LAWFLASH

NEW YORK CITY COUNCIL AMENDS PAID SICK LEAVE LAW

September 25, 2020

A bill passed by the New York City Council amends the New York City Paid Sick and Safe Leave Law to align with state law and adds significant notice and damages provisions.

The New York City Council on September 23 enacted Int. No. 2032-A (the Bill), making several important changes to New York City's Paid Sick and Safe Leave Law (the City Sick Leave Law). The Bill aligns the accrual and usage of sick and safe leave under the City Sick Leave Law with New York State's new paid sick leave law (the State Sick Leave Law), which goes into effect September 30, 2020, for accrual purposes and for which we expect guidance to be issued in the near future.

Specifically, the City Sick Leave Law would be amended to require the same sick leave usage and accrual requirements as the State Sick Leave Law. The Bill also provides significant new notice and damages provisions that businesses should be aware of.

The changes to the City Sick Leave Law will take effect September 30, 2020, if Mayor Bill de Blasio signs the Bill by then; otherwise, the changes will take effect upon signature or on October 23, 2020, if Mayor de Blasio neither signs nor vetoes the Bill.

THE BILL

Although the Bill makes notable changes to the amount of permitted sick and safe leave that must be provided to employees in New York City, these changes generally align the City Sick Leave Law's accrual and use provisions with the State Sick Leave Law's requirements. Specifically, employers in New York City will be required to provide sick and safe leave in varying amounts based on the size of the employer, as follows:

- Employers with four or fewer employees and a net income of greater than $1 million in the previous tax year will be required to provide up to 40 hours per calendar year of paid sick and safe leave; this is an expansion of the prior law, as previously employers with four or fewer employees were exempt from coverage.
- Employers with between 5 and 99 employees, regardless of employer income, will be required to provide up to 40 hours per calendar year of paid sick and safe leave, which is consistent with the prior requirements for these employers.
- All employers with 100 or more employees (regardless of employer income) will be required to provide up to 56 hours per calendar year of paid sick and safe leave, which matches the requirements of the new State Sick Leave Law.

Consistent with prior guidance, the expanded sick and safe leave benefits must be paid at the employee's regular rate of pay at the time the leave is taken, excluding tip credits and other allowances. Newly provided leave (which applies to employers with fewer than four employees with a net income of more than $1 million and large employers with 100 or more employees) will begin to accrue on the effective date of the Bill. As with the State Sick Leave Law, employees will be able to use newly provided sick and safe leave hours (e.g., the 16 additional hours of paid sick and safe leave per year for employees of a large employer) beginning January 1, 2021.

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The Bill also includes other significant new requirements for employers that will require most employers to review their sick leave policies and practices, particularly regarding notice.

Notice of Sick/Safe Leave Balance

Employers will be required to note on employee pay statements or a separate writing provided to the employee each pay period (1) the amount of sick and safe leave accrued and used by an employee during a pay period, and (2) the employee's total balance of sick and safe leave.

Reimbursement for Obtaining Documentation

Employers that require employees to submit documentation verifying the need to use sick or safe time for three or more consecutive days (which is permitted under the City Sick Leave Law) must reimburse employees for all fees charged by a healthcare provider or other service provider for the provision of such documentation.

Adverse Actions

In lieu of previous antiretaliation protections, the City Sick Leave Law will specifically delineate prohibited "adverse actions" that employers are prohibited from taking in response to employees' use or attempted use of sick and safe leave. In addition to the traditionally recognized list of "adverse actions" covered by the City's antidiscrimination laws, the Bill also recognizes an employer's "maintenance or application of an absence control policy that counts protected leave for safe/sick time as an absence that may lead to or result in an adverse action." In other words, any disciplinary action taken against an employee for use or attempted use of protected leave, or even actions that could reasonably deter an employee from taking or attempting to take sick leave, could be deemed an adverse action under the Bill.

Further, the Bill states that an employee need not specifically refer to a provision of the Bill to engage in protective activity. Finally, the Bill states that a violation of the adverse action/retaliation protections can be established when it is shown that a protected activity was a motivating factor for an adverse action, even if there were other factors motivating the decision as well.

New Enforcement Mechanisms

While the Bill does not create a private cause of action for an individual employee, the Bill does create a new cause of action that empowers the City to bring civil litigation in court for pattern or practice violations, or to enforce an administrative order issued pursuant to the City Sick Leave Law's existing enforcement mechanisms. The City will also be allowed to open administrative investigations into potential violations of the City Sick Leave Law on its own initiative, even absent a complaint, and shall have the power to issue subpoenas to compel the attendance of witnesses and production of documents as necessary.

In any civil action commenced under this new enforcement mechanism, there is a maximum penalty cap of $15,000 if the employer is found to have engaged in pattern or practice violations of the City Sick Leave Law, and the trier of fact may award additional relief of up to $500 per employee who was not provided or not permitted to use paid sick and safe leave as provided by the City Sick Leave Law. The Bill does not change the ability under the preexisting law of any individual person alleging a violation to file a complaint with the City within two years of when the person knew or should have known of the alleged violation.

New Clarity on Fines for Violations

The Bill also states that the City shall have the power to impose penalties and grant "each and every" employee appropriate relief, and that "penalties shall be imposed on a per employee basis." Under the City Sick Leave Law, potential fines include the following:

- $250: Each instance of sick and safe time being taken but unlawfully not compensated (the employee would instead receive three times the wages that should have been paid, if greater than $250)
- $500: (1) Each instance of sick and safe time being unlawfully denied by the employer; (2) when the use of sick and safe time is conditioned on the employee searching for or finding a replacement; (3) when the employer requires an employee to work additional hours to make up the original hours they were absent using sick or safe leave without getting employee consent
- $500: Fine per employee for each employee covered by an employer's official or unofficial policy or practice of not providing or refusing to allow the use of accrued sick and safe time in violation of the City Sick Leave Law
- $500, plus lost wages/benefits: Each instance an employee is

retaliated against under the City Sick Leave Law but not discharged

- $2,500, plus lost wages/benefits/equitable relief (including reinstatement): Each instance an employee is discharged or retaliated against for using or seeking to use sick and safe time

Safe Leave for Domestic Violence

Employees will continue be able to use the expanded leave benefits where they or a family member has been a victim of domestic violence.

Removal of 80-Hour Threshold for Eligibility

The Bill removes the prior requirement that an employee must work 80 hours within New York City to be eligible for sick and safe leave. By removing this requirement, the Bill ostensibly requires that employers track employee sick and safe leave balances, and provide sick and safe leave to employees who only work in New York City on rare or irregular occasions.

ANALYSIS

If the Bill takes effect, and it is expected to, employers should ensure their sick and safe leave policies allow for the use of increased leave where applicable. Employers that provide only 40 hours of paid sick leave per year to employees, including to part-time employees, may need to adjust their sick leave policies to account for the expanded leave benefits.

Employers should also consider amending their wage statements or otherwise providing supplemental notices each pay period to employees to note the amount of sick and safe leave accrued and used by an employee during a pay period, and the employee's total balance of sick and safe leave.

Finally, employers with progressive discipline absence control policies should consider amending such policies to exclude the use of sick and safe leave as absences that may lead to or result in discipline.

CONTACTS

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

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