

## **GUIDE TO CALIFORNIA'S HEALTHY WORKPLACES, HEALTHY FAMILIES ACT OF 2014**

California is now the second state in the nation to provide **paid sick leave** to employees under AB 1522, the "Healthy Workplaces, Healthy Families Act of 2014" ("the Act"). The effective date for employers to begin providing paid sick leave is **July 1, 2015**. This guide summarizes the key points of the new Act, but beware -- there are many nuances to this statute and some areas that remain unclear.

### **The Basics**

- The Act applies to all private and public employers, regardless of size.
- Any employee (whether part-time, full-time, exempt, non-exempt, on-call, or temporary) who on or after January 1, 2015, works in California for 30 or more days within a year from starting employment will beginning July 1, 2015 be entitled to **three paid sick days per year**, accrued at the rate of **one hour of sick leave for every 30 hours worked**. Out-of-state employees are also covered if they spend enough time (that is, 30 days within a year) working in California.

### **Exemptions from Coverage**

- Employees are not covered by the Act if they fall within one of these groups:
  - Employees covered by a union contract which specifically provides for paid sick leave, has binding arbitration and meets other specified requirements (including a regular hourly wage rate of not less than 30% of the state minimum wage);
  - State providers of in-home supportive services under certain sections of the Welfare & Institutions Code; and
  - Certain air carrier employees.
- Note: Temporary employees of a staffing agency are covered by the new law, and whoever is the employer or a joint employer under the law is required to provide paid sick leave to qualifying employees.

### **Sick Leave Amounts/Usage/Caps**

- **Earning of Sick Leave:** An eligible employee earns **one hour of sick pay for every 30 hours worked** (whether the hours worked are regular or overtime hours), beginning either July 1, 2015 or the employee's first day of work, whichever is later. Exempt employees are deemed to work 40 hours a week, unless their normal workweek is less.
- **Usage of Sick Leave/Caps**
  - Employees may start using accrued sick days on the 90th day of employment.
  - Although employees earn 1 hour of sick leave for every 30 hours worked, an employer may limit the number of paid sick days that an employee can use each year to **24 hours or three days per year**. However, employers must allow employees to

carry over earned sick days which are not used to the following year of employment. The carry-over provision allows an employee to have paid sick days available at the start of the next year, depending on how much he/she has already used and accrued.

- **Caps:** At the same time, although employers must allow carryover, employers also may **cap** the employee's total maximum accrual at a cap of **48 hours or six days**.

➤ **Exception to Accrual & Carry-over/Policies:**

- An employer may, of course, choose to have a more generous paid sick leave policy than what is required under the Act.
- Importantly, under the Act, no hourly accrual or carry-over is required if the employer gives employees the full amount of leave at the beginning of each year pursuant to a compliant policy. The employer must make available an amount of leave that may be used for the same purposes and under conditions not inconsistent with the Act, and the policy must either: (1) satisfy the Act's accrual, carry-over and use requirements; or (2) provide no less than 24 hours or three days of paid sick leave (or equivalent paid leave or PTO) for employee use each year, for each year of employment, calendar year or 12-month basis.
- Thus, in order to avoid accrual and carryover requirements, the employer must provide sick days at the beginning of each year, and ensure that sick leave may be used for all the same purposes and conditions specified under the Act.
- And note: If the employer provides employees 3day/24 hours of sick leave on a front-loaded basis on July 1, but then wants to switch to an anniversary-year or calendar-year basis, the employer will be required to front-load again with an additional 3 days/24 hours on the anniversary date or calendar year (that is, at the beginning of the newly calculated 12-month period).
- Note: For employers with unlimited time off policies, the Labor Commissioner's FAQ's (issued December 2, 2014) state that regardless of such a policy, "the new law requires that employers separately track sick leave accrual and use." And that also means complying with the other notice and posting requirements of the law.

