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ACT NOW ADVISORY

Amendments to the District of Columbia's Accrued Sick and Safe Leave Act of 2008

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Since 2008, the District of Columbia's Accrued Sick and Safe Leave Act ("ASSLA") has required D.C. employers to provide employees with paid leave (i) to care for themselves or their family members, and (ii) for work absences associated with domestic violence or abuse. Specifically, ASSLA provides covered workers with the ability to earn and take from up to three to up to seven days of covered paid leave each year, depending on the size of the employer.

On January 2, 2014, Mayor Vincent C. Gray signed the Earned Sick and Safe Leave Amendment Act of 2013 ("Amendment"), which significantly amends ASSLA. In particular, the Amendment (i) provides for immediate accrual of leave and availability for use after 90 days, (ii) includes tipped restaurant and bar employees, (iii) changes the provisions on retention of accrued leave, (iv) broadens retaliation protections, (v) creates new record-keeping requirements, and (vi) adds new enforcement and penalty provisions, particularly private civil actions and recovery of attorneys' fees. The Amendment is expected to take effect in mid-February.

Accrual and Availability of Leave

ASSLA will now explicitly provide that an individual accrues covered paid leave from the beginning of employment and may begin to access it after 90 days of service. Consistent with this provision, ASSLA also will now define an "employee" as "any individual employed by an employer," with certain exceptions (see the "Miscellaneous" section below). Previously, ASSLA used the D.C. Family and Medical Leave Act's definition of an employee, which required one year and 1,000 hours of service. As such, accrual of leave did not begin until after one year of service.

Tipped Restaurant and Bar Employees

The Amendment eliminates the prior exclusion of tipped restaurant wait staff and bartenders and adds a new provision requiring that restaurant and bar employees, for whom the tip credit is claimed, be provided with at least one hour of covered paid leave for every 43 hours worked, up to a maximum of five days per calendar year. (This is the same level as is currently required for employers with 25-99 employees.) However, these employees need only be paid the regular District minimum wage while on leave,

without taking into consideration the amount of tips that they may have received if working.

Provisions on Retention of Accrued Leave

The Amendment deletes ASSLA's current limited carry-over provisions (which provide that unused covered paid leave accrued during a 12-month period carries over annually but limit the amount of leave used in one year to the maximum hours the employee could earn, unless the employer allows otherwise), as well as a proviso that unused accrued covered paid leave is not paid out upon termination of employment. Also, the Amendment deletes a provision that expressly allows an employee and employer to agree that, instead of using covered paid leave, an employee could work additional hours during the same or next pay period. Notwithstanding these deletions, there does not appear to be any bar to an employer voluntarily adopting any of these provisions. Thus, it will be particularly important for employers to specify whether unused accrued covered paid leave is payable on termination.

At the same time, the Amendment adds new provisions that (i) preserve accrued covered paid leave if an employee remains with the same employer but is transferred to a separate division, entity, or location within the District, or is transferred out of the District and then transferred back; (ii) reinstate previously accrued covered paid leave and the same right to use it if there is a separation from employment and the employee is rehired by the same employer within one year; and (iii) require allowing an employee who is rehired within 12 months of a termination after a "probationary period of 90 days or more" to access covered paid leave immediately.

New Retaliation Protections

ASSLA already includes general protections against interference with, restraint, or denial of the rights provided by the statute and a prohibition on discharging or discriminating against an employee because he or she uses ASSLA paid leave or opposes practices made unlawful by ASSLA. Under the Amendment, protected actions will now also include (i) complaining to the employer; (ii) filing a complaint with the Department of Employment Services ("DOES"); (iii) filing a civil complaint; (iv) informing *any person* about an alleged violation; (v) cooperating with the DOES or another person's investigation or prosecution of an alleged violation; (vi) opposing any policy, practice, or act that is unlawful under the ASSLA; or (vii) informing *any person* of his or her rights under ASSLA. Note that "any person" could include, but is not limited to, a co-worker, a family member, the press, or an attorney.

Particularly significant are new provisions (i) providing that an adverse action taken within 90 days of engaging in protected activity raises a rebuttable presumption that the employer violated ASSLA, and (ii) making it unlawful to count ASSLA leave as an absence for purposes of discipline, discharge, demotion, suspension, or other adverse action.

