

# Finding The Cure To The Paid Sick Leave Blues

Presented by:

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# Introduction

- When enacted approximately two years ago, California's paid sick leave law caused numerous compliance issues. This resulted from the law's ambiguity and the inability of employers to harmonize pay period accrual benefit packages with the new law.
- Complicating matters are local ordinance laws where we scramble to find resources, such as A Better Balance, where we can see all the various paid sick leave laws that are now available to employees.
- Penalties are drastic, and in part draconian, require continuous monitoring for compliance.

# Introduction

- At the same time, paid sick leave policies are important for recruiting, employee relations and wellness related issues.
- Drafting a paid sick leave policy, from a compliance standpoint, requires focus on five key areas contained in all laws.
- Draft a paid sick leave policy, from an operations standpoint, requires focus on key considerations that may impact employee relations.
- Implementing a paid sick leave policy, from a compliance standpoint, requires managers be trained on processes regarding how to administer attendance policies and request notes.



Jurisdictional Issues



What Can You Take  
Leave For



Amount of Leave



Accrual and  
Caps/Payout at  
Termination



Anti-Retaliation  
Provisions

# Considerations

- If we operate facilities in municipalities that have their own paid sick leave laws, are we going to defer to the most generous so we have one uniform policy?
- How are we going to balance paid sick leave laws with vacation and pto benefits?
- Are we going to have different paid sick leave policies for different groups of employees?
- Do we have the internal systems in place (leave request forms, payroll processing, etc.) to properly track paid sick leave?

# Jurisdictional Issues

- California
- City of Los Angeles
- San Diego
- San Francisco
- Oakland
- Emeryville
- Santa Monica
- Berkeley

# Unique Jurisdictional Issues

- California currently exempts in-home supportive care employees from paid sick leave obligations, until July 1, 2018 where they will be included with different accrual and cap obligations.
- California states an employee covered by a valid collective bargaining agreement is not covered by the law if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.

# Issue: Amount of Leave

- **“24 hours or 3 days”**
  - Labor Comm.’s Aug. 2015 –First formal Opinion Letter on new leave laws: Employees must receive the greater benefit, i.e. AWS (10 hour days) and Part-Time (still get 24 hours)
- **Non-Full Time Employees**
  - 24 hours
  - Employees whose normal workday is less than 8 hours would receive 24 hours of sick leave
- **Alternative Work Week**
  - 3 days (Likely more than 24 hours)
  - Employees whose normal workday is greater than 8 hours would receive the equivalent of three full workdays



# Who is an Employee? (California)

- Most employees who work 30 or more days within a year in California
  - Includes part-time and temporary employees
- Limited exclusions for:
  - Employees under collective bargaining agreements meeting specific requirements
  - On-site construction workers covered by a valid collective bargaining agreement
  - Airline flight deck or cabin crew members subject to federal labor law
  - Certain employees of municipalities or other public entities
  - Certain providers of in-home support services until July 1, 2018

# Who is an Employee?

- Los Angeles
  - Works in the City for the same Employer for 30 days
  - Performs at least two hours of work in a particular week within the City
  - Qualifies as an Employee entitled to minimum wage
    - California minimum wage law
    - Wage orders
  - Limited exclusions for employees under collective bargaining agreements meeting specific requirements

# Who is an Employee?

- **San Francisco**
  - Works within the geographic boundaries of the City of San Francisco, including part-time and temporary employees
- **Oakland**
  - Performs at least two hours of work in a workweek in the City of Oakland
- **Emeryville**
  - Performs at least two hours of work during calendar week within geographic boundaries of the City of Emeryville , including part-time and temporary employees
  - Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law

# Who is an Employee?

- San Diego
  - Performs at least two hours of work within the geographic boundaries of the City for an employer in one or more calendar weeks of the year
  - Qualifies as an employee entitled to minimum wage under the California minimum wage law
  - Does **not** include:
    - employees authorized to be employed at less than the minimum wage under a special license issued under CA Labor Code 1191 or 1191.5
    - employees of a publicly subsidized summer or short-term youth employment program
    - student employees, camp counselors, or program counselors of an organized camp
    - independent contractors

# Who is an Employee?

- Santa Monica
  - Any person who in a particular week performs at least two hours of work within the geographic boundaries of the City of Santa Monica for an Employer.
  - Qualifies as an employee entitled to a payment of minimum wage from any Employer under California law.

