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Fight Over Sick Leave Laws Reaches Fevered Pitch

In Congress, as well as city councils, governors' mansions, courts, state ballot boxes and state legislatures all over the country, battles are being waged over ordinances and laws providing sick leave for employees.

Federal Healthy Families Act

Capitalizing on what they view as momentum at the local level with the passage and introduction of sick leave legislation in various cities and states across the nation, Senator Harkin (D Iowa) and Representative DeLauro (D Ct) introduced identical bills in the Senate and House on March 20, titled the Healthy Families Act. DeLauro has introduced a version of the bill in every Congress since 2004. This time, however, the bills have more support than any previous introduction with 113 co-sponsors in the House and 18 in the Senate.

The current version of the bill would set a national paid sick days standard. It would allow workers in businesses with 15 or more employees to earn up to 7 days of paid sick leave in one hour increments per each 30 hours worked. The employees could use the time to recover from their own illnesses, access preventive care or provide care to a sick family member, which includes a child, parent, spouse, domestic partner or any other individual related by blood or affinity, whose close association with the employee is the equivalent of a family relationship. It would also allow those who are victims of domestic violence, stalking or sexual assault to use the time to recover or seek related assistance. Accrual of time off would begin upon employment and could be used after 60 days upon the job. Employers already providing paid time off need not change their current policies, as long as they meet the statute's minimums for time, types of use and method of use. Employers would be able to require documentation supporting any request for leave longer than 3 days.

After its initial introduction in 2004, the Healthy Families Act triggered the introduction of similar laws at the local and state level. In 2006, San Francisco became the first city in the nation to pass a law guaranteeing paid sick days for all workers in the city. The ballot initiative passed with 61% of the vote and required that workers earn one hour of paid sick leave for every 30 hours worked. Employers with 10 or less employees must provide up to 5 paid sick days per year, and those with more than 10

employees must provide up to 9 days. These days may be used to recover from illness, attend doctor visits, or care for a sick child, partner or designated loved one.

Nationwide Local Legislation

In 2008, Washington D.C.'s city council unanimously passed its law. It provided for 7, 5 or 3 paid sick days, based on the number of employees; the maximum number of sick days (7) were required from employers with more than 100 employees, and the minimum (3) was required of employers with fewer than 25 employees. The D.C. law was also the first in the U.S. to allow the use of earned time off as paid "safe" days for victims of domestic violence, sexual assault or stalking. The law included exemptions for some restaurant workers and employees in the first year of their employment.

In 2011, Connecticut passed the first statewide paid sick days bill in the nation. This law applied to hourly, non-exempt service workers of business with 50 or more employees, and allows them to earn one hour of paid sick time for every 40 hours worked or 5 days per year for a full-time employee. The earned sick days may be used to care for a sick child or spouse, as well as to allow victims of sexual assault or family violence to seek assistance. Employees cannot use accrued time until they have completed 680 hours of employment commencing on January 1, 2012.

Later that year, Seattle passed its own ordinance. Similar to D.C.'s law, it allowed employees to earn 9, 7 or 5 sick days based on the size of their employers. Employees may use the time for their own illness, injury or preventive care, for the health needs of a family member, to deal with the consequences of domestic abuse, sexual assault or stalking, or if their place of business, or their child's school or place of care, is closed due to a public health emergency. [For more detail on the Seattle ordinance, click here to read our in-depth newsletter on the ordinance]. There is currently a strong push in Tacoma, Washington, for a similar law.

More recently, in March 2013, Portland, Oregon, passed a sick leave ordinance that will take effect January 2014. Portland's ordinance requires employers with more than 6 employees to provide at least one hour of paid sick time for every 30 hours worked to any employee who works at least 240 hours within the city limits per year. Employees can usie the accrued leave after 90 days of employment and are entitled to carry over up to 40 hours of unused leave into subsequent years although they are not entitled to exceed 40 hours of leave in any given year. Employers with fewer than 6 employees must provide unpaid leave on the same terms. Employers already providing time off in excess of the ordinance need not make any changes. The accrued time can be used for the diagnosis, care or treatment of the employee or a family member, including domestic partners, for certain purposes related to domestic violence, harassment, sexual assault or stalking, or if their place of business or their child's school or place of care is closed due to a public health emergency.

