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When Will D.C. Sick and Safe Leave Act Amendments Apply?

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Recent updates to the official **District of Columbia Code** appear to relieve employers at this time from any obligation to comply with the District's **Sick and Safe Leave Act Amendments Act of 2013** — after many employers in the District of Columbia, particularly those in the hospitality industry, already have made changes to their paid leave policies to comply with the amendments, as a precaution against possible private civil litigation. The Act, which took effect on February 22, 2014, amended the D.C. Accrued Sick and Safe Leave Act of 2008 ("SSLA") to expand the number of employees eligible for sick and safe leave and made other significant changes, described below.

jackson lewis.

Article By Francis P. Alvarez
Teresa Burke Wright Joseph J. Lynett
Jackson Lewis P.C.
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Amendments Took Effect February 22

Changes to the SSLA include **removing a requirement** that employees be employed for one year prior to accruing SSLA leave. Instead, the Act provides that leave starts to accrue on the date of hire and can be used after 90 days. Under the amendments, employees are eligible to accrue and use SSLA leave whether or not they have worked 1,000 hours in the prior 12 months. The amendments also extend the law to cover tipped restaurant employees — a sea change for the hospitality industry. They appear, as well, to remove a provision mandating that accrued sick/safe leave carry over indefinitely from year to year, and a companion provision that employees can use only one year's accrual of leave in any calendar year (although the removal may have been inadvertent). Finally, the amendments strengthen employee anti-retaliation protections and, for the first time, permit employees to sue for violations of the SSLA. (For more on the amendments, see our article, District of Columbia Strengthens Employee Sick and Safe Leave Protections.)

Effective Date vs. Applicability

The February 22, 2014, revisions state that the amendments will not "apply" until the new law has been included in an approved budget and financial plan, which was not expected to occur before 2015. Apparently, however, there were insufficient funds in the District's Fiscal Year 2014 through 2017 budget and financial plan for the D.C. Department of Employment Services to implement the new law. Commentators, including Jackson Lewis, and industry groups generally said the best practice is for employers to take steps immediately to comply. The Society for Human Resource Management, for example, stated that:

> Employers should waste no time moving to bring employee leave tracking and recordkeeping into compliance because, regardless of when the district begins to enforce the law, it appears that employers must begin tracking leave for the expanded group of covered employees as soon as the act takes effect.

We, too, recommended that employers comply with the new law as of February 22, in part because employees could bring a private lawsuit to enforce the law, whether the Department of Employment Services has the funding to enforce the law or not.

Official D.C. Code Appears to Show Amendments Nonexistent

Since then, the official D.C. Code has been updated. Although the latest version refers to the Sick and Safe Leave

Act amendments, it appears to show that these changes do not yet apply. The Code acknowledges the amendments in the "legislative history" section of the affected code provisions, and recognizes that those amendments "became effective on February 22, 2014," but goes on to say:

Section 3 of D.C. Law 20-89 [the Act] provided that the act shall apply upon the inclusion of its fiscal effect in an approved budget and financial plan, as certified by the Chief Financial Officer to the Budget Director of the Council in a certification published by the Council in the District of Columbia Register.

Even more significantly, the new provisions *are not incorporated into the official D.C. Code*. The D.C. Code still defines an eligible employee as someone who has worked for the employer for one year and has worked 1,000 hours during the preceding 12 months. It still excludes from eligibility for sick and safe leave "Restaurant wait staff and bartenders who work for a combination of wages and tips." The Code still states that "paid leave accrued during a 12-month period shall carry over annually" and that "an employee shall not use in one year more than [his maximum annual accrual.]" In short, the official D.C. code does not reflect the amendments that took effect in February actually exist.

What Should Employers Do?

This ambiguity leaves employers with a few options. First, they can continue to comply with the SSLA changes that went into effect in February, even though the amendments do not yet "apply." Many employers already have implemented significant changes to their leave policies to comply with the February 22 amendments, because it was not clear initially whether a law that was in "effect" but did not yet "apply" had to be complied with, and if so, how.

Alternatively, employers can take the position that compliance is unnecessary because the official D.C. Code shows that these changes are not part of current law. Employers should recognize that when the Act finally does "apply," retroactive accrual of leave back to February 22, 2014, is possible. However, under the official code, at this time, there does not appear to be any legal requirement to provide sick/safe leave to employees within their first year, to tipped restaurant workers, or to comply with any of the Act's other changes.

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