



Sick of Sick Leave? Employers in City of San Diego Now Subjected to New and Confusing Paid Sick Leave Requirements

By Annie Macaleer

With Assistance from Kera Harkins, Research Services Coordinator

On June 7, 2016, San Diego voters approved Proposition I, Ordinance Number O-20390, also known as the City of San Diego Earned Sick Leave and Minimum Wage Ordinance (“Ordinance”). The Ordinance passed with 63%¹ of San Diegans voting in its favor. In sum, the Ordinance increases the minimum wage and requires employers to provide more paid sick leave (“PSL”) than is currently required under the California Healthy Workplaces, Healthy Families Act (California’s PSL statute) that went into effect on July 1, 2015.²

For employers operating within the City of San Diego, the passage of the Ordinance has resulted in an unprecedented panic to comply with the new law before the uncertain effective date “sometime in July” (discussed below) while struggling to reconcile the glaring inconsistencies between the Ordinance and the California PSL statute. Below is a summary of the key provisions set forth in the Ordinance along with a discussion on how to comply with both laws.

Effective Date

Employers must begin complying with all of the requirements in the Ordinance (including the increased minimum wage and PSL) as soon as it becomes effective, a date that is not yet certain.

The County Registrar of Voters has 30 days to complete its ballot count from the June 7 election (therefore, until July 7). Once this is completed, the election results will be forwarded to the City Clerk for certification, who will then forward the certification to the City Council for approval. Once the City Council approves the certification, the Ordinance becomes effectively immediately. This means that employers should have already begun understanding their legal obligations and implementing compliance plans.

The *estimated* effective date is ***the week of July 11 or 18.***

Minimum Wage

Under the Ordinance, the minimum wage will increase to \$10.50 per hour worked. On January 1, 2017, the minimum wage will again increase to \$11.50 per hour worked.

¹ These are still unofficial results.

² Although some provisions of this law went into effect on January 1, 2015, the obligation for employers to provide PSL went into effect on July 1, 2015.

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Thereafter, on January 1, 2019 (and each subsequent January 1), the minimum will continue to increase automatically based on a cost of living analysis. The new minimum wage for the following calendar year will be announced on the preceding October 1 (e.g., the minimum wage that goes into effect on January 1, 2019, will be announced on October 1, 2018). Employers should set annual reminders for October 1, beginning in 2018, to ensure they are familiar with the upcoming wage increase.

Notably, the Ordinance's minimum wage requirements only apply to hours worked within the geographical boundaries of the City of San Diego, as defined by [this map](#). Therefore, it is possible that an employee could work both within and outside of these boundaries on a regular basis, which means employers will need to decide if (1) they are going to uniformly apply the minimum wage to its entire workforce, regardless of where the employee worked that day, or (2) they can administratively manage accurately tracking where an employee has worked and apply different rates of pay.

Paid Sick Leave ("PSL")

The PSL requirements under the Ordinance apply to any employee who performs at least two hours of work within the City of San Diego, with few exceptions, and apply to any employer that employs employees, with almost no exceptions (including no carve-outs for small business, public agencies, or non-profits). Under the Ordinance, the key provisions regarding PSL are as follows:³

- Employees accrue PSL at a rate of one PSL hour for every 30 hours worked (this includes regular, overtime, and doubletime hours). Exempt employees are assumed to work 40 hours per workweek for purposes of this accrual calculation, unless their actual workweek is shorter, in which case employers may use their actual workweek to calculate accrual.
- Employees begin accruing on the first date of employment.
- Employers may impose a 90-day waiting period before new hires can begin using accrued PSL.
- Employers may require employees to use PSL in reasonable increments (not to exceed two hours).
- When the need for PSL is foreseeable, the employer may require reasonable advance notice of the need to use PSL, not to exceed seven days. When the need for PSL is unforeseeable, the employer may require notice "as soon as practicable."

³ Similar to the minimum wage requirements, the Ordinance's PSL requirements only apply to hours worked within the geographical boundaries of the City of San Diego, defined by the same map that was noted above.

