

Retail Detail



California Paid Sick Leave: Are You Ready?

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California's much talked-about AB 1522, containing the Healthy Workplaces, Healthy Families Act of 2014 (the Act) became law January 1, 2015. Under the new legislation, employers must provide nearly all California employees with three paid sick days per year. Although several California cities already have sick leave ordinances -San Francisco, Long Beach (for certain hotel employees), and Oakland (effective March 2, 2015), California is only one of a few states to impose a state-wide paid sick leave requirement.

Many California employers already offer their employees at least three days of paid sick leave or other paid time off (PTO). Some of these employers mistakenly assume that this new law will not affect them. But the Act applies to virtually all employees who work in California for 30 or more days within a year. This includes part-time, temporary, and seasonal employees, who often are not covered by existing sick leave and PTO policies. The Act (and other related changes in AB 1522) also subjects California employers to new posting, notice, and recordkeeping requirements.

Back in October 2014, we issued a Management Alert on this legislation. We've also published several blog posts discussing the Act on our Cal-Peculiarities blog at www.calpeculiarities.com. In our experience, however, many employers remain unaware of all of the Act's requirements. We therefore take this opportunity to remind you of these requirements as well as the steps you already should be taking to achieve compliance. Indeed, as discussed below, many of the Act's requirements became effective back on January 1, 2015.

KEY COMPLIANCE DATES: JANUARY 1, 2015 AND JULY 1, 2015

All California employers should review the Act's requirements carefully and take steps to ensure compliance. A first reading of the Act might leave the impression that the overall effective date is July 1, 2015, because the Act expressly delays employees' entitlement to paid sick leave until on or after July 1, 2015, provided they have worked in California for 30 or more days within a year from the commencement of their employment. However, since the July 1, 2015 effective date applies only to the benefit entitlement provision¹, the rest of the statutory additions and amendments in AB 1522, including those imposing posting, notice, and recordkeeping requirements, became effective on January 1, 2015, under normal operation of California law, because AB 1522 specifies no other alternate effective dates.

In addition to preparing the required notices and posting, AB 1522 likely will require significant changes to employer policies and processes. Among the areas to consider are:

- Development and implementation of a California paid sick leave policy for employees who do not already receive sick leave or other PTO under the employer's existing policies;
- Modifications to existing sick leave or PTO policies;

- Revisions to the Wage Theft Prevention Act Notice;
- Changes to recordkeeping policies and procedures; and
- Revisions to the itemized wage statement to reflect paid sick leave balances or the development of a separate notice to be provided at the same time as the wage statement.

Each of these tasks will require careful deliberation and consideration of alternative approaches to achieve compliance.

THE ACT'S KEY PROVISIONS

Covered Employers

All employers (regardless of their size or status) that employ at least one employee who works in California for 30 or more days within a year.²

Covered Employees

Any employee who works in California for 30 or more days within a year from commencement of employment, including part-time, temporary, and seasonal employees, with the exception of:

1. Employees whose employment is governed by a valid collective bargaining agreement (CBA) that provides for the payment of wages, hours of work, working conditions, overtime premiums, regular hourly rate of pay not less than 30 percent greater than the state minimum wage, paid sick or similar leave, and final and binding arbitration of disputes regarding the paid sick days provision;
2. Construction employees covered by CBAs with specified provisions;
3. In-home supportive services providers; and
4. Certain air carrier and flight personnel.³

Accrual Rate

Covered employees accrue one hour of paid sick leave for every 30 hours worked.⁴ The accrual rate for exempt employees is based on a presumed 40 hour-workweek, except that an exempt employee whose normal workweek is fewer than 40 hours will accrue paid sick leave based on that employee's normal workweek.⁵ Although the law itself is ambiguous, the Office of the Labor Commissioner has indicated in the template California Paid Sick Leave Poster and Frequently Asked Questions (FAQs) it issued in late 2014 that accrual begins on the first day of employment or July 1, 2015, whichever is later.

