

LOS ANGELES

Daily Journal

— SINCE 1888 —

FRIDAY, APRIL 15, 2005

Employment

Employers Learn Lessons in Nation's Paid Family Leave Program

By Michele C. Coyle
and Jenai M. K. Sumida

Last year, about 86 million American workers were unable to take paid leave in order to care for a sick child. See "Get Well Soon, American Families Can't Afford To be Sick," National Partnership for Women & Families (June 2004). Many of these working Americans were forced to decide between financial survival and caring for a sick family member.

Today, some 13 million working Californians have an easier time juggling the duties of work and family thanks to the enactment of SB1661, which created the first state-mandated Paid Family Leave Insurance program in the nation. In its first six months of operation, this new program has already provided financial assistance to thousands of Californians in the form of more than \$26 million in paid family leave benefits paid out for more than 13,000 initial claims filed by employees across the state. See EDD Web site quick statistics at www.edd.ca.gov.

Under California's paid family leave program, an employee who pays into the State Disability Insurance program or participates in a Voluntary Disability Insurance program and suffers a wage loss is eligible to receive up to six weeks of paid family leave benefits, during a 12-month period, to (1) care for a seriously ill child, spouse, parent or domestic partner; (2) bond with a new child within the first 12 months after birth; or (3) bond with a minor child in connection with the adoption or foster care placement of that child within the first 12 months after adoption or placement.



Michelle Coyle



Jenai Sumida

Any employee who meets these criteria is eligible to receive paid family leave benefits regardless of how many hours they work, how long they have worked for an employer or whether they are full or part time.

The rules are fairly simple for receiving benefits for leave taken to bond with a newborn or minor child in connection with an adoption or foster placement. Both parents are eligible for paid family leave benefits within the first year of birth or placement. However, the rules regarding eligibility for paid family leave benefits during leave spent caring for a sick family member are more complicated.

Employees may receive paid family leave benefits during the time spent providing psychological comfort or arranging third-party care for an enumerated family member. However, the benefits will not be paid to an employee for any day that another family member is able and available to provide the required care.

The effect of these rules is to provide assistance to those employees who are the sole caregivers for their families. For example, if an employee's child develops a terminal illness but his or her spouse does

not work and is able to care for the child, then the employee is not eligible to receive paid family leave benefits.

However, if an employee's spouse dies and his or her child requires treatment for depression as a result, that employee is eligible to receive paid family leave benefits to provide psychological comfort to the child.

The paid family leave program is funded exclusively by employee contributions and does not require additional contributions by employers. In 2006, the costs of paid family leave will be incorporated into the base State Disability Insurance contribution rate for employees. Until then, the wages of employees who pay into the disability insurance program will be taxed an additional .08 percent, up to the taxable wage limit, in order to fund the program.

The maximum paid family leave benefit in a 12-month period is six times the weekly benefit amount, which is determined by the employee's past earnings. An employee is generally entitled to receive about 55 percent of his or her weekly earnings, up to the maximum weekly benefit of \$840. If an employee's weekly earnings vary, then an eligible employee is entitled to receive 55 percent of his or her highest weekly earnings in the approximately five to 17 months prior to the beginning of the paid family leave claim, up to \$840.

The Employment Development Department will not begin to distribute paid family leave benefits until an employee misses seven days of work due to one or more qualifying events. (Women who were previously receiving State Disability Insurance benefits due to pregnancy-

related disabilities are not subject to this waiting period, provided that they apply for paid family leave benefits to bond with a newborn immediately upon recovery from their pregnancy-related disabilities.) These seven days may be missed intermittently throughout a 12-month period, and need not be consecutive.

The waiting time for distribution of paid family leave benefits may be increased by an additional seven days if an employee is required by his or her employer to use at least two weeks of accrued but unused vacation, paid time off or kin leave prior to receipt of paid family leave benefits.

In this event, the Employment Development Department will begin to distribute paid family leave benefits on the 15th day of leave. If an employee is still utilizing paid vacation, paid time off or kin leave during any of the six weeks that paid family leave benefits are being distributed, the amount of weekly family leave benefits paid to the employee will be offset by the amount of compensation received from his or her employer during that week.

