

Reproduced with permission from Tax Management Compensation Planning Journal, Vol. 43, No. 12, p. 267, 12/04/2015. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

## **Sick Leave Laws Are Sweeping the Nation — Giving Ulcers to Employers Everywhere**

*By Christina A. Stoneburner, Esq.<sup>1</sup>*

Few employment laws have taken off in multiple jurisdictions like sick leave laws have in recent years. The appeal of such laws to family rights organizations and employees is obvious. The appeal of these laws, however, has been somewhat lost on most business groups and they have opposed the laws on several grounds, including that it will make them less competitive by adding to their overhead costs, and also by adding to administrative headaches because of the requirement to track sick leave. These concerns largely have fallen on deaf ears of lawmakers and activists. Are these concerns valid? In order to answer these questions, it is helpful to examine the current legal landscape.

---

<sup>1</sup> Christina Stoneburner is a member of the Fox Rothschild LLP's Labor & Employment Department, practicing in their Roseland, NJ office. She counsels clients on complying with applicable federal and state laws and developing strategies to avoid liability. Christina also provides counseling and training to clients on a variety of topics, including preventive training on sexual and other types of harassment, FMLA leave, compliance with the ADA and state anti-discrimination laws, disciplining/evaluating employees, diversity and workplace violence.

## **FEDERAL LAW AND INITIATIVES**

On Labor Day, President Obama issued Executive Order 13706 that mandates that government contractors and subcontractors provide paid sick leave to their employees. Employees who work on federal contracts will earn one hour for every 30 hours worked up to a maximum of 56 hours per year. Although the Executive Order was effective immediately, it applies to the following contracts that are either awarded, or where the solicitation for such contract has been issued, on or after January 7, 2017:

- a) Procurement contracts for services or construction;
- b) Contracts for services covered by the Service Contract Act;
- c) Contracts for concessions; and
- d) Contracts in connection with federal property or lands.

Employees who accrue leave under the Executive Order are able to take leave for the following reasons:

1. The care for the employee's Family Member who is suffering from a physical or mental illness, injury, or medical condition that requires care, professional medical diagnosis, or treatment of an existing condition.
2. The care for the employee's own physical or mental illness, injury, or medical condition that requires care, professional medical diagnosis, or treatment for an existing condition. If the care is for a child, sick leave can also be used to attend a school meeting related to the child's illness or disability.

3. For an employee to address the legal effects of domestic violence, including appearing in court, obtaining a restraining order, or meeting with counsel.

The issuance of this Executive Order may be largely symbolic depending on the results of the 2016 election. Regardless of the outcome of the election, the Executive Order may serve to reignite debate on the Healthy Families Act that is pending in Congress. If passed, the Healthy Families Act would require all employers with 15 or more employees to provide up to 56 hours of paid sick leave in a year. Employers with less than 15 employees would still have to provide up to 56 hours of sick leave, but the leave could be unpaid. Leave could be used for the same three reasons set forth in the Executive Order and may be used by employees on the 60th day of employment. Despite President Obama's efforts, the Healthy Families Act has not advanced in Congress.

The debate over paid sick leave is likely going to be given a more prominent national stage during the Presidential election campaign. Both Democratic front-runners, Hillary Clinton and Bernie Sanders, have endorsed President Obama's actions and have called for all workers to receive paid sick leave. Republican front-runners (at least at the time this article was written) Donald Trump and Ben Carson have not issued formal positions on the issue. Trump has expressed concern that a federal mandate could have negative consequences. Carson's official platform on other employment-related benefits such as the Affordable Care Act would tend to imply that he is not in favor of such a federal mandate.

In the meantime, there are currently three states that mandate sick leave — California, Connecticut, and Massachusetts. On January 1, 2016, Oregon will join those three states and also mandate paid sick leave. There are subtle differences between the states' laws. For example, in California, Massachusetts, and Oregon, eligible employees earn one hour of sick time for every 30 hours worked; while in Connecticut, employees earn one hour of sick time for every 40 hours worked. The laws also differ in the ways in which employees may use leave and which employees are eligible to accrue sick leave.

In addition to state leave laws, employers need to worry about municipal ordinances as well. Proponents of state sick leave laws argue that having a state sick leave law levels the playing field by making all employers comply with the same rules. However, this is not necessarily the case. Unlucky California employers must comply with the new state law and with similar laws passed by Oakland, San Francisco, San Diego, and Emeryville. The state law specifically notes that it does not preempt any laws that provide

greater benefits. Therefore, employers subject to the San Francisco and Oakland laws must provide greater benefits required under those city's ordinances, currently as much as 72 hours.

Municipal and state laws may also differ in what notice must be given by employers to employees about the laws and what notice can be required of employees before they use sick leave. Some laws require employers to post a notice or give employees individual notice of the law. Some laws require both forms of notice be given to employees. With regard to the amount of notice that must be given by employees prior to leave, some laws merely state that employees must give "reasonable" notice. Other laws specify that where leave is foreseeable, employees cannot be required to give more than seven days' notice and reasonable notice where leave is not foreseeable.

In certain places, grassroots campaigns have been successful in getting sick leave laws passed, nowhere more so than in New Jersey. As of June 30, 2015, New Jersey has nine municipalities with sick leave laws in effect — Bloomfield, East Orange, Irvington, Jersey City, Montclair, Newark, Passaic, Paterson, and Trenton. Jersey City was the first municipality whose Council passed an Ordinance, quickly followed by Newark. However, in some of the municipalities with sick leave, the laws have been enacted as a result of ballot initiatives. Voters in Montclair and Trenton voted overwhelmingly in support of the initiatives.

