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IN THIS ISSUE

- Revised Instructions for 1094/1095 B and C Forms
- Changes to the Individual Mandate Penalty
- Nondiscrimination Means Notices in Many Languages
- 2018 Marketplace Changes may affect employers
- Illinois Offers Child Bereavement Leave
- NYC Modifies Commuter Benefits
- San Diego Clarifies Sick Leave
- 49ers, Rams and now Cal Bears (Berkeley) all get Sick Leave
- St. Paul Joins Twin City Minneapolis, Enacts Paid Sick Leave
- Question of the Month

****Quick Medicare Part D Notice Disclosure Reminder**: ***Provide the Medicare Part D Notice of Creditable or Non-Creditable Coverage to Medicare eligible participants by October 15th, 2016.***

For more information, see:
https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/index.html?redirect=/creditablecoverage/

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IRS ISSUES 2016 DRAFT INSTRUCTIONS FOR 1094/1095 B AND C FORMS

Previously, Draft Forms 1094-B and 1095-B, which are used to report certain information about individuals covered by minimum essential coverage (MEC), were released on June 22, 2016, and Draft Forms 1094-C and 1095-C, which are used to report employer offers of coverage to employees, were released on July 7, 2016. On August 1, 2016, the IRS released Draft Instructions for Forms 1094-C and 1095-C (C Draft Instructions), and on August 10, 2016, the IRS released Draft Instructions for Forms 1094-B and 1095-B (B Draft Instructions).

This article focuses on the 2016 B and C Draft Instructions, and highlights the differences between the 2015 and 2016 versions of the Instructions.

2016 Changes to Form B Instructions

Reporting Exchange Coverage and Catastrophic Plans

The B Draft Instructions reiterate that insurance issuers and carriers should report covered individuals enrolled in qualified health plans through the Exchange on Form 1095-A, not on Form 1095-B. However, issuers and carriers should report coverage under group policies sold through the Small Business Health Options Programs (SHOPs) on Form 1095-B.

The B Draft Instructions also emphasize that insurers are encouraged (but not required) to report 2016 coverage under catastrophic health plans on Form 1095-B (currently, the regulations do not require this until the 2017 coverage reporting year).

Taxpayer Identification Number Cross-Reference

The beginning of the B Draft Instructions cross-references proposed Code § 6055 regulations that address employers' obligations to obtain covered individuals' taxpayer identification numbers (TINs).

Excepted Benefits

The B Draft Instructions reemphasize that excepted benefits, including stand-alone dental and vision benefits, are not considered Minimum Essential Coverage (MEC), and therefore do not need to be reported on the B Forms.

Reporting Coverage Under More Than One MEC Plan

The B Draft Instructions include additional details regarding the two filing exceptions for individuals covered by more than one MEC plan. As discussed in both the 2015 B Instructions and 2016 B Draft Instructions, the first exception states that if an individual is covered by more than one MEC plan that is provided by the same provider, then the provider is required to only report one of the plans for that month. The second exception states that reporting is generally not required for an individual's MEC coverage for a month in which the MEC coverage is offered only to individuals who are also covered by other MEC coverage for which reporting is required.

The B Draft Instructions include additional language regarding the application of this second exception to employer-sponsored MEC, stating that the exception only applies where both MEC plans are offered by the same employer. The Draft Instructions also include a cross-reference to the proposed Code § 6055 regulations which address reporting of supplemental coverage.

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IRS Issues 2016 Draft Instructions for 1094/1095 B and C Forms (Continued)

Paper Copies of Corrected Forms

As detailed in the 2015 and 2016 B Draft Instructions, providers filing 250 or more Information Returns are required to electronically file their Information Returns. The B Draft Instructions include an additional example on this topic illustrating that if a provider was required to electronically file their Forms, and then was required to file corrected Forms, the provider may file paper copies of those corrected Forms, so long as they are correcting fewer than 250 Forms.

The B Draft Instructions also include a reminder to filers that the directions contained in the B Draft Instructions for formatting are for preparing **paper** filings, and instructions for electronic failing can be found on the IRS website, along with Publications 5164 and 5165.

Waiver of Penalties

The B Draft Instructions replace the 2015 instruction's "Relief from Penalties" section with a section titled "Waiver of Penalties," which states that penalties for failing to comply with the information reporting requirements may be waived if the failure was due to **reasonable cause and not willful neglect**.

2016 Changes to Form C Instructions

"New" Filing Deadlines

Form 1095-C must be furnished to employees by **January 31, 2017**, and Forms 1094-C and 1095-C must be filed with the IRS by **February 28, 2017** for paper filing of the Forms, or **March 31, 2017** if the Forms are filed electronically. Employers may request extensions using Form 8809. This is a stark contrast to the previous year, when the IRS unilaterally granted deadline extensions spanning three-to-four months.

ALE Member Filing Obligations Clarified

The C Draft Instructions clarify who must file informational returns. First, the phrase "employer" is strategically replaced with "ALE Member" throughout the Draft Instructions to illustrate who is to file Forms 1094-C and 1095-C. Next, the Draft Instructions define ALE Member generally as each person or entity that is an ALE, or if applicable, each person or entity that is a member of an Aggregated ALE Group (e.g., an employer in a controlled group). Notably, the C Draft Instructions emphasize that each ALE Member must file one or more Form(s) 1094-C (including a designated Authoritative Transmittal) and corresponding Form 1095-Cs (for each full-time employee) under its own separate employer identification number (EIN). Ultimately, the C Draft Instructions reiterate the same substantive rules as the 2015 Instructions on when and how ALE members should file Forms 1094-C and 1095-C, with additional examples.