### **Permitted Use/Reasons for Usage of Sick Leave**

- **Reasons for Usage:** Paid sick time may be used for: (1) diagnosis, care or treatment of an existing health condition, or preventive care for, the employee or the employee's "family member"; and (2) for an employee who is a victim of domestic violence, sexual assault or stalking. The Act also states that the employer may not require the employee to search for or find a replacement worker to cover those paid sick days.
- **"Family member"** is defined more broadly than under the FMLA or CFRA. "Family members under the Act include biological, adopted, step, foster, domestic partner's or *in loco parentis*:
  - ◆ Children
  - ◆ Parents
  - ◆ Spouse or registered domestic partner
  - ◆ Grandparents or Grandchildren
  - ◆ Siblings

- **Notice of Sick Leave Request from Employee:** Paid sick leave must be provided upon an employee's oral or written request. If the need for paid sick leave is foreseeable, an employee must provide reasonable advance notice. If the need for sick leave is not foreseeable, the employee must provide notice "as soon as practicable." Thus, it is unclear whether an employer may apply existing call-in policies (for example, requiring two hours' notice for a sick call).
- **Increments:** An employer may set a "reasonable minimum increment," not to exceed two hours, for the use of paid sick leave. But the employee may determine how much paid sick leave he or she needs to use.

### **Compensation/Rate of Pay**

- Paid sick leave must be compensated at the employee's hourly wage, and must be paid no later than the next payday after the sick leave was taken.
- **NOTE:** If an employee was paid at different hourly rates, by commission or by piece rate in the 90 days before taking accrued sick leave, then the hourly rate of pay for sick pay must be calculated by dividing the employee's total wages, excluding any overtime premium pay, by the total hours worked in the full pay periods of the prior 90 days of employment.
- The employer also may pay employees for sick leave on the payday for the next regular payroll period after the sick leave was taken (that is, delay the pay until the next payroll).

### **Lending Paid Sick Days to an Employee**

An employer may lend (that is, advance prior to accrual) paid sick days to an employee in advance of the employee's accrual of the sick leave, at the employer's discretion and with proper documentation. The Act does not, however, specify the type of documentation required.

### **Notices to Employees, Poster, and Recordkeeping**

The Act has several notice, posting and recordkeeping requirements:

- **Notice with Paychecks:** Employers must provide each employee with a **written notice each pay period** setting forth the amount of paid sick leave (or PTO) available to the employee. The notice can be provided either on the employee's itemized wage statement or in a separate writing provided on the designated payday with the payment of wages.
- **Labor Code Section 2810.5 Notice:** Labor Code Section 2810.5 has been amended to require that the Notice to Employees that must be provided to hourly employees at hiring also must advise the employee that he/she may accrue and use sick leave, has a right to request and use accrued paid sick leave, may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and has the right to file a complaint against an employer who retaliates. The notice must in the language that the employer normally uses to communicate employment-related information to employees. Thus, employers will need to revise their Section 2810.5 Notices. The Labor Commissioner has prepared an updated Section 2810.5 Notice which can be found at [http://www.dir.ca.gov/dlse/Publications/LC\\_2810.5\\_Notece\\_\(Revised-11\\_2014\).pdf](http://www.dir.ca.gov/dlse/Publications/LC_2810.5_Notece_(Revised-11_2014).pdf).

NOTE: This new Section 2810.5 Notice must be used for new employees **effective January 1, 2015!** For current non-exempt employees, the sick leave portions of the notice must be

provided seven days after the employer changes its policies to comply with the law, or July 1, 2015.

- **Poster:** The Labor Commissioner also has created a poster containing information regarding the right to paid sick leave under California law, which employers are required to post in the workplace and display in a conspicuous place **effective January 1, 2015**. Wilful violations of this posting requirement will result in a civil penalty of up to \$100 for each offense. The new poster can be found at [http://www.dir.ca.gov/dlse/Publications/Paid\\_Sick\\_Days\\_Poster\\_Template\\_\(11\\_2014\).pdf](http://www.dir.ca.gov/dlse/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf).
- **Recordkeeping:** Employers will need to maintain records for at least three years documenting the hours worked and paid sick leave accrued and used by an employee. Such records must be made available to employees in the same manner as required under Labor Code Section 226 (that is, within 21 days of an employee's request). Failure to keep adequate records will result in a rebuttable presumption that the employee is entitled to the maximum hours accruable under the Act.

#### **No Pay-Out Required on Termination**

Unlike unused accrued vacation, sick leave under the Act does **not** need to be paid out upon separation of employment. Of course, if the sick leave is provided under a PTO policy, then the PTO still must be paid out on termination of employment, as with vacation pay and floating holidays.