The Trenton law faced a legal challenge filed by business groups just two days ahead of its effective date. However, that lawsuit was dismissed in April 2015. That lawsuit did result in a partial victory for employers. One of the challenges to the law was that it exceeded the police powers of the Council and applied to employers not physically located in Trenton. This argument was based on the fact that an employee is eligible to accrue paid sick leave if he or she works 80 hours per year in the municipality. The challengers to the law argued that this meant that employers not located in Trenton would have to comply with this legislation. During the lawsuit, Counsel for Trenton advised the court that Trenton would not enforce the law against employers not physically located in Trenton. Based on this representation, the Court dismissed the lawsuit. Notably, every other sick leave municipal ordinance in New Jersey has identical language that an employee merely has to work in the municipality for 80 hours to be eligible to accrue leave. However, no other ordinance has been challenged on these grounds.

Adding to employers' difficulties in complying with the laws is that paid sick leave is not always passed as its own initiative, which at least makes it easier for employers to be aware of the law, but is instead contained within other "living wage" ordinances that

may only apply to certain industries. For example, Long Beach, California has a municipal ordinance (Mun. Code §5.48.020) that sets minimum wages for hotel workers. Included in this law is a requirement that hotel workers be given five days of paid sick leave each year. Sick leave under this ordinance accrues at the rate of 5/12 of a day for each full month worked. The Ordinance applies to any hotel worker working in the city, regardless of the number of hours he or she worked per year. The Ordinance also is unusual in that it requires employers to pay employees for unused accrued sick time at the end of each calendar year. Los Angeles has also recently passed a City-wide Hotel Worker Minimum Wage Ordinance that requires at least 96 hours of paid time off for sick leave, vacation or personal leave.

Similarly, New Orleans Mayor Mitch Landrieu recently signed a Living Wage Ordinance that, beginning January 1, 2016, will require that city contractors provide up to seven days of paid sick leave per year. City contractors are defined as those who enter into one or more contracts where the payments are at least \$25,000 or receive a grant of \$100,000 or more. Only employees who work on the city contract or work at a location receiving the grant are eligible for leave. However, if an employer cannot accurately determine which employees perform work on city contracts or grants, then all of the employer's employees will be eligible to accrue sick leave.

## SUMMARY OF STATE/MUNICIPAL SICK LEAVE LAWS

As noted above, some jurisdictions have passed minimum wage or living wage ordinances that require paid time off and only apply to limited industry sectors or to government contractors. Those laws are not summarized below. The following jurisdictions have paid sick leave laws that apply to broader classes of employees and are summarized below:

- California state and the following municipalities
  - Emeryville
  - Oakland
  - San Diego
  - San Francisco
- Connecticut
- District of Columbia
- Montgomery County, Maryland
- Massachusetts
- New Jersey (no state law but the following municipalities have laws)
  - Bloomfield
  - East Orange

- Irvington
- Jersey City
- Montclair
- Newark
- Passaic
- Paterson
- Trenton
- New York City
- Oregon
- Pennsylvania (no state law but the following municipalities have laws)
  - Philadelphia
  - Pittsburgh
- Washington (no state law but the following municipalities have laws):
  - Seattle
  - Tacoma

This list may continue to grow as campaigns for sick leave gain ground in other states. Hawaii, Michigan, Minnesota, New Jersey, Pennsylvania, Vermont, and Washington currently have bills pending that, if passed, would require employers to provide paid sick leave.

## CALIFORNIA

California's law requires the fewest number of paid sick days. Eligible employees will accrue one hour of sick leave for every 30 hours worked up to a maximum of 24 hours. Employers may satisfy the law and avoid having to track the accrual of time by simply providing three days of paid leave at the beginning of the year.

Under the California State law, leave is available for the following reasons:

1. The care for the employee's Family Member who is suffering from a physical or mental illness, injury, or medical condition that requires care, professional medical diagnosis, or treatment of an existing condition.
2. The care for the employee's own physical or mental illness, injury, or medical condition that requires care, professional medical diagnosis, or treatment for an existing condition.
3. For an employee to address the legal effects of domestic violence, including appearing in court, obtaining a restraining order, or meeting with counsel.

The law defines a Family Member as either a child (including biological, adopted or foster, stepchild, or legal ward), parent (including a biological, foster,

stepparent, adoptive parent, legal guardian, or the parent of the employee's spouse or domestic partner), spouse, registered domestic partner, grandparent, grandchild, or sibling. Accrued leave must be able to be used by employees on the 90th day of employment. As noted above, California's law does not preempt any more generous laws that require sick leave.

## EMERYVILLE, CA

Emeryville's Ordinance is very broad and applies to any employee who works at least two hours in a calendar week within the geographic boundaries of Emeryville. Like California's state law, eligible employees earn one hour of sick leave for every 30 hours worked. The law provides for different maximum accruals of sick leave depending on the size of the employer. Employers with fewer than 55 employees must provide up to 48 hours of paid sick leave. Employers with 55 or more employees must provide up to 72 hours of paid sick leave.

