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MANDATORY PAID LEAVE: THE HEALTHY FAMILIES ACTS

Mandatory paid leave legislation has been introduced in Congress by Senator Kennedy (D-MA) and Congresswoman DeLauro (D-CT). The proposed federal Healthy Families Act seeks to guarantee full-time employees at least seven days of paid sick leave each year and part-time employees a pro-rata amount of leave to care for themselves and their families' medical needs. Similar legislation has been introduced in Connecticut, Massachusetts, Florida, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Pennsylvania, Wisconsin, and Vermont. Currently, San Francisco is the only city to require businesses to provide mandatory sick leave. Washington D.C.'s City Council recently approved a similar measure, which is now awaiting the Mayor's signature and then any resulting Congressional action to overturn the legislation.

In April 2007, the Service Employees International Union began a petition drive to place similar legislation known as the "Ohio Healthy Families Act" (OHFA) before the Ohio General Assembly and possibly the Ohio voters. Similar to the process by which Ohio's Smoke Free Workplace Act was enacted in 2007, the OHFA's supporters collected enough signatures to submit the legislation to the General Assembly in January 2008. The General Assembly now has until May 2008 in which to enact the OHFA. If the legislation is not enacted, the supporters will have 90 days in which to collect a second set of 120,683 signatures to place the OHFA on the November 2008 general election ballot. In some respects, the OHFA is like the federal Family and Medical Leave Act (FMLA), but the OHFA is much broader in scope than the FMLA.

I. Coverage of the Proposed Ohio Healthy Families Act.

Unlike the FMLA that only covers employers with 50 or more employees, the OHFA applies to employers having 25 or more employees. Those employers would have to provide seven paid sick days a year to full-time employees – defined as those working more than 30 hours a week; and a pro-rata number of days for part-time employees working less than 30 hours a week or 1,560 hours annually. It is unclear under the OHFA what it means to have "25 or more employees." For example, would an employer that normally has 15 employees – but that hires 10 employees for a two-week period –be covered by the OHFA for the entire year, for only the two-week period in which the employer had 25 employees, or not at all?

II. Accumulation of Paid Sick Leave.

Under the OHFA, paid sick leave accrues at least monthly and coverage begins with the employee's first hour of employment. In other words, the OHFA allows an employee to begin working for an employer on January 1 and be eligible for some amount of paid sick leave on January 2. But the employee would not be permitted to take paid sick leave until the 91st day after his or her employment begins. By contrast, under FMLA, an employee has to be employed for twelve months and have at least 1,250 hours of service with the employer in order to be eligible for family and medical leave.

III. Use of Paid Sick Leave.

Unlike the FMLA, the OHFA covers more than just serious health conditions. Instead, the OHFA permits the use of paid sick leave for any physical or mental illness, injury, or medical condition, or for obtaining professional medical diagnosis or care, or for preventative medical care of an employee or employee's family member (which includes a spouse, children, parents, and in-laws).

Unlike the FMLA which requires thirty days' notice, the OHFA would only require employees to give seven days' notice for a foreseeable leave of absence, and it would only require notice "as soon as practicable" if the leave is unforeseeable. The OHFA would also allow employees

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to use sick leave in either one hour increments or the smallest increment employers use to track other forms of leave. For example, if an employer tracks FMLA leave in fifteen minute increments, the employer would have to permit employees to use paid sick leave in fifteen minute increments.

An employer could only require medical certification of an employee's need for paid sick leave if the employee is absent for three consecutive work days. An employee would have thirty days in which to provide medical certification. But there is nothing in the OHFA that would permit an employer to challenge an employee's offered medical certification. Under the FMLA, by contrast, an employer can request a second medical opinion.

Employers would be required to keep track of employees' sick leave use and retain those records for three years.

IV. Non-Discrimination and Anti-Retaliation.

The OHFA would provide broad protection to employees with respect to the use of paid sick leave. The OHFA absolutely prohibits employers from:

- Discharging or discriminating against any employee for making any complaint that he or she has not been allowed to accrue or use sick leave, or because the employee has made any complaint or instituted any proceeding under or related to those sections, or because the employee has testified or is about to testify in any proceeding, or because the employee is assisting another in exercising such a right.
- Using paid sick leave taken under the OHFA as a "negative factor" in an employment action, such as hiring, promotion, or a disciplinary action.
- Counting the use of paid sick leave under a no-fault attendance policy.

Employers are also prohibited from providing any accrued sick leave less than that guaranteed by the OHFA.

V. Effect of the OHFA on Existing Leave Programs.

Employers would not have to provide the paid sick leave if the employer already provides leave that is "at least equivalent" to paid sick leave mandated by the OHFA. But the OHFA does not explain what this means.

Employers would be prohibited from reducing any form of leave once the OHFA becomes effective "in order to comply" with the OHFA. Because the OHFA does not explain what this prohibition means, it is unclear whether employers would be prohibited from making any changes whatsoever to their leave programs.

Finally, the OHFA states that its provisions do not interfere with, impede, or diminish employees' collective bargaining rights to establish sick leave or paid leave in excess of the minimum paid sick days required by the OHFA. But the ability to collectively bargain over sick leave would be effectively limited by the OHFA's requirement that a leave program adopted be "at least equivalent" to the OHFA's requirements. This would seem to restrict changes to existing leave policies that are in collective bargaining agreements.

VI. Enforcement.

The OHFA would vest enforcement authority in the Ohio Department of Commerce. The Department could investigate, review employers' tracking of sick leave, and bring actions on behalf of employees to enforce the OHFA. The OHFA would also create a private right of action for employees. In either case, employers would be liable for any wages, salary, employment benefits, or other compensation denied or lost to an individual employee, plus interest, multiplied by *three*. If employees have not been denied or lost any wages, salary, employment benefits, or other compensation, the employees would still be able to recover any other "actual monetary losses" that resulted from the violation up to a sum equal to 10 days of wages or salary for the employee, plus interest, multiplied by *three*. Employees would also be entitled to attorneys' fees if successful.

The combination of the FMLA, Americans with Disabilities Act, and workers' compensation is often said to create a "Bermuda Triangle" for employers in trying to properly administer these various and sometimes conflicting employee benefits provisions. The OHFA will only complicate this already overly complex situation.

If you have any questions about this or any other employment-related issue, please contact your Vorys lawyer.