least 90 days. For every 30 hours worked, an employee accrues one hour of paid sick leave. Employers must implement a system for tracking sick-time accrual and use and retain records for at least four years. The ordinance doesn't address the issue directly, but employers also may have to track hours worked by exempt employees, even though exempt employees typically do not record their daily work hours.

The law allows employees to use their sick time in some new ways. Employees can take leave for their own illnesses and medical appointments and can use time to care for sick relatives, domestic partners and children of domestic partners. Employees without

spouses or domestic partners can designate any other person as a "care-receiver" for whom the employee may use sick leave to provide care.

Employers also face additional legal and administrative restrictions. They may request documentation and some type of notice from employees before leave is taken, but they cannot prevent employees from taking accrued sick leave if the employees fail to provide documentation or notice. Additionally, employers effectively will not be able to terminate employees within 90 days after they use sick time, because such terminations raise a "rebuttable presumption" of retaliation subjecting the employer to discipline.

The law provides a number of enforcement mechanisms. The San Francisco Office of Labor Standards Enforcement may investigate possible violations and order appropriate relief, including employee reinstatement, back pay or employer penalties. Employees as well as the family member or other care recipient for whom sick leave would have been used may bring a civil action against an employer for noncompliance.

San Francisco is the first California city to adopt a paid-sick-leave law, but other cities recently have considered similar ordinances. Madison, Wis., proposed an ordinance that would have become effective on Jan. 1. Although comparable to the San Francisco ordinance, the Madison proposal provided for a longer roll-out period, requiring employers to provide one hour of sick leave for every 50 hours worked during 2007 and one hour of paid leave for every 30 hours worked in 2008 or thereafter. The

law also exempted public employees. It was defeated by the Madison Common Council, likely based on fears that the local economy would suffer.

Several state legislatures also have contemplated paid-sick-leave laws. In Washington, bills were proposed in the Senate and the House requiring employers to provide full-time workers with at least 10 days or 80 hours of paid sick leave annually. Massachusetts and Vermont also proposed bills requiring employers to provide seven sick days per year to full-time employees. The bills would have allowed employers to require medical certification for absences lasting more than three consecutive days. None of the bills passed.

With the recent changes in Congress, the prospect of a national paid-sick-leave law has increased. Sen. Edward M. Kennedy announced that he will reintroduce the Healthy Families Act in Congress this year. Given previous proposals, the bill may require employers with at least 15 employees to offer at least seven days of paid sick leave each year to full-time employees. Kennedy first proposed the Healthy Families Act in 2005. The proposed law may fare better in the new Congress.

Exactly how a paid-sick-leave law will affect employers who do not provide paid time off has been a matter of significant controversy. Most obviously, employers face a certain cost per employee for sick time use. Before the November election, the Institute for Women's Policy Research estimated that the Sick Leave Ordinance would cost employers \$5.56 per employee per week. Employers also face costs and lost production from scheduling uncertainty,

**Paid-sick-leave laws lead to increased employer flight from overly "pro-employee" jurisdictions, thereby negatively affecting the local economy.**

because employees are free to use sick time at their discretion and without having to give meaningful notice. Employers also will bear additional administrative costs associated with implementing and maintaining a system for tracking all employee hours, sick-leave accrual and sick-leave use. In total, the Institute projected that the measure could cost \$33.5 million in lost wages, payroll taxes and administrative expenses.

**P**roponents of paid-leave statutes argue that such laws greatly benefit employers. They suggest that providing paid sick leave reduces the spread of illness, such as the flu, in workplaces, thereby increasing overall employee productivity. They also suggest the law results in decreased employee turnover because employees have greater scheduling flexibility, do not face discipline for what otherwise might be considered absenteeism, and may feel greater employer loyalty. In considering the potential costs of the San Francisco ordinance, the Institute

for Women's Policy also looked at potential benefits and estimated that employers could save as much as \$7.64 per employee per week from increased productivity and decreased turnover, totaling \$46 million in savings. Because the benefit to employers outweighed the costs discussed, the report envisioned that the ordinance would have a positive net benefit. However, these projections are based on abstract statistics and are unlikely to reflect accurately what San Francisco employers experience.

Paid-sick-leave laws obviously have the potential to affect local governments and economies significantly. When Madison considered its sick-leave proposal, Northstar Economics forecast potential costs to the city. According to an opinion poll of local businesses conducted as part of the forecast, as many as 185 local businesses would consider leaving Madison if the law were passed. The group estimated that such an exodus could cost the city \$21 million in lost property-tax revenue. The study was widely criticized as exaggerating the negative

impact on the local economy. Although the numbers may not have been reliable, such laws lead to increased employer flight from overly "pro-employee" jurisdictions, thereby negatively affecting the local economy. This result seems particularly likely when laws are adopted in small geographic regions, such as San Francisco County, making employer relocation outside the immediate vicinity more viable.

Although the San Francisco ordinance's mandate and reach are limited to employees located within San Francisco County, its effect on the local economy is unknown. Given the increased number of paid-sick-leave laws being considered by city, state and national legislative bodies, employers will be well-served to make their opinions known on this subject to their local legislatures.

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