# How much time are employees entitled to?

Municipality	Annual Sick Leave Requirement/Total Accrual Cap
California	24 hours / 3 days for use 48 hours / 6 days for total accrual cap
San Francisco	40 hours (small businesses) 72 hours (all others)
Los Angeles	48 hours for use 72 hours for total accrual cap
San Diego	40 hours for use 80 hours for total accrual cap
Oakland	40 hours (small businesses) 72 hours (all others)
Emeryville	48 hours (small businesses) 72 hours (all others)
Santa Monica	2017: 32 hours (small businesses) 40 hours (others) 2018: 40 hours (small businesses) 72 hours (others)

# Front Load Available?

Municipality	Annual Sick Leave Requirement/Cap	Front-Load Available?
<b>California</b>	24 hours / 3 days for use 48 hours / 6 days for total accrual cap	Yes, 24 hours
<b>San Francisco</b>	40 hours (small businesses) 72 hours (all others)	Somewhat (see next slide)
<b>Los Angeles</b>	48 hours for use 72 hours for total accrual cap	Yes, 48 hours
<b>San Diego</b>	40 hours for use 80 hours for total accrual cap	Yes, 40 hours
<b>Oakland</b>	40 hours (small businesses) 72 hours (all others)	No
<b>Emeryville</b>	48 hours (small businesses) 72 hours (all others)	Yes
<b>Santa Monica</b>	2017: 32 hours (small businesses) 40 hours (others) 2018: 40 hours (small businesses) 72 hours (others)	Yes

# Front Load in San Francisco

- Allowed starting on January 1, 2017
- Currently:
  - If an employer uses the “front load” method, the OLSE would treat the 24 hours/ 3 days as an “advance” on paid sick leave hours to be accrued
  - For example, an employee would have to work 720 hours to accrue 24 hours of sick leave (720 hours worked ÷ 30 hours worked for each hour accrued = 24 hours accrued).  
If the employer “advances” the employee 24 hours “up-front,” accrual would temporarily halt and the employee would not continue to accrue until after the employee has worked 720 hours. The employee would then continue accruing.



# Other Accrual Rate Options Under State Law

## California:

- Paid sick leave begins to accrue on the first day of employment
- 1 hour of paid sick leave for every 30 hours worked
- 24 hours (or 3 days) of paid sick leave by the 120<sup>th</sup> day of employment
- A regular accrual basis so long as 24 hours (or 3 days) of paid sick leave are earned by the 120<sup>th</sup> day of employment or each calendar year or in each 12-month period

# Accrual Rate (Accrual Method)

1 hour of paid sick leave earned for every 30 hours worked:

- San Francisco
- Los Angeles
- San Diego
- Oakland
- Emeryville
- Santa Monica

# Accrual Cap (Must Be In Writing)

Municipality	Total Accrual Cap	Carry-Over Required if Front-Load?
California	48 hours / 6 days	No
San Francisco	40 hours (small businesses) 72 hours (all others)	Yes
Los Angeles	72 hours	Yes
San Diego	80 hours	No
Oakland	40 hours (small businesses) 72 hours (all others)	N/A
Emeryville	40 hours (small businesses) 72 hours (all others)	No
Santa Monica	2017: 32 hours (small businesses) 40 hours (others) 2018: 40 hours (small businesses) 72 hours (others)	No

# Issue: Failure to Account for Proper Paid Sick Leave

Hospital seeks to have the best of both worlds with an accrual system for paid sick leave for non-exempt employees. They provide a system where an employee gets  $\frac{1}{2}$  day a month for a total of six days for the entire year. The hospital maintains that this is compliant. Are they correct?

# Issue: Failure to Account for Proper Paid Sick Leave

Likely Not.

Non-Exempt gets 4 hours per month, which ends up correlating to only 120 hours of work.

If employee works more than 120 hours in a given month, they have not accrued the leave quickly enough. Resolution here may be a hybrid grant/accrual system.

# When Can Employees Begin Using Paid Sick Leave?

## **On the 90th Day of Employment**

- California
- Los Angeles
- San Diego
- Santa Monica
- Oakland
- Emeryville

## **As Time Accrues**

- San Francisco

# Minimum Increment for Use

## **Not Less Than 2 Hours**

- California
- San Diego
- Emeryville

## **Not Less Than 1 Hour**

- San Francisco
- Oakland

## **No Increment Requirement**

- Los Angeles
- Santa Monica

# Permissible Uses - California

- Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member.
  - A child (regardless of age or dependency status), parent (incl. step-parents and parents-in-law), spouse, registered domestic partner, grandparent, grandchild, or sibling
- For an employee who is a victim of domestic violence, sexual assault or stalking to seek aid, medical attention, obtain services or counseling, or participate in safety planning



