

PAID SICK LEAVE MANDATORY IN CALIFORNIA BEGINNING JULY 1, 2015

By

William F. Murphy
Dillingham & Murphy
San Francisco, California
wfm@dillinghammurphy.com

On September 10, 2014, Governor Brown signed legislation requiring most California employers to provide Paid Sick Leave (“PSL”) to employees. The new legislation, known as the Healthy Workplaces, Healthy Families Act of 2014, will be codified at California Labor Code §245 et seq. and also amends Labor Code § 2810.5. The new law goes into effect July 1, 2015.

A. Who Is Covered By the New PSL Legislation?

The PSL law applies to almost all employers in California. The law defines “Employer” to mean “any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities.” There is no “small employer” exception, as is the case with many other employment laws (e.g., the California Family Rights Act; even the California Fair Employment and Housing Act limits many of its anti-discrimination provisions to employers employing 5 or more employees). Are there any exceptions? Yes, but only a few. The only exemptions from the PSL law are:

- (1) Employees covered by valid collective bargaining agreements meeting several requirements, including having provisions for paid sick days or a paid time off policy that permits the use of sick days for those employees, and a regular hourly rate of pay of not less than \$11.70/hour, 30 percent more than the statute minimum wage, which is \$9.00/hour through the end of 2015; note: the state minimum wage increases to \$10.00 hour effective January 1, 2016, so the collectively bargained regular rate will need to be at least \$13.00/hour starting January 1, 2016 for this exemption to apply;
- (2) Employees in the construction industry covered by valid collective bargaining agreements meeting several requirements, including a regular hourly rate of pay of not less than 30 percent more than the state minimum wage, if the collective bargaining agreement either (a) was entered into before January 1, 2015, or (b) expressly waives the PSL legislation’s requirements; and
- (3) Employees employed by an air carrier as flight deck or cabin crew members subject to the provisions of the federal Railway Labor Act, so long as those employees are provided with compensated time off equal to or exceeding 1 hour of paid sick leave for each 30 hours worked.

That's it. Other than those three exceptions, the law applies to every other employer in California, regardless of size or annual revenues. However, the law establishes only minimum requirements pertaining to paid sick days, and does not "preempt, limit, or otherwise affect the applicability of" any other law, regulation, requirement, policy or standard that provides for greater accrual or use by employees of sick days, whether paid or unpaid.

B. What Does the New PSL Legislation Require California Employers to Do?

1. *Paid Time Off for Specific Reasons*

The law requires that all covered employees who work in California for 30 or more days within a year from the commencement of their employment are entitled to accrue and use a minimum number of paid sick days annually. "Paid sick days" means time that is compensated at the same wage as the employee normally earns during regular work hours, provided by the employer for: (1) diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member, or (2) for an employee who is a victim of domestic violence, sexual assault, or stalking to seek or obtain temporary restraining orders and related court intervention.

2. *Calculating the Applicable Wage Rate for Paying Paid Sick Leave*

The "regular wage rate" for most employees will be easy to compute: employees who earn \$10/hour as a regular hourly rate must be paid sick leave at that same \$10/hour rate. It gets a little more complex for employers who pay new employees a different rate at the outset of employment, as opposed to the rate earned after 90 days (e.g., a "probationary period"): the applicable wage rate for paying PSL in those cases is computed by dividing the total non-overtime compensation earned in the first 90 days of employment by the total number of hours worked in that same period. However, once the probationary period is concluded, the new wage rate should be used to determine what the employee must be paid for paid sick days earned and used.

There is, however, a potential issue when an employee has accrued paid sick leave at differing wage rates: what does the employer pay the employee who takes one paid sick day where the employee has accrued 24 hours of paid sick leave, 12 of them at \$10/hour and 12 of them at \$11/hour? The new PSL legislation does not address whether the paid sick leave is paid out on a "first in, first out" (FIFO) basis (in which case the employee's 8 hours of sick leave would be paid at \$10/hour) or whether an employee can elect to use 8 of the hours accrued at the higher, \$11/hour rate, saving the hours accrued at the lower rate for later. Absent guidance from the California Labor Commissioner on this point, it would seem that employers should apply the FIFO method to minimize the size of any potential disparity between the employee's current wage rate and the employee's paid sick leave rate.

3. The Amount of Paid Sick Leave Accrued, When It May Be Used, Carry-Over, Caps on Accrual, and Payment Rules

An employee accrues paid sick days at the rate of not less than one hour per every 30 hours worked beginning from the commencement of employment or July 1, 2015, whichever is later. Exempt employees are deemed to work 40 hours per workweek for purposes of the law, unless the exempt employee's workweek is less than 40 hours, in which case accrued paid sick days are based on the actual hours worked.

An employee is entitled to begin using accrued paid sick days beginning on the 90th day of employment, after which the employee may use PSL as it accrues. Although accrued but unused paid sick days carry over to the following year of employment, an employer may limit an employee's use of paid sick days to 24 hours or three days in each year of employment.

