

In This Issue:

February 2010

In a unanimous decision, the California Supreme Court holds that the state's "kin care" law does not apply to sick leave policies providing an indefinite number of paid sick days.

California's Supreme Court Limits the Reach of State Kin Care Law

By Daniel J. Cravens and Sage Fahimi

California's kin care law, Labor Code section 233, requires that any employer who provides sick leave for employees shall permit an employee to use a portion of his or her sick leave to care for a covered relative. The statute defines "sick leave" as "accrued increments of compensated leave." In its recent decision in *McCarther v. Pacific Telesis Group*, Opinion No. S164692 (Feb. 18, 2010), the California Supreme Court unanimously overturned a court of appeal decision and held that California's kin care statute applies only to traditional sick leave policies where an employee accrues a measurable, banked amount of sick leave over the course of a year. Employers providing unlimited sick leave need not provide employees with paid kin care leave.

Factual and Procedural Background

In *McCarther*, the companies provided their employees an indefinite number of paid sick days pursuant to a collective bargaining agreement. Employees were entitled to receive paid sick leave every time they missed work for their own illness up to a maximum of five days in any seven-day period. The paid sick leave policy provided an indefinite amount of leave in that it did not utilize a bank of accrued sick leave nor limit the total number of days that an employee could miss work with pay.

The employers also implemented an attendance management policy that counted employees' sick days as an "occurrence" that could lead to discipline unless the absence fell within certain designated types of protected leave, including Family and Medical Leave Act (FMLA) leave and workers' compensation leave.

The plaintiffs in the case were absent to care for ill family members. The employees were not paid for these days, nor were they disciplined for the absences. The companies argued that the kin care provisions in Labor Code section 233 only applied to traditional sick leave policies where an employee accrues a fixed number of sick days over the course of a year and not where employees are allowed an indefinite number of sick days. The trial court granted summary judgment in favor of the companies.

The California Court of Appeal reversed the trial court's grant of summary judgment,

holding that the companies' sickness absence policy constituted sick leave within the meaning of section 233; and further held that section 234 did not preclude the company from disciplining employees for taking leave pursuant to section 233 to care for ill relatives in the same manner the employers disciplined employees for taking leave for their own illnesses or injuries.

The California Supreme Court's Analysis

Section 233 Applies Only Where Sick Leave Is Accrued in Ascertainable Increments

Section 233 provides that employees are entitled to utilize as kin care "an amount not less than the sick leave that would be accrued during six months." As the amount of kin care leave to which an employee is entitled under the statute is directly related to the amount of sick leave available to the employee, the court reasoned that section 233 could not apply where the amount of sick leave to which an employee was entitled could not be ascertained.

The policy at issue in *McCarther* allowed employees to take five paid sick days in any seven-day period with the result that an employee could take an indefinite and practically unlimited amount of paid sick leave in any given six month period. As it was impossible to calculate the precise amount of paid sick leave to which the companies' employees were entitled, the court concluded that section 233 could not apply and held that employers who choose to provide their employees with an indefinite amount of sick leave can lawfully do so and need not provide kin care pursuant to Labor Code section 233. As discussed below it also appears that employers who choose to have such a paid sick leave policy are also not restricted by Labor Code section 234.

Attendance Policies

California Labor Code section 234 prohibits an employer from disciplining an employee for using kin care leave under section 233 or otherwise treats the kin care as something that could lead to discipline.

Many California employers have attendance control policies that lawfully impose discipline on employees for excessive use of the sick leave. It was assumed that kin care absences are protected leave that must be excluded from these attendance policies in the same manner as California Family Rights Act (CFRA) and FMLA leaves.

The appellate court appeared to contradict this conventional wisdom, implying that an employer could include kin care absences in its attendance policies as long as it imposes the same penalties or discipline for kin care absences as it does for the regular use of sick leave. However, the California Supreme Court reversed the court of appeals' decision in its entirety without reaching this holding leaving the issue of whether kin care absences could be included in absence control policies unsettled.

Practical Implications

The California Supreme Court clarified that employers are not required to provide sick leave.¹ However, if an employer elects to do so, and does so in the form of an accrual-based system, kin care leave must also be provided. Employers providing traditional accrual-based sick leave should continue to treat kin care as a protected leave that must be excluded from their attendance policies in the same manner as CFRA and FMLA leave.

Employers who choose to provide their employees with uncapped sick leave can safely do so and need not provide kin care pursuant to Labor Code section 233 and appear not to be restricted by Labor Code section 234.

.....
Daniel J. Cravens is a Shareholder and Sage Fahimi is an Associate in Littler Mendelson's Fresno office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Cravens at dcravens@littler.com, or Ms. Fahimi at sfahimi@littler.com.

¹ Congress is currently considering passage of the Healthy Families Act, H.R. 2460, which would require certain employers to provide paid sick leave. Such a bill would have far reaching implications, including guaranteeing all employees at least some kin care leave. San Francisco's administrative code requires certain employers to provide paid sick leave to employees working in the city.