

## CLIENT ALERT

### The Devil is in the Details: New Paid Sick Leave in California

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While it is now known by many employers that on September 10, 2014, the California Labor Code was amended to provide for new paid sick leave for employees in California, it is now important to understand the details governing this new benefit to be provided by California employers as of July 1, 2015.

The law will shortly require that employers provide three paid sick days per year for employees who, on or after July 1, 2015, work in California for 30 or more days within a year from the commencement of employment. The law, known as Healthy Workplaces, Healthy Families Act of 2014 ([Assembly Bill 1522](#)) (Act), is codified as part of the Labor Code, commencing with Section 245. In enacting the Act, the California Legislature reached several conclusions, including its finding that many workers in California do not have any paid sick days, or have an inadequate number of paid sick days, to care for their own health or the health of family members.

#### Reasons For Paid Sick Leave

Paid sick leave will be available, under the Act, upon the oral or written request of an employee for the purposes of: (1) diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member; and (2) for an employee who is a victim of domestic violence, sexual assault, or stalking. The Act also provides that an employer shall not require, as a condition of using paid sick days, that the employee search for or find a replacement worker to cover those paid sick days.

Certain employees are not covered by this Act, including an employee covered by a valid collective bargaining agreement (CBA) if the agreement 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 those 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. There are certain other carve outs for individuals employed in the construction industry (so long as they are parties to a CBA, the requirements are outlined in new Labor Code Section 245.5), as well as providers of in-home supportive services, and certain individuals employed by air carriers.

#### Sick Leave Accrual

An employee shall accrue paid sick days at the rate of not less than one hour per every 30 hours worked, beginning at the commencement of employment or July 1, 2015, whichever is later. Exempt employees are generally deemed to work 40 hours per workweek for these purposes. If the exempt employee's normal workweek is less than 40 hours, the employee accrues paid sick days based upon that normal workweek. Employees will be entitled to use accrued paid sick days beginning on the 90th day of employment, after which day the employee may use paid sick days as they are accrued.

### **Rate of Pay When Using Paid Sick Leave**

The rate of pay for paid sick leave shall be the employee's hourly wage. If the employee, in the 90 days of employment before taking accrued sick leave, was paid at different hourly rates, by commission or piece rate, or was a nonexempt salaried employee, then the rate of pay is calculated by dividing the employee's total wages, excluding any overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

### **Notice of Need for Paid Sick Leave**

If the need for paid sick leave is foreseeable, the employee must provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the employee must provide notice of the need for the leave as soon as practicable.

### **Carry Over of Accrued Sick Leave**

Like vacation and PTO in California, accrued paid sick days carry over to the following year of employment. An employer may, however, limit an employee's use of paid sick days to 24 hours or three days in each year of employment. Importantly, no accrual or carry over is required if the full amount of leave is received at the beginning of each year pursuant to a policy adopted by the employer. An employer is not required to provide additional paid sick days pursuant to the Act if it has a paid leave or paid time off policy, the employer makes available an amount of leave that may be used for the same purposes and under conditions not inconsistent with that required by the Act, and the policy either: (1) satisfies the accrual, carry over, and use requirements of the Act; or (2) provides no less than 24 hours or three days of paid sick leave, or equivalent paid leave or paid time off, for employee use for each year of employment, on a calendar year or 12-month basis.

An employer need not allow an employee's total accrual of paid sick leave to exceed 48 hours, or 6 days, provided that an employee's rights to accrue and use paid sick leave under the Act are not otherwise limited. Further, an employee may determine how much paid sick leave he or she needs to use, but the employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.

### **No Compensation Due for Accrued But Unused Paid Sick Days**

Significantly, 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. If, however, an employee separates from, and is rehired by, the employer within one year from the date of separation, previously accrued and unused paid sick days shall be reinstated. The employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehire.

### **Lending Paid Sick Days to Employees**

An employer may lend paid sick days to an employee in advance of accrual, at the employer's discretion and with proper documentation. It is not clear at this point the nature of the documentation envisioned in this regard.

### **Tracking of Paid Sick Leave**

An employer shall provide an employee with written notice that sets forth the amount of paid sick leave available, or paid time off leave that an employer provides in lieu of sick leave, on either the employee's itemized wage statement, or set forth in a separate writing provided on the designated pay date with the employee's payment of wages.

### **Retaliation Prohibited**

The Act specifically provides that an employer shall not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing an administrative complaint, alleging a violation of the Act, cooperating in an investigation or prosecution of an alleged violation of the Act, or opposing any prohibited policy, practice or act. The Act, moreover, provides a rebuttable presumption of unlawful retaliation 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 any of the following: (A) the filing of a complaint by the employee with the Labor Commissioner or alleging a violation of the Act; (B) the cooperation of an employee with an investigation or prosecution of an alleged violation of the Act; or (C) opposition by the employee to a policy, practice, or act that is prohibited by the Act.

### **Posting and Recordkeeping Requirements**

The Act provides that the Labor Commissioner shall create a poster containing the following information: (1) an employee is entitled to accrue, request, and use paid sick days; (2) the amount of sick days provided for by the Act; (3) the terms of use of paid sick days; and (4) the non-discrimination and anti-retaliation prohibitions of the Act. The employer is required to post it in each of its workplaces, and display it in a conspicuous place. If the employer willfully violates this posting requirement, a civil penalty of up to \$100 may be levied for each offense.

Employers must maintain, for at least three years, records documenting the hours worked and paid sick leave accrued and used by employees. Such records must be made available to employees, in the same manner as required under Labor Code Section 226. Failure to maintain the required records will result in a rebuttable presumption that the employee is entitled to the maximum hours accruable under the Act.

### **Penalties for Non-Compliance**

In addition to the penalty for violation of the posting requirement, the Labor Commissioner or Attorney General is vested with the power to remedy violations of the Act, and recover backpay, payment of the sick days unlawfully withheld, and other penalties. When awarding reimbursement, the dollar amount of the paid sick days withheld will be multiplied by three, each violation will not amount to less than \$250, and there is an aggregate penalty cap of \$4,000. The remedies, penalties, and procedures provided under the Act are cumulative.

Finally, the Act amends Labor Code Section 2810.5 to require that at the time of hiring, an employer shall provide to each employee a written notice, in the language the employer normally uses to communicate employment-related information to the employee, advising that an employee: may accrue and use sick leave; has a right to request and use accrued paid sick leave; may

not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.