# Permissible Uses

- Los Angeles
  - Consistent with CA
  - Also includes: Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship
- San Diego
  - Consistent with CA
  - Also allows use of sick leave when the employee's place of business is closed by order of a public official due to a Public Health Emergency or if the employee is providing care or assistance to a child whose school or child care provider is closed due to a Public Health Emergency
- Santa Monica
  - Consistent with CA ,

# Permissible Uses

- All 3 Northern California:
  - Definition of “family member” to include a designated individual if employee has no spouse or registered domestic partner.
- San Francisco
  - Effective 1/1/2017, purposes related to employee who is a victim of domestic violence, sexual assault, or stalking
  - Effective 1/1/2017, purposes related to donating the employee’s bone marrow or an organ of the employee to another person, or to care for family member donating bone marrow or organ to another person
- Oakland
  - No safe time rule
  - Medical need of employee or employee’s family member
  - If single, a designated person of choice.
- Emeryville
  - In addition, may provide care for guide dog, signal dog, or service dog of the Employee, Employee’s family member, or the person designated by employee.

# Employee's Request - California

- Notice
  - Reasonable advance notification for foreseeable need for paid sick leave
  - “As soon as practicable” for unforeseeable need for paid sick leave
- Usage cannot be conditioned on the employee searching for or finding a replacement worker to cover

# Employee's Request

- Los Angeles
  - Employee's request to use paid sick leave may be oral or written
  - Usage cannot be conditioned on the employee search for or find a replacement worker to cover
- San Diego
  - Consistent with California
  - Cannot require more than one week's notice
- Santa Monica
  - Consistent with CA

# Employee's Request

- San Francisco, Oakland
  - Consistent with California
  - Employers may define “as soon as practicable” as two hours, or a time period less than two hours, prior to start of an employee’s shift, except for accidents or sudden illnesses
- Emeryville
  - Consistent with California

# Verification Considerations

- Unclear whether documentation can be required under CA law
  - could be interpreted as getting in the way of an employee's right to sick leave

# Verification Considerations

- Los Angeles
  - An Employer may require an Employee to provide reasonable documentation for use of paid sick leave.
  - BUT must still comply with CA law, which is unclear as to whether documentation can be required
- San Diego
  - Allowed to require documentation for an absence of more than three consecutive work days
- Santa Monica
  - Consistent with CA

# Verification Considerations

- San Francisco
  - Absence for more than three consecutive workdays;
  - Clear pattern of paid sick leave abuse (i.e. taking days when vacation request has been denied, taking days for undesirable shifts, pattern of taking Mondays or Fridays or immediately following a holiday)
  - Doctor appointments
- Oakland
  - Absence for more than three consecutive workdays;
  - Clear pattern of paid sick leave abuse (i.e. taking days when vacation request has been denied, taking days for undesirable shifts, pattern of taking Mondays or Fridays or immediately following a holiday)
- Emeryville
  - Consistent with CA



# Rate of Pay for Sick Leave - California

- Exempt employees – calculated “in the same manner as the employer calculates wages for other forms of paid leave time”
- Nonexempt employees – 2 options
  - 90-day Lookback:  
Total wages earned (excluding OT premium) ÷  
Total hours worked in full pay periods of prior 90 days
  - Regular Rate:  
Same manner as the regular rate for calculating overtime in the week the employee takes sick leave, regardless of whether overtime is worked in that week

# Rate of Pay for Sick Leave

- San Francisco
  - Consistent with California
- Emeryville
  - No provisions specific to rate of pay
- Los Angeles, Santa Monica
  - No provisions specific to rate of pay
- San Diego
  - Exempt employees – at the same rate or in the same manner as the employer calculates compensation for paid working time
  - Nonexempt employees - same manner as the regular rate for calculating overtime in the week the employee takes sick leave, regardless of whether overtime is worked in that week

# Rate of Pay for Sick Leave

- Oakland
  - Hourly employees – regular hourly rate
  - Non-exempt salaried employees – Divide annual salary by 52 to obtain weekly salary; divide weekly salary by number of hours the employee is regularly scheduled to work (40 or fewer hours, even if employee regularly works more than 40 hours per week)
  - Exempt salaried employees – Divide annual salary by 52 to obtain weekly salary; divide weekly salary by 40 hours unless there is clear and convincing evidence that the exempt employee regularly works less than 40 hours in a workweek

# Payment upon Termination & Reinstatement California

- No requirement to pay out accrued, unused sick days upon separation
  - Reinstatement of accrued/unused sick leave if separated employee returns within one year of termination
  - Reinstatement not required if paid out at termination

