



California Adopts the Nation's Second Bill Requiring Paid Sick Leave for Most Employees

California Governor Jerry Brown, on August 29, 2014, signed the California Healthy Workplaces, Healthy Families Act of 2014, which requires all California employers to provide at least three paid sick days per year to employees, with only very limited exceptions. This law applies to all private-sector employers regardless of size and to all state, county, and municipal employers.

Effective Date of the New Paid Sick Leave Rules

The Act's provisions for the accrual and use of paid sick days becomes effective on July 1, 2015. However, as discussed in "Permissible Uses of Sick Leave," below, the Act contains posting, recordkeeping, and pay stub disclosure requirements that may be effective January 1, 2015.

Required Accrual of Paid Sick Leave; Limitations on Use of Paid Sick Leave

The Act requires that employers permit employees to accrue paid sick days at the rate of at least one hour of paid sick leave per every 30 hours worked, or approximately 8.7 sick days per year for a full-time employee. However, the employer may limit the use of

paid sick days to 24 hours or three days in each year of employment.

Employees who work 30 or more days within a year from commencement of employment are entitled to accrue and use paid sick leave. An employee is entitled to use accrued sick leave beginning on the 90th day of employment.

The Act further requires that accrued paid sick days carry over from year to year, but the employer may limit the amount of carried-over, accrued paid leave to 48 hours or six days, as long as the employer does not otherwise limit the employee's right to accrue and use paid sick leave. Sick leave may be used in increments of less than a full day. An employer may establish a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.

Effect on Existing Sick Leave or PTO Plans

Many employers already have sick leave or personal time off plans that comply with most or all of the statute. For those employers, the employer's current plan will be deemed to satisfy the statute, and no additional leave accrual is required, if the employer (i) makes available the required amount of leave to be used for

the employee's illness or the illness of a child, spouse, parent, stepparent, grandparent, grandchild, sibling, or certain other family members; (ii) the employer's plan provides for paid leave at the same rate of pay as the employee normally earns during regular work hours; and (iii) the employer's plan permits the carryover of paid sick leave and an accrual rate no less favorable than required by the statute.

Existing sick leave or personal time off plans will be deemed to comply with the accrual/carryover requirements if the plan provides no less than 24 hours or three days of paid sick leave or the equivalent for each year of employment and if it permits the carryover of accrued paid sick leave or personal time off up to at least the 24 hour or three day per year accrual "cap" in the statute.

No Payment of Accrued Sick Leave on Termination (Usually)

Generally, sick leave pursuant to the Act need not be paid on termination of employment (discharge, quitting, or retirement). However, many employers' current "personal time off" plans are treated under California law as the equivalent of vacation pay. Accrued, unused leave under those plans must be paid at the time of termination of employment.

If an employee separates from employment and is rehired by the employer within one year from the date of separation, previously accrued and unused pay sick days must be reinstated. The employee being rehired is entitled to use the previously accrued but unused paid sick days and to accrue additional paid sick days based on the date of rehire.

Rate of Pay for Paid Sick Leave

For employees paid by methods where the wages fluctuate (e.g., commission, piece rate, multiple hourly rates, etc.), the rate of pay for paid sick leave is determined by dividing the employee's total wages for the 90 days of employment before taking the sick leave by the total hours worked in that period, excluding overtime premiums. Hourly employees are paid according to their hourly rate of pay. Overtime-exempt employees are deemed to work 40 hours per work week unless the normal work week is less than 40 hours, in which

case the employee accrues paid sick days based upon that normal work week.

Sick leave taken by an employee must be paid no later than the payday for the next regular payroll period after the sick leave was taken.

Requirement for Advanced Notice

The employee must provide reasonable advance notice of the use of paid sick leave if the reason for the paid sick leave is foreseeable. If the need for the paid sick leave is not foreseeable, the employee must provide notice of the need for leave as soon as practicable. Paid sick leave must be paid no later than the next regular payroll period after the sick leave was taken.

Permissible Uses of Sick Leave

Paid sick days may be used for the diagnosis, care, or treatment of an existing health condition or preventive care for an employee or the employee's family member. "Family members" include a child, foster child, stepchild, legal ward, a child to whom the employee stands *in loco parentis*, a parent (biological, adopted, or foster parent), stepparent, legal guardian, spouse, registered domestic partner, grandparent, grandchild, sibling, or a person who stood *in loco parentis* when the employee was a minor child. The Act also requires that sick leave be available for use by an employee who is a victim of domestic violence, sexual assault, or stalking.

Postings, Notification, Recordkeeping, Paystub Disclosure Requirements

The Act contains several posting, recordkeeping, disclosure, and notification requirements. First, the employer must provide the employee with written notice of the amount of paid sick leave available or paid time off that the employer provides in lieu of sick leave, either on the employee's itemized wage statement or in a separate writing provided on the designated paid date with the employer's payment of wages. This creates an obligation to notify all employees every pay period of the amount of sick leave or paid time off that can be

used for purposes stated in the Act. Failure to do so can result in penalties as discussed below.

Next, the employer must keep records for at least three years documenting the hours worked and paid sick leave days accrued and used by each employee. The labor commissioner must be allowed access to these records, and the employer must make the records available to an employee upon request in accordance with the provisions of California Labor Code Section 226. If the employer does not maintain such records, it cannot enforce the three-day annual usage and six-day maximum accrual “caps” unless it shows the employee’s actual usage, or the existence of those caps, by “clear and convincing evidence.”