Increased Penalties

The C Draft Instructions explain that the penalties for improper filings are now $260 per form (previously $250 per form for 2015 filings). Employers that are required to file electronically but fail to do so may be subject to a penalty of $260 per return. The penalty applies separately to original returns and corrected returns.

Fortunately, employers who accidently file paper returns that are required to do so electronically, can file up to 250 returns on paper without penalty (i.e., the employer will only be liable for the $260 per return penalty for each return after 250). Employers may be able to avoid the penalty if they show reasonable cause for improper filing.

However, the "good faith" penalty relief available to ALE Members for incorrect or incomplete statements appears to be limited to filings in 2016 (for 2015 calendar year reporting), is no longer available in 2017.

Existing Multiemployer Plan Relief Extended

The C Draft Instructions extend the existing interim relief for multiemployer plans for another year. An ALE Member that is required to contribute to a multiemployer plan on behalf of the employee for that month is treated as having offered coverage (provided the plan is affordable to the employee, provides minimum value to the employee, and offers dependent children coverage), regardless of whether the employee was eligible for, or enrolled in coverage under the multiemployer plan. Identical to the 2015 Form 1095-C Instructions, qualifying ALE Members can enter Code "1H" (no offer of coverage) on Line 14 for any month that they enter Code "2E" (multiemployer interim relief) on Line 16. However, the C Draft Instructions caution that this approach may change for 2017.

Clarification of COBRA Continuation Coverage

ALE Members offering COBRA coverage to former employees should report Code "1H" (no offer of coverage) in Line 14, and "2A" (employee not employed during the month) in Line 16. However, ALE Members offering COBRA coverage to employees that remain employed should report this as an offer of coverage.

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IRS Issues 2016 Draft Instructions for 1094/1095 B and C Forms (Continued)

An ALE Member is treated as having offered coverage to the employee's dependents for the entire plan year so long as the ALE Member gave the employee an effective opportunity to enroll dependents at least once during the plan year, even if the employee declined to enroll the dependents, and as a result, the dependents did not receive an offer of COBRA coverage.

Finally, post-employment (non-COBRA) coverage offers should not be reported as offers of coverage on Line 14 of Form 1095-C (i.e., ALE Members may use "2A" in Line 14 and "1H" in Line 16).

Definitions

The C Draft Instructions add the term "Employee Required Contributions," generally defined as the employee's share of the monthly cost for the lowest-cost self-only minimum essential coverage providing minimum value offered by the ALE Member. However, additional rules may apply when an ALE Member provides certain employer contributions or payments (e.g., HRA contributions, wellness program incentives, or opt-out payments). Finally, the definition clarifies that ALE Members must report the Employee Required Contributions for all 12 months of the calendar year, even for non-calendar year plans.

The C Draft Instructions provided a longer explanation of a "Full-Time Employee," with no substantive changes, and also adds a link to the IRS webpage on Section 4980H employer aggregation rules.

Additional Form 1095-C Codes and Clarifications

"1A" in Line 14: ALE Members that properly enter Code "1A," (Qualifying Offer Method) on Line 14 of Form 1095-C, do not need to fill out related boxes on Line 15 or Line 16.

"1I" and "2I" in Line 14: These codes are no longer applicable, and have been reserved.

"1J" and "1K" in Line 14: These new codes report an ALE Member's conditional offer of coverage to an employee's spouse. A conditional offer of coverage is one that is subject to one or more reasonable, objective conditions (e.g., an offer that is available to a spouse only if the spouse certifies that she/he does not have access to health care coverage from another employer). These conditions attached to an offer of coverage to a spouse may impact the spouse's eligibility for a tax credit. Previously, all offers to an employee's spouse were reported in the same manner.

Expiration of Certain Transition Relief for 2015 Plan Years

The C Draft Instructions only include information on transition relief available to qualifying non-calendar year plans for 2016 calendar months. This clarifies that several forms of transitional relief previously available for 2015 calendar year plans, or the 2015 plan year, are no longer available for 2016.

Ultimately, even though the IRS is still finalizing the B Draft Instructions and C Draft Instructions, employers that are ALE Members should still familiarize themselves with the proposed changes to better prepare themselves for filing the next round of Information Returns.

No Action Required

Although these changes have yet to be finalized, employers should expect changes for 2016 filings, and may want to familiarize themselves with these proposed changes.

For the complete details, see:

Draft Form 1094/1095-B Instructions:

2016 Draft Instructions: https://www.irs.gov/pub/irs-dft/i109495b--dft.pdf
2015 Instructions (for comparison): www.irs.gov/pub/irs-pdf/i109495b.pdf

Draft Form 1094/1095-C Instructions:

2016 Draft Instructions: https://www.irs.gov/pub/irs-dft/i109495c--dft.pdf
2015 Instructions (for comparison): https://www.irs.gov/pub/irs-pdf/i109495c.pdf

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IRS ISSUES INFLATIONARY ADJUSTMENTS TO THE INDIVIDUAL MANDATE PENALTY

In August, the Internal Revenue Service released Revenue Procedure 2016-43, which adjusted the national average premium for a bronze plan offered in the public Marketplace/Exchange. Under the Individual Shared Responsibility Payment rules (i.e., Individual Mandate), an individual (or family) that fails to have Minimum Essential Coverage (MEC) would be subject to a penalty. In 2016, that penalty is either the greater of:

- $695 per adult and $347.50 per child, per year, in the tax household (up to a flat dollar amount of $2,085 for the entire household); or
- 2.5% of a family's income in excess of the 2015 income tax filing thresholds

However, the above penalties are limited to the national average premium cost for a bronze plan. As a reminder, the national average premium cost for a bronze plan is the **maximum amount** an individual may be penalized for failing to have MEC under the Individual Mandate.