- However, if an employee is separated from his/her employment and then is rehired by an employer within one year from the date of separation, the previously accrued and unused paid sick days must be reinstated. The rehired employee must be allowed to use those previously accrued sick days and begin accruing additional paid sick days upon rehire.

#### **Failure to Comply/No Retaliation**

- The Act specifically states that an employer may not deny an employee the right to use accrued paid sick days, discharge, demote, suspend, or in any manner discriminate against an employee for using or attempting to use accrued sick days, filing a complaint, alleging a violation of the Act, cooperating in an investigation, or opposing any prohibited policy, practice or act.
- The Act also provides a rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use accrued sick days, discharges, threatens to discharge, demotes, suspends or in any manner discriminates against an employee within 30 days of any of the following: (1) the filing of a complaint by an employee with the Labor Commissioner or alleging a violation of the Act; (2) the cooperation of an employee with an investigation or prosecution of an alleged violation of the Act; or (3) opposition by the employee to a policy, practice or act that is prohibited by the Act.

#### **Penalties for Non-Compliance**

- In addition to the penalty for willfully violating the posting requirement of up to \$100 for each offense, the Labor Commissioner (after a hearing) may order appropriate relief, including reinstatement, back pay, payment of sick days unlawfully withheld, interest and administrative penalties. When awarding reimbursement, the dollar amount of paid sick days

withheld will be multiplied by three (treble damages) or \$250, whichever is greater, not to exceed an aggregate penalty of \$4,000.

- The administrative penalty also may include \$50 to the affected employee for each day the violation occurred or continued, not to exceed an aggregate penalty of \$4,000.
- Furthermore, where “prompt compliance by an employer is not forthcoming,” the Labor Commissioner may take enforcement action, and order a violating employer to pay the State up to \$50 for each day or portion of a day where a violation occurs or continues. This sum may be assessed for each employee and there is no maximum aggregate.
- The Labor Commissioner or Attorney General also may bring a civil action and seek reinstatement, backpay, payment of sick days unlawfully withheld (times three) or \$250 (whichever is greater), an aggregate penalty of up to \$4,000 as liquidated damages of \$50 to each employee whose rights were violated for each day the violation occurred, attorneys’ fees, costs, and interest.
- Isolated, unintentional payroll errors or notice errors that are clerical or inadvertent mistakes will not be considered violations of the Act, and such determination may include reviewing whether the employer has compliant policies and practices in place.

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### City Ordinances

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Employers in cities with existing paid sick leave ordinances (such as San Francisco and San Diego, as of 2015) will need to comply with both the Act and the city ordinance - whichever law provides the most benefit to the employee.

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### WHAT SHOULD EMPLOYERS DO?

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- **Modify sick leave policies to be compliant by July 1, 2015.**
- **Adopt appropriate accrual and recordkeeping procedures commencing July 1, 2015, and keep records of accrual and usage of all sick leave in accordance with the Act.**
- **Implement new payroll procedures as of July 1, 2015 for calculating the appropriate hourly pay for sick pay for employees, particularly where hourly employees work more than one hourly rate, are paid commissions, or are paid piece rate, or their hourly rate otherwise fluctuates.**
- **Plan on providing notice of accrued sick leave to all employees with each paycheck effective July 1, 2015.**
- **As of January 1, 2015, make sure that you are using the amended Labor Code Section 2810.5 Notice to New Employees** (to be prepared by the Labor Commissioner).
- **Post the required Poster** in the workplace by **January 1, 2015**.
- **Update Employee Handbooks** to contain a compliant policy.
- **For union employers:** Review **collective bargaining agreements** to see whether the contract meets the requirements for union employees to fall under the exemption. (There is no explicit waiver required, as with the San Francisco Sick Leave Ordinance.)

- Ensure that there **no discrimination or retaliation** occurs against any employees for asserting rights provided by the Act.

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*Please remember that the above update provides general information and is not intended to provide legal advice as to any specific factual situation. If you have questions about the application of the Act to a particular situation, you should consult with legal counsel. The attorneys in our **Labor and Employment Law Group** would be happy to assist you.*

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