

# COUNTDOWN TO JULY 1ST: WHAT EMPLOYERS SHOULD KNOW IN PREPARING FOR CALIFORNIA'S MANDATORY PAID SICK LEAVE

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Beginning July 1, 2015, California employers, with limited exceptions, must grant every employee 24 hours or 3 paid sick days each year. Even for employers who are already providing paid sick leave, the new law presents potential liability for failure to comply with the specific regulations regarding accrual, notice and recordkeeping requirements. Consequently, employers should start preparing now for this new regulatory challenge and a new source of potential wage & hour class action liability.

## **Entitlement to Paid Sick Leave**

Any employee who has worked for an employer 30 or more days in California within a year of their employment is eligible to accrue sick leave. The term "employee" is defined to include any employee who works on a full-time, part-time, seasonal, per diem, or temporary basis. There is no exemption for "small" employers, unlike other leave laws. Thus, subject to only limited exceptions, the new law applies to any employer with one or more employees within the state.

## **Accrual of Sick Leave**

After July 1st, or the first day of employment, whichever is later, employees must accrue one hour of paid sick leave for every 30 hours worked, including overtime hours. Employees may decide the amount of

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sick time to use, subject to the employer's ability to limit use to a reasonable increment, not to exceed two hours. Employers may limit employees to using 24 hours or three work days of paid sick leave per year.

Thus, for employers with an alternative workweek schedule, the law may actually require employers to allow employees to use more than 24 hours so that the employee receives three work days of paid leave. Also, part-time employees working less than 8-hour days may take more than three work days, up to the statutory limit of 24 hours.

Employers may cap the total amount of accrued sick days at 48 hours or six work days. Employees must be permitted to carry over accrued, but unused, sick days into the following year subject to the 48 hour/six-day accrual cap. An employee is not entitled to be paid for accrued but unused sick days upon resignation or termination of employment. However, if an employee is re-hired within a year of his or her separation, the employer must reinstate any unused sick leave that was previously accrued.

### **Calculating the Rate of Pay**

For non-exempt employees, sick leave is normally calculated at the employee's hourly rate of pay. However for employees with variable pay rates, including those paid on a commissioned or piece rate, the rate of pay is calculated based upon the employee's total wages, excluding overtime premium pay, divided by the employee's total hours worked in the full pay periods of the 90 days prior to taking leave. Because these regulations do not apply immediate answers to all situations, employers should seek legal counsel in applying these provisions.

### **Covered Uses**

Upon an oral or written request, employees are permitted to take leave for the diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member. Covered family members include a spouse, registered domestic partner, children (regardless of the child's age or dependency status),

parents (including step-parents and parents-in-law), grandparents, grandchildren, and siblings. Paid sick days are also available for employees who are the victims of domestic violence, sexual assault, or stalking.

### **Changes for Employers Currently Offering PTO or Paid Sick Leave**

Employers who offer paid sick leave or paid time off (PTO) will likely have to revisit their policies in light of the new law. Employers must ensure their current policies: 1) satisfy the accrual, carry over, use, and reinstatement requirements of the law; 2) provides no less than the minimum amount sick time required by law.

### **Employee Notification**

Employees must provide “reasonable advance notification” of their need to use accrued paid sick leave. If the need for leave is unforeseeable, the employee must provide notice of his/her need for leave as soon as practicable. The law does not contain any provision allowing employers to require reasonable documentation that the sick time was used for a covered purpose. Thus, until there is some clarification, unless otherwise allowed under another leave law (e.g., FMLA, CFRA, pregnancy disability leave, or workers’ compensation), employers should refrain from requesting documentation to support the leave taken.

### **Employer Notification and Recordkeeping Requirements**

California employers must provide employees with written notice of their right to accrue paid sick leave under the new law, as follows:

1. **Poster:** Starting January 1, 2015, employers must display a poster informing employees of their right to accrue paid sick leave under the new law. This poster is available on the DLSE website.

2. **Wage Theft Prevention Act Notice:** This notice, which must be provided at the time of hire pursuant to *Labor Code* section 2810.5, now requires additional

information regarding an employee's rights under the Healthy Workplaces, Healthy Families Act.

**3. Itemized Wage Statements:** Employers must provide written notice of the amount of paid sick leave available for use or the amount of PTO an employer provides in lieu of sick leave. Alternatively, this information may be provided in a separate writing on the employee's pay date at the time wages are paid.

The new law also imposes new record-retention requirements. Employee usage and accrual must be documented and retained for at least three years, and the records must be made available for employee inspection within 21 days of a written or oral request. Failure to keep adequate records will result in a presumption that the affected employee is entitled to the maximum number of accrued hours. Failure to abide by the posting, notification, and recordkeeping requirements may also subject an employer to various civil penalties.

### **Enforcement & Penalties**

Notably, the law creates a rebuttable presumption of unlawful retaliation if an employer takes adverse action against an employee within 30 days of the employee engaging in protected activity by invoking rights defined by this new law. The rebuttable presumption of retaliation is an unprecedented addition to California leave laws, which places the burden on the employer to prove that employment decisions are valid, rather than placing the burden on an employee to prove retaliation.

The law also provides the Labor Commissioner and the Attorney General the authority to enforce these requirements and order "any appropriate relief," which may include reinstatement, backpay, payment of unlawfully withheld sick days, administrative penalties, and enforcement fines payable to the state (e.g., the Private Attorneys General Act ("PAGA")). There is a safe haven from penalties or liquidated damages for employers who can attribute their non-compliance to an isolated and unintentional payroll error or written

notice error deemed to be a clerical error or an inadvertent mistake.

## **Employers' Next Steps**

Every employers should take these new laws seriously and examine their policies and procedures to prepare for this new wave of regulations. Keep in mind the following considerations in preparing for July 1st:

**1. Determine the type of leave to offer:** There are several options employers have in implementing the new law. For employers wishing to avoid the administrative burden of tracking accrual and carryover, they may consider frontloading the minimum amount of leave at the beginning of each year. Employers that currently limit paid sick leave or PTO to full-time employees may consider amending their current policies, or adopting a new sick leave policy that applies to "non-full-time" employees.

**2. Adopt a compliant written policy:** Given the extensive consequences of non-compliance, employers should adopt or revise their written policies in light of the new law. There are many unanswered questions left by the legislature, thus employers should consult with experienced California labor and employment counsel in drafting sound and compliant policies.

**3. Train your supervisors:** The rebuttable presumption of retaliation creates high stakes for employers. Supervisors must be informed of employees' new rights under the law and the organization's policies and procedures for addressing requests for time off.

**4. Determine interaction with local sick pay laws:** Some municipalities have their own sick leave pay regulations. The California law does not limit more generous provisions in local regulations regarding sick leave, but will preempt those provisions which are less generous to employees. Employers therefore should seek legal counsel in harmonizing local sick pay laws with California's new sick pay law.