As this illustrates, achieving the full value of paid family leave benefits is highly dependent on the establishment of fair employment policies. A policy requiring employees to use more than two weeks of vacation during paid family leave-qualifying time off can effectively prevent employees from realizing any benefit from the program.

However, by requiring the use of only two weeks of vacation prior to receipt of paid family leave benefits, employers will allow their employees to manage the benefits of the paid family leave program. Such employees will then be free to utilize their accrued, unused paid leave for non-paid family leave-qualifying purposes, such as caring for a sick mother-in-law or other

unenumerated family member.

The importance of having fairly drafted employment policies is further highlighted by the inconsistencies between the paid family leave program and state or federal family leave laws. The paid family leave program is merely a wage replacement insurance program. It does not impose any duty upon California employers to provide family leave or job security that is not already provided by the Family Medical Leave Act or California Family Rights Act.

Thus, although employers may require employees to use paid family leave benefits concurrently with leave taken pursuant to the medical leave act or family rights act, it is not required. Moreover, an employee who is not entitled to leave under either law, but who is granted unpaid family leave by his or her employer, may still receive paid family leave benefits provided that he or she satisfies the requisite criteria.

In addition, although employees who contribute to State Disability Insurance are required to pay into the paid family leave program, employers who are not subject to the Family Medical Leave Act or family rights act are not required to provide them with family leave. Similarly, employees who have not been with their employer for one year or do not otherwise qualify for medical leave act or family rights act benefits will not be entitled to take family leave in the absence of company policy.

In both of these instances, employees will not be able to recoup their payment into the paid family leave program despite the fact that such payment is required by law.

Because the paid family leave program is administered by the Employment Development Department and is entirely funded by employee contributions to State Disability Insurance, the program creates very few formal obligations on the part of

the employer. Employers are merely required to deduct paid family leave insurance contributions from employee wages, display a poster providing information on paid family leave benefits and distribute an informational brochure to all new employees and all employees who leave work due to a qualifying event. Both required notices are available to download from the Employment Development Department Web site, www.edd.ca.gov.

When counseling employers on compliance obligations, attorneys should make it a point to discuss not only the affirmative requirements imposed by law, but also the significant impact that their employment policies will have on their employees' ability to receive benefits from the paid family leave program. In keeping with the spirit of the paid family leave program, employers are advised to establish fair leave policies that permit employees to take advantage of the paid family leave system.

This may be accomplished by requiring employees to use no more than two weeks of vacation prior to receiving paid family benefits, and by expanding employees' entitlement to family leave beyond that mandated by the Family Medical Leave Act or family rights act in order to provide employees with leave whenever an employee is entitled to paid family leave benefits.

The implementation of fair policies will not only help employees juggle the responsibilities of work and family but will also assist employers by offering employees incentives, de-stressing the workplace, improving employee job satisfaction and promoting harmony.

Michele C. Coyle is a partner and **Jenai M.K. Sumida** is an associate in the Los Angeles office of Hogan & Hartson.

Reprinted with permission from the *Los Angeles Daily Journal*. ©2005 Daily Journal Corporation. All rights reserved.

Reprinted by Scoop ReprintSource 1-800-767-3263

Hogan & Hartson L.L.P. is an international law firm headquartered in Washington, D.C. with nearly 1,000 attorneys practicing in 21 offices worldwide. The firm has a broad-based national and international practice that cuts across virtually all legal disciplines and industries. Hogan & Hartson has European offices in Berlin, Brussels, London, Paris, Budapest, Prague, Munich, Warsaw and Moscow, Asian offices in Shanghai, Beijing and Tokyo, and U.S. offices in New York, Baltimore, Northern Virginia, Miami, Los Angeles, Denver, Boulder, Colorado Springs and Washington, D.C. Further information about Hogan & Hartson is available at www.hhlaw.com.

Los Angeles Offices:

Downtown: 500 South Grand Avenue; Los Angeles, CA 90071; 213/337-6700; 213/337-6701 (fax)
Century City: 2049 Century Park East; Los Angeles, CA 90067; 310/789-5100; 310/789-5400 (fax)
www.hhlaw.com

HOGAN & HARTSON LLP