

Advisory

LABOR, EMPLOYMENT AND BENEFITS PRACTICE GROUP | DECEMBER 2011

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Connecticut Department of Labor Issues Guidance on New Paid Sick Leave Law

On June 30, 2011, we notified you about Public Act 11-52 (the “Act”) which, effective January 1, 2012, will require employers to provide up to five (5) days paid sick leave per calendar year to eligible employees. We defined covered employers, described the employees who will be eligible for the paid leave, outlined the Act’s key provisions, and provided recommendations to ensure compliance. The Alert may be accessed at www.wiggin.com.

On November 18, 2011, the Connecticut Department of Labor (“DOL”) issued an official document (the “Guidance”) that, according to the DOL, is “intended to serve as guidance for employers and employees in answering questions concerning public act 11-52 . . . and to assist human resources professionals in Connecticut in their efforts to comply with this new law.” The full text of the Guidance is available at <http://www.cga.ct.gov/2011/act/pa/2011PA-00052-R00SB-00913-PA.htm>. The Guidance provides a comprehensive analysis of the Act’s provisions and points out some nuances. The main takeaways are as follows:

- To determine whether an employer meets the “50 or more employees” requirement, the DOL will review the employer’s Quarterly Earnings Report (“QER”), which is filed with the DOL for unemployment compensation purposes. If an employer with multiple operations files its QER under separate registration numbers, the number of employees will not be combined to meet the 50-employee threshold. Each operation will be considered a separate entity.
- For the purposes of the manufacturer exception, an employer may have one facility that is subject to the law and other facilities that are not. If the employer has multiple buildings in a “campus” setting, the DOL will consider the primary activity of the campus to determine if the entire campus is exempt
- If an employee performs more than one job, the employer must use the classification in which the employee is primarily engaged to determine his or her status as a covered employee.
- Neither the Act nor any other Connecticut statute under DOL jurisdiction defines “per diem employees,” who are excluded from coverage. Consequently, in determining whether an individual is an exempt per diem employee, the DOL will examine how a business has traditionally defined the term. Relevant questions include: Can the employee accept or refuse work at will? What is the structure of the assignment? What is the employee’s relationship to the employer? On this issue, the DOL recognizes that per diem assignments may exceed more than one day and be longer term, and that if such an arrangement “has the characteristics of a traditional per diem relationship,” the individual will be exempt.
- Eligible employees will accrue paid sick leave at a rate of one (1) hour per every forty (40) hours actually worked, not including any time off for vacation or any other reason.

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- Eligible employees must be allowed to accrue and to use paid sick leave in one (1) hour increments, regardless of the employer's time-keeping system. Employees are not entitled to use accrued sick pay in increments of less than one (1) hour unless allowed by the employer.
- Eligible employees are entitled to carryover up to forty (40) hours of unused accrued paid sick leave at the end of each calendar year. Though employers may offer employees the option of taking a year-end payout in place of the accrued hours, an employer cannot require that workers take the year-end payout.
- Eligible employees may not use accrued paid sick leave until they have actually worked six hundred eighty (680) hours, not including any time off for vacation or other reason. This 680-hour threshold is a one-time requirement, so employees never need to satisfy it again for the same employer.
- For purposes of determining an employee's "normal hourly wage," overtime and commission payments should not be included.
- Employers cannot require employees to work extra shifts to cover missed work in lieu of being paid sick leave.
- The need for leave due to family violence is similar to the leave provided in C.G.S. § 31-51ss, which provides twelve (12) days of unpaid leave for family violence victims. The employer cannot require employees to use those days concurrently with the paid sick leave.
- For purposes of using paid sick leave to care for a child 18 years of age or older, the child must have a disability within the meaning of the Americans with Disabilities Act that prevents him or her from performing the activities of daily living. That requirement does not apply to a child under 18 years of age.
- Employers may only request reasonable documentation if the employee uses paid sick leave for three (3) or more consecutive workday absences (not necessarily calendar days). The absences do not need to be full-day absences, but rather may consist of any time taken off as paid sick leave during a workday.
- Unlike the FMLA, the employer is not authorized to seek clarification of the healthcare provider's note or obtain a second opinion if it is not satisfied with the documentation.
- An employer is not required to pay out unused accrued sick leave upon termination. However, the accrued time will be treated as a fringe benefit and, consistent with current Connecticut law, the DOL will examine the employer's policy to determine whether the employee should be paid for unused accrued time.
- A collective bargaining agreement that is in effect prior to January 1, 2012 will remain in effect until its expiration or renegotiation (whichever occurs first) even if it provides for less paid sick leave than is required under the new law. Thereafter, eligible employees who are covered by the CBA must be provided paid sick leave in accordance with the Act.

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- Upon a voluntary or involuntary separation from employment, the employee will lose any unused accrued paid sick leave. However, employees do not lose any of the hours worked towards the 680 hours of employment threshold and, if they return to work for the same employer, will pick up where they left off regarding that requirement.
- Certain provisions of the discrimination and retaliation sections apply to all employees engaged by the employer, not just service workers. For example, employers are prohibited from discriminating or retaliating against any employee because that employee requests or uses paid sick leave in accordance with the employer's own paid sick leave policy.
- The DOL has discretion regarding whether a complaint will result in a hearing. As part of the complaint process, the DOL will engage the parties in mediation to try to resolve the complaint.
- If the Labor Commissioner finds that an employer violated the Act, that employer will be liable for civil penalties. The Commissioner may also award the complainant reinstatement, back wages, payment for use of paid sick leave and reestablishment of benefits.
- Either party may appeal the Commissioner's final decision to the Superior Court. There is no other private right of action.
- Employers subject to the Act must provide appropriate notice to service workers. A DOL-issued poster that employers may use to satisfy this requirement is available in English at <http://www.ctdol.state.ct.us/wgwkstnd/SickLeavePoster2012.pdf> and in Spanish at http://www.ctdol.state.ct.us/wgwkstnd/DOL_NOTICE_SPANISH_112811.pdf

Note that the Guidance is subject to change as questions arise and the DOL develops further interpretations. If the Guidance is substantively revised at some point, we will send you an updated alert describing the changes.

If you have any questions about the Guidance or you are concerned about whether your policies comply with the Act, please do not hesitate to contact us.

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