

Developing a Paid Leave Policy for Cancer Screenings



Cancer is the second leading cause of death in the United States.¹ Early detection of breast, colorectal and cervical cancer dramatically improves treatment outcomes.² However, employees without access to paid time off for cancer screenings are less likely to obtain recommended screening tests.³ Failure to detect cancer early affects employers: Each cancer diagnosis is estimated to annually cost a business \$1,601 in lost productivity.⁴ By providing paid leave for cancer screenings, employers may realize a healthier workforce and reduce spending on worker compensation and disability costs, replacement costs for ill or injured employees who are absent, and recruitment and training costs for new employees.⁵

How does an employer develop an effective policy of providing paid leave for employee breast, colorectal and cervical cancer screenings?

■ Assess whether employer may build on current leave program or must design a new policy.

- Determine whether employer currently offers any paid time off outside of general paid sick or vacation leave.
 - > If leave is available for cancer screenings, confirm it is available to all employees and covers breast, colorectal and cervical cancer screenings.
- If leave is not available for cancer screenings, at a minimum add a specific leave for key cancer screenings (i.e., breast, colorectal and cervical cancers) that will not be charged against accrued sick time or other paid time off.

■ Include anti-retaliation provisions.

- Prohibit retaliation by supervisors and others against employees using the benefit.

■ Prohibit “replacement worker” requirements.

- Do not require an employee to find someone to cover his or her shift during the leave period.
- The policy may require advanced notice to supervisor to ensure shift is adequately covered.

■ Maintain central records of leave use.

- Employers who maintain a record of employees' use of the leave benefit can not only track leave balances, but can also analyze program effect on screening rates (particularly if an anonymous pre-implementation survey is conducted to determine screening rates), identify changes that may benefit the program and ascertain costs of the program.
- The policy should not impose onerous or invasive documentation requirements on employees; sufficient documentation for employer records may be a simple form identifying the type of screening and signature of health care provider.

■ Include union leadership in the process.

- Determine whether employees belong to a union. Any change in benefits may require negotiation and will not take effect until the next contract period.⁶
 - > If the paid leave will be an added benefit, with no alteration to existing negotiated benefits, negotiation may not be necessary.
 - > Talk to union leadership, identify concerns, include them in the process and earn their support.
 - > Check with an attorney or law department to ensure compliance with relevant labor laws.

■ Be mindful of Employment Retirement Income and Security Act (ERISA).

- ERISA establishes minimum standards for certain pension and benefit plans maintained by *private employers*.⁷
- Wages paid during cancer screening leave should be treated as a typical payroll practice.⁸ If a separate fund is set up or used for these payments, it may be considered a health or welfare benefit fund and ERISA may govern administration of the program.
 - > Check with an attorney or law department to ensure compliance with relevant labor laws.

■ Publicize the benefit!

- Employees need to know about the new policy in order to use it. Let them know their health is valued.
- Encourage employees to use the new leave time and provide educational materials on breast, colorectal and cervical cancer screenings and the benefits of early detection.

For more information about paid leave policies for cancer screening, e-mail canserv@health.ny.gov or go to www.ny.gov and search “Breast Cancer Program Leave Policy.”

¹ AMERICAN CANCER SOCIETY, CANCER FACTS AND FIGURES, 2 (2014), available at <http://www.cancer.org/research/cancerfactsstatistics/cancerfactsfigures2014/>.

² See AMERICAN CANCER SOCIETY, CANCER FACTS AND FIGURES, 10-12, 23 (2014), available at <http://www.cancer.org/research/cancerfactsstatistics/cancerfactsfigures2014/>.

³ Lucy A. Peipins et al., *The Lack of Paid Sick Leave as a Barrier to Cancer Screening and Medical Care-Seeking: Results from the National Health Interview Survey*, BMC PUBLIC HEALTH 1, 1 (2012), (finding that “[t]he percentage of workers who underwent mammography, Pap test, endoscopy at recommended intervals, had seen a doctor during the prior 12 months or had at least on visit to a health care provider during the prior 12 months was significantly higher among those with paid sick leave as compared with those without sick leave.”), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3433348/pdf/1471-2458-12-520.pdf>; see Won Kim Cook, *Paid Sick Days and Health Care Use: An Analysis of the 2007 National Health Interview Survey Data*, 54 AM. J. IND. MED. 771-779, 777 (2011) (finding that “[f]or U.S. working adults with health insurance coverage, access to paid sick days benefits was significantly associated with increased use of outpatient care and reduced use of emergency care”), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3168716/pdf/nihms305969.pdf>; see also Fernando A. Wilson et al., *The Role of Sick Leave in Increasing Breast Cancer Screening among Female Employees in the U.S.*, 2 JOURNAL OF CANCER POLICY 89 (2014) (finding that access to paid sick leave was associated with significantly increasing odds of employed women obtaining breast cancer screening).

⁴ Rebecca J. Mitchell & Paul Bates, *Measuring Health-Related Productivity Loss*, 14 POPULATION HEALTH MGMT. 93, 96-97 Fig. 1 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3128441/pdf/pop.2010.0014.pdf>; cf. Donatus U. Ekwueme et al., *Medical Costs and Productivity Losses of Cancer Survivors—United States 2008–2011*, 63 MORBIDITY AND MORTALITY WEEKLY REPORT 505, 509 Table 2 (June 13, 2014) (of cancer survivors that return to work after treatment, productivity losses average \$1459 for men and \$1330 for women, compared to those without a history of cancer).

⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, BENEFITS OF HEALTH PROMOTION PROGRAMS (2010), available at <http://www.cdc.gov/workplacehealthpromotion/businesscase/benefits/index.html>; see also Abay Asfaw et al., *Paid Sick Leave and Nonfatal Occupational Injuries*, 102 AMERICAN JOURNAL OF PUBLIC HEALTH e59 (2011) (finding employees with paid leave were 28% less likely than those without to suffer injury on the job).

⁶ The right to collectively bargain is regulated by federal and state laws, including the National Labor Relations Act (29 U.S.C. § 151 et seq) and the New York State Labor Relations Act (N.Y.S.LAW ch. 31, art. 20, § 700). Negotiated contracts may include terms concerning any matters that impact the employee-employer relationship, though federal law requires that matters related to “wages, hours, and other terms and conditions of employment” be negotiated and included in any agreement (29 U.S.C.A. § 158(d)).

⁷ 29 U.S.C. § 1001 et seq; 29 C.F.R. Part 2509 et seq.

⁸ Paid sick leave is not traditionally considered an ERISA-regulated plan so long as it is administered as a “payroll practice.” *Shea v. Wells Fargo Armored Service Corp.*, 810 F.2d 372, 376 (N.Y. 1987). In other words, so long as pay for those sick days is treated as normal compensation and paid out of the employer’s general assets, it will not be subject to ERISA regulation. 29 C.F.R. § 2510.3-1(b).