



California Amends Its New Paid Sick Leave Statute

Late last year, California Governor Jerry Brown signed the California Healthy Workplaces, Healthy Families Act of 2014 (“Act”), which requires all California employers to provide at least three paid sick days per year to employees, with only very limited exceptions. The Act further requires that an employee’s sick leave accrual must be reflected on the employee’s wage statement (paystub), a sick leave poster must be posted in all workplaces, and nonexempt, newly hired employees must be provided with a “wage theft” notice that includes information regarding sick leave accrual and usage. The Act’s provisions for the accrual and use of paid sick days recently became effective on July 1, 2015.

On July 13, 2015, Governor Brown signed Assembly Bill 304 (“AB 304”), amending certain provisions of the new paid sick leave law (codified at California Labor Code Sections 245 et seq.). AB 304 took immediate effect.

For many employers, the most significant amendments to the Act involve the rate of pay at which paid sick leave must be paid, and the establishment of alternative methods for the accrual of sick leave. Employers should review their policies to make certain they comply with the Act and amendments of AB 304.

The following is a summary of the changes included in AB 304.

Covered Employees

The Act granted the right to take paid sick leave to all “employees”—whether exempt or nonexempt for overtime purposes—who, on or after July 1, 2015, work in California for 30 or more days within a year from the commencement of employment.

AB 304 clarifies that an employee must perform that work for the *same employer for 30 days* to be eligible for accrued paid sick leave.

The Act also explicitly provided that its definition of “employee” did not include certain workers. Among those excluded from the Act’s definition of “employee” were construction workers covered by a valid collective bargaining agreement who performed “onsite” construction work. AB 304 removes the “onsite” qualification from its exclusion of construction workers.

AB 304 also added to the Act’s exclusion certain retired annuitants of a public entity.

Accrual of Paid Sick Leave

The Act originally required 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.

AB 304 authorizes employers to use a different accrual method other than providing one hour of paid sick leave per every 30 hours worked. This change permits accrual of sick leave based on pay periods or days or weeks of employment, rather than simply hours worked. However, accrual systems that are not based on hours worked must still provide for accrual on a “regular basis” and must provide for “no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12 month period.”

As with the original Act, an employer may satisfy the accrual requirement by “vesting” or providing pre-accrued sick leave of at least 24 hours or three days at the beginning of each calendar year of employment, or on a 12-month basis or at the beginning of each year of employment for the employee based on the employee’s date of hire. Employers who elect this method need not have any provision for the carryover of unused sick days to the following year.

A new “lump sum” accrual method is also included in AB 304. Under this method, the employer may satisfy the accrual obligation by providing not less than 24 hours or three days of paid sick leave that is available to the employee to use by completion of his or her 120th calendar day of employment. Under this method, the employer may provide three days or 24 hours of paid sick leave at the 120th day of employment. The employer may then follow the three-day “vesting” approach at the end of the employee’s first calendar year or first 12 months of employment.

Under any of the accrual methods, the employer may still limit the employee’s sick leave usage to three days or 24 hours per year of employment, calendar year, or 12-month period.

Carryover; Limitations on Use of Paid Sick Leave

AB 304 authorizes an employer to limit an employee’s use of paid sick days to 24 hours or three days in different time

periods including any of each year of employment, a calendar year, or a 12-month period.

Similarly, AB 304 provides that no accrual or carryover is required if the “full amount of leave” is received by the employee at any of the beginning of each year of employment, calendar year, or 12-month period. AB 304 also defines “full amount of leave” as three days or 24 hours. This provision, like the “vesting” provision in the original Act, encourages employers to forgo the other accrual methods and to use either the original three-day pre-accrual vesting provision or the new provision requiring accrual of three days or 24 hours by the 120th day of employment.

AB 304 also contains a clarifying provision that employers using the accrual methods may limit the usage of sick days to three in one year with a carryover limit for subsequent years of six days or 48 hours. Larger or more generous “caps” on carryover of paid sick days are also permissible.

Rate of Pay for Paid Sick Leave

AB 304 now permits an employer to calculate paid sick leave on any one of three bases:

- Paid sick time for nonexempt employees may be calculated by the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee works overtime in that workweek;
- Paid sick time for nonexempt employees may be calculated by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days of employment; or
- Paid sick time for exempt employees may be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

These new methods of calculation augment the existing method called for in the original Act.

Effect on Existing Sick Leave or PTO Plans

The Act originally provided that an employer’s existing sick leave or personal time-off plan could satisfy that Act’s

mandate, and no additional leave would be required if, among other criteria, the existing plan provided no less than 24 hours or three days of paid sick leave, or equivalent paid time off, for employee use for each year of employment or calendar year or 12-month basis.

AB 304 now provides that an employer's existing sick leave or paid time-off policy in effect prior to January 1, 2015, is sufficient and would apply to employees hired after January 1, 2015, if the policy, among other criteria, (i) uses an accrual method that is on a regular basis so that an employee has no less than one day or eight hours of accrued sick leave or paid time off within three months of employment of each calendar year, or each 12-month period, and (ii) the employee was eligible to earn at least three days or 24 hours of sick leave or paid time off within nine months of employment.

However, under AB 304, if an employer modifies the accrual method used in the policy it had in place prior to January 1, 2015, the employer must comply with an accrual method authorized by AB 304 or provide the full amount of leave at the beginning of each year of employment, calendar year, or 12-month period.

AB 304 further provides that sick leave benefits provided to certain state employees under specific provisions of the California Government Code or a collective bargaining agreement are sufficient to meet the Act's requirements.

Reinstatement of Paid Sick Leave

The Act previously required that if an employee separated from employment but was subsequently rehired by the employer within one year from the date of separation, previously accrued but unused paid sick leave must be reinstated.

AB 304 clarifies that an employer is not required to reinstate accrued paid time off to an employee if that paid sick leave was paid out at the time of termination, resignation, or separation of employment.

Notice of Available Leave

The Act required employers to provide employees with written notice of the amount of paid sick leave or paid time off that the employer provides in lieu of sick leave, either on the employees' itemized wage statement or in a separate writing provided on the designated paid date with the employees' payment of wages.

AB 304 permits an employer who provides unlimited sick leave or unlimited paid time off to its employees to satisfy this notice requirement by indicating "unlimited" on the employee's itemized wage statement or other written notice.

Application of this provision to employers in the broadcasting and motion picture industries is delayed to January 21, 2016.

Recordkeeping

The Act requires that employers keep records for at least three years, documenting the hours worked and paid sick leave days accrued and used by each employee, and to make those records available to the Labor Commissioner upon request.

AB 304 clarifies that an employer has no obligation to inquire into or record the purposes for which an employee uses paid leave or paid time off.

As noted above, there is no change to the existing requirements to the posting of a sick leave poster in the workplace and for inclusion on the wage theft form, for nonexempt employees, of information regarding sick leave, accrual, and usage.

Additional Guidance to Come from the California Labor Commissioner

The California Labor Commissioner (the Division of Labor Standards Enforcement) has stated on its website that it is reviewing AB 304 and intends to issue guidance at some time in the future. Employers should monitor the DLSE website for that guidance.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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