The adjustments to the 2016 national average premium cost for a bronze plan are the following:

- An adjusted cost of $223 per month, per individual ($2,676 annually); and
- An adjusted cost of $1,115 per month, for a family of five of more members ($13,380 annually)

Individuals who may be subject to Individual Mandate penalties should be aware of these new increased thresholds for penalties under the Individual Mandate.

No Action Required

Employers should be aware that employees may be exposed to greater penalties for failing to participate in Minimum Essential Coverage.

For the complete details, see:

IRS Revenue Procedure 2016-43:

https://www.irs.gov/pub/irs-drop/rp-16-43.pdf

HEALTH PLAN NON-DISCRIMINATION AND TAGLINE LANGUAGE STANDARDS UNDER THE ACA

On September 14, 2016, the Department of Health and Human Services (HHS) released a Frequently Asked Question, addressing the tagline requirement under the Patient Protection and Affordable Care Act's (ACA's) non-discrimination rules for health plans, which were finalized recently, under Section 1557 of the ACA. As a reminder, Section 1557 prohibits discrimination by a health plan based upon race, sex, color, national origin, age, or disability. Any health plans that receive federal financial assistance are subject to these non-discrimination rules, including self-funded health plans that receive Retiree Drug Subsidies.

The non-discrimination rules contain a provision requiring a "tagline" for the top 15 languages spoken by individuals with Limited English proficiency. A tagline is a short paragraph written in a non-English language that notifies readers in their language that language assistance services are available to them, free of charge.

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Health Plan Non-Discrimination and Tagline Language Standards Under the ACA (Continued)

Elements of the FAQ

The FAQ addresses the following issues as they relate to the non-discrimination rules under the ACA:

- Selection of the top 15 languages spoken by individuals with Limited English proficiency
- States with greater than, or less than, 15 languages listed
- Dealing with languages with multiple dialects; and
- Future changes to the Limited English proficiency population.

HHS also released a table containing a list of non-English languages in each state as a starting point for determining the top 15 languages in a given jurisdiction.

Covered entities should post Section 1557 notices of nondiscrimination and taglines beginning on October 17, 2016 (90 days from the Final Regulations' July 18, 2016 effective date). In addition, HHS has included a sample notice of nondiscrimination (general notice), statement of nondiscrimination, and taglines for use in complying with the Section 1557 requirements. Translated versions of these documents and taglines also are available on HHS's website below.

Action Required

Health plans that receive federal financial assistance (including self-funded plans that receive Retiree Drug Subsidies) should be aware of these new tagline rules, and the Notice requirement that is due to employees by October 17, 2016. Covered entities should also familiarize themselves with the FAQs to help ensure that they properly satisfy the ACA's nondiscrimination requirements.

For complete details, see:

The Department of Health and Human Services FAQs:

http://www.hhs.gov/civil-rights/for-individuals/section-1557/section-1557-proposed-rule-faqs/index.html

HHS RELEASES PROPOSED NOTICE OF BENEFIT AND PAYMENT PARAMETERS FOR 2018

On August 29, 2016, the U.S. Department of Health and Human Services (HHS) released its Proposed Notice of Benefit and Payment Parameters for 2018 (2018 Proposed Rules), published in the Federal Register on September 6, 2016. The 2018 Proposed Rules describes standards for The Marketplace, and covers all the major changes the agency intends to implement the next plan year, including changes to the general insurance market reforms, risk adjustment program, and health insurance market reforms. This article is limited to the proposed rules that are relevant to employers.

Increased Annual Cost-Sharing Limits

HHS proposed an increase in the maximum annual limitation on cost-sharing from **$7,150** for individual coverage and **$14,300** for family coverage in 2017, to **$7,350** for individual coverage and **$14,700** for family coverage in 2018.

New Bronze-Level HDHP Coverage

The HHS proposed an Exchange standardized plan option at the bronze level of coverage which qualifies as an HSA-eligible high-deductible health plan (HDHP) for 2018.
Under the current rules, the enrollment period for employees who become qualified employees outside the initial or annual enrollment periods starts on the first day that they become a newly qualified employee, and lasts at least 30 days. If employees are not informed of their eligibility until this 30-day enrollment period expires, then they've miss the deadline to make their plan selections.

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HHS Releases Proposed Notice of Benefit and Payment Parameters for 2018 (Continued)

The 2018 Proposed Rules require employers inform the Small Business Health Options Program (SHOP) about newly qualified employees within 30 days after the date that an employee becomes eligible for coverage. In addition, the 30-day enrollment period would begin after the employer notifies SHOP of the employee's eligibility. Finally, the coverage effective date for a newly qualified employee is the first day of the month following plan selection, unless the employee is subject to a waiting period (not to exceed 60-days, beginning on the date the employee becomes newly qualified).

Action Required

Although the HHS may make changes to the proposed rule, the proposed rule is a good indicator of benefit and payment parameters that HHS intends to adopt for 2018, so employers should familiarize themselves with these proposed rules.