Emeryville's ordinance also differs from the state law in the reasons for which leave can be taken. Under the ordinance, leave may be taken for the following reasons:

1. Employee's mental or physical illness, injury or health condition; need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or other medical reasons such as pregnancy or obtaining a physical examination.
2. Care of a Family Member with a mental or physical illness, injury or health condition, including assistance in obtaining a professional diagnosis or treatment of a medical condition.
3. Aid or care for a guide dog, signal dog or service dog of the employee, employee's Family Member, or employee's designated person.

The law also defines a Family Member slightly differently than the state law. A "Family Member" includes a child (including biological, adopted or foster, stepchild, or legal ward), parent (including a biological, foster, stepparent, adoptive parent, legal guardian, or the parent of the employee's spouse or domestic partner), spouse, registered domestic partner, grandparent, grandchild, or sibling just like the state law does. The ordinance adds to the definition of Family Member a "designated person." Under the Ordinance, an employee who does not have a spouse or registered domestic partner may designate someone for whom they can use sick leave in lieu of a spouse or domestic partner. Employees must be given opportunity to designate this person no later than the date they have worked 30 hours and have 10 days to make the designation. Employees may change this designation on an annual basis by January 31st of each year. Accrued

leave must be able to be used by employees on the 90th day of employment.

## OAKLAND, CA

Eligible employees also earn sick leave at the rate of one hour for every 30 hours worked. Oakland generously defines who is an eligible employee to include any employee who works at least two hours per year in Oakland. Like Emeryville, the amount of sick leave that must be offered depends on the size of the employer. However, the threshold for a small and large employer is vastly different than under the Emeryville Ordinance. Under the Oakland Ordinance, employers with fewer than 10 employees must provide up to 40 hours of paid sick leave. Employers with 10 or more employees must provide up to 72 hours of sick leave.

Employees may use sick leave for the following reasons:

1. Employee's mental or physical illness, injury or health condition; need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or other medical reasons such as pregnancy or obtaining a physical examination.
2. Care of a Family Member with a mental or physical illness, injury or health condition, including assistance in obtaining a professional diagnosis or treatment of a medical condition.

Family Member is defined similarly to the state law and includes a child (including biological, adopted or foster, stepchild, or legal ward), parent (including a biological, foster, stepparent, adoptive parent, legal guardian, or the parent of the employee's spouse or domestic partner), spouse, registered domestic partner, grandparent, grandchild, or sibling. Accrued leave must be able to be used by employees after the 90th day of employment.

## SAN DIEGO, CA

Eligible employees will accrue one hour of sick leave for every 30 hours worked up to a maximum of 40 hours. Like Oakland, San Diego defines an eligible employee as anyone who works at least two hours per year in San Diego.

Under the Ordinance, leave is available for the following reasons:

1. The care for the employee's Family Member who is suffering from a physical or mental illness, injury, or medical condition that requires care, professional medical diagnosis, or treatment of an existing condition.
2. The care for the employee's own physical or mental illness, injury, or medical condition that

requires care, professional medical diagnosis, or treatment for an existing condition.

3. An employee to address the legal effects of domestic violence, including appearing in court, obtaining a restraining order, or meeting with counsel.

The law defines a Family Member as either a child (including biological, adopted or foster, stepchild, or legal ward), parent (including a biological, foster, stepparent, adoptive parent, legal guardian, or the parent of the employee's spouse or domestic partner), spouse, registered domestic partner, grandparent, grandchild, or sibling (which includes half-siblings, adopted siblings, and step-siblings). Accrued leave must be able to be used by employees on the 90th day of employment.

## **SAN FRANCISCO, CA**

San Francisco's Paid Sick Leave Ordinance is one of the oldest in the country. Eligible employees earn one hour of paid sick leave for every 30 hours worked. San Francisco's ordinance applies to any employee who works at least 56 hours per year in San Francisco. Employers with less than 10 employees must provide up to 40 hours of paid sick leave. Employers with 10 or more employees must provide up to 72 hours of paid sick leave. Leave may only be used when the employee or the employee's Family Member is ill or injured. San Francisco defines "Family Member" as a child, parent, legal guardian or ward, sibling, grandparent, grandchild, spouse, registered domestic partner under any state or local law, or designated person. The "designated person" is similar to Emeryville's in that it allows for a person to be designated in lieu of a spouse or domestic partner. Employees must be given opportunity to designate this person no later than the date they have worked 30 hours and have 10 days to make the designation. Employees may change this designation on an annual basis by January 31st of each year. Unlike other laws, accrued leave must be able to be used immediately upon accrual.

## **CONNECTICUT**

Connecticut's law is unique in how it defines eligible employees. The law only applies to "service workers." "Service workers" are defined as those employees, primarily engaged in an occupation with one of the broad or detailed occupation code numbers and titles listed in the law, that work in the state of Connecticut. Employers will need to check their industrial codes to determine if the law applies, but it mostly applies to food handlers, servers, nurses and medical practitioners, dental assistants, bartenders, dishwash-

ers, and radiologic technicians. The law also only applies to employers with 50 or more employees who are employed in the state as of October 1st of each year.

