
New Legislation Makes San Francisco the First City to Mandate Fully Paid Parental Leave for Employees

By Paula M. Weber and Erica N. Turcios

On April 5, 2016, the San Francisco Board of Supervisors unanimously approved legislation that would require most San Francisco employees to receive six weeks of fully paid parental leave. The new ordinance requires nearly all private California employers to provide partial wage replacement to employees taking leave to bond with a new child under the California Paid Family Leave program, with enforcement set to begin January 1, 2017.

San Francisco is now the first city in the nation to require nearly all private employers to provide employees with six weeks of fully paid parental leave.

Under California's Paid Family Leave program (Unemployment Insurance Code Section 3300 *et seq.*), employees who contribute to the California State Disability Insurance (SDI) fund are currently entitled to six weeks of partial pay each year while taking time off from work to bond with a newborn baby, newly adopted child, or new foster child, or to care for a seriously ill family member. With the passage of the new ordinance, Article 33H of the San Francisco Police Code will now require employers to supplement the employee's Paid Family Leave by providing the remaining portion of the employee's normal gross weekly wage up to a current cap of \$924 per week.

In addition to providing supplemental compensation, the ordinance requires employers to comply with certain notice, posting, and record retention requirements. It also forbids employers from retaliating against employees for exercising their rights under the ordinance, and includes an enforcement procedure that can result in steep administrative penalties and civil damages for non-compliance.

Before the Act takes effect on January 1, 2017, employers with employees working in San Francisco should make any necessary changes to their leave policies, employee handbooks, and posted notices to confirm full compliance with the ordinance, which is described in more detail below.

Covered Employers

The ordinance applies to private employers with 50 or more employees beginning January 1, 2017, to employers with 35 or more employees beginning July 1, 2017, and to employers with 20 or more employees beginning January 1, 2018. It does not apply to employers who already provide their employees with at least six consecutive weeks of fully paid parental leave within any twelve-month period.

Covered Employees

The ordinance entitles full and part-time employees to supplemental compensation if (1) they are eligible to receive Paid Family Leave compensation under the California Paid Family Leave law for the purpose of bonding with a new child; (2) have worked for the employer at least 180 days before the start of the paid leave period; (3) perform at least eight hours of work per week in San Francisco; and (4) at least 40 percent of the employee's total weekly hours worked for the employer are in San Francisco.

Where a worker's weekly work hours fluctuate from week to week, the determination will be based on an average of the hours worked during the quarter (three-month, six bi-weekly or semi-monthly, or twelve weekly pay periods) immediately preceding the paid leave period. This excludes any unpaid leave time, but in no case considers pay periods earlier than 26 weeks prior to the paid leave period.

If the Paid Family Leave weekly benefit amount is based on earnings from a calendar quarter during which the employee did not work for the employer, or during which the employee earned a higher weekly wage than at the time of his or her leave, the determination will be based on the employee's wages in his or her current position at the time of his or her leave. However, as discussed below, a reduction in an employee's wages within 90 days of the employee's request or application for Paid Family Leave raises a rebuttable presumption that the reduction was done for the purpose of reducing the amount of supplemental compensation.

The ordinance does not apply to employees covered by collective bargaining agreements (CBA), if, after the effective date of the ordinance, any new or extended CBA expressly waives the requirements of the ordinance in clear and unambiguous terms. The ordinance does not apply to CBAs entered into before the effective date of the ordinance.

Supplemental Compensation Amount

The ordinance requires employers to provide supplemental compensation in an amount such that the Paid Family Leave compensation plus the employer's supplemental compensation equals 100 percent of the employee's gross weekly wage. Since California's Paid Family Leave program currently provides 55 percent wage replacement, employers will be obligated to pay the remaining 45 percent of the employee's weekly wages during the leave period. However, AB 908, recently passed on April 10 and effective January 2018, changes the state wage replacement to 60 percent for most workers and 70 percent for low wage workers. The employer's supplemental compensation obligation will be reduced accordingly, and will change any time the state wage replacement changes.

The law, however, provides a cap on the supplemental compensation amount an employer will be obligated to pay. The state maximum weekly benefit amount for higher-earning workers (who earn at least \$26,070.92 in a calendar quarter) is currently \$1,129 (55 percent of \$2,053). An employer's supplemental compensation obligation will be proportionally capped by reference to this maximum. Under the current maximum weekly benefit amount, the employer's obligation will not exceed \$924 per week (45 percent of

\$2,053). However, the Legislature is considering changing this maximum. Moreover, when AB 908 becomes effective in January 2018, the employer's obligation will change accordingly.

Where employees have multiple covered employers, the supplemental compensation amount is apportioned between or among the employers based on the percentage of the employee's total gross weekly wages received from each employer. If an employee works for both a covered employer and a non-covered employer, the covered employer is responsible only for its percentage of the employee's total gross weekly wages. In such a case, the employee will not receive 100 percent of the supplemental compensation amount. In addition, to receive supplemental compensation, the employee must provide to the employer(s) a state-issued or other legally authorized notice of computation of Paid Family Leave benefits and a signed information form prepared by the Office of Labor Standards Enforcement (OLSE) pertaining to wages received from all of the employee's other employers during the 90 days prior to the leave period.

