

Legislative Alert

Congress Considers Mandating Paid Leave

On June 11, the U.S. House of Representatives Workforce Protections Subcommittee held a hearing on the [Healthy Families Act \(HFA - H.R. 2460\)](#), a bill that would require employers to provide employees with up to 56 hours of “paid sick time” (paid time off/leave) each year. Rep. Rosa DeLauro (D-CT) introduced the bill in the U.S. House of Representatives on May 18 and Sen. Ted Kennedy (D-MA) introduced it in the U.S. Senate on May 21. Rep. Lynn Woolsey chaired the hearing with 6 witnesses testifying in favor of the bill, including 2 members of Congress, and 2 witnesses opposed to the bill. Supporters of the legislation claim the mandate is needed to ensure workers are not forced to choose between their jobs and their own or their family’s health. Proponents of the bill also claim that providing employees with paid sick leave increases morale, productivity and reduces the possibility “presenteeism” – a phenomenon where employees show up to the workplace sick, thereby prolonging their own illness or spreading illnesses to coworkers and the public. Opponents of the measure say that a one-size fits all mandate, like the HFA, limits an employer’s flexibility in designing compensation and benefits packages that meet the needs of their unique workforce and that a debate over an expensive mandate is not appropriate at a time when employers are struggling to avoid layoffs and business closures.

Eligibility The HFA would apply to any employer with 15 or more employees who work 20 weeks or more a year. Employees would begin accruing paid sick time on their first day of work and may begin taking the leave as soon as 60 days thereafter. Under the HFA, *both full and part-time employees* would accrue paid sick time at the same rate (1 hour of paid sick time for 30 hours worked).

Permitted Leave Employees could use paid sick time for their own medical condition, including absences related to preventive medical care, or to care for a relative with a medical condition, including assisting a relative to attend appointments related to diagnosis or preventive medical care. HFA also would allow employees to use paid sick time for an absence resulting from domestic violence, sexual assault or stalking that involves the employee or the employee’s relatives. HFA defines “relative” as anyone related by blood or a relationship with the employee that is “equivalent of a family relationship.” The HFA prohibits employers from requiring that employees assist in the “search for . . . a replacement worker to cover hours during which the employee is using the paid sick time.”

Paid Sick Time Accrual and Accumulation Under the HFA, employees would accrue 1 hour of paid sick time for every 30 hours worked, to a maximum of 56 hours in one calendar year (salaried employees are assumed to work a 40 hour work week unless otherwise noted). Paid sick time would carry over from year to year, but an employer is not required to permit an employee to accrue more than 56 hours at a given time. There is no restriction, however, on how much paid sick time an employee can use in a given year. Thus, employees who carry over paid sick time from prior years could take more than 56 hours in one calendar year. For example, an employee that carries over 56 hours of paid sick time from 2009 to 2010, could use all 56 hours in January 2010 and would begin accruing paid sick time again until he or she hit the 56 hour maximum accrual for 2010. That employee could use the newly accrued paid sick anytime within 2010 or carry it over 2011. The HFA does not require employers to compensate

employees for any paid sick time that has accrued but has not been used upon the employee's separation. If an employee is rehired within 12 months of separation, however, the HFA requires employers reinstate the employee's previously accrued paid sick time.

Requesting, Scheduling and Using Paid Sick Time Employees may request paid sick time orally or in writing. The request must include information on the expected leave duration – but the employee need not explain the reasons for the leave. Employees need to provide 7 days notice, unless the need for time off is not foreseeable, in which case the employee must notify the employer as soon as practicable. The HFA states employees should schedule the leave in a manner that does not unduly disrupt employer operations. The bill is silent on whether employees can use time off intermittently, but it does state that employees “may use paid sick time as time is” accrued. Since employees accrue paid sick time by the hour, the HFA appears to require employers to permit employees to take the time off in increments of an hour, if not smaller.

Certification Employers may only require certification for leave of more than 3 consecutive days. Employees have 30 days following taking paid sick time to provide the certification and employers may not delay the time off based on certification.

Existing Policies The HFA does not require employers with existing sick leave and paid time off (PTO) policies to provide additional leave *if* the employer's leave is available to employees on the same terms as HFA leave (i.e., at least 56 hours, that accrues immediately, may be used on the 60 day worked, intermittently, etc.) and may be used for the same purposes (employee's and relative's medical conditions or resulting from domestic violence).

Regulations and Enforcement The United States Department of Labor (DOL) would issue implementing regulations under the HFA within 180 days of the bill's enactment. Employers would not need to comply with the HFA until 6 months after DOL issues the regulations. The HFA enforcement mechanism would allow both DOL enforcement and any individual (not just employees or former employees) to bring suit individually or collectively. Damages would include lost wages and benefits or, where there has not been any lost wages or benefits, any monetary losses sustained as a direct result of the violation up to a sum equal to 56 hours of the employee's compensation, liquidated damages and other equitable relief. An action for a violation of the HFA must be brought within 2 years of the last alleged violation or within 3 years if the allegation is for a willful violation. Like the Family and Medical Leave Act, the HFA arguably creates liability for managers, as it includes in the definition of employer, “any person who acts, directly or indirectly, in the interests of an employer. . . .”

Recordkeeping The HFA would require employers to keep records demonstrating HFA compliance for a period determined by the DOL through regulations.