For the complete details, see:

CMS Fact Sheet:

https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/CMS-9934-P-Fact-Sheet-8-29-16.pdf

HHS Notice of Benefit and Payment Parameters for 2018 (proposed rule):

https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/CMS-9934-P-Fact-Sheet-8-29-16.pdf

ILLINOIS PASSES UNPAID CHILD BEREAVEMENT LEAVE ACT

On July 29, 2016, the state of Illinois enacted the Child Bereavement Leave Act (the Act). The new law affords employees who suffered the loss of a child up to 10 working days of unpaid leave.

Covered Employers

Employers who are subject to the Act are the same employers who are subject to the **Federal** Family Medical Leave Act (FMLA). Therefore, this statute applies to:

- Private employers with at least 50 employees in 20 or more workweeks in the current or preceding calendar year
- Certain public agencies, regardless of the number of employees; and
- Public or private elementary or secondary schools, regardless of the number of employees.

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Illinois Passes Unpaid Child Bereavement Leave Act (Continued)

Covered Employees

A covered employee is defined as any employee who is eligible to take leave under FMLA. As a reminder, an employee who is eligible to take leave under FMLA is an employee who:

- Has worked with the covered employer for at least 12 months
- Has completed at least 1,250 hours in the 12-month period immediately preceding the leave; and
- Works at a location where the employer has at least 50 employees within a 75-mile radius.

The leave is intended to broaden the scope of covered leaves under FMLA. Therefore, the Child Bereavement Leave Act does not seem to increase a covered employee's leave days under FMLA, but the employee could only take such leave under this Act if it occurs within the employee's allotted 12 weeks of FMLA leave.

Employee and Employer Responsibilities

Unless it is unreasonable, or impracticable, an employee must provide an employer with 48 hours advance notice of the intention to take leave under the Act. Employers may also request documentation of the need to take leave under the Act, which may include items such as:

- A death certificate
- Published obituary; or
- Written documentation of death, burial, or memorial service from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency.

Employers may not retaliate or take any adverse action against employees who:

- Exercise their rights, or attempt to exercise their rights, under the Act
- Oppose any practices the employee believes the employer is engaging in that violate the Act; or
- Support the exercise of the rights of others under the Act.

Permitted Uses for Leave

Employees must use such leave within 60 days after the employee receives notice of the death of his/her child.

Employees may use the unpaid Child Bereavement Leave for the following reasons:

- To attend the funeral, or an alternative to a funeral, of a child
- To make arrangements that are necessary for the death of a child; or
- To grieve the death of a child.

If more than one child passes in a 12 month period, the employee is entitled to a total of up to six (6) weeks of unpaid bereavement leave in a 12 month period.

Substitution of Paid Leave

Employees may elect to substitute paid leave that is provided under other means (federal, state or local leave law, collective bargaining agreement paid time off, or other employer policy) to take such leave under the Act. However, employers may **not** require employees to substitute such leave under the Act.

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Illinois Passes Unpaid Child Bereavement Leave Act (Continued)

Penalties and Enforcement

The Illinois Department of Labor is responsible for the enforcement of the Act. Employees, therefore, will file grievances against an employer with the Illinois Department of Labor. Employers found to be in violation of the Act will be assessed a civil penalty not to exceed $500 for the first offense, and $1,000 for each subsequent offense.

Action Required

Employers should update their leave policies to include an employee's rights under the Act, in addition to the requirements of notice to the employer under the Act.

For the complete details, see:

Illinois Child Bereavement Leave Act:

http://ilga.gov/legislation/fulltext.asp?DocName=09900SB2613enr&GA=99&SessionId=88&DocTypeId=SB&LegID=95913&DocNum=2613&GAID=13&Session

NEW YORK CITY, NEW YORK MODIFIES ITS COMMUTER BENEFIT ORDINANCE

On January 1, 2016, New York City began requiring employers in New York City offer commuter benefits to their employees. This ordinance applied to private employers with 20 or more full-time employees. The ordinance was titled Local Law 53. Recently, Local Law 53 was amended, to include amendments to the enforcement and penalties section of the ordinance, which became effective in September.

Penalty Amendments to Local Law 53

Initial violations (which are defined as when the City initially finds that an employer is in violation of the law) are now set at $250 (originally ranging from $100 to $250) for the first violation, and $250 for any future violations (termed recidivist violations under the ordinance). Employers will continue to be offered a waiver from "initial" violations, so long as an employer "cures" the violation within 90 days of when the City first discovers such violation.

Recordkeeping Amendments to Local Law 53

Employers must maintain records for two years of their compliance with the commuter benefit ordinance. Compliance may be accomplished in two ways:

- Each **employee** in New York City was offered an opportunity to contribute pre-tax dollars to a commuter benefit program, and either accepted or declined that offer; or
- The **employer** provided (at its own expense), a transit pass or similar mass transit commuter benefit at the **maximum** allowable pre-tax contribution amount under federal law for transit benefits (**$255 in 2016**)

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New York City, New York Modifies its Commuter Benefit Ordinance (Continued)

A sample election form for employees to elect/waive the commuter benefit is available via the link in the Action box below.

Action Required

Employers who have 20 or more full-time employees in New York City should ensure that they are offering a commuter benefit program, pursuant to the above rules.

For the complete details, see:

Local Law 53:

http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1739313&GUID=5CAAD882-03E1-4420-9F73-3E2C8F878BBD

Election/Waiver Form for Commuter Benefit:

http://www1.nyc.gov/assets/dca/downloads/pdf/about/CommuterBenefits-EmployerComplianceForm.pdf

SAN DIEGO, CALIFORNIA IMPLEMENTS ORDINANCE AMENDING PAID SICK LEAVE LAW

On July 11, 2016, the City of San Diego Earned Sick Leave and Minimum Wage Ordinance (the Initial Ordinance) went into effect; requiring employees who work in the City of San Diego receive paid sick time, in addition to an increased minimum wage rate. In our July 2016 Legislative Compliance Newsletter article discussing this Initial Ordinance, we mentioned that amendments to the Initial Ordinance would be forthcoming.

