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PTO: the latest paid leave mandate

In May, Maine became the first state requiring employers to provide paid time off that can be used for any reason, followed closely by Nevada. In August, Bernalillo County, New Mexico, became the first local jurisdiction to enact a similar mandate. Employers will want to update existing policies to satisfy expanding legal requirements and closely monitor the evolving paid leave landscape.

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Background

Eleven states and more than two dozen municipalities across the country now have paid sick leave laws in place. Connecticut, California, Massachusetts, Oregon, Vermont, Arizona, Washington, Maryland, Rhode Island, New Jersey, and Michigan have enacted paid sick leave ordinances, as have major cities such as San Francisco, Washington, D.C., Seattle, New York City, Los Angeles, Philadelphia, Pittsburgh, and Chicago.

Each of these state and local laws provides eligible employees with a minimum amount of paid sick leave but restricts its use. In general, employees are permitted to take available leave only for the reasons articulated in those laws.

Mandatory paid time off

Maine recently became the first state requiring private employers to provide paid time off (PTO). Unlike the many sick leave laws in effect across the country, Maine's law does not tie the leave to specific needs or limit the reasons for which eligible employees can use it. Nevada enacted a similar "no reason" PTO law shortly thereafter. In August, Bernalillo County, New Mexico, became the first local jurisdiction to enact a PTO mandate, while a bill that would require employers to provide paid personal time off remains under consideration by the New York City Council.

Maine

On May 28, 2019, Maine enacted the Earned Employee Leave Act (EELA), which will take effect on January 1, 2021. Initially proposed as a mandatory paid sick leave law, EELA as enacted will require private employers to allow employees to earn paid leave that can be used for any reason.

The new mandate covers “employers” as defined by the Maine Unemployment Compensation law, which includes individuals and organizations with one or more individuals performing services in the state of Maine and either (a) paid wages of \$1,500 or more during any calendar quarter in the current or preceding calendar year, or (b) employed at least one individual for some portion of a day in each of 20 different weeks within the current or preceding calendar year. In addition, EELA makes clear that employers with more than 10 employees generally will be required to provide leave. EELA contains carve-outs for workers in seasonal industries and also for employees covered by a collective bargaining agreement during the period between January 1, 2021 and the expiration of the agreement.

Under the new law, employees will earn one hour of paid leave for every 40 hours worked, up to a maximum of 40 hours per year. However, employers are not required to permit its use until the employee has been employed for 120 days. Notably, EELA is silent on issues such as carryover, use, payout on termination, and frontloading, but it does expressly preempt municipalities from enacting ordinances or rules that regulate earned paid leave.

Nevada

On June 12, 2019, Nevada became the second state to enact a mandatory paid time off law, slated to go into effect on January 1, 2020. Like Maine’s EELA, Nevada’s new law (Senate Bill No. 312) was originally proposed as sick leave legislation. As enacted, it will require private employers that have at least 50 employees in the state to provide paid leave that employees may use for any reason beginning on their 90th calendar day of employment. The new leave entitlement will not extend to temporary, seasonal, and/or on-call employees.

Under the new law, employees will accrue paid leave at the rate of at least 0.01923 hours for each hour of work performed. Alternatively, employers may frontload the total accrual in a benefit year (i.e. 40 hours) on the first day of each benefit year. Employers that already provide paid leave or PTO to all scheduled employees at that rate will not have to provide additional time.

Employers must permit carryover of up to 40 hours of accrued leave to the following benefit year unless the employer frontloads paid leave at the start of the year. Employers will be permitted to cap an employee’s usage at 40 hours per benefit year and set a minimum increment of use not to exceed four hours. Employers need not pay out unused, accrued paid leave upon separation from employment. However, any such leave must be reinstated if the employee is rehired within 90 days after separation unless the employee voluntarily quit.

The new law will require employers to provide on each payday an accounting of the employee's hours of paid leave available for use. Employers will also be required to maintain a record of each employee's receipt, accrual and use of paid leave for a one-year period.

Bernalillo County, New Mexico

On August 20, Bernalillo County, New Mexico, became the first local jurisdiction to mandate paid time off, beginning July 1, 2020. The Employee Wellness Act ("ordinance") would require covered employers to provide employees with earned paid leave to use for any reason. Because the ordinance covers employers with two or more employees and "a physical premises" within the county's unincorporated limits, it does not apply to employers within the city limits of Albuquerque, the Village of Los Ranchos, or the Village of Tijeras.

Buck comment. Even though Albuquerque is not covered by the ordinance, city councilmembers have ordered an economic analysis to determine the feasibility of adopting it.

Full-time, part-time, seasonal, and temporary employees who work for a covered employer for at least 56 hours in a year within the unincorporated limits of Bernalillo County will be eligible to earn a minimum of one hour of PTO for every 32 hours worked. Employees exempt from federal and state overtime requirements will be assumed to work no more than 40 hours per workweek for accrual purposes, unless the employer selects a higher limit. The 56-hour accrual cap will be phased in over three years, permitting annual PTO accruals of: 24 hours beginning July 1, 2020; 40 hours beginning July 1, 2021; and 56 hours beginning July 1, 2022.

Employees will be entitled to use accrued leave on the 90th calendar day after employment or the effective date of this law, whichever is later. Employees will be permitted to carry over unused, accrued PTO to the following year up to the total annual accrual amount, unless the employer's policy allows more. While there is no payout at termination requirement, up to 56 hours of an employee's previously unused accrued time off must be reinstated upon rehire within 12 months, unless the employer previously chose to pay out the earned time at separation.

Notably, the employer must provide PTO upon the request of an employee or an employee's family member, caretaker, or medical professional acting on the employee's behalf. Employers must accurately track and record the amount of PTO accrued or used by each employee for each pay period and keep such records for at least four years in addition to the current calendar year.

New York City

The New York City Council is considering legislation (Int. 800-A) that would expand NYC's Earned Safe and Sick Time law by adding a mandatory paid personal time off component. The bill would rename the city's existing paid leave law the "Earned Safe, Sick, and Personal Time Law." (See our November 27, 2017 FYI for more information on the city's current law.)

If enacted, private employers with five or more employees (or one or more domestic workers) would be required to provide 10 days of paid personal leave annually that could be used "for any reason."

Employees would accrue one hour of paid personal time for every 30 hours worked, up to a maximum of 80 hours per year. This time would be in addition to the 40 hours of sick/safe time that employers already must provide to eligible employees. However, employers that provide equivalent paid time off, vacation, personal days, or rest days would not be required to provide additional personal time.

While employees would be permitted to roll over up to 80 hours of unused, accrued personal time to the following calendar year, employers could cap use at 80 hours annually. Employees would be able to begin using personal time on the 90th calendar day following either employment or the effective date of this law, whichever is later. However, employers may require up to 14 days' prior notice when using personal time is foreseeable and could set a minimum increment for its use not to exceed four hours per day.

In closing

The paid leave landscape continues to evolve, creating new benefit entitlements for employees and increasingly complex compliance obligations for employers. Employers will want to update existing policies to satisfy expanding legal requirements and consider how to structure their paid leave benefits in light of these developments.

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