Carry Over and Accrual Cap

Employees must be permitted to carry over all of their accrued, unused paid sick leave to the following year, but employers may cap the accrual of paid sick leave at 48 hours or six days.⁶

Annual Grant

Instead of using the accrual method, employers can choose to give covered employees at least three days or 24 hours of paid sick leave at the beginning of each year. Under this option, no accrual or carry over is required.⁷

Existing Sick Leave or PTO Policy

The Act does not require an employer to provide additional paid sick days if (1) the employer has an existing paid leave or PTO policy, (2) the employer makes the paid leave available under the same conditions as stated in the new law, and (3) the existing policy either (a) satisfies the accrual, carry over, and use requirements of the Act or (b) provides for employee use at least 24 hours or three days of paid sick leave (or equivalent paid leave or PTO) per each (i) year of employment, (ii) calendar

year, or (iii) 12 months.⁸

However, employers should not assume that simply having a sick leave or PTO policy is sufficient. The existing policy must meet the Act's accrual, cap, and reinstatement rules. Additionally, employers with adequate preexisting policies still must comply with the Act's other requirements, including notice, posting, and recordkeeping, and also must satisfy the revised Wage Theft Notice requirement.

Sick Leave Use

Employers can limit use of paid sick leave to 24 hours or three days during each year of employment.⁹ Employers may set a reasonable minimum increment, not to exceed two hours, for employees to use accrued sick leave.¹⁰ The employee otherwise is entitled to determine how much sick leave he or she needs to use. Employees become eligible to use their accrued paid sick leave on their 90th day of employment, after which they may use paid sick leave as it is accrued.¹¹ Employers cannot require employees to locate a replacement worker to cover days on which an employee uses paid sick leave.¹²

Qualifying Reasons for Use

Employers must, upon an employee's written or oral request, provide paid sick leave for (1) the employee's own or "family member's" diagnosis, care, or treatment of an existing health condition, or preventive care; and (2) an employee who is a victim of domestic violence, sexual assault, or stalking to seek aid, treatment, or related assistance.¹³

Covered Family Members

The Act defines "family member" broadly to include:

1. Child (regardless of age or dependency status) - biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis;
2. Biological, adoptive, or foster parent or step parent, legal guardian of the employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis to the employee when the employee was a minor child;
3. Spouse or registered domestic partner;
4. Grandparent;
5. Grandchild; and
6. Sibling¹⁴

Rate of Pay for Paid Sick Leave

Hourly employees are paid according to their hourly rates of pay.¹⁵ Where employees earn fluctuating wages (e.g., commissions, multiple hourly rates, piece rates), the rate of pay for paid sick leave is determined by dividing the employee's total wages (not including overtime pay) by the total hours worked in the full pay periods during the prior 90 days.¹⁶

Notice Requirement

Employers must provide paid sick leave upon an employee's oral or written request.¹⁷ If the need for paid sick leave is foreseeable, then the employee must provide "reasonable advance notification" - a term that the Act does not define. If the need for paid sick time is unforeseeable, then the employee must provide notice "as soon as practicable."¹⁸

No Pay-Out Required

The Act expressly states that employers are not required to pay employees for accrued, unpaid sick leave upon employment separation, unlike California law governing vacation time.¹⁹ However, the employer must restore to the employee any accrued,

unused paid sick leave if the employee is rehired within one year of the separation.²⁰ The rehired employee is entitled to use the previously accrued but unused paid sick leave and to accrue additional paid sick leave upon rehire.²¹

Posting Requirement

Beginning January 1, 2015, employers must display in a conspicuous place in each workplace a poster notifying employees of their paid sick leave rights.²² The Act directs the Labor Commissioner to create a poster containing this information and make it available to employers. In late November 2014, the Labor Commissioner released the template poster, which is available on the California Division of Labor Standards Enforcement (DLSE) Web site.²³ The Act subjects employers that willfully violate the posting requirement to a civil penalty of not more than \$100 per offense.²⁴

Wage Theft Prevention Act Notice Requirement

AB 1522 also amends California's Wage Theft Prevention Act²⁵ to require employers to include in the mandatory Wage Theft Prevention Notice the following information about paid-sick time: (i) Employees may accrue and use sick leave, (ii) have a right to request and use paid sick leave, (iii) may not be retaliated against or terminated for requesting or using accrued sick leave, and (iv) have the right to file a complaint against an employer that retaliates. Following the Act directive, in late November 2014, the Labor Commissioner issued the template Notice, which is available on the DLSE Web site.²⁶ Employers must use either the Labor Commissioner's template Notice or revise their existing Wage Theft Prevention Act Notices to include all of the new required information. This information must be included in all Notices issued to employees on or after January 1, 2015.

