sedgwick

LEAVE AND DISABILITY REGULATORY COMPLIANCE

Summary of legislative and regulatory changes

Private employer sector | September 2023

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California

AB 575 (bonding paid leave)

Passed Assembly; passed Senate; to Governor on Sept. 20, 2023
If enacted, effective Feb. 1, 2025

If enacted, this California amendment would expand the family temporary disability insurance program to provide benefits to employees who take time off work to bond with a minor child within one year of assuming responsibilities of a child *in loco parentis*. The amendment would prohibit an employer from requiring employees to take vacation leave before receiving benefits.

California

SB 616 (accrual of paid sick leave)

Passed Assembly; passed Senate; to Governor on Sept. 20, 2023
Approved by Governor Oct. 4, 2023
Effective Jan. 1, 2024
Informational only – Sedgwick does not administer

If enacted, this California amendment would make several changes to the accrual provisions relating to paid sick leave laws. The amendment would modify an employer's alternate sick leave accrual method to add a requirement that an employee have at least 40 hours of accrued sick leave by day 200 of employment and raise the employer's authorized limitation on the use of carryover sick leave to 40 hours or five days in a year. The amendment would also increase employee paid sick leave accrual thresholds from 48 hours to 80 hours and increase the paid sick accrual rate for home health providers to 40 hours or five days per year. In addition, the amendment would exclude railroad workers from paid sick leave provisions.

California

SB 848 (reproductive loss leave)

Passed Assembly; passed Senate; to Governor on Sept. 21, 2023
If enacted, effective Jan. 1, 2024

An existing law, the California Fair Employment and Housing Act, makes it an unlawful employment practice for an employer to refuse to grant a request by any employee to take up to five days of bereavement leave upon the death of a family member. If enacted, this bill would additionally make it an unlawful employment practice for an employer to refuse to grant a request by an eligible employee to take up to five days of reproductive loss leave following a reproductive loss event, defined as the day, or for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth or an unsuccessful assisted reproduction.

The new law would require that leave be taken within three months of the event and pursuant to any existing leave policy of the employer. If an employee experiences more than one reproductive loss event within a 12-month period, the employer would not be obligated to grant for than 20 days of reproductive loss leave time within a 12-month period. In the absence of an existing policy, the new law would allow the reproductive loss leave to be unpaid but would authorize an employee to use certain other leave balances otherwise available to the employee, including accrued and available paid sick leave.

District of Columbia

B 390 (temporary rule re: short-term disability benefits)

Passed by Council Sept. 19, 2023

If adopted, effective following approval by the Mayor, a 30-day Congressional review and publication in the D.C. Register

If adopted, the District of Columbia's temporary measure would prohibit private disability insurance providers from reducing short-term disability benefits based on actual or estimated paid leave benefits. Please note this is only a restriction for insurance carriers and not for any self-insured disability plans.

Massachusetts

2024 Fiscal Year Budget ("top off" PFML benefits)

Effective Nov. 1, 2023

Recent amendments to the Massachusetts Paid Family and Medical Leave law (PFML) now allow employees to supplement their weekly PFML benefit amount with accrued paid leave (vacation, sick time, PTO, etc.). This change was part of the recently passed fiscal year 2024 budget and brings Massachusetts in line with how other state-paid family and medical leave laws operate.

Beginning Nov. 1, 2023, all employees will have the option to "top off" their PFML wage replacement benefits with available accrued paid leave to receive up to 100% of wage replacement during their PFML-qualified leave.

Previously, employers that offered PFML through a private plan had the option to allow their employees to "top off" private plan benefits with accrued paid leave. Employees who received PFML benefits from the Commonwealth's program, however, were unable to use accrued paid leave during any leave period in which they received state PFML benefits. Rather, the use of accrued paid leave was permitted only during the seven-day wait period when no PFML benefits were available, or in one block of time at the beginning or end of the PFML leave.

The Massachusetts legislature, following the lead from other states' leave laws, recognized that during these critical periods, employees should be able to use PFML and their accrued leave balances to fully replace the income they otherwise would have received if not on leave. Employees will now have the discretion to use their accrued paid leave to "top off" or save their paid time off for a later time, and employers must provide employees with this option.

The Department of Paid Family and Medical Leave is expected to issue guidance for employers tasked with calculating the difference between the PFML weekly benefit and the accrued paid leave, and timely issuing payment.