Eligible employees earn one hour of paid sick leave for every 40 hours worked up to a cap of 40 hours per year. Leave may be used for the following reasons:

1. A service worker's illness, injury or health condition, medical diagnosis, care or treatment for mental illness or physical illness, or preventative medical care for a service worker.
2. A service worker's child or spouse's illness, injury or health condition, medical diagnosis, care or treatment for a child's or spouse's mental or physical illness, injury or health condition, or preventative medical care for a child or spouse.
3. Where a service worker is victim of family violence or sexual assault: for medical care or psychological or other counseling for physical or psychological injury or disability; to obtain services from a victim services organization; to relocate due to such family violence or sexual assault; or to participate in any civil or criminal proceedings related to or resulting from such family violence or sexual assault.

"Family Member" is narrowly defined to only include a child or a spouse. A child is defined as a biological, adopted or foster child, step child, legal ward of a service worker, or child of a service worker standing in loco parentis, who is: (a) under 18 years of age; or (b) 18 years of age or older and incapable of self-care because of a mental or physical disability. Employees may use accrued sick time after completion of their 680th hour of employment, provided that the employee averaged at least 10 hours per week in the most recent complete quarter.

## **DISTRICT OF COLUMBIA**

The District's sick leave ordinance is several years old, but this year it was amended to provide protections to even more employees. D.C.'s ordinance is one of the more complicated in determining how leave accrues and how much leave accrues as both calculations depend on the size of the employer. Paid sick leave accrues as follows: (1) for employers with 100 or more employees, one hour for every 37 hours worked up to a maximum of 56 hours per year; (2) for employers with 25 to 99 employees, one hour for every 43 hours worked up to a maximum of 40 hours per year; and (3) for employers with less than 25 employees, one hour for every 87 hours worked up to a maximum of 24 hours per year.

Leave is available for the following reasons:

1. The care for the employee's Family Member who is suffering from a physical or mental illness, injury, or medical condition that requires care, professional medical diagnosis, preventive care, or treatment of an existing condition.
2. The care for the employee's own physical or mental illness, injury, or medical condition that requires care, professional medical diagnosis, preventive care, or treatment for an existing condition.
3. To address the legal effects of domestic violence or sexual abuse, including appearing in court, obtaining a restraining order, or meeting with counsel.

"Family Member" is defined as a spouse (including a person identified as a domestic partner), the parents of a spouse, children (including foster children and grandchildren), the spouses of children, parents, siblings; the spouses of siblings, a child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility, and a person with whom the employee shares or has shared, for not less than the preceding 12 months, a mutual residence and with whom the employee maintains a committed relationship. Accrued leave must be able to be used by employees after the 90th day of employment.

## **MONTGOMERY COUNTY, MD**

The law applies to all employees in Montgomery County except per diem employees and employees scheduled to work less than eight hours per week. Eligible employees accrue one hour of leave for every 30 hours worked in the County up to a maximum of 56 hours per year. This law is somewhat different from other laws. Although the other laws require carry-over of accrued but unused time, they cap the maximum that can be used in a year to the maximum that can be accrued in a year. For example, if the maximum that can be accrued in a year is 40 hours, the maximum amount of time that can be used in any given year is 40 hours. Under the Montgomery County ordinance, although the maximum that can be accrued in a year is 56 hours, the maximum amount that can be used in any given year is 80 hours.

Leave may be used for the following reasons:

1. An employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition; an employee's need for preventive medical care.

2. Care of a Family Member with a mental or physical illness, injury or health condition; care of a Family Member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; care of a Family Member who needs preventive medical care.
3. Closure of employee's place of business due to a public health emergency or an employee's need to care for a child whose school or day care has been closed due to a public health emergency.
4. Absence necessary due to domestic abuse, sexual assault or stalking for employee or employee's Family Member to obtain: (a) medical attention for physical or psychological injury; (b) services from a victim services organizations; (c) legal services, including preparing for a legal proceeding; and (e) during the time that the employee has temporarily relocated.
5. To care for a Family Member who has been quarantined.

"Family Member" is defined as either a child (including biological, adopted or foster, stepchild, or legal ward), parent (including a biological, foster, step-parent, adoptive parent, legal guardian, or the parent of the employee's spouse or domestic partner), spouse, grandparent or spouse of grandparent, grandchild, or sibling (which includes adopted siblings, foster siblings, and siblings-in-law). Accrued leave must be able to be used by employees after the 90th day of employment.

## **MASSACHUSETTS**

Massachusetts is the only state that has a paid sick leave law thanks to a ballot initiative. On November 4, 2014, voters approved a ballot initiative that allows eligible employees to accrue sick leave benefits at the rate of one hour for every 30 hours worked up to a cap of 40 hours per year. The law is also somewhat unique in that sick leave benefits must only be paid if the employer has 11 or more employees. Employers with less than 11 employees must offer unpaid sick leave. The law is also unique in how it defines eligible employees. An employee is eligible to accrue sick leave if his or her primary place of employment is Massachusetts, regardless of where the employer is located. This does not mean that the employee spends more than 50% of working time in Massachusetts, but simply that it is the location where the majority of working time is spent. For example, if an employee spends 40% of the time in Massachusetts, 30% in New Hampshire, and 30% elsewhere, the primary place of work is Massachusetts. Once an employee is eligible to accrue sick leave, sick leave will accrue for

all time worked, even hours worked outside of the state.

Leave may be used for the following reasons:

1. An employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition; an employee's need for preventive medical care.
2. Care of a Family Member with a mental or physical illness, injury or health condition; care of a Family Member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; care of a Family Member who needs preventive medical care.
3. To address the psychological, physical or legal effects of domestic abuse against the employee or the employee's child.

