California’s paid sick leave law — no get well card for employers

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California Governor Jerry Brown has signed into law AB 1522, the Healthy Workplaces, Healthy Families Act of 2014. It mandates that most employers in California provide paid sick leave to their employees. Specifically, employers must give employees at least 24 hours or three days of paid sick leave in each year of employment. California is the second state—after Connecticut—to require paid sick leave. It also follows local ordinances in such places as San Francisco, Seattle, Washington, D.C. and New York City.

The law takes effect on July 1, 2015. Employers will need the longer-than-usual time between the bill’s signing and its effective date to prepare for this law. The law contains complicated and, in some instances, unclear provisions. It is certain to lead to many questions and possible litigation. Although many employers provide paid sick leave or paid time off (“PTO”) already, most employers will need to make adjustments to their current policies.

Who must receive paid sick leave?

Who must get paid sick leave? The law is very broad. It does not require any minimum number of employees, but rather applies generally. The law defines “employer” as “any person employing another under any appointment or contract of hire.” AB 1522 entitles any “employee” to paid sick days, as long as the individual “works in California for 30 or more days within a year from the commencement of employment.” It does not have any minimum hours per week requisite. The law covers part-time employees, applies to temporary or seasonal employees, and extends to public employees.

The law excludes only four categories of employees. First, it exempts employees covered by a collective bargaining agreement expressly providing for employees’ wages, hours and working conditions; premium overtime wage rates; hourly pay at least 30 percent above the state minimum wage; and “expressly provides for paid sick days or a paid time off policy that permits the use of sick days.” The agreement must provide for final and binding arbitration for sick days disputes. Second, the law has another collective bargaining exemption for the construction industry. There, among other requirements, the agreement must have been entered into before January 1, 2015, or expressly waive the law’s requirements in “clear and unambiguous terms.” The other exceptions are...
for employees under the state’s In-Home Supportive Services program and certain airline flight deck or cabin crew members.

If an employee does not fall within one of the four exceptions, the new law covers him or her. Thus, most employers in California will have to treat all of their California employees as covered by the new law and eligible for paid sick under the law’s terms.

The law extends to some employees from other states. As discussed, it mandates paid sick leave for anyone who “works in California or 30 or more days within a year from the commencement of employment.” Thus, employees from other states working at least 30 days within California in a year would have to be provided with paid sick leave within the law’s prescriptions. The legislature’s statement of intent also referred to protecting “visitors to California.”

How much sick leave must be provided?

Beginning July 1, 2015, employees covered by the law must receive at least 24 hours or three days of sick leave per year. Employers may provide more, but this basic amount is required and subject to other provisions in the new law.

Employers may provide paid sick leave in two ways—either by accrual or granting the required amount up front. With the accrual method, the law sets an accrual rate of one hour of sick leave for every 30 hours worked. Accrual must begin either on the July 1, 2015, effective date or, for employees who are hired afterward, on their first day of work. For employees under the administrative, executive or professional overtime exemptions, the law orders accrual based on 40 hours per week. But, if the employee’s “normal workweek” is less than 40 hours, the accrual would be based on that “normal” workweek.

As an alternative to the accrual method, an employer may comply by granting the required 24 hours or three days of sick leave for use each year. This method may save the headache of tracking accruals. Such up front grants of sick leave still must comply with all of the law’s other requirements, except any unused leave does not have to carry over to the next year. The law is confusing here. At one point, it refers to granting sick leave “at the beginning of each year,” and elsewhere “for each year of employment or calendar year or 12-month basis.” An employer likely will comply if up front grants of sick leave follow an annual basis.

Many employers already provide PTO, which employees may use for vacation or illness. Such policies will comply with the new law, as long as there is a sufficient amount of paid leave available and the employer also complies with the new law’s terms, including meeting the required accrual rate. Employers who continue to provide PTO will need to review their policies and practices.