New York: New York City

6 NYCRR 7-201 et seq. (final rules re: earned sick and safe time act)

Adopted Sept. 15, 2023
Effective Oct. 15, 2023
Informational only – Sedgwick does not administer

On April 3, 2020, the State of New York enacted a paid sick leave law. As a result, in September 2020, New York City amended its Earned Sick and Safe Time Act (ESSTA) to align with the requirements of the new statewide law. The New York City Department of Consumer and Worker Protection has adopted a final rule amending the ESSTA administrative rules to bring those rules into alignment with the statutory amendments to the ESSTA enacted in 2020 and to add to or clarify certain provisions.

The ESSTA requires employers with five or more employees — and employers with four or fewer employees that had a net income of one million dollars or more during the previous tax year — to provide employees with at least one hour of paid safe/sick time for every 30 hours worked. However, employers with 99 or fewer employees are not required to provide more than 40 hours of paid safe/sick time per year, and employers with 100 or more employees are not required to provide more than 56 hours of paid safe/sick time per year.

The final rule provides that, for the purposes of applying the above requirements, employer size will be determined based on the employer's total number of employees nationwide, and an employer's size during a calendar year will be calculated by counting the highest number of employees concurrently employed at any point during the calendar year to date. To calculate the number of employees concurrently employed, part-time employees will be considered employed each working day of the week, jointly employed employees will be counted by each employer, and employees on paid or unpaid leave will be counted, as long as the employer reasonably expects them to return to active employment.

When an employer increases its number of employees during a calendar year from fewer than five to between five and 99, the duty to provide paid safe/sick time will be prospective from the date of the increase. After that date, the employer must permit an employee to use and receive pay for up to 40 hours of safe/sick time, minus the number of safe/sick time hours the employee has already used that calendar year. When an employer increases its number of employees from 99 or fewer to 100 or more, its employees have the right to use additional paid safe/sick time up to 56 hours, prospective from the date of the increase. When an employer reduces its number of employees, the reduction will not affect employee safe/sick time entitlements until the following calendar year.

The Final Rule also states that an employer's calendar year will be the 12-month period from Jan. 1 through Dec. 31, unless the employer has established a different calendar year that it uses to administer its safe/sick time policy

and has communicated this to employees in its written policy and in the notice of rights the employer must provide to each employee at the commencement of employment under the ESSTA.

The ESSTA's definition of "employee" limits that term to individuals who are "employed for hire within the city of New York." The ESSTA rules explain that this definition includes an employee who works (including by telecommuting) while the employee is physically located in New York City, regardless of where the employer is located. The final rule clarifies that an employee who only performs work (including by telecommuting) while physically located outside New York City does not fit within this definition, even if the employer is located in New York City. However, an employee who primarily works outside New York City is still "employed for hire within the City of New York" if they regularly perform or are expected to perform work within the city during a calendar year. For such employees, only hours worked in New York City must count toward the accrual of safe/sick time for the purposes of the ESSTA.

The ESSTA rules require that an employer must maintain and provide employees with a written safe and sick time policy. The final rule clarifies and adds to certain requirements pertaining to written policies. An employer who does not provide an employee with a copy of its written policy may not deny permission to use or payment of safe/sick time or take adverse action against the employee due to non-compliance with the policy.

If the employer provides employees with an amount of safe/sick time that meets or exceeds ESSTA requirements on the first day of employment and on the first day of each new calendar year — called "frontloaded safe/sick time" — then the employer's policy must specify the amount of frontloaded safe/sick time to be provided and that such time is immediately available for use. If the employer does not offer frontloaded safe/sick time, the written policy must specify that accrual of safe/sick time starts at the commencement of employment, the rate at which it accrues, and that an employee may use safe/sick time as it accrues. If an employer sets a reasonable minimum increment for the use of safe/sick time (not to exceed four hours per day), it must specify that increment in its written policy.

The written policy must include a statement that the employer will not ask the employee to provide details about the medical condition or personal situation that caused the employee to use safe/sick time, and that any such information disclosed to the employer will be kept confidential and not disclosed without the employee's written permission or as required by law. If an employer requires reasonable written documentation of the need to use safe/sick time, that requirement must appear in the employer's written policy, along with the types of acceptable documentation and instructions on how to submit documentation to the employer. If an employer withholds payment for safe/sick time pending the employee's submission of written documentation, the employer must include this policy and instructions on how to submit proof of costs associated with obtaining documentation and requests for reimbursement in its written policy.