"Family Member" is defined as a child, foster child, stepchild, legal ward or a child for whom the person has assumed the role of parent, spouse, or parent of spouse. Accrued leave must be able to be used by employees on the 90th day of employment.

## NEW JERSEY

There is no state law as of yet in New Jersey. The nine municipalities currently with laws in effect are Bloomfield, East Orange, Irvington, Jersey City, Montclair, Newark, Passaic, Paterson, and Trenton. All of the laws are virtually identical in how they define eligible employee as any person who works at least 80 hours per year in the municipality. However, as noted above, Trenton's law will only apply to employers who are physically located within Trenton. All nine municipal laws provide that leave accrues at the rate of one hour for every 30 hours worked. The laws do differ in how much leave must accrue. All of the laws except Jersey City require that employers with 10 or more employees must provide up to 40 hours of paid sick leave; employers with less than 10 employees must provide 24 hours of paid sick leave.

Jersey City's Ordinance was amended in late October 2015 to provide that employers with 10 or more employees must provide 40 hours of paid leave. Employers with less than 10 employees previously had to provide 40 hours of unpaid leave. Under the recent amendment to the Jersey City Ordinance, employers with less than 10 employees must provide up to 24 hours of paid time and 16 hours of unpaid sick leave in a year.

In all of the municipalities, leave may be used for the following reasons:

1. An employee's mental or physical illness, injury, or health condition; an employee's need for medi-

cal diagnosis, care or treatment of a mental or physical illness, injury, or health condition; an employee's need for preventive medical care.

2. Care of a Family Member with a mental or physical illness, injury or health condition; care of a Family Member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; care of a Family Member who needs preventive medical care.
3. Closure of employee's place of business by order of a public official due to a public health emergency or an employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency, or care for Family Member when it has been determined by the health authorities having jurisdiction or by a health care provider that the Family Member's presence in the community would jeopardize the health or others, whether or not the Family Member has actually contracted the communicable disease.

All of the nine municipalities use the same definition of "Family Member." "Family Member" is defined to include a biological, adopted or foster child, stepchild or legal ward, child of a domestic partner, child of a civil union partner, or child to whom the employee stands in loco parentis; biological, foster, stepparent or adoptive parent or legal guardian of an employee or employee's spouse, domestic partner or civil union partner; spouse; civil union or domestic partner; grandparent or spouse, civil union partner or domestic partner of a grandparent; grandchild; and sibling. In all of the municipalities except Newark, employees must be able to use accrued sick time on the 90th day of employment. In Newark, employees must be able to use accrued sick time on the 91st day of employment.

## NEW YORK CITY

New York City's law applies to any employee who works at least 80 hours per year in New York City. Employers with five or more employees must provide up to 40 hours of paid sick leave. Employers with less than five employees must provide up to 40 hours of unpaid sick time. All eligible employees earn sick time at the rate of one hour for every 30 hours worked. Leave may be used for the following reasons:

1. An employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition; an employee's need for preventive medical care.
2. Care of a Family Member with a mental or physical illness, injury or health condition; care of a

Family Member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; care of a Family Member who needs preventive medical care.

3. Closure of employee's place of business by order of a public official due to a public health emergency or an employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency.

New York City defines Family Member similar to most jurisdictions. "Family Member" is defined as a child, parent, spouse, domestic partner, child of domestic partner, parent-in-law, parent of domestic partner, sibling, half-sibling, step-sibling, sibling related by adoption, grandchild and grandparent. Unlike other jurisdictions, accrued sick leave is not available for use until after the 120th day of employment.

## OREGON

Prior to the enactment of Oregon's law, Eugene and Portland had passed sick leave laws. As of January 1, 2016, when the state law goes into effect, employers will only have to comply with the state law as it preempted any local laws. The state law provides that employees will earn one hour of sick leave for every 30 hours worked. Leave is not necessarily paid. Under the law, employers with 10 or more employees must provide up to 40 hours of paid sick leave. Employers with less than 10 employees must provide up to 40 hours of unpaid sick leave. The law does have a nod to Portland's sick leave law. Under the law, employers located in a city with a population exceeding 500,000 people and with at least six employees must provide up to 40 hours of paid leave.

Oregon's law provides the most reasons that leave can be used of any of the laws. Leave may be used for the following reasons:

1. Diagnosis, care or treatment of the employee's or the employee's Family Member's, mental or physical illness, injury or health condition.
2. Domestic Violence, harassment, sexual assault or stalking leave (*See* ORS §659A.272).
3. Any other reason listed in the Oregon Family Leave Act, including dealing with the death of a Family Member and caring for an infant or newly adopted child or placement of a foster child.
4. Closure of employee's place of business by order of a public official due to a public health emergency or an employee's need to care for a child whose school or place of care has been closed by

order of a public official due to a public health emergency, or care for Family Member when it has been determined by the health authorities having jurisdiction or by a health care provider that the Family Member's presence in the community would jeopardize the health of others, whether or not the Family Member has actually contracted the communicable disease.

5. To donate sick leave to another employee if the employer has such a policy.

The definition of Family Member is basically similar to other laws in that it includes the spouse of an employee, the biological, adoptive or foster parent or child of the employee, the grandparent or grandchild of the employee, a parent-in-law of the employee or a person with whom the employee was or is in a relationship of *in loco parentis*. The law also includes an individual related by blood or affinity to the employee whose close association with the employee is the equivalent of a family relationship. Employees must be permitted to use accrued sick leave on the 91st day of employment.

