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Managing the Outbreak of Paid Sick Leave Laws

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By mid-2015, three states and 14 cities in the United States, as well as the District of Columbia, will require employers to provide some form of paid sick leave to their employees. Additional measures currently are being considered by several other states and local governments. Although mandatory paid sick leave appears to be more established globally, the new laws are expected to pose significant challenges for employers operating in multiple jurisdictions in the United States—not only due to the patchwork of various state and local regulations, but also because the new laws seek to place the entire cost of paid sick leave on employers.

When writing about the recent outbreak of paid sick leave legislation occurring throughout the United States, it can be quite difficult to avoid using a bad pun here and there to describe what is happening . . . Joking aside, the recent proliferation of state and local laws in the U.S. requiring employers to provide short-term paid sick leave to their employees is expected to cause administrative headaches for businesses operating in multiple U.S. jurisdictions.

A Fast-Growing Concern in the U.S.

Providing medical leave is not a novel concept in the U.S. Since 1993, federal law, through the Family and Medical Leave Act (FMLA), has guaranteed unpaid leave for certain employees in order to address their own or a family member's serious medical issues. Several states have similar protections. Yet critics of these laws complained that they were deficient—not only because they did not require the leave to be paid, but also because they failed to provide job-related protections for short-term or non-serious illnesses. Based on what they viewed as a gap in the law, beginning in 2006, a number of workers' advocates in the U.S. began pushing state, local and federal governments to pass legislation that provided short-term paid sick leave for employees.

In 2006, San Francisco became the first jurisdiction in the U.S. to require employers to provide paid sick days to employees. Since then, the rate of jurisdictions in the U.S. enacting paid sick leave legislation has accelerated. In the past two years, 12 cities and two states passed laws requiring mandatory paid sick leave. By mid-2015, a total of three states, 14 cities and the District of Columbia will require employers to provide paid sick leave to their employees. Several other states and cities in the U.S. are considering passing paid sick leave legislation in their respective jurisdictions.

The Debate Over the Benefits of Paid Sick Leave

Currently, there is serious debate regarding whether these laws are beneficial in the long run for the U.S. economy. Proponents of these laws claim that requiring paid sick time can reduce turnover, increase productivity and reduce the spread of contamination in the workplace. Yet opponents cite the economic burdens they will place on businesses that must bear the entire costs of managing and providing the leave—especially small to mid-sized companies. A survey of New York City employers conducted by the Partnership for New York City found that a paid sick leave mandate would cost city employers $789 million per year (New York City's paid sick leave ordinance went into effect in April 2014). Another study examining the impact of Connecticut's paid sick leave law found that many businesses responded by reducing paid leave, scaling back employee benefits, cutting hours, and reducing wages or raising prices. About 24 percent of employers in the study responded that the law may require them to hire fewer employees, and 10 percent of respondents stated that the law actually caused them to limit or restrict their expansion within the state.

While mandatory paid sick leave is a fairly new concept in the U.S., the same cannot be said for other countries. According to a 2007 study conducted by the Institute for Health and Social Policy at McGill University, at least 145 countries provide paid sick days for short- or long-term illnesses, with 127 providing a week or more annually. Mandatory paid sick leave appears to be well established in most European countries.

For example, in Italy employees generally are entitled to between three to 12 months of job-protected leave, for which the employee's salary during the leave is paid, in part, through a combination of employer-based funding (by statute and through collective bargaining, depending on the industry involved) and social security. France has similar leave protections that permit, upon medical certification, leave for up to three years. The leave is paid, in part through social security and by the employer (through statute or collective bargaining), provided that any length of service requirements are met, with the amount of indemnification dependent on whether the leave is for a work-related accident or illness and, in some cases, the employee's job category. Likewise, German businesses must provide, upon medical certification, at least six weeks of paid leave at full salary to employees. After six weeks, employees may continue to receive 70 percent of their salary through statutory health insurance for up to 78 weeks within a three-year period, but capped at 2,887.50 euros per month. Germany also provides 10-20 days of paid leave for parents of sick children younger than 12 years.

Patchwork of U.S. Laws Expected to Create Headaches

Regardless of where one stands on the debate, these laws are likely here to stay, and companies now will need to deal with the resulting patchwork of paid sick leave laws.

Companies operating in multiple paid sick leave jurisdictions may find it challenging to adopt standards for their workers. Despite similarities within each jurisdiction's laws, all have significant nuances. For example, some jurisdictions (such as California) have additional recordkeeping and notice requirements, while others (such as San Francisco) place restrictions on what an employer may inquire or solicit from the employee to confirm that the employee is taking the leave for appropriate purposes. Still other jurisdictions, such as Seattle, would prohibit employers from imposing accrual caps.

Employers operating in California face particularly challenging headaches. Recently, the state passed legislation mandating at least 24 hours of paid sick leave. Despite the new law's applicability to all residents, its provisions do not prohibit local governments from passing measures that provide greater sick leave benefits (as San Francisco and Oakland have done).

Corporate counsel and HR departments representing businesses operating in multiple paid sick leave jurisdictions in the U.S. can take the following three critical steps to address these emerging laws:

1. **Stay abreast of new developments:** Several state and local governments are considering passing legislation in the near future. Recently, President Barack Obama's administration has called on Congress to pass federal legislation.
2. **Examine not only where your business operates, but also where your employees work:** Due to the patchwork of laws in operation for each jurisdiction, employers should

be mindful of how each jurisdiction's laws operate. A tricky issue may arise when employees travel to a jurisdiction that requires paid sick leave. Depending on how covered employees are defined, it may be possible for a travelling employee to be eligible for paid sick leave under that jurisdiction's law.

3. **Examine whether a local jurisdiction's paid sick leave law may be preempted:** Employers are advised to check when two or more jurisdictions' paid sick leave laws apply to any one employee. In these overlapping jurisdictions, the company may be required to comply with both jurisdictions' laws.

It is recommended that employers understand the requirements of each paid sick leave law applicable in the jurisdictions where they operate. To address these issues and develop a compliant sick leave policy and appropriate implementation, corporate counsel should consider convening a working group of internal subject matter experts, including representatives from human resources, payroll, corporate training and legal.

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