

THE CITY OF SAN DIEGO HAS RAISED THE MINIMUM WAGE AND EXPANDED SICK LEAVE FOR EMPLOYEES WORKING WITHIN ITS GEOGRAPHICAL LIMITS

Mr. Richard Fader of Ft. Lee, New Jersey asks: “Is it true that the City of San Diego has expanded both the rate of minimum wage and sick leave for employees working within its geographical limits?” Well Mr. Fader, on July 11, 2016, the San Diego Earned Sick Leave and Minimum Wage Ordinance became effective.

As of that effective date, employees working within the geographic boundaries of the City are entitled to be paid a minimum wage of at least \$10.50 an hour. Starting January 1, 2017, this minimum wage increases to \$11.50 an hour. Starting January 1, 2019, and each year thereafter, the minimum wage increases by an amount corresponding to the prior year’s increase, if any, in the cost of living based on the Consumer Price Index.

There are no exemptions for small businesses or non-profits. Employees who perform at least two hours of work within the geographic boundaries of the City in one or more calendar weeks of the year and who are entitled to be paid minimum wage under California law are entitled to the benefits of the Ordinance, with three specific exceptions. Employees not covered are those authorized to be employed at less than the minimum wage under a special license issued under California Labor Code sections 1191 (special license for mentally or physically handicapped) or 1191.5 (special license to a nonprofit organization such as a sheltered workshop or rehabilitation facility to permit the employment of employees who have been determined by the commission to meet the requirements in Section 1191); employees under a publicly subsidized summer or short-term youth employment program, such as the San Diego County Urban Corps Program; and student employees, camp counselors, or program counselors of an organized camp as defined in California Labor Code section 1182.4 (student employee, camp counselor, or program counselor of organized camp). For purposes of the Ordinance, any person who is employed as an independent contractor as defined by the California Labor Code is not an “employee” subject to the Ordinance.

Existing employees must begin to accrue earned sick leave on the effective date of the Ordinance. Employees who start work after the effective date of the Ordinance begin to accrue on their starting date of employment. Employers may limit use of earned sick leave until the employee’s 91st day of employment with the employer.

Employers must provide an employee with one hour of earned sick leave for every thirty hours worked by the employee within the geographic boundaries of the City. That means when an employee works some hours inside the City of San Diego and some hours outside the City of San Diego, the sick leave qualifier applies only for the hours worked within the City of San Diego.

“Exempt” employees are also covered by the Ordinance. Employees who are not covered by the overtime requirements of California law or regulations such as properly classified salaried employees are assumed to work forty hours in each work week for purposes of earned sick leave

accrual unless their regular work week is less than forty hours, in which case earned sick leave accrues based upon that regular work week.

Because employees accrue leave by the hour, not by a specific wage rate, when used, these hours must be paid at the hourly rate the employee earns at the time the employee uses the earned sick leave and not the rate in effect when earned. Unused earned sick leave must be carried over to the following benefit year.

An Implementing Ordinance for the Earned Sick Leave and Minimum Wage Ordinance, previously approved by the San Diego City Council, was approved by the Mayor on August 3, 2016. The Implementing Ordinance, among other things, designates an Enforcement Office and Enforcement Official, establishes a system to receive and adjudicate complaints and to order relief to cases of violations, amends the remedy for violations, amends the accrual requirements for Earned Sick Leave, and clarifies language to the existing City of San Diego's Earned Sick Leave and Minimum Wage Ordinance that became effective July 11, 2016. When the Implementing Ordinance takes effect on Friday, September 2, 2016, it will:

- Allow employers to cap an employee's total accrual of sick leave at 80 hours
- Allow employers to front load no less than 40 hours of sick leave to an employee at the beginning of each benefit year because front loading will excuse an employer from the accrual and carryover provisions of the Ordinance
- Clarify the enforcement process including a civil penalty cap for employers with no previous violations
- Clarify language regarding the award of sick leave to be more consistent with State law

The Ordinance also contains the following clarification:

An Employer who provides greater paid time off, either through a contract, collective bargaining agreement, employment benefit plan, or other agreement, than that required by this Division, is deemed to be in compliance even if the Employer utilizes an alternative methodology for calculation of, payment of, and use of Earned Sick Leave or other paid time off that can be used as Earned Sick Leave.

The ordinance also requires employers to display a poster in the workplace and also provide employees with notice of their rights. The City has now published model documents for this purpose on its website at: <https://www.sandiego.gov/treasurer/minimum-wage-program>.

All employers must maintain records documenting employees' wages earned and accrual and use of sick leave. These records must be retained for at least three (3) years.

San Diego employers, in addition to the Ordinance, are subject to the federal and state minimum wage laws. When there are conflicting requirements in the laws, the employer must follow the

stricter standard. In the case of minimum wage, San Diego employers must pay employees the rate that is most beneficial to the employee. Thus, since San Diego's current law requires a higher minimum wage rate than does the state and federal law, all employers that have employees who perform work in San Diego who are subject to the laws must pay at least the City's minimum wage rate.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of changes in the law. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are in compliance with the applicable California and federal law. Please feel free to reach out to the author at jroth@TheRothLawFirm.com with any questions or comments.