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Just as Its Earned Sick Leave Law Goes into Effect, Westchester County Enacts Another Paid Leave Law

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On April 23, 2019, the Board of Legislators of Westchester County, New York, adopted a new paid leave benefit for most employees in the county. Beginning October 30, 2019, the [Safe Time Leave Law](#) (“Law” or “Ordinance”) will require employers within Westchester County to provide employees who are victims of domestic violence or human trafficking¹ with up to 40 hours of paid safe time leave (“PSTL”) per year. This paid leave benefit is *in addition to* any other paid leave to which an employee may be entitled, such as under the county’s recently enacted [Earned Sick Leave Law](#),² as well as any other obligations an employer may have under state or local anti-discrimination laws with respect to victims of domestic violence or human trafficking.³ Moreover, unlike the Earned Sick Leave Law, PSTL is not “earned” or accrued; rather, a covered employee may use the maximum of 40 hours annually, regardless of how many hours he or she has worked.

Covered Employers and Employees

The Ordinance applies to all employers in the county and, with limited exceptions, covers all full-time and part-time employees who work in the county for more than 90 days in a calendar year. Employees excluded from coverage under the Law include participants in certain social services-sponsored programs, federal work-study programs, and those paid pursuant to federally qualified scholarship programs. There appears to be no carve-out for employees covered by a collective bargaining agreement as the Ordinance is silent on this issue.

¹ “Human trafficking” is defined as “involv[ing] the use of force, fraud, or coercion to obtain some type of labor or commercial sex act.”

² For more information on the Westchester County paid sick leave law, see the Epstein Becker Green Act Now Advisory titled “[New York’s Westchester County Issues FAQs and Notice of Employee Rights as Earned Sick Leave Law Goes into Effect.](#)”

³ For example, under the New York State Human Rights Law, victims of domestic violence are a protected category and, as such, are protected against discrimination and retaliation. State law also protects crime victims from discharge or another adverse action for taking unpaid leave to, for example, appear in court. Notably, Westchester County’s [Human Rights Law](#) expressly requires employers with four or more employees to accommodate the needs of domestic violence victims (e.g., schedule modifications or security measures), unless doing so would impose an undue hardship on the employer.

Permissible Uses of Paid Safe Time Leave

The Ordinance provides victims of domestic violence and human trafficking with PSTL in order to (i) attend or testify in a criminal or civil court proceeding relating to domestic violence or human trafficking, and/or (ii) to relocate to a safe location. While the purposes for which the leave may be used are circumscribed, the definition of “domestic violence” is quite broad. Under the Law, “domestic violence” means “a pattern of violent or abusive behavior used by one person to gain or maintain control over another.” “Abusive behavior,” however, includes, but is not limited to, “family offense matters,” which, in turn, covers a wide range of criminal conduct, including acts or threats of any of the following when the conduct occurs “between spouses or former spouses, or between parent and child or between members of the same family or household”:

- disorderly conduct, harassment, or coercion;
- sexual misconduct, forcible touching, or sexual abuse;
- stalking, criminal mischief, or menacing;
- reckless endangerment or strangulation;
- assault or attempted assault; and
- identity theft or grand larceny.

Similarly, “members of the same family or household” is expansively defined to include persons:

- related by blood or affinity;
- currently or formerly married to or in a domestic partnership with one another, even if they do not reside in the same household;
- who have a child in common, regardless of whether they were previously married or domestic partners or lived together at any time; and
- who are not related by blood or affinity but who are or were “in an intimate relationship” even if they never lived together.

Amount of Leave

The Law provides for 40 hours of PSTL per year; however, there is no mechanism for accrual, frontloading, or carryover. Unlike the Earned Sick Leave Law, the Ordinance appears to require the full bank of PSTL to be available to all employees upon eligibility. While the Law allows PSTL to be used in any “year or calendar year,” it is not clear whether the employer sets this period. Further, PSTL may be used in full days or “increments,” but the Ordinance does not identify the minimum increment of use.

