

CONNECTICUT MANDATES PAID SICK LEAVE AND BARS PRE-EMPLOYMENT CREDIT CHECKS

By Scott J. Wenner

With Democrats fully in control of both legislative houses and the governorship of a union-friendly state for the first time in more than a decade, two new laws have been enacted that place Connecticut at the leading edge of the current progressive agenda. First, in June of this year, Governor Daniel Malloy signed the first-in-the-nation mandatory sick leave law at the state level, joining the cities of San Francisco, Washington, D.C. and Milwaukee in requiring that paid sick leave be granted to most non-exempt employees who meet minimal requirements. Now, Governor Malloy also has signed into law an act that forbids pre-employment credit checks in Connecticut except where required by law or when limited exceptions are met.

Paid Sick Leave Law

Public Act No. 11-52, Connecticut's newly minted mandatory paid sick leave law, will become effective on January 1, 2012.

Covered Employers. The law will apply to any person, business, educational institution, nonprofit agency, corporation or other entity that has 50 or more employees in the State of Connecticut during any quarter of the previous year, measured each January 1. Certain manufacturers and nationally chartered 501(c)(3) nonprofit organizations that provide recreation, child care and educational services are exempted.

Eligible Workers. Each covered employer must provide paid sick leave to each of its service workers in Connecticut. A "service worker" is any employee paid on an hourly basis who is primarily engaged in a kind of occupation identified in the Act. These include, but are not limited to, registered nurses and nurse practitioners, cashiers and retail salespersons, waiters and waitresses, child care workers, pharmacists, dental hygienists and assistants, food service managers, social workers, secretaries and administrative assistants, computer operators and librarians.

Qualifying Leaves. The following are acceptable reasons for a paid leave: (i) the service worker's own illness, injury, health condition, or preventative medical care; (ii) the ill-

ness, injury, health condition or preventative medical care of the service worker's spouse or child; (iii) receipt of medical care, counseling or victim services following the worker's subjection to family violence or sexual assault, or to relocate or participate in related legal proceedings following said family violence or sexual assault.

Accrual of Paid Sick Leave Benefits. On and after January 1, 2012, eligible workers will be entitled to accrue paid sick leave at a rate of one hour for each 40 hours worked, up to a maximum of 40 hours per calendar year. Employees may carry over up to 40 unused accrued hours from one calendar year to the next, but may not use more than 40 accrued hours in any one year.

Use of Paid Sick Leave Benefits. An employee must have completed 680 hours of employment after January 1, 2012 to be eligible to use accrued paid sick leave. Further, no employee who did not work an average of at least 10 hours per week in the most recent full calendar quarter may take paid sick leave. Employees are not entitled to payment for unused accrued sick leave upon termination of employment unless payment is mandated by a collective bargaining agreement or the employer has an established policy of paying for accrued unused benefits at termination.

Rate of Pay. While on paid sick leave employees must receive their regular rate of pay or the Connecticut minimum wage, whichever is greater. Where the employee is paid at varying rates, e.g., depending on job or shift assignment, the pay rate must be the average wage the employee was paid in the pay period immediately before the period in which leave is taken.

Notice Obligations — Employer. Covered employers must notify service workers *at the time of hire* of: (i) their entitlement to paid sick leave; (ii) the amount of paid leave provided; (iii) the conditions for using paid leave; (iv) the prohibition against retaliation for using paid sick leave; and (v) the right to file a complaint with the Labor Com-

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missioner for any violation. This may be satisfied by posting, but a policy in an employee handbook and other effective means appear to be acceptable as well.

Notice Obligations — Employee. An employer may require up to seven days advance notice of a foreseeable paid sick leave, but may only demand reasonable notice if the need for leave was unforeseeable. A health provider's note may be required for a leave of three days or greater, and a court or other reasonable document may be required if the leave is related to violence or sexual assault.

Relationship to Other Leave Policies. If the employer offers any other forms of paid leave, e.g., vacation or personal days, they will be sufficient to comply with the sick leave law if: (i) those leaves may be used for the purposes required by the sick leave law; and (ii) leave accrues at least at the rate required by the sick leave law. Employers that use an undifferentiated paid time off policy and pool vacation, personal and sick leave must ensure that the minimum paid sick time required under the sick leave law is always available to the eligible employee.

Violations and Remedies. Employees may complain of violations to the Connecticut Department of Labor. After a hearing the Labor Commissioner may impose \$100 civil penalties for each failure to provide required leave and can award employees reinstatement and back pay and benefits as appropriate. The penalty for retaliation is \$500.

