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District of Columbia Issues Final Regulations for Accrued Sick and Safe Leave Act

The District of Columbia recently issued final regulations governing the Accrued Sick and Safe Leave Act of 2008 ("ASSLA" or "the Act"), the “paid sick leave” law which went into effect on November 13, 2008. The District government held off enforcing the new and confusing law for more than 18 months, until the implementing regulations could be finalized. ASSLA requires District of Columbia employers for the first time to provide paid sick leave to eligible employees for absences related to physical or mental illness, preventative medical care, care for a family member, as well as "safe" leave associated with stalking, domestic violence, or sexual abuse. The final regulations differ in some areas from the proposed regulations issued in December 2008, and issuance of the final rules means that all District of Columbia employers should now make sure that they are in compliance with the provisions of the Act.

Under the new law, the amount of paid sick leave an employer is required to provide varies based on the number of employees. An employer with 24 or fewer full-time equivalent employees must provide each employee one hour of paid sick leave for every 87 hours worked, up to a maximum of three days per calendar year. An employer with 25 to 99 full-time equivalent employees must provide each employee one hour of paid sick leave for every 43 hours worked, up to a maximum of five days per calendar year. An employer with 100 or more full-time equivalent employees must provide each employee one hour of paid sick leave for every 37 hours worked, up to a maximum of seven days per calendar year. Employees who are exempt from overtime payment under the Fair Labor Standards Act are not entitled to accrue sick leave for hours worked beyond 40 hours in a workweek.

The Act and proposed regulations included confusing provisions regarding who is an "employee" under the Act and how leave is accrued. Specifically, it was unclear whether an individual could begin taking sick leave after 90 days of service, or had to wait until becoming an “eligible employee” after one year of continuous service. The final regulations define an "employee" as an individual who has been employed by the same employer for at least one year without a break in service, except for regular holidays, sick, or personal leave granted by the employer, and who has worked at least 1,000 hours of service with such employer during the

previous 12-month period. Under the final regulations, an employee begins to accrue paid leave on the date he or she meets the above qualifications of an "employee" (not from the date of hire). The final regulations also remove any indication that employees can begin accessing paid leave 90 days after the start of employment.

The final regulations attempt to clear up questions about whether paid leave must be offered to employees working only in Washington, D.C. or all employees company-wide. In order to meet the definition of an "employee," a worker who is employed by the employer in more than one location must spend more than fifty percent (50%) of his or her working time for the employer in the District of Columbia. An "employee" also includes an individual whose employment is based in the District of Columbia, who spends a substantial part of his or her working time in the District of Columbia, and does not spend more then fifty percent (50%) of his or her working time in any particular state. The final regulations state that independent contractors, students, certain health care workers, and restaurant wait staff and bartenders are not "employees" under the Act. The number of employees is based on the average number of monthly full-time equivalent employees employed in a preceding calendar year.

Unused accrued leave must carry over annually, but employees are not entitled to use in one year more sick leave days than the maximum number of sick leave days that may be accumulated in one year under the Act, unless permitted to do so by the employer. Employers are not required to reimburse an employee for unused accrued sick leave upon the employee’s termination or resignation.

The Act imposes notice obligations on both employers and employees. In particular, an employer must post a notice of rights under the ASSLA in a conspicuous place. To the extent possible, an employee needs to give the employer at least 10 days advance written notice of the need to use paid sick or safe leave. Where notice is not possible, the employee may provide an oral request prior to the start of the work shift for which the paid leave is requested. In the event of an emergency, the employer is to be notified prior to the start of the next work shift or within 24 hours of the onset of the emergency, whichever occurs sooner.

An employer may require that the request for paid leave of three (3) or more consecutive days be supported by a “reasonable” certification. The final regulations also provide that an employer may create and enforce a policy that prohibits the improper use of paid leave, or that requires the more frequent certification from an employee if there is evidence documenting a pattern of abuse of paid leave. An employer may not, however, discourage an employee from using the paid sick or safe leave or retaliate against the employee for using paid sick or safe leave.

An employer with an existing paid leave policy providing paid time off or universal leave is not required to modify the policy if the policy offers an employee the option, at the employee’s discretion, to accrue and use leave under terms and conditions that are at least equivalent to the paid leave available under the Act. The ASSLA does not change any obligation of an employer subject to an existing contract, collective bargaining agreement or employment benefit program that provides greater paid leave rights to employees than those provided under the Act.

Employers should examine their current leave policies and collective bargaining agreements to ensure

compliance with the final regulations of the ASSLA and make modifications to leave policies if necessary. Employers are encouraged to consult with counsel for assistance in adopting or modifying leave policies to comply with the Act's requirements. The authors of this summary at Venable LLP, and others in Venable's Labor and Employment practice group, are available to assist our clients in complying with this complicated new law.

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