FREQUENTLY ASKED QUESTIONS REGARDING THE SAN FRANCISCO PAID SICK LEAVE ORDINANCE

AND CALIFORNIA'S NEW PAID SICK LEAVE LAW

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On July 1, 2015, the Healthy Workplaces, Healthy Families Act of 2014 (the "State Law"), requiring paid sick leave for employees in California, took effect. The State Law does not supersede San Francisco's Paid Sick Leave Ordinance (the "PSLO"). The two laws are similar in some respects but differ in important ways. The Frequently Asked Questions below provide guidance regarding compliance with the PSLO in light of the new State Law.

The Office of Labor Standards Enforcement ("OLSE") cannot provide definitive guidance on compliance with the State Law. For such guidance, consult the California Department of Labor Standards Enforcement ("DLSE") at http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm or via email at AB1522@dir.ca.gov.

1. **Q: If an employer complies with the minimum requirements of the State Law, has the Employer also complied with the PSLO?**

   A: No. The requirements for the two laws are distinct, and the State Law does not preempt the PSLO. Employers must comply with both the State Law (unless the particular employer is exempt from that law) and the PSLO.

2. **Q: If an employer complies with the PSLO, has the employer also complied with the State Law?**

   A: Not necessarily. In some respects, but not all, the PSLO is more expansive than the State Law. For some issues, compliance with the PSLO will mean that the employer is also complying with the State Law. But that is not true for all issues. As previously stated, Employers must comply with both the State Law and the PSLO.

3. **Q: Under the PSLO, may an employer limit the amount of accrued sick leave that an employee may use in a given year?**

   A: No. The PSLO does not allow an employer to limit an employee's use of accrued sick leave to anything less than the amount the employee has earned. By contrast, the State Law allows an employer to limit an employee's use of accrued sick leave to "24 hours or 3 days" in a year, whichever is more for that employee. With regard to the phrase "24 hours or 3 days," the State has explained that the 24-hour minimum applies where an employee's regular work day is 8 hours or less. But if it is more than 8 hours, a "paid sick day" under the State law is the full amount of that employee's regular work day. So an employee who works a regular 10-hour shift would be subject to a 30-hour limit (10 hours x 3 days), rather than 24 hours. (See DLSE Opinion Letter, August 7, 2015, available at http://www.dir.ca.gov/dlse/OpinionLetters-byDate.htm).

4. Q: What are the features of the accrual system under the PSLO?

A: Under the PSLO, there is only one accrual system, with the following features.

- An employee accrues one hour of paid sick leave for every 30 hours worked.
- The employee does not start accruing until 90 days after the start of employment.
- There is a "cap" on accrual – 40 hours for small businesses (having fewer than 10 workers) and 72 hours for other businesses.
- The accrual cap is not an annual cap. Whenever an employee's accrued leave drops below the cap due to usage, the employee begins again to accrue. Thus, the PSLO cap is referred to as a "floating" cap.

Whatever steps an employer may take to comply with the State Law, employers must satisfy the above requirements to comply with the PSLO.

5. Q: Does the accrual system under the State Law comply with the PSLO?

A: No. Under the State Law, there are two accrual calculation methods. Neither one is identical to the calculation method under the PSLO, although both are similar. But limitations on usage and accrual under the State law mean that compliance with the State law accrual method(s) does not equate to compliance with the PSLO.

State Law Accrual Method #1

One accrual method under the State Law ("State Law Accrual Method #1") is similar to the PSLO's accrual system in that the employee accrues one hour of sick leave for every 30 hours worked (although under the State Law, accrual begins on the first day of employment, whereas under the PSLO it does not begin until the 90th day of employment). However, State Law Accrual Method #1 differs from the PSLO in the following ways:

- Under the State law, an employer may limit an employee's use of paid sick leave to three days or 24 hours a year. The PSLO does not allow an employer to limit an employee's use of accrued sick leave to anything less than the amount the employee has accrued.
- The State Law provides for a cap of 48 hours or 6 days on accrual of paid sick leave. While this cap is 8 hours more generous than the PSLO's 40-hour cap for small businesses, it is 24 hours less generous than the PSLO's 72-hour cap for businesses with 10 or more employees.