Note that the scope of employees who are subject to the paid sick leave law is broader than the scope of employees covered by the Wage Theft Prevention Act Notice. As a reminder, the Wage Theft Prevention Act Notice must be given to all nonexempt employees upon hire and within seven calendar days of any changes to the information contained in the Notice, unless all changes are reflected in a timely itemized wage statement provided to the employee or in a separate document required by law and provided to the employee within seven days of the changes.

Pay Stub Requirement

Every pay day, employers must provide each covered employee with written notice that sets forth the amount of paid sick leave available or the PTO that an employer provides in lieu of sick leave. This notice must appear either on the employee's itemized wage statement or in a separate writing provided to the employee on the designated pay date.²⁷ Violation of this provision subjects the employer to penalties under the Act, but not under California Labor Code Section 226.²⁸

Recordkeeping Requirement

The Act requires employers to keep records for three years to document the hours worked and the sick leave accrued, and to make the records available for inspection by the Labor Commissioner and the employee.²⁹

Prohibitions

The Act prohibits employers from denying employees the right to use accrued sick leave and from discriminating or retaliating against an employee who uses or attempts to use paid sick leave, who files any complaint with the Labor Commissioner, who alleges a violation of the Act, who participates in an investigation under the Act, or who opposes any policy or practice prohibited by the Act.³⁰

Rebuttable Presumption

The Act creates a rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use accrued sick leave or takes other adverse action against an employee within 30 days of the employee: (i) filing a complaint, (ii) cooperating in an investigation, or (iii) opposing a practice prohibited by the Act.³¹

Enforcement and Penalties

The Act's lengthy enforcement provision is not a model of clarity. It generally provides that employers that violate the Act are subject to administrative fines imposed by the Labor Commissioner and to civil penalties on behalf of the aggrieved employee. Liable employers also are responsible for attorney's fees, costs, and interest in actions by the Labor Commissioner or the Attorney General. Among the potential fines and penalties is an administrative penalty that includes the greater of the dollar value of the number of paid sick days withheld from the employee times three or \$250, not to exceed \$4,000. And if the violation results in harm to the employee, then an additional penalty of \$50 per day applies, up to \$4,000. Only employers that make an "isolated and unintentional payroll error or written notice error that is clerical or inadvertent" are excused from penalty or liquidated damages assessments.³²

City Ordinances

The Act does not preempt any California paid sick leave ordinances, such as the existing San Francisco ordinance and the newly enacted Oakland ordinance, which became effective on March 2, 2015. Employers must comply with any applicable ordinance and the California Paid Sick Leave Law. For each provision or benefit, the employer must provide whichever is more generous to the employee. For example, the San Francisco ordinance is more generous in terms of the amount of sick time that might be available in a year, while the California law is more generous with respect to the rehire provision.

FREQUENTLY ASKED QUESTIONS

The Act raises numerous questions, many of which remain unanswered. Efforts are under way to push for "clean-up" legislation to clarify some of these issues. We are also hopeful that the Labor Commissioner will provide further guidance.

In the meantime, following are some of these issues:

1. What about employers that have unlimited vacation/time off policies? Do they need to establish a separate California paid sick leave policy?

More and more employers are offering "unlimited time off" policies, under which employees do not accrue a set amount of paid time off. Instead, employees may take unlimited routine paid time off for any reason. And since employees do not accrue a specific amount of paid time off, the employer does not track any time. The statute does not address unlimited time off policies. However, in the DLSE's December 2014 FAQs, the Labor Commissioner indicated that this type of "unlimited" time off policy does not comply with the Act's requirement that employers separately track sick leave accrual and use. Thus, employers that have these policies will need to provide a separate bank of time that employees can use for paid sick leave, and track the accrual and use of this bank of time.

2. When do current employees begin to accrue paid sick leave?

As noted above, the Labor Commissioner's California Paid Sick Leave Poster and FAQs indicate that employees begin to accrue paid sick leave on the first day of employment or July 1, 2015, whichever is later. This guidance provides much needed clarity because the statute itself is not clear not on this point.

Labor Code Section 246(a) states that "[a]n employee who, on or after July 1, 2015, works in California for 30 or more days within a year from the commencement of employment is entitled to paid sick days as specified in this section." The very next subsection, 246(b)(1), states that "[a]n employee shall accrue paid sick days at the rate of not less than one hour per every 30 hours worked, beginning on the commencement of employment or the operative date of this article, whichever is later" (emphasis added). These provisions are subject to different interpretations. By one view, existing employees begin to accrue paid sick leave on January 1, 2015, but are not entitled to use that leave until July 1, 2015, provided they have worked in California for 30 or more days. By a competing view, existing employees do not begin to accrue paid sick leave until 30 days after July 1, 2015. By yet a third view, employees begin to accrue paid sick leave on July 1, 2015, and may use it as they accrue it, provided they have been employed the requisite time. Many employers are relieved that the Labor Commissioner has provided guidance on this issue.

