



Healthy Families, Healthy Workplace Act of 2015 – Paid Sick Days now Mandated in CA

By *Lauraine Bifulco*

It now pays to get sick in California! On July 1, 2015, California employers of all sizes will be required to provide their employees with at least 24 hours or 3 days of paid sick time off per year that accrue at the rate of 1 hour per 30 hours worked. California becomes only the second state in the country, after Connecticut, to require employers to provide paid sick days. (What? We are usually the first on this kind of thing!). The new legislation surprisingly does not exempt small employers and requires the paid sick days to be provided to all employees who work at least 30 days in the year. While unused sick days do not need to be paid out upon termination, employers are faced with strict record-keeping, posting, notice, and anti-discrimination and retaliation provisions. The “Healthy Workplaces, Health Families Act of 2014” is leaving smaller employers who currently do not offer any paid time off to their employees scratching their heads at the bill’s proclamation that “Providing paid sick days is affordable for employers and good for business.” Those who already provide some form of paid time off such as sick days, vacation, personal time, or PTO are struggling with the complexities and unanswered questions in the new law about whether their current policies will meet the new requirements. This is a complicated and confusing piece of legislation that will require careful analysis.

Who is a Covered Employer?

All private and public employers including the state, political subdivisions, and municipalities are required to comply with the new law. Of note, there is no minimum number of employees. Even employers with 1 or 2 staff members and non-profit organizations will now be required to provide paid sick days.

Who is an Eligible Employee?

Effective 7/1/15, any employee who works 30 or more days within a year is entitled to paid sick days. This will include full-time, part-time, temporary, and even seasonal workers. The only exclusions are providers of certain in-home services, employees of an air carrier flight deck or cabin crew members who receive paid time off equal to the requirements of the new law, union-represented employees covered by a collective bargaining agreement that provides for paid sick time and meets other requirements, and employees in the construction industry covered by a collective bargaining unit that satisfies specific criteria.

How do Paid Sick Days Accrue?

Upon hire, all eligible employees must begin accruing paid time off at the rate of 1 hour for every 30 hours worked. For purposes of calculating the accrual, exempt, salaried employees are considered to work 40

hours per week, unless their normal workweek is less than 40 hours. Employees are entitled to use accrued paid sick days beginning on their 90th day of employment. Accrued paid sick days must be allowed to carry over to the following year of employment; however, an employer may limit the employee's use of paid sick days to 24 hours or 3 days each year. Under no circumstances must an employer allow the total accrual of paid sick days to exceed 48 hours or 6 days. If an employer wants to avoid having to track the accruals and carryovers described above, the full 24 hours or 3 days of paid sick days must be provided to the employee in a lump sum at the beginning of each year. For existing employees, this will be on 7/1/15. For new hires after that, it will be on the anniversary of hire.

While that might sound straight forward at an initial read, we find that the law fails to answer some basic questions:

- *If the employer sets up an accrual at 1 hour per 30 hours worked, a full-time employee would accrue 69 hours in a full year. The accrual can be capped at 48 hours, and usage can be limited to 24 hours. How are we going to explain this to our employees and get our payroll system to track this?*
- *How do you handle a temporary employee that is hired with uncertainty about whether or not he/she will work 30 days in the year?*
- *Do employees who live outside of California but travel to California and work here for more than 30 days in a year need to be allowed to accrue paid sick days?*
- *Do the 90 days of employment need to be continuous before the employee can begin using paid sick days?*
- *Does the 1 hour of paid sick time that accrues for every 30 hours of time worked include overtime hours?*
- *The law refers frequently to "24 hours or 3 days." Does that mean that we can calculate part-time employees' maximum paid sick time based on the number of hours in their typical work day?*

How can Employee Use Paid Sick Days?

Employees must be allowed to use paid sick days for the diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member, or if a victim of domestic violence, sexual assault, or stalking. For purposes of this law, family member is defined as a child, parent, step-parent, spouse, registered domestic partner, grandparent, grandchild, or sibling. Note that the list is more expansive than for other California benefits such as leave under California Family Rights Act (CFRA) and Paid Family Leave (PFL) benefits – another source of potential confusion for employers and employees. Employees must be allowed to request the use of paid sick days either verbally or in writing with reasonable advanced notice when the need for time off is foreseeable. When the need for time off is unforeseeable, the employee only needs to provide notice as soon as practicable. The employer may set a reasonable minimum increment for use of paid sick time but it cannot exceed 2 hours. Employees may not be required to find a replacement worker to cover the days he/she will be using paid sick days.