On August 3, 2016, the San Diego City Council approved the Implementing Ordinance which amends the Initial Ordinance. The Implementing Ordinance is effective September 2, 2016. Highlights of the Implementing Ordinance are discussed below.

Caps, Carry-Over, and Frontloading

The Initial Ordinance required employers to provide employees with one hour of earned sick leave for every 30 hours worked in San Diego. The Initial Ordinance also allowed employees to carry over accrued but unused sick leave to the following year, but did not set a cap on accrual. The Implementing Ordinance now allows employers to cap an employee's accrual of earned sick leave at 80 total hours.

In addition to the hourly accrual method permitted by the Initial Ordinance, the Implementing Ordinance also allows employers to frontload an employee's leave hours by awarding an employee no less than 40 hours of earned sick leave at the beginning of each benefit year. The employer must frontload the full 40 hours (regardless of whether the employee is full-time, part-time, or temporary), meaning the employer cannot prorate for employees with reduced schedules.

Notice Requirements

The Implementing Ordinance expands the notice information that employers must provide. The Implementing Ordinance now requires employers to provide the employer's legal name and any fictitious business names. The notice also must now include information detailing how the employer is satisfying the law's requirements, including the accrual method used.

Lastly, the Implementing Ordinance extends the deadline to provide employees with notice to the time of hire or **October 1, 2016**, whichever is later.

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San Diego, California Implements Ordinance Amending Paid Sick Leave Law (Continued)

Complaints of Violations

The Implementing Ordinance requires written complaints of employer violations be filed with the City Treasurer within two years of an alleged violation.

Penalties

The Implementing Ordinance increases the amount of civil penalties, increases penalties for multiple violations, and includes a liquidated damages provision for retaliatory violations.

Employer Retaliation

The Initial Ordinance prohibited employers from taking retaliatory actions against employees for exercising their right to paid sick leave. The Implementing Ordinance now creates a rebuttable presumption of retaliation by the employer if, within 90 days of the employee exercising his/her right to paid sick leave, the employer takes adverse action against that employee.

Action Required

Employers who have employees in San Diego, California should review their PTO and/or sick leave policies and notices, and ensure they are in compliance with the Implementing Ordinance.

For complete details, see the Implementing Ordinance, here:

https://www.sandiego.gov/sites/default/files/tr_sd_minwageordinance_o-20706_20160805.pdf

BERKELEY, CALIFORNIA ENACTS NEW PAID SICK LEAVE LAW

On August 31, 2016, the Berkeley City Council enacted a paid sick leave and minimum wage Ordinance, which amends the Berkeley Municipal Code Chapter 13.99 (Minimum Wage Ordinance), and adds Chapter 13.100 (Paid Sick Leave Ordinance). The Minimum Wage Ordinance is effective October 1, 2016, and the Paid Sick Leave Ordinance (Ordinance) is effective on October 1, 2017. Currently, there are two competing sick leave measures on Berkeley's November ballot (one proposed by sick leave advocates, and another sponsored by the City). Both measures differ slightly from the Ordinance passed by City Hall. Unless, and until one of these ballot measures pass, the current Ordinance is the governing law.

This article focuses on the paid sick leave portions of the Ordinance, and summarizes the provisions below.

Covered Employers

Covered employers include any person, including corporate officers or executives, who directly or indirectly employ or exercise control over the wages, hours, or working conditions of any employee (including those that do so through a temporary employment agency or subcontractor), or any person receiving and holding a Berkeley business license.

Covered Employees

The Ordinance covers any person who, in a calendar week, performs at least two (2) hours of work within Berkeley's geographic boundaries, and qualifies as an employee entitled to minimum wage.

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Berkeley, California Enacts New Paid Sick Leave Law (Continued)

Accruing Paid Sick Leave

Employees begin to accrue paid sick leave either on October 1, 2017 or when employment begins, whichever is later. Employees that have accrued state-required paid sick leave before October 1, 2017 are entitled to maintain those sick leave hours, and may use that leave consistent with state law. Unfortunately, the Ordinance is unclear whether this means employees that are covered by the state law are excluded from the Ordinance, or how these differences should be reconciled. Employees can begin using sick leave 90 days after the commencement of employment.

Small businesses (defined as businesses that employ **fewer** than **25** workers in a given week, including all full-time, part-time, temporary employees, as well as employees hired through a staffing agency or similar entity) may limit employees to accruing 48 hours of paid leave per year, and the use of paid sick leave by employees may also be limited to 48 hours per calendar year.

Large employers may limit employees to accruing 72 hours of paid leave per year. Accrued, but unused leave carries over from year to year (either calendar or fiscal year), but cannot exceed the cap. However, unlike state paid sick leave, large employers cannot limit the amount of leave that employees may use during the year (e.g., employees can only accumulate sick leave hours up to a cap, but once they use up the time, then they can accumulate more sick leave time, even during the same year).

Using Paid Sick Leave

Sick time may be used to treat physical or mental illness, an injury, or other medical condition, to obtain a professional diagnosis, or for other medical reasons, such as pregnancy or obtaining a physical examination.

Leave may be used for an employee's own need, or to care for a family member (including a child, parent, legal guardian, ward, sibling, grandparent, grandchild, spouse, or registered domestic partner). If the employee does not have a spouse or registered domestic partner, the employee may designate a person for whom leave may be used (a designated person).

