

April 20, 2016

San Francisco Passes Historic Paid Parental Leave Law

San Francisco is once again at the forefront of the nation with groundbreaking employment legislation. The San Francisco Board of Supervisors has unanimously approved the Paid Parental Leave Ordinance – the first of its kind – that will require employers to supplement the benefits currently available under state law. Specifically, subject to the limits explained below, under the Ordinance an employer must make up the difference between an employee's regular wages and the partial wage-replacement benefits provided under California's Paid Family Leave (PFL) program when an employee – female or male – takes leave to bond with a new child. The Ordinance passed on a final vote by the Board of Supervisors on April 12, and now goes to Mayor Ed Lee, who has said he will sign the measure. Here is an overview of what employers need to know.

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Effective Dates

The Ordinance takes effect as follows: On January 1, 2017, for employers with 50 or more employees; on July 1, 2017, for employers with 35 or more employees; and on January 1, 2018, for employers with 20 or more employees. Note that the Ordinance counts the total number of employees, not just those who work in San Francisco. For example, an employer that has one employee in the City and 49 employees elsewhere will be covered as of January 1, 2017.

Supplemental Compensation

Under California's existing PFL program, employees who take leave to, among other reasons, bond with a newborn, newly adopted child or new foster child can receive up to six weeks of partial wage replacement benefits in a 12-month period. The PFL benefit is 55% of the employee's weekly gross wages up to a maximum weekly benefit of \$1,129 (as of January 1, 2016). (Note that Governor Brown just signed A.B. 908, which, beginning in 2018, will increase the PFL benefit from 55% to between 60% and 70% depending on an individual's wage level; this legislation will also remove the seven-day waiting period for PFL benefits.)

The new Paid Parent Leave Ordinance will require employers to provide “covered employees” with “Supplemental Compensation” during a parental leave when the employee is receiving PFL benefits. Supplemental Compensation is the difference between the employee’s regular gross weekly wages and the PFL benefit, for up to six weeks. If an employee receives the maximum weekly PFL benefit, Supplemental Compensation will be proportionally capped in relation to the maximum PFL benefit, so that the employee may not be entitled to 100% of their normal wages. Thus, based on the 2016 PFL benefit rates, the *maximum* weekly Supplemental Compensation under the Ordinance would be approximately \$924.

Covered Employees

Under the Paid Parental Leave Ordinance, a “covered employee” is an employee who:

1. is eligible for California PFL benefits for the purpose of bonding with a new child;
2. commenced working for the employer at least 180 days prior to the start of the leave;
3. performs at least eight hours of work per week for the employer within the geographic boundaries of San Francisco; and
4. works at least 40% of her or his total weekly hours in San Francisco.

Employees who are covered by a collective bargaining agreement (CBA) are covered by the Ordinance unless one of the following applies: 1) the CBA expressly waives the requirements of the Ordinance in clear and unambiguous terms, or 2) the CBA was entered into before the Ordinance’s effective date (but only until the CBA is extended or expires).

Terms and Conditions

An employer can require employees to use up to two weeks of accrued vacation to help satisfy the employer’s obligation to pay Supplemental Compensation during the leave period. It appears that this would be counted toward the employer’s total six-week obligation to provide Supplemental Compensation. Alternatively, the employer can require the employee to use two weeks of vacation prior to the employee’s initial receipt of PFL benefits (in which case the vacation time would not offset the Supplemental Compensation).

Also, the employer can require that the employee, as a precondition to receiving Supplemental Compensation, sign an agreement to reimburse the employer for the full amount of Supplemental Compensation if the employee voluntarily terminates the employment within 90 days after the leave. Conversely, if an employer terminates an employee during the leave period, the employer remains obligated to pay the Supplemental Compensation for the remainder of the leave period.

The Ordinance also specifies that an employer is not required to pay Supplemental Compensation if it has an existing policy that provides employees with at least six weeks of fully paid parental leave for new child bonding within any 12-month period.

No Retaliation

The Paid Parental Leave Ordinance contains expansive protections for employees who exercise their rights to receive Supplemental Compensation. Where an employee is terminated within 90 days of having requested or applied for California PFL benefits, the law establishes a rebuttable presumption that the action was taken to avoid paying Supplemental Compensation. Furthermore, the law imposes a rebuttable presumption of retaliation if adverse action is taken against an employee within 90 days of the employee engaging in protected activity, such as filing a complaint or cooperating with an investigation.

Notice and Enforcement

The Ordinance contains notice, posting and recordkeeping requirements. It will be enforced by the San Francisco Office of Labor Standards Enforcement (OLSE) and also provides employees with a private right of action. Remedies for violations include restitution of Supplemental Compensation withheld, liquidated damages, and penalties of \$50 per day to each employee whose rights were violated.

Getting Ready

Employers with employees who work in San Francisco should begin the process of determining whether they will need to make changes to, or implement, parental leave policies to comply with the new Supplemental Compensation mandate. Employers should also stay tuned for rules and FAQs on the Ordinance from the OLSE.

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