Here We Go Again: Legislature Takes Another Pass At Paid Sick Leave Law

MSK Alert by Anthony Amendola and Grant Goeckner-Zoeller
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Earlier this week, the California Legislature passed Assembly Bill 304, which provides a number of important amendments to the state's recently enacted paid sick leave law, the Healthy Workplaces, Healthy Families Act (the "Act"). The amendments, passed as emergency legislation, goes into effect immediately. While it is clear that the bill is intended to ease compliance and provide clarity, like its predecessor, the bill is poorly drafted and on the key issue of earning sick leave, considerable uncertainty remains.

Prior to its amendment, the Act provided that employees were entitled to accrue one hour of sick time for every thirty (30) hours worked. Employees could be limited to three (3) days or twenty-four (24) hours of sick time use per year, and a total sick time accrual of six (6) days or forty-eight (48) hours. As an alternative, employers also were permitted to grant three (3) days or twenty-four (24) hours of sick time to employees at the beginning of each year, and then were not required to track accrual or allow carry-over of unused sick time. The original Act also provided that non-exempt employees with fluctuating pay rates were to be paid sick time according to a ninety (90) day average pay calculation. Employers also were required to provide employees with written notice of the amount of sick leave available on the employees' itemized paystubs or in separate writings provided with the pay checks. The Act further imposed additional notice and posting requirements and prohibitions against discrimination or retaliation related to sick time use.

With respect to the accrual/grant of sick leave, AB 304 makes two significant changes. First, it allows alternatives to the existing one hour of sick time for every thirty (30) hours worked accrual method. Instead, the law provides as follows:

- "An employer may use a different accrual method …provided that the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period."

- "An employer may satisfy the accrual requirements of this section by providing not less than 24 hours or three days of paid sick leave that is available to the employee to use by the completion of his or her 120th calendar day of employment."

With respect to the first of these additions, it is unclear what is meant by "regular basis." Presumably, accrual by week or per pay period should comply. However, it is less clear whether an accrual based on hours worked will be deemed to be on a "regular basis," nor whether monthly or quarterly accruals will comply. In addition, while it appears that an accrual on a regular basis will be permitted as long as "an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day [i] of employment or [ii] each calendar year, or [iii] in each 12-month period" this reading is not free from doubt. Indeed, the new language also can be read to mean an accrual on a regular basis will be permitted as long as "an

employee has no less than 24 hours of accrued sick leave or paid time off [i] by the 120th calendar day of employment or [ii] each calendar year, or [iii] in each 12-month period." It is unclear at this point which interpretation will be adopted by the agencies and by the courts.

The second addition too is puzzling. One possible reading is that any method of providing sick pay that results in an employee earning twenty-four (24) hours or three (3) days of sick leave by the one hundred and twentieth (120th) calendar day of employment will meet the "accrual requirements" of the Act. However, since the first addition already addresses accrual of the same amount of sick leave during the same time period, this reading would seem to render this language redundant. Another possible reading is that an employer may grant an employee twenty-four (24) hours or three (3) days of sick time by his or her one hundred twentieth (120th) calendar day of the employment year. However, this reading would seem to contradict the existing requirement that such a grant be provided "at the beginning of each year of employment, calendar year, or 12-month period."

Moreover, the Act has also been amended to "grandfather" a broader range of pre-existing paid time off policies. Specifically, a paid leave policy in effect prior to January 1, 2015, which provided for accrual on a regular basis and provided no less than eight (8) hours or one day of paid leave within three (3) months, and no less than twenty-four (24) hours or three (3) days of paid leave within nine (9) months of the beginning of each employment year, is now deemed to meet the minimum requirements of the Act. However, if an employer modifies the accrual method in its pre-existing policy, the employer must comply with the statutory accrual provisions. A pre-existing policy also must permit the use paid leave for the same purposes and under the same conditions as specified in the sick leave law. This is a curious amendment, as any employer that complied with the original version of the Act would already have amended its preexisting policy by the July 1, 2015 deadline originally imposed by the Act. While not free from doubt, it is presumed that an employer that already modified its policy in light of the Act should be able to reinstate its former, pre-January 1, 2015 policy to the extent that it now complies with the law.

AB 304 also makes the following more straight forward amendments to the Act:

- Clarifies that an employee must work for the same employer for thirty (30) days within a year from hire to be eligible for sick time;
- Authorizes employers with unlimited sick leave or unlimited paid time off policies to satisfy the written notice requirement by indicating "unlimited' on the employee's paystub (Note: employers should carefully consider all potential issues before instituting an unlimited time off policy);
- Provides that paid sick leave for non-exempt employees may be paid at the "regular rate of pay," which is the calculation already used to calculate overtime;
- Clarifies that for purposes of implementing the 3-day annual limitation on the use of accrued sick time, an employer may define the "year" as a calendar year or any other 12-month period;

- Specifies that exempt employees may be paid for sick time in the same manner as they are paid for other forms of paid time off (e.g., vacation);

- States that an employer is not required to inquire into, or record, the purposes for which an employee uses paid leave; and

- Delays the implementation and enforcement of the paystub/written notice requirement for employers covered by Wage Order 11 (Broadcasting Industry) and Wage Order 12 (Motion Picture Industry) of the Industrial Welfare Commission until January 21, 2016.

The California Labor Commissioner's office has stated that it will provide its own interpretation of the changes made by AB 304. According to the Labor Commissioner's website, this interpretation will be published "soon." If and when the Labor Commissioner issues this advice, we will update you further.

ASK MSK

Q: What should an employer do in response to the sick time law amendment?

A: Employers who have not implemented a compliant leave policy and/or not notified employees of any changes to the applicable leave policy should do so immediately. Employers who have already complied with the Act as originally passed should consider whether further amendments to their policies make sense, as the amendments provide employers more options for compliance. The most likely areas where employers should consider revisiting are (1) the rate of pay calculation, and (2) the rate of accrual.

Q: Do the amendments clarify whether an employer may require documentation for an absence?

A: No. The amendment does not provide guidance regarding documentation of sick leave absences and employers should consult labor counsel before taking adverse employment action in response to an employee's refusal to provide such documentation. Curiously, the amendment did add language stating that "an employer is not obligated to inquire into or record the purposes for which an employee uses paid leave or paid time off." It is not immediately clear why this language was added.