An employer also has no obligation under the new law to allow an employee's total accrual of paid sick leave to exceed 48 hours or 6 days, so long as the employee's rights to accrue and use paid sick leave are not otherwise limited. So, accruals of paid sick days may be "capped" by employers at 6 days or 48 hours. As with accrued vacation pay, then, an employee who has reached the maximum accrual of 48 hours or 6 days will not accrue any more paid sick leave until the employee has used some portion or all of the existing accrued sick leave.

Although employees are permitted to determine how much paid sick leave they need to use, the employer may set a reasonable, minimum increment, not to exceed two hours, for the use of paid sick leave. This rule prevents employees from imposing administrative burdens on employers by claiming numerous, small increments of PSL (e.g., 15 minutes to go to the pharmacy to pick up medication).

The employer must provide payment for paid sick days no later than the payday for the next regular payroll period after the sick leave was taken.

Employers should make sure that the itemized wage statements accompanying employees' paychecks include the amount of paid sick leave available to the employee. The legislation also amends Labor Code § 2810.5 to requirement that employers provide written notice to employees on hiring of their rights to accrue and use paid sick leave, except that this requirement does not apply to employees directly employed by the state or any political subdivision, to exempt employees, and to employees covered by a valid collective bargaining agreement meeting certain conditions.

4. What Happens to Accrued But Unused Sick Pay On Termination?

An employer is not required to provide compensation to an employee for accrued, unused paid sick days on termination, resignation, retirement, or other separation from employment. However, if an employee's employment ends but the employee is rehired within one year from the date of separation, the previously accrued, unused paid sick days are to be reinstated.

5. *Posting and Record-Keeping Requirements*

The new law also has posting requirements. The California Labor Commissioner (Department of Industrial Relations, Division of Labor Standards Enforcement) is charged by the PSL law with creating a poster in compliance with the law for use by employers. An employer who willfully violates the posting requirement is subject to a civil penalty of not more than \$100 per each offense.

The PSL legislation also contains detailed records and documentation requirements, and permits employees to inspect and copy PSL records pertaining to them pursuant to California Labor Code § 226.

C. What About Employers Who Already Have Paid Sick Leave Policies, or PTO Policies Permitting Employees to Take Paid Leave for the Purposes Defined in the New PSL Legislation?

An employer is not required to provide additional paid sick days if the employer has a paid leave or paid time off policy, the employer makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in the PSL legislation, and the policy either (1) satisfies the accrual, carryover and use requirements of the PSL law, or (2) provides no less than 24 hours or three days of paid sick leave for employee use for each year of employment or calendar year.

D. Miscellaneous Rules

The new legislation provides that an employer may lend paid sick days to an employee in advance of accrual at the employer's discretion and with proper documentation. Note: employers should be mindful that Labor Code § 224 and established case law severely limit a California employer's ability to recover indebtedness from a departing employee's final paycheck. As with any other advance on wages requested by employees, employers should seek the guidance of counsel concerning documentation and collection of advanced paid sick days.

If the need for paid sick leave is foreseeable, the employee shall provide advance notification. If the need is not foreseeable, the employee shall provide notice of the need for the leave as soon as practicable.

An employer may not condition the use of paid sick leave on the employee search for or find a replacement workers to cover the days during which the employees uses paid sick leave.

E. Enforcement

The PSL legislation includes anti-retaliation provisions, and provides a "rebuttable presumption" of unlawful retaliation if an employer takes adverse action against the employee within 30 days of the employees' filing a complaint with the Labor Commissioner alleging a violation of the PSL law, the cooperation of the employee with an investigation of an alleged

violation of the PSL law, or opposition by the employee to a policy or practice prohibited by the PSL law.

The law provides that the California Labor Commissioner shall enforce the new legislation. The Labor Commissioner is to keep confidential the name and other identifying information of persons making complaints of violations or suspected violations of the PSL. If the Labor Commissioner determines, after a hearing, that a violation of the law has occurred, the Labor Commissioner may order appropriate relief, including reinstatement, back pay, the payment of sick days unlawfully withheld, and the payment of an additional sum in the form of an administrative penalty to an employee or other person whose rights were violated. Paid sick days unlawfully withheld, the amount withheld is to be multiplied by three, or to \$250, whichever is greater, but not to exceed an aggregate penalty of \$4,000. However, an employer is not to be assessed any penalty or liquidated damages under the PSL law due to an “isolated and unintentional” payroll error or written notice error that is a clerical or an inadvertent mistake regarding the accrual or available use of paid sick leave.

The Labor Commissioner or the Attorney General may also bring a civil action in court to enforce the PSL, and, on prevailing, may collect legal and equitable relief on behalf of the aggrieved, as well as penalties and liquidated damages. Note: the statute provides that any person or entity enforcing the PSL under the Private Attorney General Act (PAGA) shall, on prevailing, only be entitled to equitable, injunctive or restitutionary relief, and reasonable attorneys’ fees and costs. This provision appears to confirm that the new PSL legislation’s requirements may also be enforced in Court by aggrieved employees who comply with the PAGA procedures. Prejudgment interest on amounts found to be due but unpaid is also available.

F. A Final Word

The advent of mandatory paid sick leave in California promises to raise a number of thorny issues for California employers of all sizes. We will keep an eye out for additional guidance from the California Labor Commissioner as the effective date of the statute draws nearer.