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uncapped sick leave exempt from kin care statute

MSK Client Alert

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The California Supreme Court has decided that employers with *uncapped* sick-leave policies need not allow employees to use half their sick days for purposes of "kin care" under Labor Code Section 233. In other words, if an employer does not put a ceiling on the number of paid sick days, it is exempt from Section 233.

Section 233 provides in relevant part: "Any employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee's **accrued** and available sick leave entitlement, in an amount not less than the sick leave that would be **accrued** during six months at the employee's then current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic partner of the employee." (Emphases added.)

In *McCarther v. Pacific Telesis Group*, __ Cal. 4th __ (Feb. 18, 2010), the plaintiffs brought a class action suit against their employer, alleging that they were not allowed to use paid sick days to care for their relatives, in violation of Section 233. The plaintiffs were covered by a collective bargaining agreement (CBA), which required that employees be compensated for any day of missed work due to their own illness or injury, up to five consecutive days of absence in any seven-day period. (Disability periods for eight days or longer rendered an employee eligible for short-term disability benefits; disability lasting longer than a year could be covered by the employer's long-term disability plan.) The CBA provided no cap on sick days and no sick days were banked. Rather, as explained by the Supreme Court: "if an employee normally works a five-day schedule from Monday-Friday, is absent for an entire workweek due to an illness, returns to work the following Monday morning, and becomes ill during the day on Monday, the employee can leave work and be absent for five more continuous working days with full pay."

In reaching its decision, the Supreme Court subjected the word "accrue" to intensive analysis and discussed the legislative history of Section 233. The Court determined that "the reach of the statute is limited to employers that provide a measurable, banked amount of sick leave."

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Therefore, if an employer does not provide a "measurable" and "banked" amount of sick leave, it need not allow employees to use half (or any) of that sick leave to care for family members. However, under more typical sick-leave plans that do accrue a stated maximum of paid sick leave over time, employees are entitled to Section 233's kin care leave.

Ask MSK - Q&A Section

Q: Does an employer in California have to provide paid "sick days" for employees?

A: In general, no, at least outside of San Francisco. As the court in *McCarther* recognized, "[e]mployers are not required to provide sick leave." But, in San Francisco, a municipal ordinance requires that all employees working within the city limits receive at least one hour of paid sick leave for every 30 hours worked.

Q: Aside from potentially using their "sick time" under the employer's policy for Labor Code Section 233 kin-care purposes, do employees have other rights regarding time off to care for family members who are sick?

A: Yes. Employers are obligated under the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) to allow employees to take up to 12 weeks per year of *unpaid* time off in case of their own "serious health condition" or in the event of a family member's "serious health condition." There are some differences between these laws, however, and both statutes are accompanied by detailed regulations. Employers should consult experienced employment counsel to ensure that their policies and decisions are consistent with all applicable laws.

Q: If an employee says that he or she requires time off under the FMLA or CFRA to care for a sick family member, can the employer require a doctor's note to document the existence of a "serious health condition"?

A: Yes. But the timing and method of requiring medical certification, as well as the content of any doctor's note, are precisely regulated, and there are some differences between the FMLA and CFRA in this context. For example, employers under the FMLA may require the disclosure of a specific "serious health condition," but the CFRA does not allow employers to require such disclosure.

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