3. For purposes of calculating paid sick leave accrual (one hour of sick leave for every 30 hours worked), does one count the overtime hours of nonexempt employees?

The Act does not expressly exclude overtime hours. Instead, it simply provides that employees shall accrue one hour of paid sick leave for every 30 hours worked.³³ Accordingly, absent guidance that states otherwise, we assume that employers should count the overtime hours of nonexempt employees.

4. How much notice can employers require? That is, for foreseeable absences, what constitutes “reasonable advance notification”? And for unforeseeable absences, what notice is “practicable”?

The Act does not define the terms “reasonable advance notification” or “practicable.” Absent further clarification, what constitutes reasonable advance notice is going to vary based on the facts and circumstances of the particular case. The same is true for how much notice is “practicable” for an unforeseeable absence. Employers should exercise caution before denying an employee’s request to use accrued paid sick leave based on inadequate notice.

5. Can an employer require employees to submit documentation that they have used sick leave for a covered purpose under the Act?

The Act is silent on this issue. Thus, while we believe employers may request documentation, employers should exercise caution before taking any adverse action against an employee for failure to provide documentation. Again, guidance from the Legislature or the Labor Commissioner would be most welcome.

RECOMMENDED PROACTIVE STEPS

California employers already should be taking steps to ensure that they will be able to achieve full compliance with the Act by each applicable effective date. These are among the actions to consider:

- Review and, as necessary, revise existing paid sick leave or PTO policies and procedures to ensure that they meet the Act’s requirements.
- Develop a new California paid sick time policy that complies with the Act for any employees who not covered under existing paid sick leave or PTO policies (e.g., part-time employees, temporary employees, and seasonal employees).
- Review any applicable California municipal ordinances and compare those ordinances with the Act to determine how to comply with all applicable paid sick leave laws.
- Review and, as necessary, revise antiretaliation, attendance, conduct, and discipline policies to prevent retaliation against employees for taking time off under the Act.
- Comply with the Act’s notice, posting, and record-keeping requirements.
- By January 1, 2015, or as soon as possible, post the California Paid Sick Leave Poster in a conspicuous location at each California workplace.
- Consider how to comply with the posting requirements for remote workers.
- Update your Wage Theft Prevention Act Notice to reflect AB 1522’s requirements as stated in the Labor Commissioner’s template Notice. Employers were required to begin using the updated Notice on January 1, 2015.
- Ensure that benefits, timekeeping, and payroll systems are ready to properly calculate, track, and report accrued and unused paid sick leave.
- Ensure that itemized wage statements, or some other written notice of available paid sick leave or PTO, will be provided properly.

- Train supervisory and managerial employees, as well as HR and payroll personnel, on AB 1522's requirements.
- Monitor the DLSE Web site³⁴ for regulations, additional FAQs, and other publications that provide guidance on how to comply with AB 1522's requirements.

NOTES

1. Labor Code § 246(a).
2. Labor Code §§ 245.5(b); 246(a).
3. Labor Code § 245.5(a).
4. Labor Code § 246.(b)(1).
5. Labor Code § 246(b)(2).
6. Labor Code §§ 246(d), (i).
7. Labor Code §§ 246(d), (c).
8. Labor Code § 246(c).
9. Labor Code § 246(d).
10. Labor Code § 246(j).
11. Labor Code § 246(c).
12. Labor Code § 246.5(b).
13. Labor Code § 246.5(a).
14. Labor Code § 245.5(c).
15. Labor Code § 246(k).
16. Id.
17. Labor Code § 246.5(e).
18. Labor Code § 246(1).
19. Labor Code § 246(f)(1).
20. Labor Code § 246(f)(2).
21. Id.
22. Labor Code § 247(a).
23. www.dlse.ca.gov.
24. Labor Code § 247(c).
25. Labor Code § 2810.5.

26. www.dlse.ca.gov.
27. Labor Code § 246(h).
28. Id.
29. Labor Code § 247.5..
30. Labor Code § 246.5(c).
31. Id.
32. Labor Code § 248.5.
33. Labor Code § 246(b)(1).
34. www.dlse.ca.gov.

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