# Payment upon Termination & Reinstatement

- Los Angeles, San Francisco
  - Consistent with CA, except no provision stating that reinstatement of accrued, but unused paid sick leave is not required if paid out at termination
- San Diego
  - Reinstatement of accrued/unused sick leave if separated employee returns within six months of termination
    - But under state law, have to still reinstate unused time if return within one year
- Santa Monica
  - Consistent with CA on no payment upon termination
  - No provisions specific to reinstatement
- Oakland, Emeryville
  - Consistent with California

# Retaliation Prohibited

- Employers are prohibited from discharging, reducing in compensation or otherwise discriminating against an Employee for:
  - Opposing any practice proscribed by this article,
  - Requesting to use paid sick leave or actually using paid sick leave,
  - Participating in proceedings related to this article,
  - Seeking to enforce or assert rights under this article
- Rebuttable presumption of retaliation exists if an employer does any of the following within 30 days of the employee engaging in protected activity
  - Denies the employee the right to use accrued sick days
  - Discharge/threaten to discharge
  - Demote, suspend, or “in any manner discriminate”

# Retaliation Prohibited

- San Francisco
  - Consistent with CA, also unlawful to threaten to discharge, demote, suspend, or in any manner discriminate or take adverse action
  - Unlawful for absence taken under paid sick leave to be counted as absence that leads to discipline, discharge, or other adverse action
  - Rebuttable presumption is 90 days
- Oakland
  - Consistent with CA, also unlawful to reduce vacation/PTO or other non-wage benefits, increasing expenses for employees for items such as parking, meals, and/or uniforms
- Emeryville
  - Consistent with CA

# Retaliation Prohibited

- Los Angeles
  - Consistent with CA, but no provision specific to a rebuttable presumption of retaliation
- San Diego
  - Consistent with CA, but more broadly creates a rebuttable presumption if adverse action within 90 calendar days of the employee's exercise of any rights provided by the division
- Santa Monica
  - Consistent with CA



# Issue: Retroactive Designation of PSL Versus No-Call/No-Show

- On Wednesday afternoon, after a blow up with my supervisor, I stormed out claiming that I was stressed out and needed time off. I was no-call, no-show for three days and not returning any communications. On Friday, I was three days no-call/no-show. You have an established no-call, no-show policy. Can you approve a termination?
- The employee must notify the employer in advance if the sick leave is planned, as may be the case with scheduled doctors' visits. If the need is unforeseeable, the employee need only give notice as soon as practical, as may occur in the case of unanticipated illness or a medical emergency.

# Notice & Records Required by Employer

Municipality	Notice Requirement
California	<ul style="list-style-type: none"><li>• Poster</li><li>• Written Notice to Employee at Hire (WTPA Notice)</li><li>• Paystub – Available Sick Leave</li></ul>
San Francisco	<ul style="list-style-type: none"><li>• Poster</li><li>• Paystub – Available Sick Leave</li></ul>
Los Angeles	<ul style="list-style-type: none"><li>• Poster</li></ul>
San Diego	<ul style="list-style-type: none"><li>• Poster</li><li>• Written Notice to Employee at Hire</li><li>• Paystub – Sick Leave Accrued <i>and</i> Used</li></ul>
Oakland	<ul style="list-style-type: none"><li>• Written Notice to Employee at Hire</li><li>• Poster</li></ul>
Emeryville	<ul style="list-style-type: none"><li>• Poster</li><li>• Written Notice to Employee at Hire (WTPA Notice)</li><li>• Paystub – Available Sick Leave</li></ul>
Santa Monica	<ul style="list-style-type: none"><li>• Poster</li></ul>

# Enforcement & Penalties - California

- Labor Commissioner
  - Investigations (Lab. Code §1174)
  - Conduct administrative hearings
- DLSE Administrative Hearing
  - Reinstatement, backpay, payment of sick days plus fines (up to \$4,000), administrative penalty
- No Direct Private Right of Action
- PAGA may apply

# Enforcement & Penalties (cont'd)

- Los Angeles
  - Subject to guidelines and rules that may be promulgated by the Office of Wage Standards of the Bureau of Contract Administration
- Santa Monica
  - Subject to administrative regulations that may be adopted by the Finance Director
  - Misdemeanors - Fines from \$150 to \$500, imprisonment for up to six months, or both
  - Infraction – Fines from \$100 to \$250
  - Each day of a violation is a separate offense
  - Administrative citation pursuant to Chapter 1.09 of this Code.
  - Violators will be required to reimburse the law enforcement agency that investigated the violation its full investigative costs.
  - Violations are considered a strict liability offense – no proof of intent required

# Enforcement & Penalties (cont'd)

- Santa Monica (Civil Remedies)
  - Any aggrieved applicant, employee, or any other person or entity acting on behalf of the public, may file a civil action in court
  - Employees and applicants may recover:
    - legal or equitable relief, including, back wages, sick pay unlawfully withheld, penalties up to the amount of \$100 to each person whose rights under this Chapter were violated for each day that the violation occurred or continued, reinstatement, and/or injunctive relief, reasonable attorneys' fees and costs.
    - For willful violations, monies and penalties to be paid may be trebled.
  - Any person or entity acting on behalf of the public may recover equitable, injunctive or restitutionary relief, and reasonable attorneys' fees and costs. The remedies are cumulative.