## PENNSYLVANIA

There is no state law requiring leave. However, Philadelphia and Pittsburgh both have ordinances that require that sick leave be provided.

## PHILADELPHIA

Philadelphia's law requires either unpaid or paid sick leave be provided based upon the size of the employer. Under the law, employers with 10 or more employees must provide up to 40 hours of paid sick leave. Employers with less than 10 employees must provide up to 40 hours of unpaid sick leave. The total amount of leave may vary because of the relationship between this ordinance and the Philadelphia ordinance requiring domestic violence leave. If an employee uses paid leave due to domestic abuse, sexual assault or stalking, the employee can use unpaid leave as set forth in the ordinance requiring unpaid leave in those circumstances.

Leave accrues at a slightly different rate than under most of the laws. Employees earn one hour of sick leave for every 40 hours worked. Leave is available for the following reasons:

1. An employee's own mental or physical injury or health condition, including doctor appointments to diagnose or care for an illness or for preventative care.
2. Care of a Family Member's mental or physical injury or health condition, including doctor ap-



pointments to diagnose or care for an illness or for preventative care.

3. Absence necessary due to domestic abuse, sexual assault or stalking for the employee or employee's Family Member to obtain: (a) medical attention for physical or psychological injury; (b) services from a victim services organizations; (c) psychological or other counseling; (d) relocation; or (e) legal services, including preparing for a legal proceeding.

"Family Member" is defined as the spouse of an employee; the biological, adoptive, foster, or stepparent or child of the employee; the grandparent, spouse of the grandparent, or grandchild of the employee; the biological, foster or adopted sibling or sibling-in-law; or a life partner. Employees must be able to use accrued time on the 90th day of employment.

## PITTSBURGH

Pittsburgh's law goes into effect on January 11, 2016. However, lawsuits have been filed challenging the City's ability to pass the law. Challengers to the law have argued that Pittsburgh is prohibited from passing the law because it is organized under a home rule charter. The opponents claim that there is a home rule law that prohibits cities formed under home rule charters from passing laws that relate to the terms and conditions of employment. If the law survives the challenges, it will provide that employees will either earn paid or unpaid sick leave depending on the size of the employer. Under the law, for the first year the law is effective, employers with 15 or more employees must provide up to 40 hours of paid sick leave. Employers with less than 15 employees must provide up to 40 hours of unpaid sick leave. After the first year the law is in effect, employers with less than 15 employees must provide 24 hours of paid sick leave. Leave will accrue at the rate of 1 hour earned for every 35 hours worked.

Leave may be used for the following reasons:

1. An employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition; an employee's need for preventive medical care.
2. Care of a Family Member with a mental or physical illness, injury or health condition; care of a Family Member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; care of a Family Member who needs preventive medical care.
3. Closure of employee's place of business by order of a public official due to a public health emer-

gency or an employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency, or care for Family Member when it has been determined by the health authorities having jurisdiction or by a health care provider that the Family Member's presence in the community would jeopardize the health of others, whether or not the Family Member has actually contracted the communicable disease.

The law defines Family Member slightly differently than the majority of the laws. "Family Member" includes a biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, or a child to whom the employee stands in loco parentis; a biological, foster, adoptive, or step-parent, or legal guardian of an employee or an employee's spouse or domestic partner or a person who stood in loco parentis when the employee was a minor child; a person to whom the employee is legally married under the laws of any state; a grandparent or spouse or domestic partner of a grandparent; a grandchild; a biological, foster, or adopted sibling; a domestic partner; and any individual for whom the employee has received oral permission from the employer to care for at the time of the employee's request to make use of sick time. Employees must be permitted to use accrued leave on the 90th day of employment.

## WASHINGTON

There is currently pending state legislation to mandate sick leave that seems to be advancing, but as of now there is no state law. Seattle and Tacoma both have ordinances requiring the provision of sick leave.

## SEATTLE

Seattle's law sets forth tiers for determining how eligible employees accrue time and how much sick time is available. Employers must have at least 4 employees for the law to be applicable. The tiers are defined as follows: (1) Tier 1 — Employer that employs more than four and fewer than 50 full time equivalents on average per year; (2) Tier 2 — Employer that employs at least 50 and fewer than 250 full time equivalents in a calendar year; and (3) Tier 3 — an employer that employs 250 or more full time equivalents on average per calendar year. A "full-time equivalent" is any number of employees whose total hours worked totals 40 hours per week or an employee who is defined as full-time by the employer. In order to be eligible to accrue sick time, employees must work at least 240 hours per year in Seattle.

Employees who work for Tier 1 and Tier 2 employers earn one hour of sick time for every 40 hours

worked. Employees who work for Tier 3 employers earn one hour of sick time for every 30 hours worked. Employees who work for a Tier 1 employer can accrue up to 40 hours per year; for Tier 2 it is up to 56 hours per year; and for Tier 3 it is up to 72 hours per year.

Leave may be used for the following reasons:

1. An employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition; an employee's need for preventive medical care.
2. Care of a Family Member with a mental or physical illness, injury or health condition; care of a Family Member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; care of a Family Member who needs preventive medical care.
3. Closure of employee's place of business due to a public health emergency or an employee's need to care for a child whose school or day care has been closed due to a public health emergency.
4. To address the effects of domestic violence, sexual assault or stalking.

