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An Update on the Epidemic: California's Statewide Paid Sick Leave Law

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On January 1, 2015, California's Healthy Workplaces, Healthy Families Act of 2014 (California paid sick leave act) went into effect. When Governor Edmund G. Brown, Jr. signed the Act into law on September 10, 2014, California became the second state to mandate that certain employers provide paid sick leave to employees.¹ In addition, at least 18 cities, three of which are in California, have passed their own mandatory sick leave laws.² In December 2014, the Office of the Labor Commissioner issued Frequently Asked Questions (FAQs) that clarified employers' responsibilities under the new law.³

Under the new California law, with some limited exceptions, employers with employees who work in California will need to provide up to 24 hours or three days of paid sick time to current and new employees beginning on July 1, 2015. For employers in the three California cities that mandate paid sick leave, compliance with multiple laws may prove challenging.

Covered Employers and Employees

The California paid sick leave act applies to any employer that has at least one employee who works more than 30 days in a year in the state of California. All employees who work more than 30 days in a year in California are covered (including part-time and temporary employees), with the exception of (a) employees covered by a valid collective bargaining agreement that provides paid leave and has other required provisions; (b) employees in the "construction industry" covered by a valid collective bargaining agreement;⁴ (c) providers of "in-home supportive services" (as defined under California law); and (d) individuals employed by an air carrier as a flight deck or cabin crew member (provided they receive compensated time off).

- ¹ Prior to California's passage of a paid sick leave law, Connecticut previously enacted a paid sick leave law. In addition, Massachusetts also recently passed a paid sick leave law, which will be effective July 1, 2015.
- ² The 18 cities are: Long Beach, CA; Oakland, CA; San Francisco, CA; Washington, D.C.; East Orange, NJ; Irvington, NJ; Jersey City, NJ; Montclair, NJ; Newark, NJ; Passaic, NJ; Paterson, NJ; Trenton, NJ; New York City, NY; Eugene, OR; Portland, OR; Philadelphia, PA; City of SeaTac, WA; and Seattle, WA. San Diego also passed a sick leave ordinance, but it is on hold pending a June 2016 referendum.
- ³ The Labor Commissioner's FAQs can be found at http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm.
- ⁴ "Employee" in the construction industry means "an employee performing onsite work associated with construction, including work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, repair work, [and other work as described in certain sections of the Business and Professions Code] and other similar or related occupations or trades."

Accrual and Caps

Under the new law, employees accrue one hour of sick time for every 30 hours worked (including overtime hours). Employees who are exempt administrative, executive, or professional employees accrue sick time based on the employee's normal work week or a 40-hour work week, whichever is less. As clarified by the Labor Commissioner's FAQs, employees first become eligible to receive or accrue paid sick time on July 1, 2015, or the date of hire, whichever is later; however, for the purpose of determining whether they have worked in California for 30 days (within a year),⁵ the Labor Commissioner has clarified in its FAQs that it believes the key date for beginning to count any 30-day period is January 1, 2015.⁶ At its discretion, an employer may loan sick time to an employee in advance of accrual.

While the date on which actual accrual of paid sick time begins is measured from July 1, 2015, the time period for when an employee may use accrued paid sick time is measured by the actual date of employment. Specifically, an employee must be employed for at least 90 days by the employer before being able to use any accrued paid sick leave. For example, Employee A is hired on March 1, 2015 and will reach 90 days of employment on May 31, 2015. Under the law, Employee A begins accruing sick time on July 1, 2015. Employee A will be able to use her paid sick time immediately upon accrual in July 2015. In contrast, Employee B is hired on July 1, 2015. He reaches his 90th day of employment on September 29, 2015. Under the law, Employee B begins accruing paid sick leave on July 1, 2015. In this scenario, however, Employee B cannot use any paid sick leave until 90 days of employment, or September 29, 2015.

