



CALIFORNIA LEGISLATIVE DEVELOPMENTS

WILSON TURNER KOSMO
LLP

A WBENC certified women-owned business representing companies throughout California

BUSINESS LITIGATION • CLASS ACTION • EMPLOYMENT LAW • PRODUCT LIABILITY

www.wilsonturnerkosmo.com

California Enacts Bill Requiring Employers Provide Paid Sick Leave

On September 10, 2014, Governor Jerry Brown signed the “Healthy Workplaces, Healthy Families Act of 2014” (AB 1522) making California the second state (Connecticut is the other) to require employers to provide paid sick leave. The law takes effect July 1, 2015, and implements a number of new Labor Code provisions (sections 245 et seq.) and will require employers to provide up to three days of paid sick leave each year.

California employers should begin learning the law’s very detailed requirements and compare it against similar but different ordinances already enacted in San Francisco and being considered in San Diego. Accordingly, this article will provide an initial review of this bill’s numerous requirements. The full-text of this new law is available at: http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1501-1550/ab_1522_bill_20140904_enrolled.pdf.

The Law Applies to Almost All Employers, Regardless of Size

Likely one of the more controversial aspects of this new law is its scope. For instance, unlike Connecticut’s Paid Sick Leave law which applies only to employers with more than 50 employees and San Francisco’s Paid Sick Leave Ordinance which exempts smaller employers from certain obligations, this new law applies to almost all employers regardless of size, many public employers, the state and municipalities.

Notably, however, like many other recent Labor Code amendments, this law contains carve-outs for employees covered by collective bargaining agreements (CBAs) with certain provisions. Specifically, this law does not apply to employees covered by CBAs that expressly provide for the wages, hours of work, and working conditions of employees, as well as for paid sick days (with final and binding arbitration for any disputes regarding paid sick days), premium wage rates for all overtime, and a regular hourly rate of not less than 30 percent more than the state minimum wage.

Similarly, construction industry employees covered by a CBA with these provisions are not covered by this law if the CBA was entered into before January 1, 2015, or if the CBA expressly waives the requirements of this new law in clear and unambiguous terms.

Responding to the State of California’s concern about costs, an amendment inserted at the eleventh-hour also exempts a provider of in-home supportive services under specified sections of the Welfare and Institutions Code.

Finally, certain individuals employed in the airline industry and covered by the federal Railway Labor Act are exempted provided they receive compensated time-off at least equal to this new law.

Accrual and Usage Rules

After July 1, 2015, employees who work in California for thirty or more days within a year from the commencement of employment will accrue paid sick leave at a rate of no less than one hour for every 30 hours worked. Exempt employees will be deemed to work 40 hours per week for accrual purposes, unless their normal workweek schedule is less than 40 hours, in which case they will accrue paid sick leave based upon that normal workweek.

Employees will be entitled to use accrued paid sick days beginning on the 90th day of employment, after which they may use paid sick days as they are accrued. Employers will also have the discretion to lend paid sick days to an employee in advance of accrual, and employers cannot require employees to locate a replacement worker to cover days on which an employee uses paid sick days.

While accrued paid sick days shall carry over to the following year of employment, employers may limit an employee's use of paid sick leave to 24 hours, or three days, in each year of employment. However, no accrual or carry-over is required if the full amount of sick leave is received at the beginning of each year. An employer also has no obligation to allow an employee's total accrual of paid sick leave to exceed 48 hours or six days, provided that an employee's rights to accrue and use paid sick leave under this section are not otherwise limited. This six-day accrual limit appears intended to ensure the employee has the full sick leave rights both for the instant year and the beginning of the next year.

One of the bigger concerns about this proposed law was its potential impact on employers who already provide an equal amount of sick time or paid time off. New Labor Code section 246(e) addresses this concern by stating that an employer does not need to provide "additional" paid sick days if it meets certain requirements. Specifically, the employer is exempted from providing additional paid sick days if (a) it has a paid leave policy or paid time off policy, (b) the employer makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in this new law, and (c) the employer's policy does either of the following: (1) it satisfies the accrual, carry over and use requirements of this new law; or (b) it provides no less than 24 hours or three days of paid sick leave, or equivalent paid leave or paid time off, for employee use for each year of employment or calendar year or 12-month basis. Notably, unlike the exemptions provided to this entire new law for certain groups (discussed above), this particular exemption seems to apply only to the provision of "additional" time off, but does not exempt employers from other aspects of this new law (i.e., notices, posters, record-keeping, etc.).

Employers will not be required to compensate employees for unused sick days upon termination of employment, but they must reinstate the previously unused balance if they rehire the employee within one year. In that instance, the rehired employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehiring.

Employees will be entitled to use paid sick time for preventive care for themselves or a family member, as well as for the diagnosis, care, or treatment of their or their family member's existing health condition. For purposes of this bill, "family

member” means a (1) child (as defined), (2) parent (as defined), (3) spouse, (4) registered domestic partner, (5) grandparent, (6) grandchild, or (7) sibling. The employer shall also provide paid sick days for an employee who is a victim of domestic violence, sexual assault, or stalking, as discussed in Labor Code sections 230 and 230.1.

An employee may determine how much paid sick leave the employee needs to use, but an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave. In response to employer concerns sick leave is more unpredictable than many other leaves (e.g., FMLA, etc.), this bill requires employees to provide “reasonable” advance notification if the need for paid sick leave is foreseeable. Where the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for leave as soon as practicable.