"Family Member" is defined as a child (including biological, adopted or foster child, stepchild, legal ward, or child of a person standing in loco parentis who is under 18 years, or 18 or older and incapable of self-care because of mental or physical disability), grandparent, parent (including biological or adoptive parent of an employee or an individual who stood in loco parentis to an employee when the employee was a child), parent in law, spouse, or domestic partner. Employees can use accrued leave on the 180th day of employment.

## TACOMA

Tacoma's law will go into effect on February 1, 2016. The law will apply to any employee who works at least 80 hours per year in Tacoma. Eligible employees will earn one hour of sick time for every 40 hours worked up to 24 hours.

Leave can be used for the following reasons:

1. Diagnosis, care or treatment of the employee's or the employee's Family Member's, mental or physical illness, injury or health condition.
2. Domestic violence, harassment, sexual assault or stalking leave to obtain legal or enforcement remedies or obtaining services from a domestic violence or rape services program, or to relocate.
3. Dealing with the death of a Family Member.

4. Closure of employee's place of business by order of a public official to limit exposure to an infectious agent, biological toxin, or hazardous material.
5. To care for a child whose school or place of care has been closed by order of a public official.

"Family Member" is defined as a biological, adopted, or foster child, stepchild, or legal ward, or a child to whom the employee stands in loco parentis; a biological, foster, or adoptive parent or legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child; a person to whom the employee is legally married under the laws of any State or a domestic partner; and a grandparent. Employees can use accrued leave on the 180th day of employment.

## PROBLEMS CREATED BY MULTIPLE SICK LEAVE LAWS IN A JURISDICTION

As noted above, certain jurisdictions may have multiple sick leave laws that apply to employers, with slight differences between the laws. The differences in the laws may seem minor, but they cause big headaches for employers. For example, some of the laws' differences directly impact employers and employees' ability to collectively bargain.

Some of the municipal sick leave laws apply to employees who are currently covered by collective bargaining agreements (CBA) as of the effective date of the law. For example, San Diego's law, which went into effect on April 1, 2015, provides that if the CBA does not provide for paid sick time as provided under the Act, the Act shall take effect within 6 months of its passage.

The following scenario is an example of how this provision of the law negatively impacts employees and makes life difficult for employers:

A Poway, California trucking company has 30 drivers who are union members. The CBA does not expire for three years. The drivers cover routes in Southern California, including San Diego, but do not have the same routes every day.

The last union negotiations were contentious as the company was in dire financial straits and could not afford to raise the \$18 hourly rate. In the prior CBA, employees were entitled to two weeks' vacation and one week of sick time. Unused vacation time was paid to employees at the end of the year; sick time was not. Pursuant to the current CBA,

the parties agreed to provide employees with three weeks' vacation and no sick time. Employees are required to request in advance the use of vacation time, except that employees may use vacation time for their own illnesses, and unused vacation time was to be paid out at the end of the calendar year. If an employee did not use the extra week of vacation it was akin to receiving a salary increase. Since the contract was negotiated, the company's financial position has not improved and costs need to be cut by 10%.

Some drivers make deliveries several times per week to San Diego. Drivers spend between 30 and 90 minutes unloading the truck. The company's trucks do not have GPS tracking. Drivers simply manually log the deliveries by noting the delivery address and the time arrived at each location.

What are the company's obligations with regard to San Diego's sick leave law?

If your first reaction was nothing because the trucking company is not physically located in San Diego, you would be wrong. San Diego's law applies to any employee who works two hours per year in San Diego, regardless of where the employer is physically located.

If your second reaction was that the company does not have to do anything because it provides more than 40 hours of vacation time that can be used for sick time, that is also wrong. As was noted above, the law applies because the CBA does not provide for sick leave. Under the law, employers who offer paid time off sufficient to meet the law's requirements do not have to offer additional leave provided that paid time off can be used for the same reasons as the law. The San Diego ordinance provides that leave can be used for more than just the employee's or the employee's Family Member's illness. It also allows for leave where the employee or the employee's Family Member is a victim of domestic violence or in the event of workplace or school closure due to a public health emergency. Because the employer's vacation policy does not allow for leave in all the circumstances required by the Ordinance and requires that vacation time be requested in advance, additional sick leave must be provided.

What if a driver merely drives through San Diego on the way to Chula Vista; is that driver "working" in San Diego? The answer to that question is likely no. However, a driver who makes a delivery to San Diego would likely be seen as working in San Diego. In that case, working time is measured from the minute the driver enters San Diego until the driver leaves the city. In order to track accrual of sick time, the com-

pany has to either blindly trust the drivers' versions of how long they were in San Diego or invest in expensive equipment that will electronically monitor the time the employee is actually in San Diego. Even assuming that the company could afford and the Union would agree to allow for the installation of GPS tracking in the delivery trucks, someone is still going to have to review the GPS data and try to match up latitude and longitude coordinates with the boundaries of San Diego.

