Governor Brown Signs Two New Laws That Will Impact California Employers in 2015

MSK Alert by Steve Schneider
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California Employers Required to Provide Paid Sick Leave to Employees

Effective July 1, 2015, nearly all California employers will be required to provide at least three days of paid sick leave per year to their employees. The new law, AB 1522, also known as the "Healthy Workplaces, Healthy Families Act of 2014," was approved by the California Legislature on August 30, 2014 and signed into law by Governor Jerry Brown. It will be enforced by the Labor Commissioner and the Attorney General, either of whom may bring civil actions.

While the vast majority of employers will be required to provide paid sick leave under AB 1522, the new law does carve out exceptions for: (1) providers of in-home supportive services, (2) flight deck or cabin crew members of air carriers subject to the Railway Labor Act, and (3) employees working under collective bargaining agreements, provided certain minimum requirements are met (*see* ASK MSK sidebar).

Under AB 1522, employees who work in California for 30 or more days within a year will be eligible to accrue at least one hour of sick leave for every 30 hours worked. This includes both full-time and part-time employees who, on or after July 1, 2015 work in California for 30 or more days. Employees will be entitled to use their accrued sick days beginning on their 90th day of employment.

The new law gives employers the authority to limit an employee's use of paid sick days to 24 hours (three days) in each year of employment, as well as the authority to limit an employee's total accrual of sick pay to 48 hours (six days). An employee's unused sick pay will carry over to the following year, although employers will not be required to pay out accrued but unused sick days upon termination of employment.

Upon the oral or written request of an employee, an employer must allow the employee to use accrued sick days for: (1) the diagnosis, care, or treatment of an existing health condition of, or preventative care for, the employee or the employee's family member (which is defined broadly to include a child or legal ward, parent, parent-in-law, parent of one's registered domestic partner, spouse. registered domestic partner, grandparent, grandchild and a sibling), and (2) time off for an employee who is the victim of domestic violence, sexual assault, or stalking.

One way for employers to satisfy the accrual and carry over requirements of the new law will be to provide employees with all three paid sick days at the beginning of each year (although the law does not clarify whether "year" is defined as calendar year, employment year, or on a 12-month basis). Employers with existing paid sick or paid time off ("PTO") policies may similarly satisfy the statute by making available under their existing policies three days of leave that can be used for the same purposes stated in the law, if the policy also satisfies the accrual,

carryover, and use requirements of the statute.

Employers who violate this law may be subject to penalties including but not limited to three times the dollar amount of paid sick days withheld from each employee or $250, whichever is greater, up to an aggregate penalty of $4,000. In addition, the Labor Commissioner may impose upon a non-complying employer a $50 per day enforcement charge for each affected employee.

Importantly, 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 the filing of a complaint or of cooperation with an investigation concerning alleged violations, or opposition by the employee to a policy prohibited by the new law, there will be a rebuttable presumption of unlawful retaliation.

AB 1522 will make California the second state in the country to mandate paid sick leave for employees, Connecticut being the first in 2011. However, there are a number of cities including New York City, Portland, San Francisco, Seattle, Washington D.C., and Newark, New Jersey, which have already implemented similar mandatory paid sick leave for their employees. Most recently, the San Diego City Council approved an ordinance granting up to five days sick leave per year beginning in 2015 and raising the city's minimum wage to $11.50 per hour by 2017.

California Employers Must Educate Supervisors about "Abusive Conduct" During Sexual Harassment Training Sessions

This past week, Governor Brown also signed AB 2053. Under Section 12950.1 of the Government Code, employers with 50 or more employees are already required to provide at least two hours of sexual harassment training to all supervisory employees once every two years. AB 2053 amends this section effective January 1, 2015 to require such employers to include in their sexual harassment prevention training education on preventing "abusive conduct" in the workplace.

Pursuant to the new law, "abusive conduct" is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." For example, abusive conduct may include "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." According to the law, "a single act shall not constitute abusive conduct, unless especially severe and egregious."

While it does not appear that AB 2053 is intended to expand the definition of unlawful harassment under the California Fair Employment and Housing Act, nor does it appear to make "abusive conduct" *per se* unlawful, the statute may be argued as establishing a new standard of care with respect to unlawful conduct. Moreover, since the law does not expressly make "abusive conduct" unlawful, it is unclear why it includes the statement that "a single act shall not constitute abusive conduct, unless especially severe and egregious." That said, this new law

might in some cases support an intentional or negligent infliction of emotional distress claim for worksite bullying.

ASK MSK

Q: As an employer, what will I need to do to prepare for the implementation of AB 1522?

A: In addition to requiring virtually all California employers to implement or amend their existing sick leave policies, AB 1522 also will obligate employers to abide by new notice, posting, and recordkeeping requirements. Starting July 1, 2015, employers will be required to display a poster in each workplace, to be created by the Labor Commissioner. Employers also will be required to provide employees with written notice setting forth the amount of paid sick leave available on either the employee's itemized wage statement or in a separate writing provided on the designated wages pay date. In addition, employers will have to keep for at least three years records documenting employee hours worked and paid sick days accrued and used. Employers also will be required to give new hires starting July 1, 2015 written wage notices that must include, in addition to the current content of those notices, recitations about their sick leave rights.

Q: At what rate must sick days be paid under AB 1522?

A: For non-exempt employees, the statute states that sick pay must be paid at "the employee's hourly wage." It is unclear whether this means the employee's stated straight time hourly rate or the "regular rate of pay" used to calculate overtime, which would factor in other compensation, such as shift premium, production bonuses and the like.

Further, the statute states that "[i]f 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."

Q: Under what circumstances are employees covered by collective bargaining agreements exempt from AB 1522?

A: In most industries, the law will not apply to an employee covered by a valid collective bargaining agreement (CBA), if the CBA expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or paid time off policy that permits the use of sick days for covered employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.

In the construction industry, the law will not apply to an employee covered by a valid CBA that expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and regular hourly pay of not less than 30 percent more than the state minimum wage rate, and the agreement either (A) was entered into before

January 1, 2015, or (B) expressly waives the requirements of AB 1522 in clear and unambiguous terms.

Q: As an employer, is there anything I can do now to prepare for when these new laws go into effect?

A: Under AB 1522, employers that already have sick leave policies should review them to assure that as of July 1, 2015 they will be compliant with the new law. Employers that have not implemented a sick leave policy should create one by July 1, 2015 in compliance with this new law. All employers should also be prepared to abide by the new posting, notice and recordkeeping requirements.