

# Ah-Choo! California Employers Will Soon Be Required to Pay Sick Leave

## Labor & Employment Law Update

on September 16, 2014

Gov. Jerry Brown last week signed into law Assembly Bill 1522, the “Healthy Workplaces, Healthy Families Act of 2014.” Under this new law, effective July 1, 2015, California employers, with few exceptions, must provide at least 24 hours (3 working days) of paid sick leave per year to their employees.

### Who Is Covered?

Essentially all employers and employees (including part-time and temporary employees) are covered by the law. Unlike other California leave laws (as well as other states and the FMLA), there is no minimum employee threshold; nor is there a minimum-hours-worked requirement.

The few exceptions are:

- Employees covered by collective bargaining agreements (CBA's) that expressly provide for paid sick days or paid time off (PTO) that permits employees to use sick days. The CBA must have a final and binding arbitration provision concerning the application of the paid sick leave provisions. Moreover, the CBA must provide a regular rate of pay at least 30% above the state minimum wage rate.
- Employees in the construction industry covered by CBAs that provide a regular rate of pay at least 30% above the state minimum wage rate. In addition, the construction industry CBA has to have been entered into before January 1, 2015, **OR** expressly waive the requirements of the new statute in clear and unambiguous terms.
- Providers of in-home support services under specific sections of California law set out in the statute.
- Individuals employed by air carriers as flight deck or cabin crew employees and covered by the federal Railway Labor Act. But this exception only applies if those employees are “provided with compensated time off equal to or exceeding the amounts established in [the new statute].”

## How, When and How Much Sick Leave is Accrued?

Once the act goes into effect on July 1, 2015, employees who have worked 30 or more days in California within a year of their employment will begin immediately accruing paid sick leave. At a minimum (the law encourages greater benefits), they must accrue the 24 hours at a rate of one hour for every 30 hours worked beginning upon the commencement of employment or on the effective date of the statute. (So, employees who did not previously have sick time begin accruing it on July 1, 2015, not retroactive to when their employment began.)

For purposes of calculating accrual, overtime-exempt employees are presumed to work 40 hours per week. Thus, they will accrue 1.333 hours per week. If an exempt employee's normal workweek is less than 40 hours, that employee will accrue sick leave based on the normal workweek. (So, an exempt employee whose normal workweek is 30 hours would accrue 1 hour per week; an exempt employee whose normal workweek is 15 hours would accrue ½ hour per week.)

Employees can begin to use their accrued sick leave on the 90<sup>th</sup> day of their employment. Employees may decide the amount of leave they need to use, although employers may set a reasonable minimum increment – but that minimum increment cannot exceed two hours. (That is, an employer cannot have a rule that requires an employee to use at least three hours of sick leave per occurrence.)

An employer may (but is not required to) “lend” sick days to an employee in advance of accrual at the employer’s discretion and with proper documentation.

Employers must allow an employee to use no less than 24 hours (or three 8-hour work days) of paid sick leave per year. Any unused sick time must be allowed to roll over to the following year, although employers may cap total accrual at 48 hours (six 8-hour work days).

The law allows an employer to avoid the accrual and carry-over issue if they provide at least 24 hours or three days of paid sick leave at the beginning of each year (calendar or other 12-month period). That way, each employee is guaranteed to have sick leave available at the beginning of the year, instead of having to wait to accrue it.

If you already have a sick leave or PTO policy in place, you do not have to provide additional leave, so long as your current policy: 1) satisfies the statute's accrual, usage, and carry over requirements; and

(2) provides no less than 24 hours of paid sick leave or PTO annually. In essence, you need to comply with the law.

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## Sick Leave Rate

Sick leave must be paid at the employee's hourly wage. If an employee is paid on commission or a piece rate, the hourly rate is obtained by dividing total wages (**not** including overtime premium pay) by the employee's total hours worked in the full pay periods in the prior 90 days of employment.

## No Payout Required Upon Termination

Unlike vacation time, accrued but unused sick leave under this act need not be paid to an employee upon termination. But, if that employee should be rehired by the employer within a year, all previously accrued and unused sick time must be reinstated.

## Reasons May Sick Leave Be Used

Paid sick days may be used for the diagnosis, care, or treatment of an existing health condition of, or the preventive care for, an employee or an employee's family member.

"Family member" means a child (including step, adopted, foster, legal ward, or a child to whom the employee stands *in loco parentis*, and "regardless of age or dependency status"), a parent (including step-parents, parents-in-law, legal guardians, or someone who stood *in loco parentis* while the employee was a minor – regardless of how long ago that was), a spouse, a registered domestic partner, a grandparent, a grandchild, or a sibling.

In addition, paid "sick days" may also be used by employees who are the victims of domestic violence, sexual assault, or stalking.

## Notice Requirements

Employees must provide "reasonable advance notification" of their foreseeable need to use the leave. If the need is unforeseeable, the employee must provide notice of the need for leave "as soon as practicable." Requests to use sick leave may be made orally or in writing.

An employer may not require the employee to find a worker to replace her/him during her/his sick leave.

Employers must provide employees with written notice of their available amount of paid sick leave or PTO leave provided in lieu of sick leave. This notice must be either on the employee's itemized wage statement (*i.e.*, their pay stub) or in a separate writing provided on the employee's pay date at the time wages are paid.

Additionally, employee usage and accrual of sick leave must be documented and retained for at least three years. These records must be made available for employee inspection within 21 days of a written or oral request for such

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information. (Just as under current Labor Code Section 226.) If an employer does not maintain adequate records, it will be presumed that the affected employee is entitled to the maximum number of accruable hours under the law unless the employer can show otherwise by clear and convincing evidence.

Each new employee must be provided notice of their entitlement to accrue and use sick leave, that they may not be terminated for exercising their rights under the act, and that they may file a complaint for retaliation if they believe they have been retaliated against.

Employers will also be required to display a poster in a conspicuous place in each workplace. The act requires the Labor Commissioner to create a poster and make it available to employers.

### Enforcement and Penalties

In an unusual move, the act establishes a rebuttable presumption of unlawful retaliation for denying the use of sick leave, for any adverse action or threat of adverse action, or any other manner of discrimination occurring within 30 days of an employee engaging in any of the following:

- 1) filing a complaint with the Labor Commissioner OR alleging a violation of the act;
- 2) cooperating with an investigation or prosecution of a violation of the act; or
- 3) opposing an employer's policy, practice, or act that is prohibited by the act.

There is no private cause of action under the act. The Labor Commissioner is responsible for the law's enforcement and regulation. If, after a hearing, the Labor Commissioner finds that a violation occurred, the Labor Commissioner may order "any appropriate relief, including reinstatement, backpay, the payment of sick days unlawfully withheld," as well as administrative penalties.

The law also authorizes the Labor Commissioner or the Attorney General to institute a civil action for a violation of the act.

There are penalties for posting violations (\$100 per offense), withholding sick leave (triple damages or \$250, whichever is great, up to a maximum of \$4,000), any other harm to an employee (\$50 per day, up to a maximum of \$4,000), or failure to promptly comply with an order of the Labor Commissioner (\$50 per day). All of those penalties are cumulative.

### What Should Employers Do?

California employers should update their sick leave, PTO leave, and record-retention policies to ensure compliance. Employers should also ensure that all managers and supervisors are trained in the application of the new law and the

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employer's revised policies.

Employers must also ensure that their California employees' wage statements or pay stubs accurately reflect accrued and used sick time.

Finally, employers should update their new hire packets, Employee Handbook and/or their existing sick leave or PTO policies to make them compliant with the new law.

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