Forgetting for a moment the record-keeping nightmare these laws create for employers, in the above scenario, the fact that this law applies to the union drivers greatly increases the company's costs. Assume that 15 drivers work at least two hours per year in San Diego and that they accrue the maximum 40 hours of sick time each year. The CBA negotiations were premised on the idea that most employees would use two weeks' vacation and cash out the remaining week at the end of the year. There are now 15 employees with essentially an extra week of salary if the drivers maximize use of their sick time. The company is also paying these employees one week of sick time and annual salary costs have increased by nearly \$22,000. The only choice for cutting costs may now be a lay-off.

In addition to these difficulties, the company must manage the employee relations issues that will arise as half of the workforce receives a greater benefit simply because they make deliveries to San Diego. It is not hard to imagine that there may be significant conflict between employees as they jockey for the San Diego routes.

The laws also directly impact future negotiations for CBAs. Many of the laws allow for CBAs to waive the provisions of the laws as long as the waiver is explicit in the CBA. However, the laws differ on when such a waiver would be effective. Some of the laws will only allow for waiver of the provisions of the law if the CBA provides an equivalent amount of sick time or paid time off that can be used for all of the reasons set forth in the law and provided that it accrues as set forth in the law. In other words, employers must essentially comply with the law in order to waive the laws other requirements such as poster requirements and individual notice to employees. This will impact higher wage rates and benefits that are traditionally part of a CBA.

## **OTHER DIFFICULTIES FACED BY EMPLOYERS**

All of the sick leave laws have one thing in common — the type of documentation that can be required of employees using sick leave. Employers frequently have policies in place that require doctors' notes for absences, both as a way of tracking sick or

FMLA leave, but also as a way of curbing abuses. The laws set limits on when doctors' notes or other supporting documentation can be required. Generally, the laws only permit employers to request documentation if an employee is absent for three or more days. Some laws allow a request to be made if the employee is absent for two or more days. However, all of the laws state that employees cannot be made to state details regarding the specific nature of their illnesses. In short, employers may simply have to accept a doctors' note that says nothing more than the employee was ill or to excuse the employee from work. This makes it difficult for employers to verify if an employee truly was sick or there has been an abuse of sick leave.

More importantly, providing such limited information may make it difficult for an employer to verify if an employee is safe to return to work after an illness. Employers need to be able to adequately protect their workforce and customers, especially with health related/food service workers, to insure that proper disease protection protocols may be followed. For example, according to the CDC, an employee with H1N1 virus or some other flu may be contagious for up to seven days after first developing symptoms. An employee may, however, seek to return to work prior to the end of seven days after they first developed symptoms. As the laws are written, an employer is prohibited from determining not only what illness the employee had, but also whether or not the employee remains contagious.

In addition, under OSHA regulations, certain types of illnesses that employees may have require that the employer take affirmative steps to report illnesses on 300 logs or face fines and penalties. For example, if a nurse at a physician's office contracts MRSA at work and is then hospitalized due to the infection, that is a recordable injury under OSHA regulations. However, the laws as written limit an employer's ability to comply with those obligations.

The laws' broad retaliation provisions provide an additional area of concern. The laws all provide for penalties for violating the laws and for retaliating against employees who exercise their rights under the law. However, it is unclear from reading these laws what constitutes a "violation." Take New York City's Ordinance, for example. New York City's sick leave ordinance provides that anyone who is found to be in violation of the sections of the law requiring the accrual and carryover of sick time and the permissible uses of sick time may be assessed a civil penalty. The first violation carries a maximum fine of \$500; the second violation occurring within 2 years is not to exceed \$750; and any subsequent violations are \$1,000 per violation.

For example, a New York City employer has 20 employees. The employer's payroll company tracks accrual of sick time and notes the accrual on the employees' pay stubs. In the first January payroll, the payroll company forgets to provide carry-over time for employees and all 20 employees' paystubs show that they have no time carried over. No one notices it for the first two payroll periods as no employee has tried to use paid sick time. At the beginning of February, an employee files a complaint alleging that his accrued time was not carried over. The DCA reviews the employee's paystub and uses that as proof that there have been violations.

As the law is written, this could be 20 separate violations per day for 31 days. If that is the case, the fines would be a crippling total of \$619,250. Even if the DCA found that each "violation" only occurred each time a paystub was issued to each employee, then that would still be 40 separate violations for a total fine of \$39,250. In the above example, there may be an argument that the DCA would recognize that the failure to list the carry-over time on the paystubs was, although technically a violation, was one without damage to the employees as no one was denied sick time. However, as written, an employee could simply file a complaint that would require an employer to defend against the claim.

## **PROHIBITION ON MUNICIPAL SICK LEAVE LAWS**

Some states have recognized that having multiple laws not only creates confusion for employers, but also creates a competitive disadvantage. Twelve states — Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, Tennessee, and Wisconsin — have passed laws that prohibit local governments from passing sick leave laws. Legislation has been introduced in the New Jersey Assembly and Senate (A4365/S2865) to prohibit municipalities from enacting laws that affect terms and conditions of employment, which would include sick leave laws. Similarly, legislation passed the Pennsylvania Senate on February 14, 2015 that would nullify Philadelphia's paid sick leave ordinance and prohibit municipalities from enacting paid sick leave laws. Neither the New Jersey nor Pennsylvania laws have advanced in recent months. Employers in every other state face the possibility of having to comply with a patchwork of local sick leave laws.

Absent some type of state or federal blocker, the best advice I can give employers is to make sure that sick leave policies are carefully reviewed and to invest in large bottles of aspirin and antacids.