Under the Ordinance, leave may **not** be used for reasons related to domestic violence, sexual assault, or stalking. However, employees may use state-accrued leave for these reasons.

Rate of Pay for Sick Leave

Employees are paid sick leave at their normal hourly wage. If an employee was paid a different hourly rate, on commission/piece rate, or were non-exempt salaried employees during the first 90 days of employment (before leave may be used), sick leave pay is calculated by dividing the employees' total wages (excluding overtime premium pay) by the total hours worked in the full pay periods of the prior 90 days of employment.

Paid sick leave must be paid no later than the payday for the next regular payroll period following the date leave was taken. Wage statements must be provided when sick leave wages are paid, and must disclose the number of accrued paid sick leave.

If an employee is terminated, resigns, retires, or otherwise separates from employment, employers are not required pay an employee for any unused sick leave hours.

Notice and Posting Requirements

Employers must conspicuously post a city-created notice informing employees of their paid sick leave rights at any workplace or jobsite in Berkeley where any employee works. The notice must be posted in any language spoken by at least five percent of the employees at the workplace or jobsite.

If employees do not work at a regular physical location, the employers must provide them with a copy of this notice upon hire, or upon assignment to perform work in Berkeley (and before the employee commences work in Berkeley).

Recordkeeping Requirements

Employers are required to keep employee payroll records for four years identifying the hours worked, wages paid, and paid sick leave accrued for each employee. If an employer does not keep adequate records, or denies the City reasonable access to the records, then absent clear and convincing evidence, an employee's account of how much he or she was paid is presumed accurate. Notably, the Ordinance does not require an employer keep records to identify the hours an employee used for paid sick leave.

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Berkeley, California Enacts New Paid Sick Leave Law (Continued)

Anti-retaliation and Penalties for Noncompliance

Employers are prohibited from interfering or taking disciplinary action against employees for using sick leave. Taking adverse action against an employee within 90 days of the employee exercising protected rights creates a rebuttable presumption the act was done in retaliation for exercising those rights.

The City may impose a $500 fine for any of the following:

- An employer's failure to post the notice
- Failure to maintain payroll records
- Failure to allow the City access to payroll records; or
- Failure to provide employees with wage statements showing accrued sick leave hours

The City may impose a $1,000 fine for each employee against whom the employer took retaliatory action.

Advanced Notice of Leave

Employees must provide their employers with reasonable advance notice if the need for leave is foreseeable. If the need is not foreseeable, employees must provide notice as soon as practicable. Employers cannot condition the use of paid leave on an employee's ability to search or find a replacement worker to cover their leave hours.

Notably, the Ordinance allows employers to take reasonable measures to verify or document that the leave was used for a permitted purpose, in contrast to state law. However, employers cannot require employees to incur expenses exceeding $15 on documentation or verification.

Previous Paid Sick Leave Policy

If an employer already has a paid leave policy which may be used for the same purposes as Berkeley's Ordinance, and meets or exceeds the accrual, cap, carry-over, and use requirements under the Ordinance, then the employer is not required to provide additional paid sick leave.

Waiver Through Collective Bargaining Agreement

The Ordinance may be waived through a bona fide collective bargaining agreement, if the waiver is in clear and unambiguous terms and does not conflict with any state or federal laws.

Action Required

Employers with employees in Berkeley, California should review their paid sick leave policies, and revise and implement any necessary changes. These employers should also review and comply with the requirements to post a notice, and maintain records of compliance.

For complete details, see:

Berkeley Paid Sick Leave Ordinance:

http://www.employmentlawworldview.com/files/2016/09/Berkeley-Item-01-Ordinance-7505.pdf

2016 Berkeley Ballot measures:

http://www.ci.berkeley.ca.us/Clerk/Elections/Election__2016_Ballot_Measures_Page.aspx

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SAINT PAUL, MINNESOTA ENACTS SICK AND SAFE TIME ORDINANCE

On September 7, 2016, St. Paul, Minnesota became the second city in Minnesota (Minneapolis being the other) to enact a sick and safe time ordinance requiring employers provide earned sick and safe time to employees that work in the City of St. Paul (City). The St. Paul Sick and Safe Time Ordinance (Ordinance) is effective on July 1, 2017 for larger employers (24 or more employees), and effective on July 1, 2018 for smaller employers (less than 24 employees).

Highlights of the Ordinance are outlined below.

Covered Employers

The Ordinance applies to private employers of all sizes that have at least one employee working within the City. Although all private employers are subject to the Ordinance, the effective dates are different based on the size of the employer, as discussed above.

If an employer has an existing leave policy that satisfies the Ordinance's requirements, the employer is not required to provide additional sick and safe time.

New Employer Grace Period

New employers are allowed to provide **unpaid** sick and safe time for the first six months after hiring its first employee. After those six months, the employer must provide paid sick and safe time in accordance with the Ordinance. This new employer grace period will no longer be available beginning January 1, 2023.

Covered Employees

The Ordinance applies to all employees (including full-time, part-time, and temporary employees), who work in the City for at least 80 hours in a year. Independent contractors and government workers, except government workers employed by the City, are exempt from the requirements of the Ordinance.