Again, we are left with unanswered questions:

- *How are employers supposed to reconcile the new paid sick days requirements with the existing kin care law? We now clearly have to provide at least 24 hours or 3 days of paid sick time – all of which is allowed to be used for a family member. As kin care only requires that employees be allowed to use 1/2 of their total annual accrual to care for family members, what happens if an employer provides more than 24 hours of paid time off? How much of that additional time would be allowed to be used to care for family members?*
- *How can an employer obtain proof that paid sick days were used for a proper reason? The law states explicitly that it does not affect any other laws guaranteeing the privacy of health information and that all information obtained as part of providing paid sick days shall be treated as confidential and not disclosed to any person except the affected employee.*

This certainly raises questions about asking an employee to provide a note from a medical provider and sharing that information with a supervisor.

How are Employees Paid for Paid Sick Days?

Employees must pay employees at “the same wage as the employee normally earns” no later than the payday for the next regular payroll after sick time is taken. If an employee has different hourly rates of pay, earns commission, is paid via piece rate, or is a salaried, non-exempt employee, the employer must take the total amount paid to the employee (not including overtime premium pay) in the full pay periods from the prior 90 days and divide by the total hours worked, to determine the hourly rate of pay to be used for paid sick days. While terminating employees do not have to be paid out for unused, accrued sick days, if rehired within one year, the hours must be reinstated.

- *Are our payroll companies going to be able to come up with these types of calculations for us?*
- *Do rehired employees need to wait 90 days after rehire before being able to use reinstated paid sick days?*

What if the Company already offers Paid Vacation or PTO?

The legislation clearly states that if an employer who already has a paid leave or paid time off policy that meets the minimum requirements of the new law, the employer will not be required to offer additional paid sick days. Of note, the employer’s current plan must satisfy the accrual, carry over, and use requirements of the new law and provide no less than 24 hours or 3 days of paid sick time off or equivalent paid time off.

Some of the challenges would be:

- *As California law requires vacation and PTO to accrue with each pay period, an employer would not be able to use the lump sum methodology allowed for paid sick days. As such, employers would have to examine how much time off their employees currently accrue to see if the current accrual meets the minimum requirements under the new law of 1 hour per 30 hours worked. Employers with current plans where employees accrue a certain number of hours per pay period regardless of hours worked, will potentially have to amend their plans, particularly to address part-time employees.*
- *California employers are not permitted to have de-escalating vacation and PTO accruals. To meet the new paid sick days requirements, an employee must accrue paid time off at no less than 1 hour per 30 hours worked. This means that a full-time employee, for example, would accrue 2.67 hours of paid time in an 80 hour bi-weekly payroll resulting in a total of 69.33 hours at the end of the year. If an employer did not want to provide this much paid time off, they would not be allowed to decrease the rate of accrual during the course of the year.*
- *Continuing with the example above, as vacation and PTO policies must under California law allow for carryover of unused time and cannot cap the balance at less than 1.5 to 2 times the total annual accrual, the minimum accrual to meet the new requirements would result in an accrual cap of at least 104 hours (69.33×1.5). Again, this may well cause employers to have to significantly enrich an existing policy in order to meet the new requirements.*

What are the Paperwork Requirements?

Effective 1/1/15, employers will be required to provide information about the company’s paid sick days policy to new employees at the time of hire either on the Notice to Employee which has just been updated by the DLSE. For current employees, an revise Notice to Employee may be used or the employer can communicate the required information in a separate written document within 7 days of the change in benefits. As exempt employees do not receive a Notice to Employee, our recommendation would be to prepare a written policy document to be given to all employees. Effective 1/1/15, there is also a new poster describing paid sick days that must be posted. Copies of the new Notice to Employee and the poster are available here: <http://www.dir.ca.gov/dlse/>

In addition to these initial notices and the poster, employers must also provide information about the amount of paid sick days (or other paid time off) available on the employee's paystubs or in a separate document provided with each paycheck. Records of hours worked, paid sick days accrued, and paid sick days used must be maintained for 3 years. If an employer fails to maintain the proper records, the employee will be entitled to the maximum number of hours accruable unless the employer can show "clear and convincing" evidence otherwise.