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- When an employee’s PSL absence exceeds three consecutive workdays, the employer may require reasonable documentation from the employee’s health care provider that the PSL was taken for a permissible reason. Note that the California PSL statute does not permit any such certification, according to its enforcement agency (the California Division of Labor Standards Enforcement).
- Employees may use PSL for the following reasons:
 - Employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition of the employee.
 - Employee needs time off to obtain professional diagnosis or treatment for a medical condition of the employee.
 - Employee needs time off for other medical reasons of the employee, such as pregnancy or obtaining a physical examination.
 - Employee is providing care or assistance to a family member (as defined by the Ordinance) with an illness, injury, or medical condition, including assistance in obtaining professional diagnosis or treatment of a medical condition.
 - Employee needs time off for use of Safe Time (as defined by the Ordinance).
 - Employee’s worksite is closed by order of a public official due to a Public Health Emergency or the Employee is providing care or assistance to a child (as defined by the Ordinance) whose school or child care provider is closed by order of a public official due to a Public Health Emergency.
- Accrued but unused PSL is not paid out upon separation of employment.
- If an employee is rehired within six months of his or her separation date, the employer must reinstate all accrued but unused PSL.

An employer may use its alternative paid time off programs or policies (e.g., PTO or unlimited time off policies) to comply with the Ordinance as long as the time off is “sufficient to meet the requirements of this section” and may be used “for the same purposes and under the same conditions.”

Enforcement

The Ordinance creates the Office of Enforcement, which shall be charged with enforcing these new laws. It is currently unclear whether the enforcement agenda will be complaint-driven or more proactive, although it is likely to have somewhat of a proactive approach,

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targeting employers with known wage violations. The City of San Diego's budget for the fiscal year starting on July 1, 2016, will include \$400,000 for enforcement of the Ordinance.

Remedies and Penalties

In addition to filing a claim with the Office of Enforcement, an employee may immediately commence a civil lawsuit for alleged violations of the Ordinance without first seeking relief with the Office of Enforcement. An employee may seek the following damages: backpay, liquidated damages (double backpay), damages for denial of use of PSL, reinstatement, and reasonable attorneys' fees and costs.

An employer that violates the Ordinance is subjected to a civil penalty of up to \$1,000 per violation. An employer that violates the notice and posting requirements of the Ordinance is subjected to a civil penalty of up to \$100 per employee (maximum of \$2,000).

Notices and Postings

This July, and every subsequent October 1 when the minimum wage increases, employers must post in every worksite and jobsite (i.e., posting at one worksite is insufficient) a notice advising employees of their rights under the Ordinance, including the new minimum wage and increase PSL. In addition, this July only, employers must provide individual notices to employees advising employees of their rights under the Ordinance. Employers must post and provide these notices in English and in any other language that is spoken by at least 5% of their workforce.

The Office of Enforcement is tasked with promulgating model notices for employers, which will be published on its website [here](#). Employers are encouraged to periodically check this website for updates.

Task List for Employers: Reconciliation with California PSL Law

It is immediately apparent that the Ordinance substantively conflicts with the California PSL law for the following reasons, among others: (1) the Ordinance provides for a higher *use* limit (40 hours compared to 24 hours); (2) the Ordinance *prohibits a cap* on PSL accruals; and (3) the Ordinance *does not permit* employers to comply by using any lump sum, allotment, or frontloading options.

Notably, although the Office of Enforcement's website is not fully implemented yet, it did post FAQs [here](#) last Friday, June 24, 2016, which indicated that the "implemented" version of the Ordinance might include provisions that address the prohibitions on caps and lump sums. If the implemented version does not rectify these blatant discrepancies, below are

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key recommendations⁴ on how employers can modify their existing PSL policies to comply with the Ordinance:

- For those employers with accrual PSL policies, they need to ensure that their policies are modified to allow for a higher use limit (40 hours) and eliminate a cap (unless the implemented Ordinance states otherwise).
- For those employers with allotment policies, they need to convert their policies into accrual policies (unless the implemented Ordinance states otherwise). If an employer has already allotted PSL during 2016 (e.g., on January 1), it is not recommended to retract or clawback those allotted PSL banks.
- For those employers using PTO policies to comply with PSL laws, they need to ensure that their policies are modified to be set forth in terms of hours worked (rather than pay periods or months worked) and eliminate a cap—unless the implemented Ordinance states otherwise for either.
- For those employers using unlimited time off policies to comply with PSL laws, other than minimally modifying their policies to include additional references to the Ordinance and certain technical requirements, they do not appear to need to make any further modifications.

If you have questions about this alert, please contact Annie Macaleer.



Annie Macaleer
Attorney
Labor and Employment Law
619.906.5741
annie.macaleer@procopio.com

⁴ In addition to these major changes, each revision will of course require more minor changes. Employers are encouraged to consult with their legal counsel in implementing these changes and reconciling these two laws.

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