Accrual, Carryover, and Caps

Employees accrue one hour of sick and safe time for every 30 hours worked, beginning on his/her first day of employment or when the Ordinance becomes effective (based on the employer size), whichever is later. Sick and safe time is accrued in increments of an hour and no accrual is permitted in fractions of an hour. Employers may limit accrual of safe and sick time to 48 hours in a year, and may limit the amount of sick and safe time available to an employee for use at 80 hours a year. So, once an employee has 80 hours of accrued sick and safe time, the employee would not accrue any further sick and safe time. Employees are permitted to carry over accrued but unused sick and safe time into the following year calendar or fiscal year, subject to the above mentioned accrual caps.

The Ordinance does not explicitly allow employers to limit the amount of accrued sick and safe time an employee may **use** per year or at once, which may result in an employee using more than 80 hours of sick and safe time in a year. For example, if an employee accrues but does not use 80 hours of sick and safe time in 2018, carries over those 80 hours into 2019, and then uses those 80 hours of sick and safe time in March of 2019, the employee will begin to accrue another 48 hours of sick and safe time in April of 2019.

In addition to accrual over time, employers may choose to "frontload" safe and sick time at the beginning of each year. If the employer elects to use the frontloading method, employers must provide 48 hours of earned sick and safe time following an employee's initial 90 days of employment for use during the first year, and then must provide 80 hours of earned sick and safe time beginning each subsequent year.

Paid Sick and Safe Time Wages

Under the Ordinance, employees using sick and safe time earn the same hourly rate as if they were an active employee. However, employees are not entitled to compensation for lost tips or commissions while using sick and safe leave.

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St. Paul, Minnesota Enacts Sick and Safe Time Ordinance (Continued)

Permitted Uses of Sick and Safe Time

Employees may begin using accrued sick and safe time 90 calendar days after their employment begins. Accrued sick and safe time may be used for the following reasons:

1. For an employee's or family member's, mental or physical illness, injury, or health condition, or for medical diagnosis, care, treatment, or preventative care
2. For victims (employee or family member) of domestic violence, sexual assault or stalking, to receive medical attention, obtain services from a victim services organization, receive psychological or other counseling, relocate, and obtain legal service or attend legal proceedings
3. For employees to close their place of business, by order of a public official, in connection with a public health emergency; and
4. For childcare or care of family members whose school or care facility has been closed due to public health emergencies, inclement weather, or other unexpected closures

The Ordinance provides broader coverage than Minneapolis' Ordinance, defining "family member" as the employee's child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, registered domestic partner, and any individual related by blood or affinity whose association with the employee is equivalent to a family relationship.

Employees may use sick and safe time in increments (up to four hours) that are consistent with the employer's current payroll practices or industry standards. An employer cannot require that an employee find a replacement worker as a condition of using sick and safe time.

Requesting Leave and Documentation

Employees must request to use accrued sick and safe time, and when possible, the employee's request should include the expected duration of his/her absence.

Employers may request reasonable documentation that leave is for a permitted reason if an employee is absent for more than three consecutive days. The Ordinance does not define "reasonable," but employers should not request more information than is necessary to verify the leave was for a permitted use.

Termination and Reinstatement

Employers are not required to pay employees for accrued but unused sick and safe leave upon termination or separation from employment. However, if an employee is rehired within 90 days, the employer must reinstate the employee's accrued sick and safe time.

Notice and Recordkeeping Requirements

Employers must display a notice informing employees of their rights under the Ordinance in a conspicuous and accessible location in the workplace. Employers that provide employee handbooks must also include this notice in the handbook. The St. Paul Department of Human Rights and Equal Economic Opportunity (Department) will be publishing a sample poster/model notice on its website.

Employers are required to keep records for each employee detailing his/her accrued and used leave time, for a period of three years. Upon request by an employee, the employer must provide the employee, either in writing or electronically, the employee's earned sick and safe time available for use, as well as sick and safe time the employee has already used.

No Discrimination or Retaliation

Employers may not discriminate or retaliate against employees for exercising their rights under the Ordinance (including using accrued sick and safe time or filing a complaint). In addition to filing complaints with the Department, the Ordinance creates a private right of action allowing employees to file a civil lawsuit against the employer.

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St. Paul, Minnesota Enacts Sick and Safe Time Ordinance (Continued)

Penalties

For violations of this Ordinance, the Department Director may order relief including:

1. Reinstatement and back pay
2. For the first violation, the payment of any earned but withheld leave, and liquidated damages including either a fee for the amount of accrued leave withheld multiplied by two or $250, whichever is greater
3. For subsequent violations, penalties range from those enforced for the first violation, to an additional administrative fee, payable to the employee, of up to $1,000, or 10% of the total amount of unpaid wages, whichever is greater
4. An administrative fine of up to $1,000, payable to the employee, for each violation of the Ordinance's confidentiality, discrimination, or retaliation provisions; and
5. An administrative fine of up to $1,000, payable to the City, for each violation of the Ordinance's notice, posting, and recordkeeping requirements

The Ordinance provides a detailed explanation of the Department's authority to investigate violations and enforce penalties when it determines there has been a violation of any of the Ordinance's provisions.

Action Required

Employers with employees in St. Paul, Minnesota should review their paid sick leave policies, and revise and implement any necessary changes by the effective date applicable based on the employer's size. These employers should also review and comply with the requirements to post a notice, and maintain records of compliance.

