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# together

## Navigating the Maze of Paid Sick Leaves

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# Agenda

- Determining the Right Paid Leave Program for Your Organization
- Structuring a Paid Leave Program to Help Prevent Leave Abuse
- The Interplay of Mandated Paid Leave and Voluntary PTO Policies
- The Intersection With Federal and State Unpaid Leave Laws
- Handling Paid Leave Under Cafeteria Plan and COBRA Rules
- Purchasing PTO Days Under a Cafeteria Plan
- ERISA Preemption
- Understanding Mandated Paid Leave Laws: Notice Provisions, Certification Requirements, and Covered Reasons
- Establishing the Terms and Conditions of a Paid Leave Policy

# The Right Program for Your Organization

- State and Local Compliance
  - Stay ahead of uptick in legislation mandating paid sick leave...what jurisdictional requirements currently apply?
- Financial Considerations
  - State laws requiring payout of unused leave depending on type offered
- Employee Relations Considerations
  - How will the most qualified candidates for a position perceive leave plan?
  - Leave Culture...population likely to abuse leave?

# The Right Program for Your Organization

- Legal Compliance
  - Not enough to simply provide specific number of days
  - Must comply with notice provisions, certification requirements, covered reasons, etc.
- Multi-state employers must consider how to structure programs to comply with varying state and local mandates
  - Same considerations come into play with unpaid state leave laws
  - Consider employee relations and administrative issues

# Structuring Paid Leave to Prevent Abuse

- Impose and clearly communicate terms and conditions for using paid leave to all employees
  - Provide and enforce specific notice, certification, and documentation requirements
  - Retain discretion to request additional information when permitted by law
- Determine how much leave to provide over and above legal mandate
- Determine if a “bucket” of leave for any reason will result in less abuse than separate “buckets”

# Interplay of Mandated Paid Sick Leave and Voluntary PTO Policies

- Considerations if PTO policy is already in place
  - Compliance with requirements of mandated paid sick leave
    - *Wide range of entitlements across jurisdictions mandating paid sick leave*
    - *Are equivalent leave entitlement and benefits provided under PTO policy?*
    - *Compliance with applicable requirements?*
  - Reducing PTO to comply with mandated paid sick leave may be viewed as reducing employee benefits creating employee relation issues

# Intersection With Federal and State Unpaid Leave Laws

- Federal Family and Medical Leave Act (FMLA)
  - Employers may impose the terms and conditions associated with a paid leave policy, as long as applicable written notices are provided to the employee.
  - Additional medical information (over and above what is permitted by the FMLA) may be obtained for paid leave benefit as long as employer makes clear that the additional information is only required to receive the paid leave benefit, and does not affect right to take unpaid FMLA leave.
  - State FMLA laws have similar “substitution” provisions.
- Paid sick leave mandates may provide coverage for similar reasons and may run concurrently. However, in many cases, paid sick leave provides coverage for additional qualifying reasons.

# Handling Paid Leave Under Cafeteria Plan and COBRA Rules

- Paid leave can be a source of pre-tax premiums for health and welfare benefits
- Can prepay, pay-as-you-go, or catch-up on return
- FMLA leave can allow employees to revoke health coverage elections or continue coverage, but discontinue contributions
- Upon return employee can reinstate health coverage on the same terms
  - Note that discontinued health FSA coverage can lead to a gap where incurred claims are ineligible for reimbursement

# Handling Paid Leave Under Cafeteria Plan and COBRA Rules

- There are special COBRA rules for FMLA
  - Not initially treated as a termination of employment or qualifying event
  - Only a QE when the individual does not return at the end of the FMLA leave
  - And only if coverage ends before the end of the maximum coverage period
  - COBRA duration clock begins at the end of the FMLA period

# Purchasing PTO Days Under a Cafeteria Plan

- Section 125 proposed rules allow employees to purchase extra PTO with pre-tax premiums
  - Purchased days must be used last after “nonelective” days
  - Purchased days cannot roll over into a subsequent year
  - Unused days must be forfeited or converted into taxable wages by the end of the year
- Very difficult to run a PTO buying program, particularly with the overlay of state and local mandated benefits