Employers are permitted to cap use of paid sick time at 24 hours (or three days) in each year of employment. While the law references "24 hours or three days" as the amount of paid sick leave that must be provided on an annual basis, the law also defines a "paid sick day" as time that is "compensated at the same wage as the employee normally earns during regular work hours." For employers whose employees work on an alternative workweek schedule, such as a four-day per week, 10-hour per day schedule, a "paid sick day" might actually be 10 hours of wages for the employee, or 30 hours. Thus, the statute's references to "24 hours or three days" will likely result in varying interpretations by employers with alternative workweek schedules or schedules worked by employees that are anything other than an eight-hour day. In addition, employers should be aware that the rate at which they pay sick leave is the employee's hourly wage. For situations involving varying pay rates, such as different hourly pay, commission or piece rate employees, or non-exempt salaried employees, the employer must divide the employee's total wages (not including overtime premium pay)⁷ by the employee's total hours worked in the full pay periods for the prior 90 days of employment to determine the appropriate "hourly wage" for the employee's paid sick leave.

Similar to California's requirements related to vacation accrual, employers who use an accrual-based sick pay system must allow employees to carry over all accrued paid sick days to the following year of employment. An employer may limit or cap accrual to a maximum bank of 48 hours of paid sick time. However, once an employee uses sick time, the employee's banked time would fall below the cap, and the employee would be eligible to accrue further sick leave.⁸ An employer may avoid calculating accrual and carry-over by frontloading the full amount of leave that could be used at the beginning of each year, *i.e.*, 24 hours or three days. Employees who separate employment with a particular employer and are re-hired within one year by that same employer must have their accrued but unused paid sick leave bank reinstated and be allowed immediate use.

5 The applicable "year" for purposes of calculating whether an employee has worked 30 days in California is not defined by the new statute. However, the Labor Commissioner's FAQs indicate that the measurement of the year will "mostly be tracked by the employee's anniversary date," presumably based on the fact that eligibility for use is based upon length of employment.

6 The new statute does not explain whether the "30 or more days within a year" that an employee must work to be eligible for paid sick leave means actual work days or calendar days. For non-exempt employees who typically have a defined schedule and number of days per week that they work, counting the 30-day period is relatively easy. However, for exempt employees who might or might not work seven days per week and who do not necessarily track days or hours worked, determining when the 30-day period has passed may be more difficult.

7 The new law does not explain whether "overtime premium pay" means the 1.5 or 2 times the employee's regular rate of pay that many employees view as "overtime pay" or just the "premium" that is received for the overtime worked, *e.g.*, 0.5 or 1 times the regular rate is the premium pay rate.

8 See The Labor Commissioner's FAQ, http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm, Question: "If I qualify, how much paid sick leave am I entitled to take and be paid for?"

Permitted Uses

Employers must allow employees to use the 24 hours or three days of paid sick time on the employee's oral or written request for the following reasons:

For his or her own qualifying need, or for that of a "family member,"⁹ for:

- Diagnosis, care, or treatment of an existing health condition; or
- Preventative care.

Additionally, sick time can be used:

- If the employee is a victim of domestic violence, sexual assault, or stalking.

Employers may require that paid sick leave be used in "reasonable minimum" increments not to exceed two hours.

Cash-Out

Employers are not required to cash out an employee's accrued, but unused, paid sick time at the end of employment. Employers should, of course, note that if they combine vacation and sick time into a paid time off (PTO) bank intended to comply with the law, they are still obligated to follow California rules governing vacation or PTO. This includes an obligation to pay out the accrued but unused PTO upon termination from employment.

Use of Existing Leave Banks

California employers that use PTO banks to provide both paid vacation and sick leave will have to consider how California's requirement to pay out accrued but unused PTO upon termination will impact their compliance with the new law. For instance, although the California paid sick leave act does not require pay-out on termination, employers who use PTO to comply will need to cash out on termination. Employers that rehire a terminated employee within one year will likely have to reinstate some or all of the accrued but unused paid leave bank upon rehire because the California paid sick leave act requires reinstatement of accrued paid sick leave and does not address any credit for the cash-out. The result, of course, is a windfall for reinstated employees, who received a pay-out of PTO at termination, but who must also have paid time off in the form of paid sick leave restored. Similarly, an employer considering compliance through frontloading PTO, e.g., providing PTO in a lump sum up front to an employee, must carefully craft any policy to also comply with the California prohibition on "use it or lose it" PTO policies.