If an employer requires employees to provide reasonable notice of the need to use safe/sick time, that requirement and the method for providing notice must be specified in the written policy. The ESSTA rules differentiate between situations where the need to use safe/sick time is foreseeable and unforeseeable and set

notification requirements accordingly. Regarding the foreseeable need for safe/sick time, the ESSTA rules provide that an employer may not require an employee to provide more than seven days' notice prior to the date on which their safe/sick time is to begin. Regarding the need for unforeseen safe/sick time, an employer may require an employee to provide notice as soon as practicable but may not require an employee to appear in person or deliver any document to the employer before taking safe/sick time. The Final Rule clarifies that the need to use safe/sick time is foreseeable when the employee is aware of the need seven days or more before such use. Otherwise, the need is unforeseeable.

The Final Rule also provides additional, non-exhaustive examples of methods an employer may specify in its written policy for employees to provide notice when the need to use safe/sick time is either foreseeable or unforeseeable, beyond those examples already set forth in the ESSTA rules. As alternatives to requiring employees to call a designated phone number, follow a uniform call-in procedure, or use another reasonable means of communication, the employer may specify that employees should send an email to a designated email address or submit a leave request through a scheduling software system.

The ESSTA rules provide that when the use of safe/sick time results in an employee absence of more than three consecutive “workdays,” an employer may require reasonable written documentation that the absence was for a purpose authorized under the ESSTA. The Final Rule clarifies that “workdays” means the days or shifts the employee would have worked but for the need to use safe/sick time.

The final rule also specifies that for the use of sick time, written documentation signed by a licensed clinical social worker, licensed mental health counselor or other licensed health care provider, indicating the need for time taken amounts to reasonable documentation. For the use of safe time, reasonable documentation includes documentation signed by a representative of a victim services organization, an attorney, a member of the clergy or a medical professional; a police or court record; or a notarized letter from the employee explaining the need for such time.

An employer may not require details about the reason for an employee’s use of safe/sick time, except the dates on which the employee needed to be absent from work. If an employer requires reasonable documentation, it may not require the employee to submit that documentation before returning to work and must reimburse the employee for reasonable costs and expenses incurred in obtaining the documentation.

The Final Rule specifies that an employee’s pay statement must state:

1. The amount of safe/sick time accrued and used during the pay period; and
2. The total balance of accrued safe/sick time available for use.

If the employee's accrued safe/sick time exceeds the amount the employee is entitled to use in a calendar year, the pay statement must inform the employee of the amount of safe/sick time available for use in the calendar year. If an employer issues pay statements via an electronic system, it may comply with these requirements by:

1. Electronically alerting the employee each pay period to the availability of the required information; and
2. Making the information readily accessible to the employee through the electronic system when the employee is not at workplace, including accrual, use, and balance information for past pay periods.

The Final Rule states that an employer must pay an employee for safe/sick time at the employee's regular rate of pay at the time the safe/sick time is taken, provided that the rate of pay may not be less than the highest applicable pay to which the employee is entitled under state law or any other applicable federal, state or local law, rule, contract, or agreement.

The ESSTA rules state that if the employee uses safe/sick time during hours that would have been overtime, the employer is not required to pay the overtime pay rate. The Final Rule clarifies that the employer may only deduct the number of hours of safe/sick time actually used by the employee from safe/sick time accrued, regardless of whether those hours would have been classified as straight time or overtime.

Although an employee is not entitled to compensation for tips or gratuities lost during the use of safe/sick time, an employer must pay an employee whose regular pay rate is based (in whole or in part) on tips and gratuities at least the highest applicable pay rate to which the employee would be entitled under state law or any other applicable federal, state or local law, rule, contract or agreement, without allowing for any tip credit or allowance.

The ESSTA rules provide minimum safe/sick time pay rates for employees who work on commission, who earn a flat rate regardless of the number of hours worked, who perform more than one job for the employer or who receive fluctuating pay for a single job. The Final Rule clarifies that these specified minimum safe/sick times apply unless a higher rate applies pursuant to any other law, rule, regulation, contract or agreement.

If an employer requires reasonable written documentation or confirmation of the use safe/sick time, the employer need not pay safe/sick time until the employee provides that documentation. However, the Final Rule clarifies that an employer may not withhold payment when the employee cannot obtain the required documentation due to costs. If an employee has provided documentation of the use of safe/sick time and proof of the reasonable costs incurred to obtain that documentation, the employer must reimburse the employee for those costs no later than the payday for the next regular payroll period beginning after the date on which the employee provided proof of the costs.