The Act also requires that the employer display a poster in a conspicuous location in the workplace containing a description of the requirements of the Act. The poster must also contain an anti-retaliation statement. The labor commissioner is to develop a poster that can be used by all employers.

Although the accrual/sick leave usage provision states that accrual need not begin until July 2015, there is no provision in the statute for the effective date of the paystub disclosure, posting, notification, and recordkeeping requirements. The apparent intent of the Act is that the disclosure, posting, and related requirements would also be effective as of July 1, 2015. However, under general California law, a statute becomes effective on January 1 of the year following its signature by the governor. Therefore, there is an argument that those requirements become effective January 1, 2015.

A further disclosure requirement involves the “wage theft notice” that is part of California Labor Code Section 2810.5. This applies to nonexempt employees only. In addition to the numerous other items required for such a written notice, the statute now requires that, at the time of hire of most nonexempt employees, the notice include statements that the employee may accrue and use sick leave; that the employee has a right to request a new sick leave; that the employee may not be terminated or retaliated against for using and requesting the use of accrued paid sick leave; and that the employee has the right to file a complaint against an employer who retaliates. The labor commissioner is to prepare a template of the notice, presumably an amendment to the existing template the labor commissioner has previously issued.

Categories of Employees Excluded from Coverage

A few categories of employees are exempt from the statute:

- An employee covered by a collective bargaining agreement (“CBA”) in any industry other than the construction industry, if the CBA provides for wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees, and it includes a final and binding arbitration provision, premium wages for all overtime hours worked, and a regular hourly rate of pay of not less than 130 percent of the current state minimum wage (currently \$11.70, although that amount will increase effective January 1, 2016 to \$13.00) (there are special rules for construction industry CBAs);
- Certain in-home health care or supportive services workers as defined in several sections of the California Welfare and Institutions Code; and
- Individuals employed as flight deck or cabin crew members by an air carrier subject to the Federal Railway Act if the individual is provided with compensated time off equal to or exceeding the amount required by the Act.

Anti-Retaliation Provision

The Act includes a provision that an employer may not discriminate against an employee for using accrued sick leave, attempting to exercise the right to use accrued sick days, filing a complaint with the labor commissioner or alleging a violation of the Act, cooperating in an investigation or prosecution of an alleged violation of the Act, or opposing any “policy or practice or act that is prohibited” by the Act. Further, the anti-retaliation provision creates a rebuttable evidentiary presumption of unlawful retaliation if an employer denies an employee the right to use the accrued sick days, or discharges, threatens to discharge, demotes, suspends, or otherwise discriminates against an employee within 30 days of (i) the filing of a complaint by the employee with the labor commissioner or “alleging a violation” of the Act; (ii) cooperation of an employee with an investigation or prosecution of an alleged violation of the Act; or (iii) “opposition” by the employee to a policy, practice, or act that is prohibited by the Act.

Enforcement and Remedies

The Act contains no provision for a private right of action. Instead, the Act states that “the labor commissioner shall enforce this Article, including investigating an alleged violation, and ordering of appropriate temporary relief to mitigate the violation or to maintain the status quo pending the completion of a full investigation or hearing...”

The Act does contain penalty provisions. If paid sick days are unlawfully withheld, the employer must pay the amount unlawfully withheld multiplied by three, or \$250, whichever is greater, but no more than an aggregate penalty of \$4,000. If the violation of the Act results in “other harm” to the person such as a discharge from employment, the penalty may include \$50 for each day or portion thereof that a violation occurred or continued, but not to exceed \$4,000. The labor commissioner or the attorney general may bring a civil action in court against an employer who violates the Act and may seek legal or equitable relief, such as reinstatement, back pay, and reasonable attorneys’ fees. The provision authorizing the labor commissioner to file lawsuits refers to the fact that a person or entity may seek to enforce the Article “on behalf of the public as provided under applicable state law.” This appears to be a reference to the Labor Code Private Attorneys General Act, which permits an “aggrieved employee” to seek to recover statutory penalties that would otherwise be recoverable by the labor commissioner.

Sick Leave Legislative in Certain California Cities

Several California cities have already enacted similar mandatory paid sick leave laws. These include San Francisco, San Diego, and Long Beach (for certain hotel employees). The Act contains an anti-preemption provision that allows cities or other municipalities to establish different, more generous paid sick leave requirements.

No Effect on Other Paid or Unpaid Leave Statutes

The Act does not affect the employer’s obligations under other statutes that provide for other forms of paid or unpaid time off, such as the California Family Rights Act, the California paid family leave provisions of the Unemployment Insurance Code, and various statutes requiring unpaid leave for victims of crimes, domestic violence, or for jury duty or other purposes.

What Should Employers Do?

Every employer with employees in California should review its sick leave or paid time off policy to determine if the policy complies with the accrual, usage, and carryover provisions of the Act. Employers with unionized personnel should review their CBAs to determine if the exceptions for employees under the CBA apply. Special rules apply to CBAs in the construction industry.

Employers should become familiar with the detailed requirements for written notice of sick leave entitlement and usage, for inclusion of the required statements in the “wage theft” form for new nonexempt hires, and for accurate disclosure on pay stubs of sick leave accrual information. Employers must also ensure that their record retention systems will retain for at least three years the necessary data regarding sick leave accrual and usage.

Finally, employers should review the local ordinances of the city or cities in which they employ personnel: San Francisco, San Diego, and Long Beach have their own paid sick leave statutes that in some respects are inconsistent with the statewide Act. Other cities or municipalities may adopt similar ordinances in the future.

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