Mandatory Credit Checks for Applicants and Employees Banned for Most Employers

On July 13, Connecticut's Governor signed S.B. 361 into law making Connecticut the sixth state to bar mandatory consent to credit checks by employees and applicants after October 1, for all but financial employers. At least half a dozen other states, including California and New York, are considering similar bans. At the federal level the Equal Employment Opportunity Commission (EEOC) has held hearings to express disapproval of the practice of requiring credit checks and within the past year commenced at least two lawsuits challenging the use of credit and criminal background checks, claiming that they have a disparate impact based on race while neither is sufficiently job-related nor justified by business necessity. *EEOC v. Kaplan Higher Education Corp.*, Civil Action No. 1:10-cv-02882 (N.D. Ohio 2010); *EEOC v. Freeman*, No. 09-cv-02573 (D. Md. 2009). Both cases remain active and the viability of the claim of discrimination remains to be decided in both.

Prohibition. Under the law it will be unlawful for any employer other than financial institutions to require an applicant or employee to give consent for the employer to obtain a credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers.

Covered Employers. The new law forbids credit checks at all Connecticut places of employment regardless of size except for financial institutions. A "financial institution" is defined by the new statute as "any entity or affiliate of a state bank and trust company, national banking association, state or federally chartered savings bank, state or federally chartered savings and loan association, state or federally chartered credit union, insurance company, investment advisor, broker-dealer or an entity registered with the securities and exchange commission." *Public Act No. 11-223*, §1(a)(3).

Exemptions. For employers that are not financial institutions, the new law provides only three exceptions: (i) where the credit report is required by law; (ii) where the employer reasonably believes that the employee has engaged in activity that violates a law related to the employee's employment; and (iii) where a credit report is "substantially related" to the employee's current or potential job, or if the employer has a *bona fide* purpose in obtaining information in the credit report that is both job-related and disclosed in writing to the employee or applicant. However, this seemingly broad exemption is substantially narrowed by the law's definition of "substantially related."

To be "substantially related", one of the following must apply to the position for which the employee or applicant is being considered:

- i. The job is a managerial position that includes setting the direction or control of a business, division, unit or agency of a business;
- ii. The position entails access to personal or financial information of customers, employees, or the employer beyond what would be provided in a retail transaction;
- iii. The position requires a fiduciary responsibility to the employer, including the authority to issue payments, collect debts, transfer money or enter into contracts;
- iv. The job gives access to confidential and proprietary business information or trade secrets;

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- v. The job will provide access to the employer's nonfinancial assets valued at \$2,500 or more, including, but not limited to, museum and library collections, and to prescription drugs and other pharmaceuticals.

Violations and Remedies. Aggrieved applicants and employees may file a complaint with the Connecticut Department of Labor. The Labor Commissioner must commence an investigation and issue findings within 30 days of receipt of a complaint. If the findings warrant further action, the Labor Commissioner next must conduct a hearing and may assess a penalty of \$300 for each unlawful inquiry found to have been made.

Practical Steps to Take Before These New Laws Become Effective

Fortunately, there is adequate time before these laws become effective in October (credit check ban) and January (paid sick leave) for employers to understand their obligations and develop a compliance strategy. The following measures should be considered by all employers operating in Connecticut:

1. If a business has 50 or more employees in Connecticut, it should obtain qualified advice on whether it is covered by the paid sick leave law. That question, in turn, depends largely upon whether its employees include at least 50 "service workers" – a determination based on how many of its employees are employed in one of 68 standard occupation codes and job titles that are defined by the U.S. Department of Labor's Bureau of Labor Statistics in its Standard Occupational Classifications.
2. Covered employers should carefully review existing sick leave or paid time off policies to determine whether they already comply with the paid sick leave law, as many larger and mid-sized employers already will.
 - a. Where an employer's existing policies are compliant for its full-time service workers, specific attention should be paid to part-time workers who average more than 10 hours per week, as some employers do not make part-time employees eligible for benefits, including sick leave.
 - b. In determining that it is compliant, an employer must ensure that it fully complies – that is, that it satisfies

the accrual rate and carry-over requirements of the Connecticut law in addition to allowing full-time employees to take up to five paid sick leave days per year.

3. Covered employers should review and revise employee handbooks and offer letters to ensure that their service workers are advised of their paid sick leave rights at their time of hire.
4. Covered employers should review timekeeping systems to make sure that they can keep track of accrual, use and carry-over of paid sick leave.
5. Management and supervisors should be alerted to the paid sick leave requirements and their obligation not to retaliate against any employee who seeks leave under the employer's paid sick leave policy.
6. All employers within the State of Connecticut who are not financial institutions or otherwise exempt must discontinue and/or refrain from requiring credit checks of employees and applicants as a condition of employment or continued employment.

If you have any questions about these two new laws, please contact the authors using the information provided below. ♦

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.

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