

# ANDERSON KILL EMPLOYMENT LAW INSIDER

# ALERT

## Recent Developments in Overtime Pay, Paid Family Leave and Paid Sick Time

By Bennett Pine

### President Obama Issues Initiative to Expand Overtime Pay

On March 13, 2014, President Barack Obama requested that the Labor Department issue rules that greatly expand the number of workers who will be eligible to receive overtime pay.

The Obama administration issued an executive order that points out that some salaried convenience store managers, fast food shift supervisors and office workers may be expected to work 50 or 60 hours a week without overtime, and that their pay rate may actually be less than the \$7.25 an hour minimum wage.

Currently, most hourly workers must be paid time-and-a half if they work more than 40 hours a week under the federal Fair Labor Standards Act. However, many salaried workers do not need to be paid overtime if paid more than \$455 a week, if they are considered by their employers to fall with the so-called white collar “administrative,” “executive,” or “professional,” exemptions from overtime.

The administration wants to raise the pay threshold for workers eligible to receive overtime, but it hasn’t said precisely where it wants to set the new threshold to require overtime. Limitations on the definitions of the white-collar exemptions also are requested, such as requiring a floor on the percentage of time an individual spends “supervising” or “managing” in order to be considered exempt from overtime.

California and New York already require companies to pay overtime to anyone earning \$600 per week or less. And those thresholds are set to increase to \$800 per week in California and \$675 per week in New York by 2016.

Quoting White House officials, the *New York Times* stated that “the proposed new regulations would increase the number of people who qualify for overtime and continue Mr. Obama’s fight against what he says is a crisis of economic inequality in the country.” At the same time, the proposal already has angered business interests such as the U.S. Chamber of Commerce and congressional Republicans who have accused the president of abusing his executive authority.

The proposed changes to the regulations likely will be subject to a protracted period of public comment pending final approval by the Labor Department, and may likely result in a retrenchment in the Obama administration’s original proposal.

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## New York Assembly Passes Bill Requiring Paid Family Leave

On March 7, 2014, the New York State Assembly passed a bill designed to establish paid leave for "family care," including medical emergencies on account of the birth or adoption of a child or to care for an ill family member.

While the federal Family and Medical Leave Act provides for up to 12 weeks of leave annually, FMLA mandates unpaid leave only. Currently only three states (California, New Jersey and Rhode Island) guarantee paid family leave. Proposals are also pending in Nebraska and Minnesota.

As stated by Assembly Speaker Sheldon Silver, "Most employees cannot afford to take unpaid leave from work... allowing employees to earn some income during a brief leave can prevent financial disaster."

Under the Assembly measure, which passed by a vote of 84-40, workers would be guaranteed half of their regular pay up to a capped amount. Employers would be required to purchase a paid family leave insurance policy, the cost of which would be offset by an initial weekly employee contribution of up to 45 cents.

The Assembly bill also proposes to 1) increase the Temporary Disability Insurance premium — with the cost increase to be split between employer and employee and 2) expand the definition of a family member to include a child (biological, adoptive or foster), a spouse, domestic partner, parent, grandchild, grandparent and sibling or parent of a spouse or domestic partner. Assemblywoman Catherine Nolan, the bill's sponsor, referred to this as the "modern family." The bill will now be forwarded to the state Senate's Labor Committee — which has a more conservative make up than the Assembly — for consideration.

## New York City Council Mandates — and Then Expands — Paid Sick Time Requirement

Back in January 2014, the New York City Council passed a law, to be effective April 1, 2014, requiring that employers with at least 15 employees, and employers with at least one domestic worker, must provide their workers with paid sick time. On February 27, 2014, by a vote of 48-3, the council passed a resolution at the urging of Mayor Bill deBlasio, lowering the threshold for coverage from 15 employees to five. The legislative requirement still will be effective on April 1, 2014.

Under the law, all employees other than domestic workers accrue one hour of paid sick time for every 30 hours worked, up to a maximum accrued of 40 hours per calendar year.

It is up to the employee to determine how much accrued time to utilize. Employers, however, may set a minimum floor as to how the increment may be used, up to four hours.

The time that has been accrued may be utilized by employees for absences caused by:

- the employee's mental or physical illness, injury or health condition or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care;
- care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or



- closure of the employee's place of business by order of a public official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of an official due to a public health emergency.

Provisions are also included for employers to require reasonable notice of an employee's need to use accrued time; permitting employers to require documentation for use of the accrued time and limited carry-over of time, retention of records, anti-retaliation, and administrative enforcement. There is no requirement however, that employers be required to pay for the unused time upon separation from employment.

### **Newark Adopts Paid Sick Leave Ordinance**

Joining New York City, Jersey City and a nationwide trend, on January 29, 2014, Newark, New Jersey became the eighth U.S. city to mandate that all private employers in the city provide employees with paid sick leave.

The Newark ordinance takes effect on May 29, 2014, or upon the expiration of a current collective bargaining agreement, whichever is later.

Employers that employ at least 10 employees for compensation must provide eligible employees up to 40 hours of paid sick time in a calendar year. Employers with fewer than 10 employees must provide eligible employees up to 24 hours of paid sick time in a calendar year. A "calendar year" means "a regular and consecutive 12-month period, as determined by an employer."

Upon request, employees can use accrued paid sick time for the following reasons.

- An employee's or a family member's mental or physical illness, injury or health condition.
- An employee's or a family member's need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition.
- An employee's or a family member's need for preventive medical care.
- Closure of the employee's place of business by order of a public official due to a public health emergency.
- An employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency.
- Care for a family member when it has been determined by the health authorities having jurisdiction or by a health care provider that the family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease, whether or not the family member has actually contracted the communicable disease.

Other provisions of the Newark law, like those in the New York City law described above, provide for advance foreseeable notice on the need to use the time, written confirmation that use is for an authorized purpose, recordkeeping and notices, violation and remedies, and exclusions for employers already having paid leave policies providing time sufficient to meet the requirement of the Newark ordinance. ▲

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