The New York City Council finally succeeded on May 13, 2013, in passing its own law, after repeated attempts since 2009. Previously City Council Speaker Christine Quinn had declined to bring the proposed legislation up for a vote. But this year, as she prepares to run for mayor, she faced increasing pressure to support the measure and ultimately brokered a compromise law. The resulting law provides that beginning April 1, 2014, private sector workers in businesses with 20 or more employees will be able to earn up to 40 hours of paid sick time a year, while those in smaller businesses will receive up to 40 hours of unpaid sick time a year. The threshold will be lowered in October 2015 to businesses with 15 or more employees. Paid or unpaid sick time can be used to care for a worker's own health needs or the health needs of a spouse, domestic partner, child, parent, or the child or parent of a worker's spouse or domestic partner. The bill contains several key compromises, including an exemption for manufacturing companies and an effective date contingent on the strength of the city's economy. Mayor

Bloomberg vetoed the law on Friday, June 7, but in as much as it passed 45-3, there is more than enough support to override such a veto. In fact, the City Council spokesman said the council would accept the veto at a June 12 meeting and override it within 30 days.

Opposition Efforts

Although it looks as if New York's law has the City Council support to override a veto by Mayor Bloomberg, other laws are meeting more stalwart opposition efforts.

In April 2013, Philadelphia's mayor vetoed a sick leave bill for the second time in 3 years, citing fears the legislation would actually cost workers jobs. The measure would have required local firms to offer one hour of sick leave for every 40 hours worked. Firms with 6 to 20 workers would have been required to offer up to 4 sick days per year and larger firms up to 7 days per year. Businesses with fewer than 6 workers would have been exempt. Despite having more city council support than the 2011 version of the bill, supporters were still one vote short of being able to override the Mayor's veto.

Milwaukee's battle to enact its legislation is the poster-child for the partisan fighting surrounding the sick leave legislation efforts. Milwaukee was actually the third city to pass such legislation doing so in 2008 with 69% of the vote. Its law established that employers must provide one hour of paid sick leave for every 30 hours worked, up to 9 days per calendar year; employers with fewer than 10 employees had to provide 5 days. The ordinance covered part-time and temporary employees as well, and all employees were eligible to use their leave after 90 days of employment. The ordinance allowed use of the time off for a broader range of needs that far exceeded those provided under existing state or federal law, and included a very broad definition of "family member" that arguably extended even to close friends, girlfriends and boyfriends.

The ordinance was quickly denounced by business groups and challenged in court by a local commerce association. On February 6, 2009, a judge granted a temporary injunction against the law taking effect, and made the injunction permanent in June. The National Association of Working Women appealed the decision in July, and the Court of Appeals asked the Wisconsin Supreme Court to decide the matter in February 2010. On October 14, 2010, an equally divided Wisconsin Supreme Court sent the case back to the Court of Appeals, unable to reach a majority decision with one judge sitting out. On March 24, 2011, the Court of Appeals upheld the ordinance. However, when the democratic legislators left the state shortly thereafter over the collective bargaining rights dispute, state republicans passed a bill preempting the local ordinance, which was promptly signed by Governor Walker. Another legal challenge followed, but in July 2011, a judge held that the ordinance was "dead," having been rendered moot because of the state legislation voiding it.

Following Governor Walker's lead in Wisconsin, the preemption movement, backed by conservative and pro-business groups, including the National Restaurant Association and the American Legislative Exchange Council, has succeeded in passing laws preempting local sick leave bills in 13 states, including Florida, Louisiana, Mississippi, Kansas, Tennessee, Arizona (whose preemption law will be challenged in court, as its passage violates a statewide ballot measure outlawing preemption laws), Indiana and others.

Current Battlegrounds

Despite the opposition, supporters point to active campaigns for sick day laws in more than 20 states and cities currently underway, with statewide legislation introduced in 2013 in Arizona, Hawaii, Iowa, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Vermont and Washington.

But there are also active campaigns for preemption laws in multiple states, including Michigan, Alabama, South Carolina, Washington, Oklahoma and others.

