

Paid Sick Leave Post-FFCRA

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Although many employers provide paid sick leave as a benefit for their employees, no federal law currently requires private employers to provide paid sick leave. Last year, Congress passed the Families First Coronavirus Response Act ("FFCRA") that included national paid sick leave for the first time. But leave was limited to reasons related to COVID-19 and the temporary law has since expired. What remains is a patchwork of state and local, paid sick leave laws that employers must navigate carefully. In response, my state, Texas, has tried to limit this local patchwork, while the White House has recently proposed new federal laws to expand paid sick leave nationally.

Unpaid sick leave

On the federal level, the primary law protecting employee leave is still the Family and Medical Leave Act of 1993 ("FMLA"). The FMLA provides up to 12 weeks of *unpaid* leave for, among other reasons, an employee's own serious health condition or to care for another family member suffering from a serious health condition. Although providing significant protections for employees, FMLA leave is still unpaid, and it applies only to employees employed 12 months and 1250 hours at locations where at least 50 employees are employed within 75 miles.

Paid sick leave

In response to the national coronavirus emergency, Congress experimented for the first time with mandating paid employee sick leave nationally. The FFCRA provided for the first time, on a federal level, paid sick leave for employees and funded the leave through federal tax credits for employers. The Act was still limited to COVID-19 related reasons, and applied only to employers with fewer than 500 employees. It required two weeks of paid sick leave for employees recovering from illness, quarantining because of exposure to the coronavirus, or caring for someone for reasons related to COVID-19. And it provided an additional 10 weeks of expanded paid FMLA leave to care for a child whose school or daycare had closed because of coronavirus.

Although the FFCRA served a valuable purpose, it expired on its own terms on December 31, 2020. Many believed the FFCRA would be extended, but the \$900 billion pandemic relief stimulus package eventually signed by the President on December 27, 2020 did not extend the FFCRA's federal paid sick leave mandates. Instead, if employers *voluntarily* elected to provide paid FFCRA leave, the relief package provided only extended employer tax credits, which themselves expired on March 31, 2021.

State and local laws also provide sick leave protection

As a result, there is again no federal paid sick leave requirement. However, many state and local laws still require employers to provide paid sick leave for COVID-19 related reasons. For instance, the states of New York, New Jersey and California have laws providing or expanding paid sick leave for COVID-19 related reasons. There are also local governments that have likewise expanded paid sick leave for COVID-19 related reasons, like New York City and Philadelphia.

That is not to say that paid sick leave did not exist before the coronavirus pandemic. Even before 2020, many states and local jurisdictions were passing mandatory paid sick leave laws. The City of San Francisco first passed a paid sick leave requirement in 2006; Connecticut followed with paid sick leave in 2011; California and Massachusetts joined it in 2014; and more states followed. As of August 2019, there were 11 states, along with the District of Columbia, and over 30 localities, that required paid sick leave. Currently, in addition to the District of Columbia, there are at least 15 states and many more localities that require employers to provide some form of paid sick leave.

The effort to limit the local patchwork in Texas

Several large Texas cities joined the trend starting with Austin in 2018, and followed by San Antonio and Dallas in 2019. All three cities required employers to accrue paid sick leave for employees who worked more than 80 hours in the city in a year's time. Although many businesses already provided paid time off (PTO), each ordinance required specific accrual and recording often inconsistent with an employer's existing policies, and applied to businesses not even located in the city to the extent their employees worked as little as 80 hours in a year within the city's limits. As a result, a service company located in a Dallas suburb like Frisco would be required to track the time its employees spent in the City of Dallas. And, as anyone who has been to Dallas can attest, it is not easy to tell where the City ends and the suburbs begin.

All three ordinances were challenged in the courts, and in each case injunctions were issued barring enforcement. The Austin court of appeals was first to uphold the injunction of the Austin ordinance, finding it unconstitutional and preempted by the Texas Minimum Wage Act. The Texas Supreme Court subsequently denied review of that decision. *Texas Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. denied). More recently, the San Antonio court of appeals likewise upheld the injunction of San Antonio's ordinance on the same grounds. *Washington v. Associated Bldrs & Contractors of S. Tex., Inc.*, No. 04-20-000040-CV, 2021 WL 881288 (Tex. App.—San Antonio March 10, 2021). And even more recently, a federal court permanently enjoined the Dallas ordinance on the same basis. *ESI/Employee Solutions, L.P. v. City of Dallas*, No. 4:19-CV-570-SDJ, 2021 WL 1227637 (E.D. Tex. March 31, 2021). The two more recent decisions have not currently been appealed.

To avoid this kind of limbo for employers, the Texas Senate on April 12, 2021 passed Senate Bill 14 banning any local ordinances in conflict with state law regulating private employment practices. The sponsors intended to provide consistency for Texas employers, rather than a patchwork of employment laws that vary from city to city. Of course, the bill still has a long way to go to become law, and many will dislike any limit on local government's authority. We will see whether the bill survives the legislative session.

New White House Proposals

Meanwhile, the President has made his own proposals for paid sick leave. On April 21, 2021, President Biden announced a tax credit for employers offering paid leave for employees to receive the COVID vaccine. The tax credit is for businesses with less than 500 employees to offset the cost of giving employees paid time off to get vaccinated and recover from any side effects, providing up to \$511 per day for up to 10 workdays or 80 hours, similar to the prior FFCRA. The tax credit is funded by the American Rescue Plan passed in March, and available between April 1 and September 30, 2021.

Even more recently, President Biden in a speech to Congress also proposed an ambitious new federal paid leave policy for all workers. The proposal is for 12 weeks of paid leave each year for reasons similar to the FMLA, with workers receiving at least 2/3 of their average weekly wages up to \$4,000 per month. According to the White House, the program would be implemented over the next decade and would cost around \$225 billion, to be funded mostly by increased taxes on the wealthy (although there may be other ways to fund the program). However, this is still just a proposal. It is more likely that Congress might pass the Healthy Families Act, as President Biden also requested, requiring employers to allow workers to accrue seven paid sick days per year. This Act would be funded by employers rather than the government.

Conclusion

Paid sick leave is gaining momentum. Currently, there are at least 15 states and the District of Columbia that require some form of paid sick leave, and many more localities. And federal paid sick leave may be coming. Even if your company already provides paid sick leave, legal requirements vary based on the size of employer covered, the number of hours needed to qualify, the accrual and usage of hours, carryover and payout, and other variables. Any employer that operates in multiple states, counties or even cities should check the local laws to confirm that its policies comply, and should consult a qualified employment lawyer. The attorneys in the Employment Practice Group at Kane Russell Coleman Logan PC can help.

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