

California's Paid Sick Leave Law Imposes New Obligations

Yesterday, Sept. 10, California Gov. Jerry Brown signed into law the "Healthy Workplaces, Healthy Families Act of 2014." Effective July 1, 2015, the Act imposes requirements upon employers in California very similar to those enacted in other jurisdictions (such as New York City) with respect to paid sick leave.¹ The Act establishes minimum requirements and does not preempt, limit or otherwise affect more generous laws and regulations. While many employers have policies that provide more generous paid sick leave to their employees, the new California law imposes some additional requirements that will force employers to modify their policies (and perhaps mesh them with local law, such as San Francisco's paid sick leave requirements), provide additional notices, and update their recordkeeping practices or be subject to steep penalties.

Employees May Earn Up to 24 Hours of Paid Sick Leave Per Year

The Healthy Workplaces Act gives employees the right to earn paid sick days, which accrue at the rate of one hour for every 30 hours worked and are paid at the employee's regular rate of pay (subject to certain calculations for varying pay rates, commission or piece-rate workers, and nonexempt salaried employees). Full- and part-time employees (including short-term workers) are eligible to accrue paid sick leave based on the number of hours worked. For accrual purposes, exempt employees are presumed to work a 40-hour workweek; however, if the exempt employee's normal workweek is fewer than 40 hours, paid sick leave will accrue based on the employee's normal workweek. Note that the law appears to apply to non-California residents, expanding entitlement to paid sick leave to an employee "who, on or after July 1, 2015, works in California for 30 or more days within a year from the commencement of employment." The Act does not require that an employer provide additional paid sick leave if the employer's PTO, vacation or other paid time off policies already provide paid time off that can be used for the purposes permitted by and under the same conditions provided by the Act, provided that the employer's policy (i) satisfies the accrual, carryover and use requirements of the Act, OR (ii) provides no less than 24 hours or three days of paid sick leave or equivalent PTO for employee use per calendar year, 12-month basis, or year of employment. Employers may opt to advance sick days to employees with "proper documentation." Accrued sick leave carries over from year to year, although an employer can set a maximum accrual of 48 hours or six days. Carryover is not required, however, if the employer provides eligible employees with the full annual amount of PTO or similar leave at the beginning of each year.

Use of Paid Sick Leave

Employees may begin using accrued paid sick leave beginning on the 90th day of employment. (It appears that employees who are rehired are not subject to a new 90-day waiting period.)

Employers must, upon an employee's written or verbal request, provide paid sick days for:

1. diagnosis, care, or treatment of an existing health condition of, or preventative care for, the employee or the employee's family member (as defined in the Act); and

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2. an employee who is a victim of domestic violence, sexual assault, or stalking who needs to obtain or attempt to obtain any relief (such as a temporary restraining order) to help ensure the health, safety or welfare of the victim or his or her child; seek medical attention for injuries caused by domestic violence, sexual assault or stalking; obtain services from a domestic violence center, program or rape crisis center; obtain psychological counseling related to an experience of domestic violence, sexual assault or stalking; or to participate in safety planning and take other actions to increase safety from future acts of domestic violence, sexual assault or stalking, including temporary or permanent relocation.²

Employees determine how much paid sick leave they need to use, although the employer may set a reasonable minimum increment not to exceed two hours. Employers may limit use of paid sick leave to 24 hours or three days in each year of employment. Employers may not require employees to search for or find replacement workers as a condition to receiving paid sick leave.

Employees must provide reasonable advance notification of the need for leave when the leave is foreseeable. If the need for paid sick leave is unforeseeable, the employee must provide notice as soon as practicable. Employees who take paid sick leave must receive the sick leave pay no later than the payday for the next regular payroll period.

No Payout Upon Termination; Reinstatement Upon Rehire

The Act does not require employers to pay out accrued unused sick leave upon termination. However, the employer must reinstate unused sick days if the employee is rehired within one year of termination. (For employers who provide PTO instead of separate sick and vacation leave, this requirement will be irrelevant, as accrued PTO will have been paid out upon termination, and therefore need not be reinstated.)

