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Labor & Employment Bulletin

OHIO HEALTHY FAMILIES ACT: WHAT NEXT?

The Ohio Healthy Families Act (“OHFA”) now seems destined to be on the November 4, 2008 ballot to be voted on by all Ohioans. If it becomes law, employers of twenty-five (25) employees or more will be required to provide employees seven (7) days of **paid** sick leave per year. To prepare for this new law, employers must review and make any revisions to their paid time off policies **before** OHFA becomes effective.

The noise level surrounding OHFA has increased substantially in the last few weeks. As those backing this initiative pushed forward, Governor Strickland attempted to broker a compromise among the supporters and opponents of the initiative. At the same time, those opposed to the initiative have become much more visible in their opposition. While Governor Strickland continues his efforts toward compromise, it seems unlikely those efforts will be successful. September 5, 2008 is the last possible date for compromise as that is the last day to remove the initiative from the November ballot. Due to the vague and ambiguous language utilized in OHFA, there are many unanswered questions regarding how this law would be applied. Benesch has been advising employers to take a wait-and-see approach given the possibility that compromise or delay might keep this initiative off the November ballot. As it now appears likely that the measure will be on the ballot, it is time to plan for its implementation.

1. Status

The supporters of OHFA, principally the

Service Employees International Union, have obtained and submitted many more signatures than are necessary to have the measure appear on the ballot November 4, 2008. A recent poll showed that approximately 70% of likely voters will vote in favor of OHFA. Those opposed are in full campaign mode against OHFA. Thus, it appears that a compromise or delay of any kind is unlikely. As a result, Ohio employers need to begin preparation for the law's implementation, as it remains likely to pass if voted upon. If passed by Ohio voters, OHFA will become effective thirty (30) days thereafter.

2. Summary of OHFA

OHFA requires all employers who employ 25 or more employees to provide employees with seven (7) paid sick days per year. Employees working thirty (30) or more hours per week will be entitled to the full seven (7) days of sick leave annually. Employees working less than thirty (30) hours per week (1560 hours per year) will be entitled to a pro rata amount of paid sick leave. If schedules vary, a weekly average of hours worked over the twelve (12) week period immediately prior to the leave is to be used to determine the amount of time the employee is entitled to take.

The sick leave may be used for any absence of an employee for any of the following reasons:

- 1 The employee's physical or mental illness, injury or medical condition of employee.
- 2 The employee obtaining professional

medical diagnosis or care, or preventive medical care.

- 3 The employee caring for a child, parent or spouse who has conditions or needs diagnosis or care described in 1 or 2 above.

The sick leave must be granted upon oral or written request. Thus, requiring a written request is not permitted under OHFA. Employees are required to provide seven (7) days' notice if the need for the leave is foreseeable. If not foreseeable, notice is required as soon as practicable. Employees may use sick leave in increments that are the smallest the employer utilizes to track attendance, but in no event less than one hour increments.

Employers may require certification from health care providers verifying the reason for the leave **only** if the leave is **more** than three (3) consecutive days. Employees have thirty (30) days after the first day of the leave to provide any required certification.

OHFA requires that employees begin accruing sick leave from the first day of work, although employers are required to grant the sick leave only after ninety (90) days of employment. Accrual of sick leave must be on at least a monthly basis and, after the initial ninety (90) days of employment, it may be used as it accrues. OHFA also requires that unused sick leave be carried over year to year, but states that employers are not required “to permit employee[s] to accumulate more than seven (7) days of sick leave per year.” It is unclear whether this means that employers can

limit employees to a maximum of seven (7) days of accumulated sick leave at any one time, or that the employers may limit the amount of time carried over each year to seven (7) days, but otherwise an unlimited bank of days builds year to year.

OHFA provides employees with several new legal claims they can bring against employers in the event of a violation of its requirements. The law prohibits employers from: (i) denying or interfering with any right provided by OHFA; (ii) discriminating or discharging any employee who opposes a practice made unlawful by OHFA; (iii) treating the employee's use of sick leave as a "negative factor" in any employment action; and (iv) counting use of paid sick leave under a "no-fault" attendance policy. Violations of these prohibitions can result in liability for back wages and benefits, interest, treble damages and attorneys' fees.

3. Problems and Uncertainty

Unfortunately, OHFA creates a number of problems and uncertainties for Ohio's employers. For example, no medical verifications for absences of three (3) days or less are permitted. Obviously, the potential for abuse is great in this regard. For those absences of more than three (3) days, an employee has thirty (30) days to provide a medical certification and the employer is prohibited from delaying the leave pending receipt of the certification. This also will adversely impact an employer's ability to monitor use of the sick leave. Also, there is nothing in the law which indicates whether, or how, an employer may challenge a certification. In addition, there is no definition of what constitutes an injury or illness entitling employees to use the paid sick leave. Other unanswered questions include: how the law will be applied to salaried employees; how a "day" is to be construed where an employer utilizes shifts of more than eight (8) hours; and whether employees are entitled to pay for unused sick leave upon termination of employment.

The enforcement provisions also create significant, new risks for employers. The

prohibition against considering the use of sick leave as a "negative factor" in employment action is exceedingly vague. Assume an employee who recently used sick days is terminated for poor performance unrelated to the time off. It will be very easy for the employee to allege that the termination was related to the use of sick leave and initiate a lawsuit on that basis. The same can happen in the context of a promotion denial, wage increase and any other employment decision. There seems little doubt that litigation against employers will significantly increase if OHFA becomes law.

4. Need For Policy Review Prior To November

OHFA also provides that once enacted, employers can not change any policy to reduce or eliminate any form of leave time to comply with the law. Thus, if OHFA becomes law, an employer providing five (5) days sick leave and ten (10) days of vacation will not be able to reduce the ten (10) days of vacation to increase the sick leave to seven (7) days. It would simply have to increase the available sick days. Thus, it is vitally important for employers to review their leave policies and be prepared to make any desired changes prior to OHFA's effective date.

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

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Additional Information

If you have additional questions or would like to discuss the impact of OHFA on your specific operations and policies, please contact any of the following members of Benesch's Labor & Employment Practice Group:

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