As the battles heat up locally and now nationally, both sides make compelling arguments. Those in favor of sick leave laws rely on facts like the following to support their cause:

- 40 percent of private-sector workers, including 70 percent of low-wage workers, have no paid sick days. Nearly two-thirds of restaurant workers have reported cooking or serving food while sick.
- A recent study from the University of Arizona showed that within four hours of a sick employee coming to work with a flu-like virus, more than 50 percent of office surfaces were contaminated with the virus.
- Illness costs our national economy $226 billion annually in lost productivity. The vast majority of this cost-71 percent-is due to "presenteeism," the practice of sick workers coming to work and infecting their colleagues rather than staying at home.
- Simply by reducing unnecessary emergency room visits, universal paid sick days would save the economy $1 billion in health care costs per year, according to the Institute for Women's Policy Research.
- In a 2010 University of Chicago survey, one in eight workers reported that they or a family member had been fired, suspended, written up or penalized for taking time off due to personal or family illness.
- A 2012 study found the lack of paid sick leave to be a barrier to receiving cancer screenings and preventive care; workers with paid sick leave were more likely to have a mammogram, Pap test and endoscopy, and were more likely to have visited a doctor in the previous year than workers without paid sick leave, even when adjusted for sociodemographic factors.
- A 2012 study found the lack of workplace policies like paid sick days contributed to an additional 5 million cases of influenza-like illness during the H1N1 pandemic of 2009.

Those against local sick day laws argue that they are "an intervention by government in employer-employee relationships that contributes to the high-cost regulatory environment that discourages job creation" (Kathryn Wylde of The Partnership for New York City) and will lead to a loss of jobs for the very workers the laws are supposed to benefit. They also rely on a study purporting to show that Connecticut employers cut jobs and benefits after the passage of the state's law. Preemption supporters argue that it is unfair to potentially saddle businesses with different standards throughout a single state; that it can create unfair advantages if a business in a city with mandated sick leave has to compete with a business located outside the city, without mandated sick leave and its attendant costs to the business.

Skellenger Bender can certainly help address any questions you might have concerning Seattle's or Portland's sick leave laws, or any law that might pass in Tacoma or statewide in Washington, Oregon or Alaska. Elsewhere, we recommend you contact experienced employment law counsel with any questions you might have concerning any applicable law, your existing policies or other related issues.

With such diametrically opposed viewpoints falling along partisan lines and the current gridlock in Congress, it is unlikely that the Healthy Families Act will pass. But we likely have not seen the end of the battles over this type of legislation being waged on the front lines of cities and states across the nation.

NLRB Legal Alert Follow-Up

Our April Legal Alert (copy) covered the legal challenges to the current makeup of the National Labor Relations Board. We discussed the *Noel Canning* decision by the D.C. Circuit Court of Appeals, holding that the recess appointments of two current members of the NLRB were unconstitutional, and the resulting passage of a House bill that would prohibit the NLRB from taking any action that requires a quorum.

Since that time, at least 6 other bills with the goal of shutting down the current NLRB have been introduced in both the House and Senate. The *Canning* decision was appealed to the Supreme Court in April, and both sides have publicly called upon the Court to take the case and address the issue of recess appointments. On May 16, the Third Circuit Court of Appeals joined the D.C. Circuit in holding that Obama's recess appointments violated the Constitution's recess appointment power. Meanwhile, employers have been appealing NLRB decisions in greater numbers to the D.C. Circuit, knowing that the decisions will be struck down as unconstitutional (employers can choose to appeal Board decisions in the federal circuit where they are based or where the Board is based in the D.C. Circuit). Obama recently re-nominated two of the sitting recess appointees, whose appointments were held unconstitutional. They are facing stiff opposition from Republican Senators, who maintain they should have stepped down when the court ruled their appointments were invalid.

The recess appointments issue has significant implications not only for the NLRB, but also for other boards many of which have recess appointments due to the current acrimony and gridlock in Congress. The implications of this fight will not be limited to President Obama's administration as most modern presidents utilize the recess appointments clause. Under the circumstances, it would be surprising if the Supreme Court did not take the *Canning* appeal. Stay tuned.

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