Employee Requests for Use of PSTL

The Ordinance sets forth the following procedure for employee requests to use PSTL:

- An employee may request PSTL orally, in writing, by electronic means, or by any other means acceptable to the employer;
- When possible, the request must include the expected duration of the absence; and
- If the need for PSTL is foreseeable, the employee must make “a good faith effort” to provide notice to the employer and “a reasonable effort” to schedule PSTL so as to not unduly disrupt the employer’s operations.

Employees may not be required, as a condition of using PSTL, to find a replacement to cover for the time they will be absent from work. However, an employer may require an employee to provide “reasonable documentation” demonstrating that the PSTL was used for a covered purpose. Such documentation may include the following: (i) a court appearance document or subpoena, (ii) a copy of a police report, or (iii) an affidavit from an attorney involved in the court proceeding or from a representative of an organization that provides assistance to victims of domestic violence or human trafficking.

Employers must protect the confidentiality of any documentation or other information they receive about an employee or family member related to a request for PSTL. Moreover, any health or safety information in the employer’s possession must be maintained on a separate form and in a separate file from other personnel information.

Prohibition on Retaliation

Employers may not (i) interfere with or deny an employee the right to use PSTL, (ii) discriminate or retaliate against an employee for requesting or using safe time leave, or (iii) discriminate or retaliate for filing a complaint or participating in an investigation concerning an alleged violation of the Ordinance. Further, employers are prohibited from including PSTL “as an absence that may lead to or result in discipline, discharge, demotion, or suspension.” The ban on retaliation also includes “reporting or threatening to report an employee’s [or family member’s] suspected citizenship or immigration status ... to a federal, state or local agency” because the employee has exercised a right protected by the Ordinance.

The Law creates a rebuttable presumption of unlawful retaliation when an employer takes adverse action against an employee within 90 days of the filing of a PSTL-related complaint.

Notice and Posting Requirements

Employers must give employees both a copy of the Law and written notice explaining how the Law applies to those employees. This notice must be provided either at the commencement of employment or within 90 days of the effective date of the Law (October 30, 2019), whichever is later. In addition, by the Law's effective date, employers must display in a conspicuous location accessible to all employees a copy of the Ordinance and a poster in English, Spanish, and any other language deemed appropriate by the county. An employer that willfully violates the notice and posting requirements may incur a fine of up to \$500 for each separate offense. The Ordinance directs the Westchester County Department of Weights and Measures – Consumer Protection (“Department”) to create the notice and various posters.

Enforcement and Penalties for Violations

Employees who believe that their employer has violated the Ordinance have one year from the date of the alleged violation to file either a lawsuit or an administrative complaint with the Department. Employees may recover the greater of three times the wages that should have been paid during a PSTL absence or \$250, whichever is greater, for each instance of PSTL taken but unlawfully not paid. Additional penalties may include:

- paying an employee \$500 for each instance of PSTL requested but not taken because it was unlawfully denied;
- paying an employee \$500 for each instance of PSTL unlawfully conditioned upon the employee seeking or finding a replacement during his or her absence;
- any actual damages suffered by the employee as a result of the violation;
- reasonable attorneys' fees and administrative hearing costs;
- reinstatement and back pay; and/or
- other monetary or equitable relief as may be appropriate, without limitation.

What Westchester County Employers Should Do Now

As noted above, the Law leaves several matters unresolved. First, the Ordinance provides that employees may use PSTL in “any year or calendar year,” but it does not specify whether the employer or employee makes this determination. Similarly, the Law allows employees to use PSTL in full days “and/or increments” but fails to define a permissible increment or assign that decision to either the employer or employee. Further, the Ordinance does not address how employers are to calculate the appropriate rate of pay for PSTL. Hopefully, the county will provide guidance on these issues in the coming months.

In the meantime, employers should do the following:

- Begin preparing for the Law's October 30, 2019, effective date, including developing policies for ensuring the confidentiality of PSTL-related information.
- Although not explicitly required by the Law, consider incorporating information about the Law into employee handbooks or manuals.
- Train supervisory and human resources personnel on employees' rights and the company's obligations under the Ordinance, along with the procedures for responding to a request for PSTL leave, including the prohibition on requiring an employee to find a replacement during his or her absence, as well as how to handle confidential information.

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