State Law Accrual Method #2

The other accrual method under the State Law calculates accrual at a different rate, but otherwise operates in the same manner as State Law Accrual Method #1 above. It requires that accrual occur at regular intervals such that an employee has no less than 24 hours of accrued sick leave by the 120th calendar day of employment or of each calendar year or in each 12-

month period. State Law Accrual Method #2 does not comply with the PSLO because it does not use the PSLO's accrual rate of one hour for every 30 hours worked. It also does not comply for the same reasons set forth in the two bullet points listed above under State Law Accrual Method #1.

Beyond this general overview, we do not address the particulars of the State Law's accrual systems, which are complex, and for which the California Department of Labor Standards Enforcement has enforcement responsibility. The key point is that employers who are subject to the PSLO must comply with the PSLO's requirements notwithstanding the requirements of the State Law.

6. Q: Does the State Law's "up-front" method of providing paid sick leave comply with the PSLO?

A: No. One way for an employer to comply with the State Law is an "up-front" method for providing paid sick leave. The up-front method is not an accrual system. Under the up-front method, the employer makes available to the employee 24 hours or three days of paid sick leave at the beginning of the calendar year, year of employment, or any 12-month period. By doing so, the employer has satisfied its obligations under the State Law. The employee accrues no sick leave, and has no sick leave to "carry over" to the next year. For new employees only, the State Law up-front method is satisfied if the employer provides the new employee with 24 hours or three days of paid sick leave by the employee's 120th day of employment.

Under the PSLO, there is no up-front method. There is only the PSLO's accrual system, previously described in Question #4. Thus, an employer's use of the up-front method permitted by State Law would not satisfy the employer's obligations under the PSLO. However, as discussed below in Question #7, an employer could retain certain features of an up-front method and still comply with the PSLO. The PSLO does not prohibit an employer from providing an employee up-front with paid sick leave that the employee has not yet accrued under the PSLO.

7. Q: If an employer provides an employee with 24 hours or 3 days of paid sick leave "up-front" under the State Law, how can an employer also satisfy the accrual requirements of the PSLO?

A: If an employer chooses to use the State Law "up-front" method, the OLSE would treat the 24 hours or 3 days (measured in hours) of paid sick leave made available to the employee as an "advance" on paid sick leave hours to be accrued under the PSLO.

For example, under the PSLO, an employee would have to work 720 hours to accrue 24 hours of sick leave (720 hours worked ÷ 30 hours worked for each hour accrued = 24 hours accrued). Accordingly, if the employer "advances" the employee 24 hours "up-front," accrual would temporarily halt and the employee would not continue to accrue under the PSLO until after the employee has worked 720 hours (after the initial 90 day period for a new employee). The employee would then continue accruing under the PSLO.

Then, by working an additional 480 hours, and not using any of the time accrued, the employee would accrue 16 hours of paid sick leave (480 hours worked ÷ 30 hours worked for each hour accrued = 16 hours accrued). If the business has fewer than 10 employees, this employee would reach the 40-hour cap for "small businesses" under the PSLO (an employee of a larger business would accrue until the 72-hour cap). Because of the PSLO's floating cap, an employee who uses any paid sick leave after reaching the 40 hour cap begins to accrue again under the PSLO immediately after usage.

As discussed above in Question 3, State law requires an employer provide a minimum of 24 hours or 3 days of paid sick leave, whichever is more for an employee. Accordingly, employees with regular shifts of more than 8 hours per day will receive more than 24 hours under the up-front method. Whatever the amount the employer is required to provide up-front under the State law – whether it be 24 hours or a larger sum --the OLSE will treat that amount as an advance on hours to be accrued under the PSLO.

8. Q: If an existing employee starts the year with less than 24 hours or 3 days of accrued sick leave carried over from the previous year and the employer chooses to "advance" more hours to comply with State Law, how does the employer satisfy the requirements of the PSLO?

A: If the employee starts the year with less than 24 hours or 3 days carried over from the previous year, the PSLO does not prevent the employer from advancing hours "up-front" to bring the employee's total to 24 hours or 3 days and comply with State Law. In this situation, the employee's accrual of sick leave would be halted until the employee has worked the number of hours it would have taken to earn the number of hours of accrued sick leave the employer advanced to him or her.