Employee Notice & Documentation

Sick time must be provided upon an employee's oral request. If foreseeable, employees must provide "reasonable advance notification." There is not yet any definition as to what constitutes "reasonable advance notice." If the sick time is unforeseeable, an employee must provide the employer with notice of the need to use sick time as soon as practicable. There is no express provision that permits employers to require reasonable documentation that sick time has been used for a covered purpose. Until further regulations or guidance are issued, employers should not request documentation unless documentation can be required for another purpose such as Family and Medical Leave (FMLA), California Family Rights Act (CFRA) leave, pregnancy disability leave, or workers' compensation. If an employer possesses health information about an employee or family member, or information related to domestic violence or sexual assault, such information must be treated as confidential and cannot be disclosed, except to the affected employee, or as required by law.

⁹ Under the California law, a "family member" includes biological, adopted or foster child, stepchild or legal ward, or a child to whom the employee stands *in loco parentis*; a biological, adoptive, or foster parent, step parent, or legal guardian of any employee or the employee's spouse or registered domestic partner, or a person who stood *in loco parentis* when the employee was a minor; spouse or registered domestic partner; grandparent; grandchild; or sibling.

Notice and Posting Requirements

Employers must post, provide individual notice on hire, and provide information each time wages are paid.

Posting. Beginning January 1, 2015, employers must display a poster in each of their workplaces. The Labor Commissioner has created a poster with the required information and it is available on the Labor Commissioner's website.

Individual Notice. Section 2810.5 of the Labor Code (California's "Wage Theft Prevention Act") is amended to add a provision regarding an employee's rights under the California paid sick leave act.¹⁰ The notice must be provided at the time of hiring. The FAQs have clarified that the updated or amended notice must be provided to new employees beginning on January 1, 2015.¹¹ In addition, in accordance with an existing Wage Theft Prevention Act requirement, employers must provide all employees with an updated or amended notice within seven calendar days "after the time of the changes," unless another writing is provided. For existing employees, notice of any changes to the items listed in section 2810.5 can be accomplished through a timely itemized wage statement furnished in accordance with Labor Code section 226 or some other writing, such as the Labor Commissioner's published amended, sample Wage Theft Prevention Act notice for use by employers. However, the Labor Commissioner's amended notice contains detailed, specific information that must be conveyed to an employee. Thus, an employer must carefully consider whether notice to existing employees can truly be effectively accomplished through itemized wage statements and may wish to consider disseminating notice to existing employees through another means. Although the "change" in the employer's policy need not occur until July 1, 2015, to avoid inconsistencies in administration and failure to provide notice arguments, employers should consider providing an updated/amended notice as early as possible in 2015, and certainly by no later than July 8, 2015, seven days after the date an employer must begin accruing paid sick time for existing employees.

Written Notice Each Time Wages Paid. Employers also must provide written notice to an employee that sets forth the amount of paid sick leave available (or PTO leave provided in lieu of sick leave) for use. The employer may provide this written notice on either the employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages.

Recordkeeping

Employers must keep all records documenting hours worked and paid sick days accrued and used by an employee for three years. An employer's failure to maintain or retain adequate records creates a rebuttable presumption the employer violated the law, absent clear and convincing evidence otherwise. In addition, an employer must make these records available to an employee upon request as required under Labor Code section 226.

Prohibitions

Under the new law, an employer cannot:

- Require, as a condition of taking sick time, that an employee search for or find a replacement worker to cover the hours during which the employee is absent.
- Deny the right to use accrued sick days or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against any employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with the department¹² or alleging a violation, cooperating in an investigation or prosecution of an alleged violation, or opposing any policy or practice that is prohibited.

10 The Section 2810.5 notice must be amended to include "that an employee: may accrue and use sick leave, has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and has the right to file a complaint against an employer who retaliates."

11 The Labor Commissioner has issued the amended notice and is available on the Labor Commissioner's website.

12 Presumably the reference to "the department" refers to the California Department of Labor Standards Enforcement.

There is a rebuttable presumption of unlawful retaliation when an employer takes adverse action against a person within 30 days of the employee:

- Filing a complaint with the Labor Commissioner or alleging a violation of this law;
- Cooperating with an investigation or prosecution of an alleged violation of the law;
- Opposing any policy, practice, or act that is unlawful under the law.

In assessing penalties, the fact-finder must consider whether the employer, prior to an alleged violation, adopted, and is in compliance with, a set of policies, procedures, and practices that fully complies with the law.

