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EXPERT ANALYSIS

California's New Paid Sick-Leave Law: Are You Ready?

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On Sept. 10, California Gov. Jerry Brown signed, the Healthy Workplaces, Healthy Families Act of 2014, making California only the second state in the nation to mandate paid sick leave for employees. (Connecticut's paid sick-leave law was enacted in 2011.)

Effective July 1, 2015, the law requires employers to provide up to three days of paid sick leave each year for most California employees.

WHO IS COVERED?

Any employee who works in California at least 30 days within one year from the commencement of employment is entitled to paid sick leave. The statute applies to all private employers and most public employers, regardless of the number or location of employees (unlike similar municipal paid leave ordinances, the new sick-leave law does not exempt "small businesses" from its coverage).

Only a few categories of employees are exempted from the paid leave requirement: certain in-home health care workers, flight deck and cabin crew members who are covered by the Railway Labor Act, and certain workers who are subject to collective bargaining agreements that provide similar or greater sick-leave benefits. All other employees are covered, including part-time, temporary and seasonal employees who work in excess of 30 days per year.

WHAT IS REQUIRED?

Employees may make an oral or written request to use accrued paid sick time to address the diagnosis, care or treatment (including preventive treatment) of an existing health condition in the employee or the employee's family member. An employee who is the victim of domestic violence, sexual assault or stalking may make an oral or written request to use accrued paid sick time to engage in protected activities such as seeking medical attention or counseling, obtaining a restraining order, and participating in safety planning.

"Family member" is broadly defined under the law to include an employee's:

- Child (regardless of age), including a biological, adopted or foster child; legal ward; or a child to whom the employee stands in loco parentis.
- Biological, adoptive or foster parent, step-parent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis to the employee when the employee was a minor child.



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- Spouse.
- Registered domestic partner.
- Grandparent.
- Grandchild.
- Sibling.

This definition of "family member," which includes grandparents, grandchildren and siblings, goes beyond the definition of that term under California's "Kin Care Law" and the definition of family leave under the federal Family and Medical Leave Act, 29 U.S.C. § 2601, and the California Family Rights Act. Thus, employees may be entitled to paid sick leave that is not chargeable to their FMLA or CFRA entitlements.

ACCRUAL, USE AND CARRYOVER

Employees accrue sick leave at a rate of not less than one hour for every 30 hours worked, subject to the permissible (but not mandatory) limits described below.

The new law applies equally to exempt and non-exempt employees, with exempt employees presumed to have a 40-hour workweek for accrual purposes unless the employees' normal workweek is less than 40 hours, in which case the employees will accrue paid sick leave on the basis of their normal workweek.

Employees are entitled to use accrued paid sick leave beginning after the 90th day of employment, after which they may use paid sick leave as it is accrued. Accruals, however, begin on the later of the statute's effective date or the employee's commencement of employment.

Accordingly, although an employee must work at least 30 days within the year to earn paid sick leave, and although new employees do not have to be permitted to use paid sick leave until the 90th day of employment, accruals will be retroactive to the first day of employment for any employee hired after the statute's effective date. An employer may elect to advance sick leave to an employee before it is accrued, but is not required to do so.

All unused sick leave will carry over to the following year of employment. However, the statute permits employers to provide the full allotment of sick leave at the beginning of each year instead of tracking accruals and carryover. The statute does not clarify whether "year" in this context refers to the year of employment, the calendar year or something else.

Sick leave accruals may be capped at 48 hours (six workdays), and employers may limit the use of paid sick leave to 24 hours (or three workdays) in each year of employment. Employers may also set a "reasonable minimum increment, not to exceed two hours" for the use of paid sick leave, but the statute expressly authorizes the employee to "determine how much paid sick leave he or she needs to use." This provision arguably seems to override the employer's ability to schedule leave within the requirements of its workplace and staffing needs.

The statute attempts to define the "hourly rate" at which accrued sick leave must be paid out when used, but it does not address the wages earned by tipped employees or certain other employees who receive non-traditional pay.

Accrued but unused sick leave will not need to be paid out upon termination, resignation, retirement or other separation from employment (unless, of course, the employer provides undifferentiated paid time off in lieu of sick leave, with such PTO being payable upon termination). If an employee separates from his or her employment but is rehired within one year, any previously accrued and unused paid sick leave will need to be reinstated, and the employee will be able to

use the restored leave time without satisfying the 30- and 90-day waiting periods applicable to new employees.

OTHER ALTERNATIVES

Employers may also satisfy the mandates of the paid sick-leave statute through an existing paid leave policy or PTO policy that makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in the statute and that either satisfies the accrual, carryover and use requirements of the statute or provides no less than 24 hours or three days of paid sick leave, or equivalent paid leave or PTO, for employee use during each year of employment or calendar year or on a 12-month basis.

Employers who elect to satisfy the statute through an existing PTO program, however, need to ensure that all employees eligible for paid sick leave are also eligible for the PTO program.

NOTICE, POSTING, RECORDKEEPING AND ENFORCEMENT

The law places new notice, posting and recordkeeping requirements on employers, including:

- Notice on wage statements: After July 1, 2015, employers must provide employees with a written notice that sets forth the amount of paid sick leave available for use. This information must appear on either the employee's itemized wage statement or on a separate document provided on the designated pay date with the employee's payment of wages.
- Updated wage theft prevention notices: Employers must amend the Wage Theft Prevention Act notices provided to new hires to indicate that employees may accrue paid sick leave, have the right to request and use accrued paid sick leave, may not be terminated or retaliated against for using or asking to use paid sick leave and have the right to file a complaint for retaliation.
- Workplace posters: In a visible location, employers must display a poster specifying that employees are entitled to accrue, request and use paid sick days; the amount of paid sick days provided for by the new law; the terms of use for paid sick days; and that retaliation or discrimination against an employee who requests paid sick days, uses paid sick days, or both, is prohibited and that an employee who experiences prohibited conduct has a right to file a complaint with the California labor commissioner. The commissioner is charged by the statute with creating a suitable poster and making it available to employers.
- Recordkeeping: Employers must keep records that document the hours worked and paid sick days accrued and used by an employee for at least three years. The labor commissioner will have access to these records, and employers must make the records available to their employees.

The statute authorizes the commissioner to enforce the new law, investigate alleged abuses and order appropriate relief for violations. Either the labor commissioner or the California attorney general will be able to bring a civil action against persons who violate the new law. The new statute contains broad penalty and anti-discrimination and retaliation provisions, including a rebuttable presumption of unlawful retaliation when employees suffer adverse action within 30 days after undertaking an activity protected by the statute.

Finally, the statute provides that it establishes minimum requirements for paid sick leave and does not preempt, limit or otherwise affect the applicability of any law, regulation or requirement that provides for greater accrual of sick-leave benefits, whether paid or unpaid, or similar employee protections.

In light of the new law, California employers are now advised to:

- Consult with counsel to ensure that existing leave policies comply with the requirements of the statute.
- Make necessary adjustments to sick leave and PTO policies in advance of the law's effective date, July 1, 2015.
- Obtain the necessary workplace posters outlining the rights of employees with regard to paid sick days and the terms of the new law and display these posters in visible locations.
- Update payroll systems so that both accrued vacation and accrued sick leave are designated on paystubs and tracked and/or limited per the statute's requirements.
- Educate human resources staff and managers about the new law's requirements and the prohibitions on retaliation, including the 30-day rebuttable presumption of retaliation.

For additional information about this law and its effects on your workforce, please contact one of the authors of this commentary or the Hogan Lovells lawyer with whom you work.



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