New Record-Keeping Requirements

D.C. employers must now retain records documenting hours worked by employees and paid leave taken for a period of three years. They must also allow the Office of the

District of Columbia Auditor access to such records to monitor compliance. Further, if an issue arises as to an employee's entitlement to paid leave, then the failure to maintain or retain adequate records, or refusal to allow access to the records, creates a rebuttable presumption that the employer has violated ASSLA.

New Enforcement and Penalty Provisions

Employees will now be able to pursue a civil action or an administrative action through DOES. In both cases, the employer is liable for back pay, reinstatement, or other injunctive relief, compensatory or punitive damages (including at least $500 for every day an employee was denied leave and required to work), plus attorneys' fees and costs. The statute of limitations for a civil complaint is three years, which is tolled (i) when an administrative complaint is filed (within 60 days of the incident) or (ii) during the period that the required notice was not posted. A judgment may be enforced by either the employee or the District.

In addition, employers are liable for $500 in damages for each accrued day denied, regardless of whether the employee takes unpaid leave or reports to work on that day. Furthermore, employers that commit willful violations are subject to a civil penalty of $1,000 for the first offense, $1,500 for the second offense, and $2,000 for the third and each subsequent offense. Notably, this willful violation penalty clause includes willful violations of the notice-posting requirement, for which the penalty otherwise previously was set at $100 per day with a cap of $500.

If the employer does not comply, the Mayor is required to take appropriate enforcement action, including initiating a civil action and (except where otherwise prohibited) revoking or suspending any registration certificates, permits, or licenses. DOES may also order the employer to pay up to $500 per day per employee in liquidated damages.

Miscellaneous

The definition of "employee" will now expressly exclude (i) individuals who volunteer to engage in the activities of educational, charitable, religious, or nonprofit organizations; (ii) lay officers within the discipline of any religious organization who are engaged in religious functions; and (iii) casual babysitters employed in or around the residence of the employer. The definition retains the prior exclusions of independent contractors, students, and health care workers who choose to participate in a premium pay program.

The definition of "employer" is expanded to include any entity that employs or exercises control over the wages, hours, or working conditions of an employee, whether directly, through agents, or through the use of temporary services or staffing agencies. This means that companies cannot avoid ASSLA liability through the use of temp agencies.

Additionally, ASSLA will now exclude from coverage employees in the building and construction industry who are covered by a collective bargaining agreement that expressly waives the statute's requirements.

What Employers Should Do Now

If your company does business in the District of Columbia, now is good time to review your leave policies to ensure compliance with the specific requirements of the amended ASSLA. In particular:

- Review your current leave policies to confirm that they:
    - provide a sufficient number of paid covered hours of leave;
    - provide that covered leave begins accruing when the employee starts work and can be used after 90 days of employment; and
    - generally describe the reasons for taking covered leave, which include individual medical issues as well as care for family members and for absences associated with domestic violence or abuse.
- Be aware that PTO (paid time off) policies may be sufficient, so long as the leave provided is at least equivalent to ASSLA's requirements.
- Make sure that your policies address whether (and to what extent) covered leave can be carried over to the following year and clearly state that covered leave is not paid out on termination.
- Ensure that your policy and/or practice also follows ASSLA's new requirements for maintaining or restoring accrued leave for employees who transfer to other positions or who leave employment and are rehired within a year.
- If you are a restaurant or bar, make sure that your leave policy clearly allows tipped employees to accrue and use up to five paid days of covered leave per year and states what they will be paid for these days (at least the full D.C. minimum wage).
- If you have an anti-retaliation policy, ensure that it conforms to the Amendment, and train managers and supervisors to understand that there can be no retaliation against an employee for taking or seeking to take protected sick leave or for complaining that he or she was denied such leave.
- Make sure that any action taken against an employee who has sought or taken ASSLA leave is properly and fully documented.
- Post the required notice in the same place where you regularly post other employee notices. (Failure to do so tolls the statute of limitations and may subject you to extensive liquidated damages.)
- Keep records of all hours worked and ASSLA time taken by employees, since all ASSLA leave earned and all paid covered leave requested and taken must be recorded and kept for a period of at least three years. These records should be easily available for production, if necessary.

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