# ERISA Preemption

- Employers are subject to these state and local rules because their PTO programs are normally payroll practices that are not ERISA welfare benefit plans
- Expanding state and local rules have reawakened interest in “ERISAFying” PTO programs
  - Easy to contemplate; difficult to execute
  - Essentially requires funded VEBA that uses an actuary to determine necessary contributions and directly pay the benefits
    - *Likely to result in litigation with states, local governments, or employees*

# Understanding Mandated Paid Sick Leave Laws

- Require employers to grant to employees minimum amounts of paid sick leave to be used for qualifying reasons
- Eligibility, accrual, amount of entitlement, notice provisions, certification requirements, and covered reasons vary by jurisdiction
  - But some geographic similarities

# Understanding Mandated Paid Sick Leave Laws

- Mandatory paid sick leave laws in effect in:
  - Connecticut; Washington, DC\*; Jersey City, New Jersey; New York City\*; Portland; San Francisco; Seattle
- Mandatory paid sick leave legislation has been introduced in jurisdictions including:
  - Arizona, California, Florida, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York State, Newark,\*\* North Carolina, Oregon, Pennsylvania, Tacoma, Vermont, Washington

\* Significant amendments proposed

\*\* Passed by the City Council and pending signature by Mayor Quintana

# Common Provisions of Mandated Paid Sick Leave Laws

- Accrued but unused sick leave can be carried over to next year
- Cap on annual accrual of sick leave time (except San Francisco)
- Payout of accrued but unused sick leave time not required by paid sick leave statute
- Use of leave by employee or covered family members/dependents for general health reasons
  - Illness, injury, or health condition
  - Medical diagnosis, care, or treatments
  - Preventative medical care
- Some jurisdictions specifically provide leave for domestic/family violence, sexual assault, stalking

# Common Provisions of Mandated Paid Sick Leave Laws

- Most jurisdictions have broad definitions of “family member”
  - Some recognize “committed relationships” involving cohabitation
- Employee notice to employers
  - 7-10 days for foreseeable leave
  - Otherwise, typically as soon as practicable
- Typically certification for leave of three consecutive days or more
- Poster and/or individual employee notification
  - Translations in other languages may be required based on workforce
- Recordkeeping
- Anti-retaliation
- Some permit waiver by CBA

# Connecticut

- Employers with 50 or more employees are covered
- Manufacturing businesses classified in NAICS sectors 31-33 and certain 501(c)(3) organizations are exempt
- Accrual of one hour per 40 hours worked begins on date of hire
- Accrued leave can be used after 680 hours of work
  - One time requirement
- Employees can accrue and use up to 40 hours per calendar year
- Leave for victims of family violence or sexual assault can be used for the employee only (not employee's child or spouse)
- Seven days' notice for foreseeable leave; but otherwise as soon as practicable
- Certification permitted if absence 3 or more consecutive work days

# Washington, D.C.

- Broad coverage of employers and employees (expanding further)
- Regulations provide employee eligibility is employment for one year and at least 1,000 hours worked during the year to begin accruing leave (this will change).
- Accrual rates depend on number of employees
  - 100+ employees: 1 hour for every 37 hours worked
- Employees can accrue and use up to 7 days per calendar year
- Leave can be used for illness and for absences associated with domestic violence or sexual abuse
  - For employee or family members
- Employer can require employees to provide documentation within one business day of their return to work if absence 3 or more consecutive days; notice requirements may apply as well.

