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California Joins Trend Toward Mandatory Sick Leave

San Francisco was the first in 2006; at least six other localities and the District of Columbia have followed.

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By July 1, 2015, all California employers must provide paid sick leave to their employees. In September 2014, California enacted the Healthy Workplaces, Healthy Families Act (AB 1522). The new law, codified in California Labor Code §§245 et seq. and as an amendment to §2810.5, requires all California employers, big and small, to provide a minimum of three days of paid sick time to qualifying employees. The California governor's office estimates that roughly 40 percent of the state's workforce — approximately 6.5 million people — does not now earn paid sick leave. Nationwide, the numbers are similar, with an estimated 40 percent of the workforce lacking paid sick leave.

California's sick-leave law is the latest development in a national trend toward paid sick time for all workers. In 2006, San Francisco County became the first jurisdiction in the nation to require employers to provide paid sick leave for all employees, including temporary and part-time workers. Since then, at least six other localities and the District of Columbia have enacted sick-leave legislation.

With AB 1522, California becomes only the second state to pass a law requiring paid sick leave (Connecticut approved a similar measure in 2011). Legislation has been introduced and there are groups campaigning for laws to make paid sick leave mandatory in at least 20 other states. In contrast, at least 10 states have passed preemption laws prohibiting local jurisdictions from enacting sick-leave laws. AB 1522 — heralded by workers' rights groups as a victory and derided by business groups as a "job killer" — is sure to be at the center of national discussion surrounding paid sick leave.

AB 1522 does more than give workers the right to paid sick time. It also imposes notice and record-keeping obligations on employers. And although the law does not authorize private enforcement actions per se, it creates a new category of protected activity immunizing employees from retaliatory conduct. The law also empowers the state labor commissioner to investigate alleged violations and, along with the attorney general, to bring actions to enforce the law. As such, AB 1522 offers new, complex regulations that employers — even those already offering sick time — must understand before the law takes effect on July 1, 2015.
According to the California Labor Code, AB 1522 applies equally to "any person employing another under any appointment or contract of hire," regardless of how many workers the employer has. It generally applies to an employee who has worked at least 30 days within one year of her date of hire. However, not all workers qualify as "employees." Specifically excluded from the statutory definition of "employee" are certain workers covered by collective bargaining agreements and airline cabin and flight-deck crews. A late amendment to the law also exempted state-funded in-home health care providers. Eligible employees may begin taking paid sick time after 90 days of employment.

WHAT'S PROVIDED

Covered employees are entitled to no fewer than three days of paid sick time per year. Employers can allow employees to accrue sick time at the rate of one hour for every 30 hours worked, or grant at least 24 hours or three days of paid sick time per year of employment, calendar year or 12-month period. (AB 1522 also provides a formula for determining the accrual rate for employees who are exempt from overtime requirements. See Cal. Lab. Code §246(b)(2).) Accrued paid sick days will carry over from one year to the following year; however, an employer may limit an employee's use of paid sick days to 24 hours or three days in each year of employment.

An employer is not required to provide additional paid sick days if the employer already has a paid leave policy or a paid time off (PTO) policy and makes available an amount of leave that may be used for the same purposes and under the same conditions. Employers may cap total accrued sick leave at 48 hours or six days as long as the employer does not otherwise limit the accrual or use of paid sick leave.

Unlike vacation pay, an employer is not required to provide compensation to an employee for accrued, unused paid sick days upon termination, resignation, retirement or other separation from employment. However, if an employee separates from an employer and is rehired within one year from the date of separation, previously accrued, unused paid sick days must be reinstated. This new requirement likely would require many employers to adjust their existing paid sick-time policies.

Employers may lend sick days to their employees "at the employer's discretion and with proper documentation." The law does not specify what constitutes "proper documentation." But employers may look to documentation of lent vacation days for guidance.

Employees may use paid sick leave not only when they become ill, but also for preventive care, to care for sick family members and to take time off after experiencing domestic violence, sexual assault or stalking as defined in §§230 and 230.1 of the Labor Code.

Sick leave must be paid at the employee's hourly wage. If the employee is not paid on an hourly wage or had a different hourly pay rate within 90 days before taking sick leave, the rate for sick leave is calculated by dividing the employee's total wages (excluding overtime) by the total hours worked in the full pay periods of the prior 90 days of employment. The employer must pay the sick leave no later than the payday for the next regular pay period after sick leave was taken.

AB 1522 requires employers to provide employees with written notices of the employer's sick leave policy at the time of hiring. Employers must also notify each employee of the amount of paid sick leave, or PTO in lieu of sick leave, available to that employee on either the employee's itemized wage statement or a separate writing provided on payday. Employers must also post notices concerning employers' obligations and employees' rights under AB 1522.

Employers must keep at least three years of records documenting the hours worked and paid sick days accrued and used by employees. Even employers already offering paid sick time or unlimited leave are bound by these new record-keeping requirements. The failure to maintain adequate records creates a presumption that the employee is entitled to the maximum number of hours accruable under AB 1522 unless the employer proves otherwise by clear and convincing evidence.

INDEPENDENT OF OTHER RIGHTS

AB 1522 is specifically intended to add to and be independent of "other rights, remedies, or procedures available under any other law." It does not limit or affect any laws regarding privacy of confidential health-related or other sensitive information. The law does not lessen any employer's obligations with respect to existing collective bargaining agreements, employment benefit plans or other contracts or agreements relating to employment. AB 1522 expressly sets a minimum of paid sick leave that must be provided and is not intended to discourage employers from offering more generous sick leave.

In addition to deciding when to use sick leave, the employee, not the employer, decides how much paid sick leave to use, subject only to the employer's ability to require a minimum increment — not to exceed two hours — of paid sick leave be used at a time. Employers cannot require an employee to find another employee to "cover" for them while taking sick leave. However, if the need for sick leave is foreseeable, the employee must give her employer reasonable advance notice. If the need for sick leave is unforeseeable, the employee must give notice only "as soon as practicable."

The law makes the use of sick leave a protected employment activity shielded from adverse employment actions such as actual or threatened firing, demotion or suspension. If an employer takes an adverse employment action against an employee within 30 days of certain specified activities, a rebuttable presumption of retaliation arises. Employers should be especially cautious when taking adverse employment actions against employees to ensure they do not inadvertently trigger the presumption of retaliation.

The law also imposes new penalties for noncompliance. Specifically, penalties are authorized for failing to itemize the amount of sick leave or PTO in lieu of sick leave available; willfully failing to post adequate notices; unlawfully withholding sick days; and violating AB 1522 in any other way that harms an employee.

AB 1522 authorizes the labor commissioner to enforce the law, to investigate alleged violations and to impose fines and penalties for noncompliance. Both the labor commissioner and the attorney general are authorized to bring enforcement actions and to obtain interest and prevailing-party attorney fees.

AB 1522 does far more than simply provide workers paid leave for medical issues. All California employers — even those already providing sick leave more generous than this law requires — will face new notice and record-keeping requirements beginning July 1, 2015. Those caught unprepared for these changes face potential fines, penalties and enforcement actions. California employers should review their policies, notices and record-keeping protocols to ensure compliance.

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