# Enforcement & Penalties (cont'd)

- San Diego
  - Employees claiming harm from a violation of the Ordinance may seek the following remedies:
    - Back wages;
    - Damages for denial of the use of accrued sick leave;
    - Reinstatement or other injunctive relief;
    - Attorneys' fees and costs; and
    - Liquidated damages equal to double back wages.
  - Employees claiming retaliation may also seek liquidated damages that are the **greater** of double back wages or:
    - \$1,000 for each violation not resulting in termination; or
    - \$3,000 if the employee is terminated.

# Enforcement & Penalties (cont'd)

- San Diego (cont'd)
  - Additionally, employers who violate the Ordinance may be subject to the following civil penalties:
    - \$500 to \$1,000 per violation, where a “violation” is defined as each and every day that an employer fails to pay an employee minimum wage or fails to provide an employee with earned sick leave;
    - \$500 per employee who was not given appropriate notice, up to a maximum of \$2,000;
    - \$1,000 to \$3,000 per act of retaliation; and
    - Cumulative civil penalties against an employer who has not previously violated any provision of the Ordinance are limited to \$10,000.
  - The Ordinance will be enforced by the Office of the City Treasurer

# Enforcement & Penalties (cont'd)

- San Francisco
  - OLSE may administratively enforce
  - The OLSE, City Attorney, any person aggrieved by violation, any entity a member of which is aggrieved, or any other person or entity acting on behalf of the public may bring civil action
  - Remedies
    - Reinstatement
    - Backpay
    - Payment of sick leave unlawfully withheld
    - Liquidated damages in the amount of \$50 to each employee, plus sick leave withheld multiplied by three; or \$250, whichever is greater
    - Reasonable attorney's fees and costs
    - Interest



# Enforcement & Penalties (cont'd)

- Oakland
  - City or employee may file civil action
  - Remedies
    - Backpay
    - Reinstatement
    - Injunctive relief
    - Attorney's fees
    - Expert witness fees and expenses
    - Any person who negligently or intentionally violates law shall be liable for civil penalties for each violation to a maximum amount of \$1,000 per violation
  - City of Oakland may award same relief as court

# Enforcement & Penalties (cont'd)

- Oakland
  - City of Oakland may also consider non-compliance in making decisions on city contracts, land use approvals, and other entitlements that operate within Oakland
- Emeryville
  - City or employee may file civil action
  - Employee may also file complaint with City
  - Remedies
    - Back pay
    - Reinstatement and/or injunctive relief
    - Fines and penalties

# Issue: Paystub Compliance

- Failure to comply with local ordinances may result incorrect accrued but unused PSL balances to be put on paystubs.
- California law requires the amount of accrued but unused paid sick leave to be put on paystubs.

# Issue: Harmonizing PSL With Point System Attendance Policy

St. Dominic's Hospital maintains a point system where every occurrence is either a half point or full point. I have been absent three times in the past month. My supervisor approaches you and requests disciplinary action for both my absence and for me not failing to call in properly. Can I be disciplined here.

# Issue: Interplay Between Paid Sick Leave/FMLA/CFRA/Paid Family Leave

- Questions currently arise as to whether you can unilaterally require an employee to use paid sick leave while on FMLA/CFRA leave. Answer is not clear, but likely yes.
- Unless it is part of PTO, you cannot use Paid Sick Leave as the “waiting period” to collect Paid Family Leave benefits.

# Miscellaneous Issues

- Acquisitions of entities that have different paid sick leave laws.
- Conflicts between collective bargaining agreements and paid sick leave laws.
- Additional potential liability for misclassification of independent contractors.

# Hypothetical

- Hospital currently provides California Paid Sick Leave time and pay to non-benefited employees. They are not penalized for the days off and there is an accrual system. If employees use incremental hours because they do not have accrued time off, do we penalize them? For example, if the non-benefited employee wants to use 2 hours of CA sick leave time, per a point system (attendance policy) they would receive half a point for an unscheduled absence. Is this compliant with sick leave law?

# Final Questions



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# Thank You



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