Employers must provide at least 24 hours or three days of paid sick leave per year. Yet, how the two numbers apply in practice is unclear. The standard is easy to apply with full-time employees. However, some employees regularly work less than eight hours per day. The law requires a flat 24 hours or three days, without any provision for proration. Thus, if an employee works less than eight hours per day, the employer most likely should provide the full 24 hours of paid sick time, even though it will result in a benefit in excess of three days.

Paid sick time that is accrued must carry over to the following year of employment. The employer may impose a limit on sick leave balances of 48 hours or six days. If an employer wishes to take advantage of these annual and maximum accrual limits, it will be important to have a written
policy setting forth the cap. Interestingly, no carryover is required if the employer grants the required amount of sick leave up front each year.

**Employee’s use of sick leave and its protections**

Paid sick time may be used for (1) diagnosis, care or treatment of an existing health condition of, or preventive care for, an employee or an employee’s family member; or (2) for an employee who is a victim of domestic violence, sexual assault or stalking to obtain relief, including medical attention and psychological counseling.

The law defines “family member” broadly. It includes the employee’s child (biological, adopted, foster child, stepchild, legal ward or a child to whom the employee stands in loco parentis, and regardless of age or dependency status); parent (biological, adoptive, foster parent, stepparent, legal guardian or a person who was in loco parentis when the employee was a minor); parents in-law through an employee’s spouse or registered domestic partner (based on the above definition of “parent”); spouse; registered domestic partner; grandparent; grandchild; and sibling.

An employee is entitled to use accrued paid sick leave on the 90th day of employment, even though accrual must begin at the start of employment. After 90 days, the employee may use paid sick time as it accrues. An employer may set a “reasonable” minimum increment for the use of leave, but the minimum must be two hours or less. Thus, employers that set increments above two hours for the use of sick leave or PTO benefits will need to amend their policies.

An employer may require employees to provide reasonable advance notification of the need for leave. If the need is unforeseeable, an employer may require notice as soon as practicable. The law does not address the question of requiring medical or other notes verifying that an employee’s absence was for a qualifying reason.

The law prohibits an employer from denying the right to use available sick leave. Further, it protects an employee from discharge, threat of discharge, demotion, suspension or any discrimination for, among other things, using sick days, attempting to exercise the right to use sick days or opposing a prohibited policy or practice. The law is unclear whether this prohibition applies only to the required 24 hours or three days of paid sick leave or to all paid sick leave. Employers should treat at least the first 24 hours or three days of sick leave each year as protected. Employers need to revisit any attendance policies that count absences that now will qualify as protected use of sick leave, as well as take care against including any protected absences in any discipline for excessive absenteeism.

**Calculating and paying paid sick leave**

An employer must provide pay for sick leave taken by the payday for the pay period in which the employee used leave. The rate of pay “shall be the employee’s hourly wage,” if the employee had only one pay rate in the past 90 days of employment. Otherwise, the calculation gets a little complicated. A different rule applies for employees who, in the 90 days of employment before using sick leave: (1) had different hourly pay rates, (2) was paid by commission or piece rate or (3) was a non-exempt salaried employee. Then, an employer must calculate the rate of pay for sick leave 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.” Salaried exempt employees presumably would be paid a rate based on their weekly salaries divided by 40 hours.
Sick leave and termination, and rehiring leading to reinstatement of previously accrued sick leave

Under California law, employers pay unused vacation and PTO when employment ends. The new law expressly provides that unused paid sick leave does not have to be cashed out upon separation of employment. Nonetheless, the end of employment does not necessarily mean that unused sick leave disappears forever. The law provides that, if an employee leaves and is rehired “within one year from the date of separation,” the previously “accrued and unused paid sick days shall be reinstated.” The rehired employee may use the reinstated sick leave immediately.

Interaction with other laws

The sick leave law intersects with other laws and changes to employer policies likely will be necessary. Among them, California’s kincare law requires that an employer permit employees to use half of any paid leave each year that they may use for their own illness to care for a family member. The new law did not amend the kincare law. Thus, if an employer provides leave beyond the required 24 hours or three days, some of that leave still may be subject to the kincare law. For example, if an employer provides 10 days per year of sick leave or PTO, an employee still will be able to use half (five days) per year to provide care for certain family members. The kincare law covers different family members than the paid sick leave law (parents, spouses, domestic partners, children and children of a domestic partner).