For complete details, see:

Saint Paul Sick and Safe Time Ordinance:

https://stpaul.legistar.com/LegislationDetail.aspx?ID=2801386&GUID=D3340F14-A618-4A88-8D04-E820E6C352C7&FullText=1

COMPLIANCE REMINDER: DISTRIBUTE MEDICARE PART D CREDITABLE OR NON-CREDITABLE COVERAGE NOTICE BY OCTOBER 15TH

The Medicare Modernization Act (MMA) requires employers/plan sponsors to notify Medicare-eligible employees (whether working or retired), spouses, and dependents, whether the prescription drug coverage offered through their health plan qualifies as creditable, or non-Creditable coverage. This Notice is due to health plan participants by October 15th of each year. Coverage is **creditable**, if on average, the coverage provided by a plan reimburses prescription costs on the same level, or better, than Medicare Part D. If it does **not**, then such prescription coverage is considered **non-Creditable** prescription coverage.

In addition, plan sponsors should complete the online Disclosure to CMS Form to report the creditable/non-Creditable coverage status of their prescription drug plan each year, no later than 60 days from the beginning of each plan year, within 30 days after termination of a prescription drug plan, or within 30 days after any change in creditable/non-Creditable coverage status. Employers must comply with both requirements

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Provide Notice of Creditable or Non-Creditable Disclosure by October 15th

Plan sponsors must provide a written disclosure notice to all Medicare eligible individuals annually who are covered under its prescription drug plan. **This Notice must be provided prior to October 15th each year, and at various times set forth in the regulations, including when a Medicare eligible individual joins the plan.**

The notice must be provided to:

- Medicare eligible active working individuals and their dependents;
- Medicare eligible COBRA recipients and their dependents;
- Medicare eligible disabled individuals covered under the employer's prescription drug plan; and
- Any retirees and their dependents.

These individuals face a late enrollment penalty for failing to maintain creditable coverage for a period of 63 days or longer following their initial enrollment period for the Medicare prescription drug benefit. This information is important so these individuals can decide whether to enroll in a Medicare Part D prescription drug plan.

Model Notice Letters are available here: https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/Model-Notice-Letters.html

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Complete Online Disclosure to CMS Form

Plan sponsors must log on to the CMS website no later than 60 days from the beginning of each plan year, within 30 days after termination of a prescription drug plan, or within 30 days after any change in creditable coverage status, and complete the Online Disclosure to CMS Form, which informs CMS whether the plan's prescription drug benefit is creditable or non-Creditable. Completing the Form is a quick process, which consists of three sections: 1) the plan sponsor information, 2) the creditable/non-Creditable offer, and 3) certification by the plan sponsor (see partial screen capture below).

Creditable/Non-Creditable Offer:

Please select **ONE** of the following to continue and complete the required disclosure information.

- ◯ All Options Offered Are Creditable
- ◯ All Options Offered Are Non-Creditable
- ◯ There are Some Creditable and Non-Creditable Options Offered

I understand and agree to the following statements:

1. That this submission supersedes any previous submission of this information with dates prior to the date below;
2. That the entity/plan sponsor agrees to disclose to CMS and all Medicare Part D eligible individuals any changes that would affect the creditable status of the above coverage as outlined under §423.56.
3. That I am authorized to supply this disclosure of creditable coverage on behalf of the Entity; and
4. That the information provided in this disclosure is true, correct, and complete to the best of my knowledge and belief.

Entity's Authorized Individual Name

Entity's Authorized Individual Title

Entity's Authorized Individual Email

(If no email address is available, Please enter: CCDBnoisp@cms.hhs.gov)

Today's Date

(Format: MM/DD/YYYY)

Review and Submit

The Disclosure to CMS Form is available here:
https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/CCDisclosureForm.html

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QUESTION OF THE MONTH

Can We Allow Laid-Off Employees to Spend Down Their Health FSAs Without Electing COBRA?

QUESTION: Our company offers a calendar-year cafeteria plan with a health FSA funded through employee salary reductions. The health FSA is subject to COBRA, and our plan documents provide that health FSA coverage ends upon termination of employment. Before year-end, we expect to eliminate several positions at our company. Can we amend our plan to permit the laid-off employees with unused amounts remaining in their health FSAs to be reimbursed for eligible expenses incurred after their employment terminates, so that they can use up their account balances without electing COBRA?

ANSWER: No. Under the cafeteria plan rules, health FSA participants can only be reimbursed for eligible medical expenses incurred while their health FSA coverage is in effect, and coverage stops when the participant stops making contributions. Furthermore, any amounts remaining when coverage stops are subject to the “use-or-lose” rule, which generally requires forfeiture of health FSA contributions not used to reimburse expenses incurred during the coverage period. In addition, the preamble to the IRS election change regulations states that “a cafeteria plan [may] not permit individuals terminating employment to change their health FSA elections to match the amount of premiums paid prior to termination (i.e., stop paying premiums) and continue to receive health FSA reimbursements with respect to the remainder of the period of coverage.” A plan amendment of the type you suggest would effectively violate these rules and would not be allowed.

By electing and paying for COBRA coverage under the health FSA, however, a laid-off employee with unused health FSA amounts can continue to be reimbursed for eligible medical expenses incurred after termination of employment and while the COBRA coverage is in effect, up to the employee’s elected maximum reimbursement amount (less prior reimbursements for the period of coverage). And regardless of whether COBRA is elected, the health FSA must continue to reimburse eligible expenses incurred before the date on which the employee’s health FSA coverage ends (again, up to the elected maximum reimbursement amount, less prior reimbursements), so long as claims are made within the run-out period specified in your plan. If your company wishes to do more for the laid-off employees, it could offer to pay or waive their COBRA premiums (this could be included in an existing severance plan or memorialized elsewhere), although the offer must not favor highly compensated individuals in violation of the Code § 105(h) nondiscrimination rules. Advice of legal counsel is recommended in crafting such an arrangement.

Source: EBIA

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