Notice, Posting and Recordkeeping Requirements

- Employers will be required to use the soon-to-be-updated Wage Theft Prevention Act Notice that must be provided to employees at the time of hire and within seven days of certain changes. (See California Labor Code § 2810.5.) The updated Wage Theft Prevention Act Notice will state that an employee may accrue and use sick leave, has a right to request and use paid sick leave, may not be retaliated against or terminated for requesting or using accrued sick leave, and has the right to file a complaint against an employer who retaliates for requesting or using accrued sick leave.
- On each designated pay date, employers must provide employees with written notice setting forth the amount of paid sick leave or equivalent PTO available on the employee's itemized wage statement or on a separate document provided to the employee.
- The Labor Commissioner will create a poster detailing the rights provided by the Act that employers must post in a conspicuous location.
- Employers will be required to retain records documenting hours worked and sick days accrued by employees for three years, and to make the records available to the Labor Commissioner and the applicable employee for inspection.

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- Health, domestic violence and related information regarding the employee and his or her family member must be maintained as confidential.

No Retaliation

The Act prohibits denying employees the right to use accrued sick days. It also prohibits discrimination and retaliation against employees who use or attempt to use paid sick days, file a complaint with the Labor Commissioner or allege a violation of the Act, cooperating in an investigation or prosecution under the Act, or oppose any policy, practice or act prohibited by the Act. The Act creates a rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use accrued sick days or takes other adverse action against an employee within 30 days of the employee filing a complaint or alleging a violation under the Act, cooperating in an investigation or prosecution under the Act, or opposing a policy, practice or act prohibited by the Act.

Penalties

The Act has some teeth. Specifically:

- Violation of the pay date notice provision subjects the employer to penalties under the Act, rather than under Section 226 of the Labor Code (which provides the penalties for violation of itemized wage statement requirements).
- Employers are subject to a \$100 penalty per offense for willfully violating the posting requirement.
- Where prompt compliance by the employer is not forthcoming, the Labor Commissioner may take enforcement action, including filing a civil action. In compensation to the State, the Commissioner may order the violating employer to pay to the State liquidated damages up to \$50 for each day or portion of a day a violation occurs or continues for each employee whose rights under the Act were violated.
- Remedies for aggrieved employees include reinstatement, back pay, payment of sick days unlawfully withheld, and payment of an additional sum as an administrative penalty. If paid sick days were unlawfully withheld, the administrative penalty will include the greater of (i) three times the dollar value of the paid sick days withheld from the employee, or (ii) \$250, not to exceed \$4,000. If the violation resulted in other harm to the employee, such as discharge from employment, or otherwise results in a violation of the rights of that employee, a \$50 per day additional penalty will be included in the administrative penalty, up to \$4,000.
- Upon prevailing in a civil action, in addition to the penalties and other damages outlined here, the Labor Commissioner or Attorney General (or person enforcing the Act on behalf of the public) will be entitled to collect reasonable attorneys' fees and costs and interest.
- Employers will not be assessed penalties or liquidated damages assessments due to "an isolated and unintentional payroll error or written notice error that is a clerical or inadvertent mistake." In considering this defense, the fact-finder may consider whether the employers' policies, procedures and practices are in compliance with the Act.

The remedies provided under the Act are cumulative. Moreover, the provisions of the Act are explicitly designated as in addition to and independent of any other rights, remedies or procedures available under any other law.

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Excluded Employees

Excluded from the definition of covered employees are those employees covered by a valid collective bargaining agreement that expressly provides for the payment of wages, hours of work, and working conditions, and that expressly provides for paid sick days (or the equivalent, such as PTO), as well as premium overtime, regular hourly rate of pay at least 30 percent greater than the state minimum wage, and final and binding arbitration of disputes regarding the application of the paid sick days provision. Also excluded from the definition of employees are construction industry workers covered by collective bargaining agreements with similar terms that meet certain other requirements, in-home supportive services providers, and certain air carrier and flight personnel covered by the federal Railway Labor Act.

¹ This will appear in the newly created Article 1.5 (commencing with § 245) of Chapter 1, Part 1 of Division 2 of the Labor Code, and as an amendment to § 2810.5 of the Labor Code (the Wage Theft Prevention Act).

² The new law incorporates the provisions of Labor Code §§ 230(c) and 230.1(a).

This document is intended to provide you with general information regarding the Healthy Workplaces, Healthy Families Act of 2014. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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