# Jersey City

- All employers with more than 10 employees must provide paid leave
- Covers employees who work in Jersey City at least 80 hours in a calendar year
- Accrual of one hour per 30 hours worked begins on date of hire
- Accrued leave can be used after 90<sup>th</sup> calendar day of employment
- Employees can accrue and use up to 40 hours per calendar year
- Reinstatement of unused time if employee is rehired within 6 months
- Includes leave time for closure of employee's place of business or child's school or place of care due to public health emergency or if family member is a risk to public health
- Employee need only provide oral request/notice as soon as practicable
- Individual employee notification and poster required
- Three-year recordkeeping requirement

# New York City

- Employers with 20 or more employees are covered as of April 1
  - Independent Budget Office confirmed in December that economic indicators met the requisite threshold for ordinance to be effective on earliest date
  - *City Council expected to pass amendment dramatically expanding coverage*
- Exempts manufacturing businesses in NAICS sectors 31-33
- Covers employees who work in NYC at least 80 hours in a calendar year
- Accrual of one hour per 30 hours worked begins on date of hire or effective date of ordinance
- Accrued leave can be used after 120<sup>th</sup> calendar day of employment
- Employees can accrue and use up to 40 hours per calendar year
- Reinstatement of unused time if employee is rehired within 6 months
- Includes leave time for closure of employee's place of business or child's school or place of care due to public health emergency
- Notice to current employees (by May 1<sup>st</sup>) and new hires required

# Seattle

- All employers with more than four “full-time equivalent” (FTE) employees (regardless of where they work)
  - Employees’ leave entitlement depends on number of FTEs
- Employees must work 240 hours in Seattle in a calendar year to be eligible
- For employers with at least 250 FTEs, accrual of one hour per 30 hours worked begins on date of hire, with maximum accrual of 72 hours per calendar year
- Accrued leave can be used after 180<sup>th</sup> calendar day of employment
- Includes leave time for closure of employee’s place of business for health/safety reasons and for reasons related to domestic violence, sexual assault, or stalking
- Reinstatement of unused time if employee is rehired within 7 months
- Documentation can be required if clear instance or pattern of abuse
- Employees must be provided with available leave time on paystub and/or online
- Runs concurrently with federal and state leave laws (if applicable)

# Portland

- Covers employers with 6 or more employees and employees who work at least 240 hours a year in Portland (starting January 1, 2014)
- Accrual of one hour per 30 hours worked begins on date of hire or effective date of ordinance
- Accrued leave can be used after 90<sup>th</sup> calendar day of employment
- Employees can accrue and use up to 40 hours per “year”
- Includes leave time for closure of employee’s place of business or child’s school/place of care due to public health emergency, if family member is a risk to public health, or if employee is excluded from workplace for health reasons
- Reinstatement of unused time if employee is rehired within 6 months
- Employee notice before the start of his/her shift or as soon as practicable
- Certification may be required if absence more than 3 consecutive days and in cases of abuse.

# San Francisco

- Broad employer and employee coverage
- Employees start to accrue 90 calendar days after start date
  - 90 days does not have to be continuous or worked in San Francisco
- Employees accrue one hour for every 30 hours worked
- 72-hour “cap” for large employers (at any point in time)
- No cap on how much leave time employees may use per year
- Employees rehired within one year who previously completed eligibility period accrue leave time upon rehire
- Includes leave time related to care for a “designated person”
  - Special rules apply regarding employer obligations with respect to designated persons
- Four-year recordkeeping requirement

# Establishing Terms and Conditions of a Paid Leave Policy

- Make sure minimum jurisdictional requirements are incorporated if in the “employee’s” favor
- If greater leave is provided, determine if additional terms and conditions may apply beyond those permitted by law
- Make sure all notice and recordkeeping requirements are followed
- Ensure managers understand that paid sick leave mandated by law also is “protected” by law

# Other Legal Considerations When Implementing a Paid Leave Policy

- Additional obligations to provide leave as a reasonable accommodation under the ADA and similar state and local laws
  - Pregnancy disability leave may be required as well in some jurisdictions
- Wage and Hour Considerations
  - Cash-out of paid leave
  - Deduction issues when an employee exhausts leave



QUESTIONS?