Unused Vacation Leave

The employer may choose to require the employee to use up to two weeks of the employee's unused, accrued vacation leave to help satisfy the employer's supplemental compensation obligation. This option may be exercised in addition to, or in lieu of, the employer's current option under the California Paid Family Leave program to require an employee to use up to two weeks of unused, accrued vacation leave as a precondition to the employee's receipt of Paid Family Leave (thereby providing the employee with a total of eight weeks of leave), and may depend on the amount of unused vacation leave that the employee has accrued.

Reimbursement on Separation

In order to be eligible for supplemental compensation, employees must agree to reimburse the employer in the full amount of supplemental compensation received if the employee resigns within 90 days of the end of the employee's leave period and the employer requests reimbursement in writing.

Wage Reduction or Termination Presumption

An employer who terminates an employee within 90 days of the employee's request or application for Paid Family Leave, or reduces an employee's wages during the leave period or within the 90-day period, raises a rebuttable presumption that the termination or reduction was done for the purpose of avoiding or reducing the amount of supplemental compensation required under the ordinance. An employer can rebut this presumption by clear and convincing evidence that the termination or wage reduction was done solely for another reason. An employer who fails to rebut this presumption is obligated to pay the supplemental compensation for the entire leave period based on the employee's prior higher wage rate. An employer who terminates an employee during the leave period is required to pay the supplemental compensation for the remainder of the leave period.

Notice, Posting, and Record Retention Provisions

The ordinance also requires employers to comply with certain notice, posting, and record retention requirements. Employers must post OLSE-issued notices in the workplace informing employees of their rights under the ordinance. Employers must also retain records relating to the payment of supplemental compensation for a three-year period and make such records available to the OLSE on request. Failure to

maintain adequate records or provide the OSLE reasonable access to records raises a presumption that the ordinance has been violated, absent clear and convincing evidence to the contrary.

Anti-Retaliation Provisions

The ordinance includes anti-retaliation provisions that prohibit employers from interfering with or retaliating against an employee who exercises his or her rights under the ordinance, including the right to supplemental compensation, the right to file a complaint or inform any person of an employer's violation of the ordinance, the right to cooperate with the OSLE in investigations of alleged violations, and the right to inform any person of his or her possible rights under the ordinance. Any adverse action taken against a person who exercises such rights raises a presumption of retaliation and violation of the ordinance that can only be rebutted by clear and convincing evidence that the adverse action was solely for a reason other than retaliation.

Administrative Enforcement and Penalties

The ordinance tasks the OLSE with implementing and enforcing the requirements of the ordinance, and authorizes the OLSE, following a due process hearing, to order any appropriate relief, including temporary or interim relief, payment of supplemental compensation and administrative penalties. If the OSLE determines that supplemental compensation was unlawfully withheld, the employee will be entitled to three times his or her supplemental compensation, or \$250, whichever is greater. In addition, if a violation of the ordinance results in harm to or violates the rights of the employee or any other person (such as, for example, failing to post the required notice or an act of retaliation), the administrative penalty will include \$50 per employee or person for each day or portion thereof that the violation occurred or continued.

The OSLE may also request that City agencies or departments revoke or suspend any registration certificates, permits, or licenses held or requested by the employer or person until such time as the violation is remedied. It may also order the violator to pay the City up to \$50 per day and per employee to compensate the City for the costs of investigating and remedying the violation.

Civil Enforcement and Damages

The ordinance also entitles the City or any person or entity acting on behalf of the public, as provided under state law, to bring a civil action in court for violating the ordinance. The ordinance prohibits a person aggrieved by a violation—or an entity a member of which is aggrieved by a violation—to bring a private cause of action if the City has brought a civil action alleging the violation or if the OLSE informs the person or entity in writing that it intends to initiate administrative enforcement or has determined that no violation has occurred.

A prevailing party in a civil action will be entitled to legal and equitable relief, including reinstatement, back pay, payment of supplemental compensation plus interest, and liquidated damages in the same amounts as described above (\$50 to each employee or person whose rights were violated for each day or portion thereof that the violation occurred or continued, and three times the supplemental compensation withheld or \$250 (whichever is greater)), as well as reasonable attorneys' fees and costs. A person or entity enforcing the ordinance on behalf of the public is entitled only to equitable, injunctive, or restitutionary relief, and reasonable attorneys' fees and costs.

Preparing for Compliance

Employers with employees working in San Francisco should take the following steps to prepare for the law when it becomes effective:

1. Identify whether the company is a covered employer, and the date by which compliance will be required.
2. Revise company leave policies and employee handbooks to comply with the provisions of the ordinance.
3. Obtain OSLE forms and post OSLE notices relating to Paid Family Leave and supplemental compensation as they become available.
4. If the company must terminate or reduce an employee's wages within 90 days of the employee's request or application for Paid Family Leave, or during the employee's leave period, carefully document the reasons for the termination or reduction.
5. Implement procedures for retaining records relating to the payment of supplemental compensation and ensure such records can be easily produced to the OSLE.

If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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