Itemized wage payment statements, recordkeeping, wage disclosure notices and posters

The law adds to employers’ itemized wage payment statement obligations. An itemized wage payment statement must show the amount of available paid sick leave or PTO. Alternatively, an employer may provide this information in a separate writing on the designated payday.

The law requires that an employer keep records of hours worked and sick leave accrued and used for three years. An employer must make these records available upon request to the employee or the Labor Commissioner. Because wage claims can have a four-year limitations period under California’s Unfair Competition Law, employers should keep the records for four years. If an employer fails to keep the required records, the law presumes that the employee “is entitled to the maximum number of hours accruable,” despite any previous sick leave use. The employer would have the burden of showing otherwise by “clear and convincing evidence,” a higher standard not otherwise applied to wage issues under California law.

Since 2012, California has required employers to provide new non-exempt employees with a wage disclosure notice containing certain information. A new notice must be provided in certain instances when the information changes. Now, the wage disclosure notice also must state, “That an employee: may accrue and use sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has a right to file a complaint against an employer who retaliates.” Employers will need to modify their wage disclosure notices accordingly. Because this information would not be in current wage disclosure notices, employers may wish to provide current employees at the time of the law’s effective date with a revised notice or a separate writing reflecting this language—the options available whenever information required on the notice changes.

Finally, California employers will have yet another poster. The Labor Commissioner must create a poster informing employees of their rights under the new law. Employers will have to post it in
“each workplace of the employer” and in “a conspicuous place.” An employer who “willfully” fails to post the poster will face a civil penalty of up to $100 per offense.

**Consequences of non-compliance**

The new law contains other significant penalties for violations. An employee may file a complaint with the Labor Commissioner for any alleged violation, including any discrimination or retaliation. Even before a complaint may be resolved, the law authorizes the Labor Commissioner to order “appropriate temporary relief to mitigate the violation or to maintain the status quo pending the completion of a full investigation and hearing.” California law does not grant the Labor Commissioner such authority elsewhere.

If the Labor Commissioner determines that any violation occurred, the agency may order “any appropriate relief,” including reinstatement, backpay, the payment of sick days unlawfully withheld, “and the payment of an additional sum in the form of an administrative penalty to an employee or other person whose rights . . . were violated.”

If an employer failed to provide paid sick days, the administrative penalty shall include the dollar amount of the withheld paid sick days multiplied by three, or $250, whichever amount is greater, up to an aggregate penalty of $4,000. For “other harm,” such as termination of employment, the administrative penalty shall include $50 for each day or portion of a day that a violation “occurred or continued,” up to an aggregate penalty of $4,000.

Separately, the law compensates the Labor Commissioner for the costs of investigating and remediating violations. It authorizes the Labor Commissioner to order an employer to pay up to $50 for each day or portion of a day that “a violation occurs or continues for each employee or other person whose rights . . . were violated.” The law does not include a limit on such an award. Potentially, if a violation was continuing because an employer failed to offer paid sick days or did not comply at all on some continuing basis, this amount could be significant. The Labor Commissioner also may bring a civil action in court, with the same potential recovery.

The law is silent about whether a private party may bring a lawsuit to enforce the law and seek recovery of the various penalties. Individuals have been permitted to sue under various other anti-retaliation provisions of the Labor Code rather than proceeding through the Labor Commissioner. In addition, an employee may be able to sue for various penalties under the Labor Code Private Attorney General Act.

**A note for San Francisco employers**

San Francisco is the only local jurisdiction in California with a paid sick leave ordinance. It survives. AB 1522 provides that it “does not preempt, limit[,] or otherwise affect the applicability of any other law.” San Francisco employees cannot conclude that compliance with one law will satisfy the other. There are important differences between AB 1522 and the San Francisco ordinance. Employers must comply with both laws, which will require policies and practices complying with the more protective provisions of the two laws.

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