The Final Rule clarifies that employers must not only retain accessible, contemporaneous, and accurate records for each employee demonstrating compliance with the ESSTA, but also create those records. In addition to other recordkeeping requirements, the Final Rule adds that each employee record must show, for each pay period, the

amount of safe/sick time accrued and used during that period, the employee's total balance of accrued safe/sick time and the amount of safe/sick time available for use by the employee.

The Final Rule provides the following clarification regarding accrual, hours worked, and carry-over. An employer must base the amount of safe/sick time used on the amount of time the employee would have worked on the day they were absent but for a covered reason. Per diem employees may use safe/sick time for hours they were scheduled to work or hours they would have worked absent the need to use safe/sick time. For per diem employee or employees with indeterminate shift lengths, the employer shall base hours of safe/sick time used on the hours worked by the replacement employee for the same shift or, if this method is not possible, on the hours worked by the employee when they most recently worked the same shift.

An employee of an employer with 99 or fewer employees may carry over up to 40 hours of unused safe/sick time from one calendar year to the next, and an employee of an employer of 100 or more employees may carry over up to 56 hours of unuse safe sick time, unless the employer has a policy of paying employees for unused safe/sick time at the end of the calendar year in which it was accrued and providing the employee with an amount of paid safe/sick time that meets or exceeds ESSTA requirements for the next calendar year. Regardless of the number of hours an employee carries over, an employer with 99 or fewer employees is only required to allow employes to accrue up to 40 additional hours of safe/sick time in a calendar year, and an employer with 100 or more employees is only required to allow employees to accrue up to 56 additional hours of safe/sick time.

If an employee's safe/sick time exceeds 40 or 56 hours in a calendar year, as applicable, the employer is only required to allow the employee to use up to 40 or 56 hours that year. Employee accrual of safe/sick time must account for all time worked, regardless of whether the time worked is less than a 30-hour increment. To calculate accrual for time periods of less than 30 hours, employers may round accrued safe/sick time to the nearest five minutes or to the nearest one-tenth or quarter of an hour, if this method will not result in a failure to provide proper accrual for all the time actually worked.

North Carolina

HB 259 (preemption of local regulation of leaves)

Passed House; passed Senate; to Governor on Sept. 22, 2023

If enacted, effective July 1, 2023

If enacted, this North Carolina amendment would preempt any local regulation of employment conditions, including wages, hours of work, leaves, employee benefits and working conditions for minors.

Oregon

OAR 839-009-0240 (temporary rule re family leave act and sick leave)

Adopted Sept. 6, 2023
Effective Sept. 6, 2023

The Oregon Bureau of Labor and Industries has adopted a temporary rule to implement the Oregon Family Leave Act (OFLA), and specifically, to delineate the scope of the attestation requirement that applies to leave taken to care for an individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. This temporary rule expires on Feb. 29, 2024.

Under the temporary rule, when an eligible employee takes OFLA leave to care for or to deal with the death of an individual related to the employee by affinity, the employer may require the employee to verify the relationship. Specifically, the employer may require the employee to attest in writing that the employee and the other person have "a significant personal bond, that when examined under the totality of the circumstances, is like a family relationship."

Sedgwick's best practice is to not request verification of family relationships. This update allows an employer to request a statement from the employee regarding the family relationship but does not require an employer to do so.

Washington

SB 5286 (paid family and medical leave premium rate)

Enacted April 20, 2023
Effective July 23, 2023

Washington has amended its paid family and medical leave law to modify the method the Employment Security Department will use to calculate the total premium rate for paid family and medical leave benefits. On or around Oct. 20 of each year, the Department must calculate the total premium rate as follows:

- Calculate an amount that equals 140% of the prior fiscal year's expenses, including the total amount of benefits paid and the Department's administrative costs.
- Subtract the balance of the family and medical leave insurance account as of Sept. 30 from the amount determined in (1) above, and (3) divide the difference from (2) by the prior fiscal year's taxable wages.

"Taxable wages" means the total amount of wages subject to a premium assessment for all individuals in employment with an employer and all individuals electing coverage. The department must set the total premium rate at the rate calculated as described in the above section, subject to the following conditions:

- If the Department determines the total premium rate exceeds a rate necessary to maintain a three-month reserve at the end of the following rate collection year, the Department must set the total premium rate at the minimum rate necessary to close the rate collection year with a three-month reserve; and
- The total premium rate must not exceed 1.20%.

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