For example, if the employee works 8 hours or less per day, and the employee had 20 hours of paid sick leave available under the PSLO at the end of the year, those hours would carry over to the next year. If the employer chose to advance the employee 4 hours at the beginning of that year (so the employee would have 24 hours available), the employer is in effect giving the employee 4 hours of sick leave the employee has not yet earned. Because 1 hour of paid sick leave is accrued for every 30 hours of work under the PSLO, and the employee was advanced 4 hours of sick leave, the employee would resume accruing paid sick leave under the PSLO after working 120 hours (30 x 4 = 120).

As another example, if, following a December illness for which an employee used all of his accrued sick leave so that the employee had no hours of accrued sick leave going into the new year, the employer advanced the employee 24 hours at the beginning of the year, the employee's accrual under the PSLO would temporarily halt and would resume after the employee had worked 720 hours (30 x 24 = 720) in the new year.

9. Q: If an existing employee ends the year with more than 24 hours or 3 days sick leave available, and the employer only makes 24 hours or 3 days of paid sick leave available for use

at the beginning of the new year to comply with the State Law, has the employer complied with the PSLO?

A: No. Regardless of whether the employer's "up-front" policy satisfies the State Law, whether it satisfies the PSLO is a separate question. The PSLO does not permit an employer to limit the number of accrued hours that may be used by an employee at a given time. So, for example, if an employee has 40 hours of accrued leave under the PSLO as of January 1, and gets sick during the first week of January, the employee has the right under the PSLO to use all 40 hours of paid sick leave then. The employer could not limit the employee to taking only 24 hours or 3 days of paid sick leave. Further, under the PSLO, the employee would continue to accrue sick leave at the rate of one hour for every 30 hours worked after having worked off the up-front amount that the employer advanced under State Law.

10. Q: Does a paid leave policy in existence prior to January 1, 2015 that qualifies as a "grandfathered plan" under the State Law comply with the PSLO?

A: No. The State Law also has a "grandfathering" provision for employers with paid leave policies or paid time off (PTO) policies in existence prior to January 1, 2015, if the policy provides for sick leave that may be used for the same purposes as the State Law. Such policies may continue, and the employer will be deemed in compliance with the State law (and not required to provide additional paid sick leave under the State law) if (1) the accrual is on a regular basis and provides no less than one day or 8 hours of accrued paid sick leave or paid time off within three months of employment each year, and (2) the employee is eligible to earn at least three days or 24 hours of paid sick leave or paid time off within 9 months of employment. This accrual system is different from the one-hour-per-30-hours-worked system required by the PSLO and therefore does not satisfy the employer's obligations under the PSLO

.11. Q: How does the State Law's poster requirement interact with the PSLO's poster requirement?

A: The State Law requires employers to post a notice in each workplace in a conspicuous place to inform employees of their rights under the State Law. Posting of this notice, though required by the State law, does not satisfy the separate requirement under the PSLO to post a notice, in certain languages, informing employees of their rights under the PSLO. Employers must still post the PSLO notice of rights, in addition to the notice required under State law.

12. Q: How does the State Law's employee notification requirement interact with the PSLO?

A: The State Law requires that employers provide employees written notice of the amount of paid sick leave available for use, either on the employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages. There is no such requirement directly imposed by the PSLO. In order to avoid employee confusion, employers should include in this notice the amount of accrued paid sick leave under the PSLO as well, as that amount may differ from the amount available under the State Law. If

the employee's wage statement (or separate writing from the employer) shows only the amount of paid sick leave available under the State Law, and that amount differs from what is available to the employee under the PSLO (as it often will), OLSE would presume that such a communication, because of the likelihood that it would mislead employees, would interfere with their exercise of rights under the PSLO in violation of Section 12W.7 of the PSLO.

13. Q: Do the State Law and the PSLO exempt some employees covered by a collective bargaining agreement (CBA) from the requirements of those laws?

A: Yes, as to the State Law in some cases; but no, as to the PSLO. The State Law exempts from its requirements employees covered by certain types of CBAs. But the State Law exemption does not carry over to the PSLO, and the PSLO has no such exemption. The PSLO allows labor and management to waive any or all provisions of the PSLO in a CBA if the waiver is expressly stated in clear and unambiguous terms.