Employees using paid sick leave shall be compensated at the employee’s normal rate during regular hours of work. If the employee in the 90 days of employment before taking accrued sick leave had different hourly pay rates, was paid by commission or piece rate, or was a nonexempt salaried employee, then the rate of pay shall be calculated by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days of employment.

Notice, Posting and Record-Retention Rules

This new law also furthers a recent trend of new California laws that enact substantive rights and impose administrative responsibilities, although arguably in less expansive form due to last-minute amendments proposed by human resources organizations.

For instance, this law amends Labor Code section 2810.5 to require employers to provide at the time of hiring written information about this new paid sick leave entitlement. Specifically, this law requires that the notice employers have been required to provide since 2012 concerning pay-related information now also include language advising employees of their right to accrue and use paid sick leave, their right to be free from retaliation, and their right to file a complaint. Fortunately, this particular Labor Code section generally requires the Labor Commissioner to develop a template employers may use, so presumably the Labor Commissioner will develop an updated form. An earlier but-since deleted provision of this law would have required employers to essentially develop and distribute written notice in at least five languages but was silent as to what the notice would have been required to say or when it needed to be distributed.

An employer will also be required to display in a conspicuous place in each workplace of the employer a poster notifying employees of these paid sick leave rights. The Labor Commissioner will be responsible for preparing this poster. Employers who willfully violate the posting requirements will be subject to a civil penalty of not more than \$100 per offense.

Employers will also be required to provide employees with written notice identifying the amount of paid sick leave available, or paid time off an employee provides in lieu of sick leave, for use on either the employee's itemized wage statement required under Labor Code section 226 or in a separate writing provided on the designated pay date with the employee's payment of wages. An employee alleging failure to provide such notice shall be entitled to the penalties specifically enumerated under this law (discussed below) rather than under Labor Code section 226.

New Labor Code section 247.5 also requires employers to retain, for at least three years (rather than the five years originally proposed), records documenting the hours worked, paid sick days accrued, and paid sick days used by each employee. These records may be inspected by the Labor Commissioner under Labor Code section 1174, or by an employee under Labor Code section 226. Troublingly, and in another example of a recent trend in California, this section provides that if an employer fails to maintain adequate records, it shall be presumed that the employee is entitled to the maximum number of hours accruable under this new article, unless the employer proves otherwise by clear and convincing evidence. In other words, an employer cannot simply prevail by satisfying the preponderance of the evidence standard traditionally used, but must satisfy the much more rigorous "clear and convincing" standard traditionally reserved for punitive damages purposes.

Retaliation Protections and Enforcement

This bill also prohibits discrimination or retaliation against employees for using accrued sick days, or for filing a complaint regarding any sick day policy violation. However, similar to last year's protections against "immigration-related practices" (AB 263), this bill creates a rebuttable presumption of unlawful retaliation if an employer takes an adverse employment action (including denying the right to use sick days) within 30 days of an employee (1) filing a complaint with the Labor Commissioner or in court alleging violations of this article; (2) cooperating with an investigation or prosecution of an alleged violation of this article; or (3) opposing a policy, practice or act that is prohibited by this article.

Under Labor Code section 248.5, the Labor Commissioner may enforce this new law by awarding reinstatement, back pay, and payment of sick days unlawfully withheld, plus the payment of an additional sum in the form of an administrative penalty to an employee whose rights were violated. Where paid sick leave is unlawfully withheld, the employee shall recover the dollar value of the paid sick days withheld, or \$250 multiplied by three, whichever is greater, but not to exceed an aggregate penalty of \$4,000. If a paid sick leave-related violation results in "other" harm to the employee or person, the administrative penalty shall include a sum of \$50 for each day that the violation occurred or continued, not to exceed \$4,000.

If the employer fails to promptly comply, the Labor Commissioner may take "appropriate" enforcement action to ensure compliance, including filing a civil action. In such instances, the violating employer may be ordered to pay up to the state of California \$50 for each day a violation occurs or continues.

Employees or other persons may report suspected violations to the Labor Commissioner, and to encourage such reporting, the Labor Commissioner may keep the reporting employee's identifying information confidential.

The Labor Commissioner or the Attorney General may also file a civil action in court against the employer or any person violating this article. The Labor Commissioner or Attorney General may recover appropriate legal and equitable relief, including reinstatement, back pay, the payment of sick days improperly withheld, and liquidated damages of \$50 to each employee for each violation each day, plus reasonable attorneys' fees and costs. (A provision authorizing employees to file civil actions was deleted by recent amendment while another amendment clarifies that these administrative actions would be maintained on "behalf of the aggrieved," suggesting any penalties would ultimately be awarded to the employee.) Subdivision (b) to Labor Code section 245 clarifies that the provisions of this new article "are in addition to and independent of any other rights, remedies or procedures under any other law.

Lastly, proposed section 249, subdivision (d), specifies this bill establishes "minimum" requirements for paid sick days and does not preempt, limit or otherwise affect the applicability of any other law or ordinance that provides greater accrual of use of paid sick days. California employers already must consider slightly different variations in San Francisco and, unless stayed by referendum, San Diego shortly, and this legislative invitation for municipalities to enact still-broader versions suggests employers may soon need to have multiple versions of their paid sick leave policies.