The law also states that an employer is not to be assessed any penalty or liquidated damages due to an isolated or unintentional payroll error, a clerical written notice error, or an inadvertent mistake regarding accrual or available use of paid sick leave.

Penalties & Employee Remedies

The California paid sick leave law assesses various penalties for violations of the law:

- *Posting.* An employer that willfully violates the posting requirements is subject to a civil penalty of not more than \$100 per offense.
- *Paid Sick Days Withheld.* If paid sick days are withheld, the employee is entitled to the dollar amount equivalent of paid sick days withheld from the employee multiplied by three, or \$250, whichever is greater, but not to exceed an aggregate penalty of \$4,000.
- *Other Violations.* If an employer engages in other violations (such as failure to provide written notice each time wages are paid), the maximum penalty shall include a sum of \$50 a day, not to exceed an aggregate penalty of \$4,000. In addition, to compensate the state for investigating and remedying a violation, the Labor Commissioner may order the violating employer to pay the state \$50 for each day (or part of a day) a violation occurs or continues. The \$50 sum can be assessed for each employee or other person whose rights were violated. The law places no maximum aggregate on this \$50 per person, per day sum.

Section 248.5(a)-(c) of the new law gives the Labor Commissioner the authority to enforce the law by investigations, hearings, and, if liability is shown, the imposition of penalties and equitable relief. "Where prompt compliance by an employer is not forthcoming, the Labor Commissioner may take any appropriate enforcement action to secure compliance, including the filing of a civil action." Section 248.5(e) permits either the Labor Commissioner or the Attorney General to bring a civil action against an employer or other person violating this law. Importantly, however, the new law does not expressly, by its terms, permit a private right of action by an aggrieved employee to seek enforcement and remedies for an alleged violation.

Impact on Existing Policies

If an employer has a PTO policy that provides an amount of paid time off sufficient to meet the law's requirements and may be used for the same purposes and under the same conditions as paid sick leave under the law, it need not provide additional paid sick time. However, employers should not assume that just having a PTO policy is enough, as the policy must be viewed in light of the paid sick leave law's accrual, cap, and reinstatement rules.

Further, employers should note that the law does not diminish an employer's obligation to comply with a contract, collective bargaining agreement, employment benefit plan, or other agreement providing more generous paid sick time to employees. Moreover, the law does not discourage or prohibit employers from adopting or retaining more generous paid sick time policies.

Recommendations

Employers that have employees who perform work in California should take one or more of the following actions:

- For employers with employees working in California cities with paid sick leave laws, review city laws and compare with the state law to determine how to comply with all applicable paid sick leave laws.

- For employers in multiple states and/or cities that have paid sick leave laws, formulate a compliance plan and policy to achieve compliance with all applicable paid sick leave laws.
- Review and revise, if necessary, paid sick leave and/or PTO policies and procedures to ensure they meet the law's requirements, including review of carryover, cap, and reinstatement provisions.
- Review and revise, if necessary, anti-retaliation policies.
- Monitor the Labor Commissioner's public notices and website for any update to the template notices and workplace posters.
- Obtain and display the necessary posters in a conspicuous and accessible place in each workplace in California and determine how to address posting requirements for remote workers starting on January 1, 2015.
- Employers that want to develop their own notice should consult with knowledgeable employment counsel to ensure the notice satisfies all legal requirements. Additionally, employers should consider creating acknowledgment forms to guard against claims that notice was not provided.
- For employers using the Labor Commissioner's Wage Theft Prevention Act sample notice to employees or one similar to the sample, ensure that the notice is updated to include the necessary paid sick leave notice required by the law.
- Use of a revised notice to newly hired employees of their rights under this new law should begin on January 1, 2015. To avoid arguments that proper notice has not been provided to existing employees, employers should strongly consider providing such notice to current employees as soon as possible, and by no later than July 8, 2015.
- Ensure timekeeping, payroll, and benefits systems properly calculate, track, and detail accrued and used sick time. If a third-party payroll processor is used, ensure it is aware of and complies with the law's requirements.
- Ensure that all itemized wage statements or other written notice provided at the time of payment to an employee includes the amount of paid sick leave available to the employee.
- Train supervisory and managerial employees, as well as HR and payroll personnel, on the new law's requirements.

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