

Management Alert



California Paid Sick Leave: Here's Your Ounce of Prevention

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As we [previously reported](#) on [our blog](#), last month Governor Jerry Brown signed into law AB 1522, containing the *Healthy Workplaces, Healthy Families Act of 2014*. 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 soon San Diego (effective April 1, 2015) – California is only the second state (after Connecticut) to impose a state-wide 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.

Key Compliance Dates: January 1, 2015 and July 1, 2015

All California employers should carefully review the Act's requirements and start taking steps to ensure compliance *now*, to prepare for January 1, 2015. A first reading of the Act might leave the impression that the overall effective date is July 1, 2015. This is 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 provision (Lab. C. 246(a)), we believe that the rest of the statutory additions and amendment in AB 1522 – including those imposing posting, notice, recordkeeping, and arguably accrual requirements – will become effective on January 1, 2015, under normal operation of California law, because AB 1522 specifies no other alternate effective dates.

Of course, it is possible that the Legislature actually did intend an overall effective date of July 1, 2015. Alternatively, it is possible the legislative intent was exactly as the plain language would indicate – to effectively require employers to notify employees of their upcoming entitlement to paid leave six months in advance, and to allow accrual to begin so that covered employees can use their paid leave soon after July 1, 2015. We do expect clean-up legislation to clarify some of the questions that AB 1522 leaves unanswered. Meanwhile, however, the prudent course of action is to assume, and prepare for, a January 1, 2015 effective date for all provisions in AB 1522 other than the employee's right to use the Act's new paid sick leave.

Another reason to consider compliance steps now is that – 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 in advance of a January 1 rollout.

The Act's Key Provisions

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

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.

Accrual Rate. Covered employees accrue one hour of paid sick leave for every 30 hours worked. 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. As explained below (see Unanswered Question Number Two), covered employees arguably begin to accrue paid sick leave under the Act on the latter date of January 1, 2015 or their date of hire.

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.

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.

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.

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 pre-existing policies still must comply with the Act's other requirements, including notice, posting, and recordkeeping; and also must meet 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. Employers may set a reasonable minimum increment, not to exceed two hours, for employees to use accrued sick leave. 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. Employers cannot require employees to locate a replacement worker to cover days on which an employee uses paid sick leave.

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.

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) sibling.

Rate of Pay for Paid Sick Leave. Hourly employees are paid according to their hourly rates of pay. 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.

Notice Requirement. Employers must provide paid sick leave upon an employee’s oral or written request. 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.”

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. 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. The rehired employee is entitled to use the previously accrued but unused paid sick leave and to accrue additional paid sick leave upon rehire.

Posting Requirement. Employers must display in a conspicuous place in each workplace a poster notifying employees of their paid sick leave rights. The Act directs the Labor Commissioner to create a poster containing this information and make it available to employers, although the Labor Commissioner need not do so prior to January 1, 2015. The Act subjects employers who willfully violate the posting requirement to a civil penalty of not more than \$100 per offense. Whether or not a poster is available on a timely basis, employers should consider providing employees with the required information in some manner no later than January 1, 2015.

Wage Theft Prevention Act Notice Requirement. AB 1522 also amends California’s Wage Theft Prevention Act (Labor Code § 2810.5) to require employers to include in the mandatory Wage Theft Prevention Notice the following information about paid sick time: that employees (i) 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 who retaliates. The Labor Commissioner is to prepare a template Notice, but, again, employers would be wise to ensure this information appears in Wage Theft Prevention Act Notices by 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 non-exempt 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 document provided to the employee on the designated pay date. Violation of this provision subjects the employer to penalties under the Act, but not under California Labor Code section 226.

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

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 a 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.

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.

Enforcement and Penalties. The Act's lengthy enforcement provision is not a model of clarity. It generally provides that employers who 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.

City Ordinances. The Act does not preempt any California paid sick leave ordinances, such as the existing San Francisco ordinance and the newly-enacted San Diego ordinance, which becomes effective on April 1, 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.

Unanswered Questions

The Act raises numerous questions that remain unanswered. We understand that efforts are under way to push for "clean-up" legislation to clarify some of these issues. We also are hopeful that the Labor Commissioner will be providing further guidance.

In the meantime, we highlight some of these open issues:

1. What about employers who 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. Employers who have these policies should now consider providing a separate bank of time that employees can use for paid sick leave required under the Act, and then 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 statute is not clear 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 – Labor Code section 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 may have begun accruing leave as of July 1, 2015, and may use it as they accrue it, provided they have been employed the requisite time. A prudent employer, we believe, will adopt the first view.

Because the Legislature did not specify an effective date for these provisions, and because a California statute becomes effective on January 1 of the year following its signature by the governor, unless it specifically provides otherwise, a plain reading of the Act and resort to the normal rules of statutory interpretation will likely yield the result that existing employees

will begin to accrue paid sick leave on January 1, 2015, even though they are not entitled to use that leave until they have worked in California for 30 or more days on or after July 1, 2015. We expect that the Legislature or the Labor Commissioner will clarify this point soon.

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 non-exempt employees?

The Act does not expressly exclude overtime hours and, instead, simply provides that employees shall accrue one hour of paid sick leave for every 30 hours worked. Lab. Code § 246(b)(1). Accordingly, absent guidance that states otherwise, we assume that employers should count the overtime hours of non-exempt 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 should take steps now 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, 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 anti-retaliation, attendance, conduct, and discipline policies to prevent retaliation against employees for taking time off under the Act.
- Prepare to comply with the Act’s notice, posting, and recordkeeping requirements.
 - Monitor the Division of Labor Standards Enforcement (DLSE) website (www.dlse.ca.gov) for template notices and posters.
 - Consider how to comply with the posting requirements for remote workers.
 - Review the Wage Theft Prevention Act Notice and be prepared to update the Notice to reflect the Act’s requirements.
 - 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, will be provided properly.

- Train supervisory and managerial employees, as well as HR and payroll personnel, on AB 1522's requirements.
- Monitor the DLSE website (www.dlse.ca.gov) for regulations, frequently asked questions (FAQs), and other publications that provide guidance on how to comply with AB 1522's requirements.

Upcoming Webinar

We will provide further updates as more information about this new law becomes available. In addition, please join us on November 3, 2014 for a complimentary webinar on the subject. You may [register here](#).

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