# Presenters



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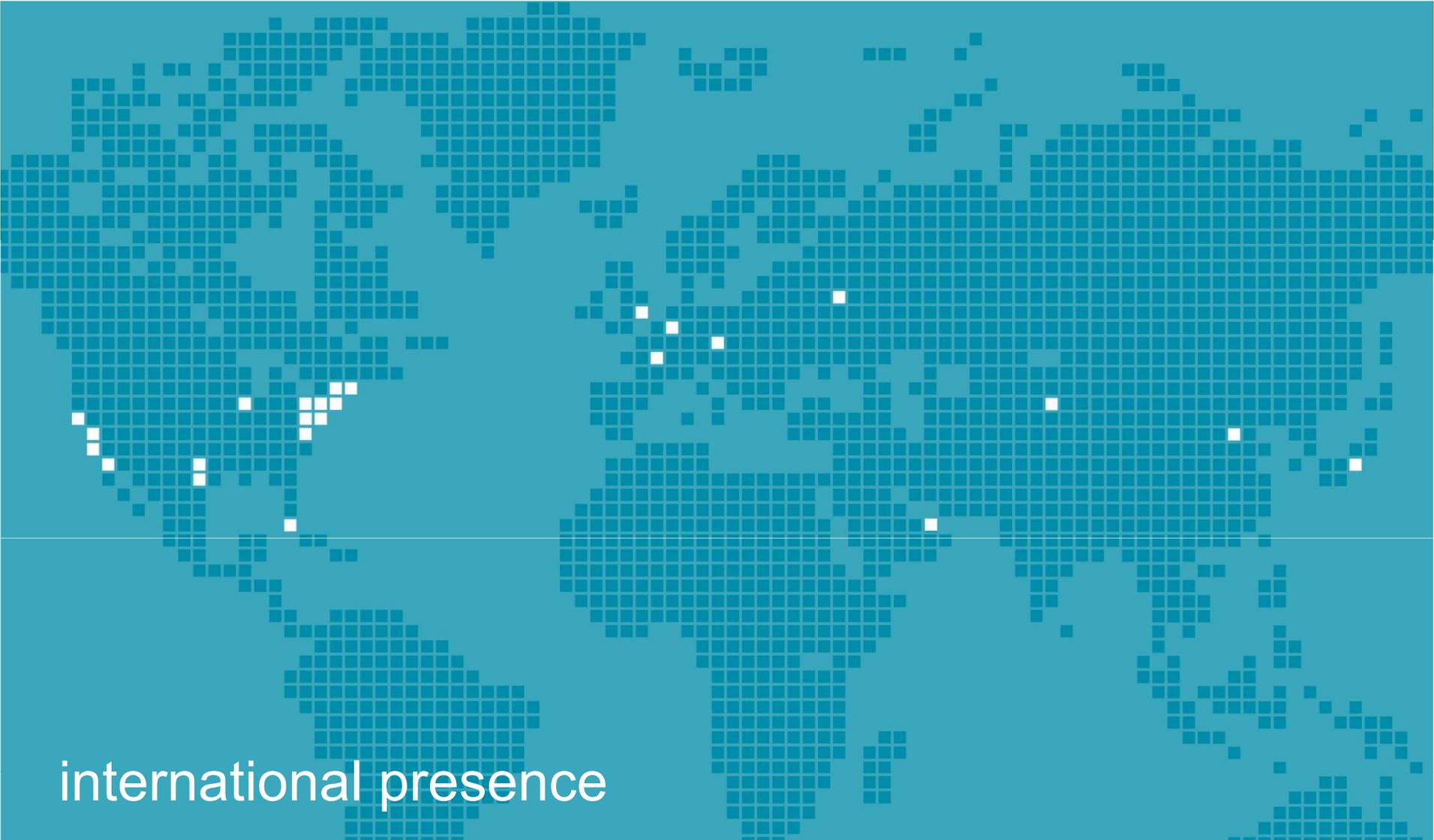
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