

# BenAlert

## *Benefit Trends and Legislative Updates*



May 2007

Howitt Insurance Services is pleased to provide you with periodic updates on benefit trends and legislative updates. As part of our valuable services, we want to ensure that you are in compliance and well-informed of the ongoing changes in our industry.

## **San Francisco Sick Leave Ordinance: An Update**

*May 22, 2007*

The San Francisco Office of Labor Standards Enforcement (OLSE) maintains “Frequently Asked Questions” (FAQs) to assist employers in achieving compliance with the City’s new Paid Sick Leave Ordinance (Ordinance). On April 27, 2007, OLSE issued its most recent set of updates. The purpose of this memorandum is to provide you with additional guidance with regard to the Ordinance.

### **Background**

All employers with at least one person employed within the boundaries of the City and County of San Francisco (City) must provide sick pay benefits to employees who work in the City for more than 90 calendar days. Sick leave benefits accrue at the rate of one hour for every thirty hours worked, with a maximum accrual of 40 hours for employers with less than 10 employees and 72 hours for employers with 10 or more employees.

### **Discussion**

The new FAQs focus on four major areas.

1. **Definition of a Small Business Employer.** For purposes of determining whether an entity is a small employer, the calculation must include part-time and temporary employees. In the event the number fluctuates from week to week, OLSE will calculate business size based on the weekly average number of persons who worked for compensation during the previous calendar year. This calculation is based on weekly counts over the 52 week period divided by 52. For new employers, OLSE will calculate the average number of employees who work within the first 90 days from the time the first employees began work.

2. Eligible Individuals. The FAQs have also provided guidance regarding certain types of employees. Calculations must include all workers treat each of the following as included or not included:
  - a. Undocumented workers. The OLSE will not inquire as to whether workers are documented or not documented. Each is a worker;
  - b. Independent contractors. Although the Ordinance excludes coverage of independent contractors, the individual must actually be an independent contractor under California law and not just classified by the employer as one;
  - c. Household workers. Household employees who work in San Francisco qualify under the Ordinance unless they are properly classified by their employer as independent contractors. The distinction may be the issuance of 1099s; and,
  - d. Airport employees. The Ordinance applies only to employees who work within the geographic boundaries of San Francisco. It does not apply to employees who work at the Airport.
  
3. Use of Paid Sick Leave. The Ordinance requires employers to allow workers to use paid sick leave while working in the City. It does not require employers to allow employees with accrued sick leave to take sick leave while working outside of San Francisco. Employers may do so at their own discretion.

In the event that an employee is transferred to work outside of the City, the unused sick leave is “in the bank” for use upon his/her return to work in the City. The employer may allow the use of “banked” sick leave outside the City, at its discretion.

The FAQs state that it is reasonable to require advance notice for use of sick leave; however the employer practice must not be so onerous that it deters its usage. Similarly, it is appropriate under some circumstances to require a doctor’s note, but it should not be a requirement in all cases.

Sick leave must be available immediately upon its accrual.

4. Payment of Sick Leave.
  - a. Hourly Rate of Pay. The rate of pay is the hourly rate at the time of leave for hourly employees. Note, however, that the rate must be at least the statutory minimum rate of pay in the City (\$9.14/hour) and, include credit or overtime. It also appears that employers must also continue all benefits during sick leave that are available to those not on sick leave.

- b. Rate for Exempt Salaried Employees. To determine the hourly rate of pay for an exempt salaried employee, the employer must divide the annual salary by 52 and then divide by 40, unless there is clear evidence that the exempt employee works less than 40 hours. In that situation, the employer is to use the actual number of scheduled hours.
- c. Miscellaneous Situations. If the rate of pay fluctuates based on the work assigned, the employer is to use the rate of pay applicable at the time of sick leave.
  - i. Tips are not included in the determination of the rate for sick pay. The rate is based on the compensation paid by the employer.
- d. When is Sick Leave Payable. Employers must pay sick leave no later than the pay day for the next regular payroll period following the sick leave.
- e. Can Unused Sick Leave be Cashed Out? The Ordinance permits it only if it is expressly provided for in a collective bargaining agreement.
  - i. Miscellaneous Additional Items
  - ii. It is worth noting that if the employer does not offer individuals an opportunity to list a designated person to care for, in lieu of spouse or domestic partner, then the employee may designate the person at the time of leave. That person will remain as the designated person for the remainder of the period.

The FAQs clarify that sick leave does not accrue while someone is on vacation or sick leave or working outside of the City.

Our ERISA Attorney has raised the question about (messenger/delivery truck) drivers. Although the Ordinance and FAQ guidance doesn't answer it directly, it is our sense that drivers whose regular routes are within City limits (e.g., bread trucks vis a vis long haul drivers with two stops in the City) that they are eligible employees. We have also had the question about professional consultants on assignment in the City. If the consultant is a de-facto employee under California law, then he/she would be eligible for overtime; however, if they satisfy the California definition of Independent Contractor, he/she would not be eligible for San Francisco sick leave pay.

We will keep you informed of additional developments as they become available. To access the FAQs directly, go to [http://www.sfgov.org/site/olse\\_index.asp?id=49389](http://www.sfgov.org/site/olse_index.asp?id=49389)

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