Discrimination and Retaliation?

Employers are prohibited from denying an employee the right to use accrued sick days. They further cannot discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to use them, filing a complaint alleging a violation, cooperating in an investigation, or opposing any policy or practice prohibited by the new law. There will be a new rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use accrued sick days, discharges, or takes any other adverse action against an employee within 30 days of the employee engaging in any of the described protected actions.

- *Employers will be challenged with administering attendance guidelines and discipline policies in order to avoid claims of retaliation.*

What are the Fines and Penalties?

Employers who withhold paid sick days from employees will be subject to a penalty in the amount of the dollar value of the paid sick days withheld multiplied by 3, or \$250, whichever amount is greater, not to exceed an aggregate penalty of \$4,000. If a violation causes "other harm" to an employee or other person, the administrative penalty will include an additional sum of \$50 for each day that the violation occurred. Additionally, if the Labor Commissioner needs to take enforcement action, it can order the violating employer to pay the state a penalty of \$50 for each day that the violation occurred. The Labor Commissioner or the Attorney General can also bring a civil action in court against the employer which may include the collection of equitable relief on behalf of the employee including reinstatement, backpay, the payment of unlawfully withheld sick days, reasonable legal fees, and additional penalties. Fortunately, the law provides that no penalties will be assessed due to an isolated and unintentional payroll or notice error that is clerical or inadvertent. However, prior violations and current compliance efforts with regards to written policies, procedures, and practices will be taken into consideration.

What should Employers Do?

First of all, employees need to get prepared now for these new requirements. Waiting until July 2015 could prove costly as the penalties are significant and the notice and posting requirements go into effect on January 1st:

- Analyze your current vacation and PTO plans to determine if you want to amend them to comply with the new paid sick days requirements.
- If needed, add a new paid sick days policy to your employee handbook. If you don't have a handbook, you should still create a written policy for distribution to new hires.
- Talk with your accounting department and payroll provider to ensure that your systems can provide the necessary wage calculations, accruals, and recordkeeping.
- Determine if you are in a city that already has paid sick days requirements and analyze which statute is more favorable to your employees. Failure to apply the more generous benefits will subject you to liability potentially under both the state and the city statutes.

- Update your employee handbooks, remembering that this new Paid Sick Days law does not effect other benefits such as California Family Rights Act (CFRA), Pregnancy Disability Leave (PDL), Paid Family Leave, Crime Victims Leave, etc. While those other rights and benefits remain unchanged, the policies in your handbook may need revision due to a certain amount of paid time off now being available. The synthesis of these various rights and benefits is not always straight forward.
- Unionized employers should review their collective bargaining agreements to see if they meet the provisions for covered employees to be excluded from Paid Sick Day benefits.
- Update new hire documentation to provide the required information about Paid Sick Days.
- Obtain the revised version of the DLSE's Notice to Employees, complete one for each current employee, and distribute no later than 1/8/15.
- Obtain the new required poster and display it within your work locations prior to 1/1/15.
- Stay tuned for more information as we hope additional guidance will be forthcoming from the Labor Commissioner.

To review the full text of the law, click here:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1522

To access the DLSE's FAQs on the subject, click here: http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm

If you are feeling overwhelmed, you are not alone! At Vantaggio, we are here to help analyze your current policies and practices and make recommendations about getting into compliance in a way that best meets your company's specific business needs.

Come attend one of our upcoming, interactive workshops where our consultants will help you review your existing polices, decide what to change and what not to change, and assist you with crafting new compliant polices. Bring your laptop and your current polices, and you'll leave the workshop with new policies that are ready to be added to your current handbook.

If Vantaggio has drafted your handbook for you in the past, please contact us asap about the much needed 2015 updates. And as always, please call us with any questions.

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