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ABD Academy Webinar

California's New Sick Leave Law

November 20, 2014

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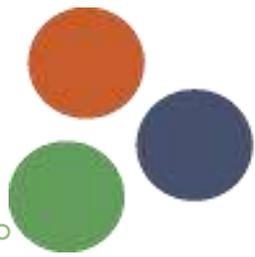
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Ready to learn about California's New Sick Leave Laws?



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California's New Sick Leave Law

November 20, 2014

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New CA Sick Leave Law

- Employers Covered: All employers, regardless of size.
- Effective Date: The law is ambiguous:
 - New California laws are presumed to take effect on January 1 of the year following enactment (i.e., January 1, 2015).
 - While the law does not specify a different effective date, it ties employee eligibility to sick leave to July 1, 2015.
 - Recommendation: Take steps to ensure compliance with *at least* the notice and record keeping requirements by January 1, 2015.



New CA Sick Leave Law

- Eligible Employees: Any “employee who, on or after July 1, 2015, works in California 30 or more days within a year from commencement of employment...”
 - The law covers employees regardless of exempt, non-exempt, full-time, part-time, or temporary status.
 - Conditional exclusion of some employees covered by a collective bargaining agreements—consult with counsel.
- Minimum Accrual Rate & Timing: 1 hour per 30 hours work “beginning at the commencement of employment or the operative date of this article, whichever is later.”
 - Exempt Employees: Deemed to work 40 hours per workweek, unless the normal workweek is less than 40 hours.



CA Law Prohibits Forfeiture

- Accrued time must carry over from year to year, unless full amount is received at beginning of year.
 - Employers may cap accrual at 48 hours or 6 days.
 - San Francisco & Oakland: Cap must be at least 72 hours for employers with 10 or more employees.
- Employers may limit use to 3 days or 24 hours per year of employment.
 - San Francisco & Oakland: No usage cap.
- Employers are not required to pay out accrued sick leave on termination.
 - However, the employer must reinstate accrued sick leave if the employee is re-hired within one year (and allow its immediate use).

Alternative Policies

- Employers are not required to offer additional sick leave if:
 - The employer makes available paid leave that may be used for the same purposes, and either:
 - Satisfies the law's accrual, carry over, and use requirements; OR,
 - Provides no less than 24 hours or three days of paid sick leave, or equivalent paid leave for each year of employment, calendar year, or 12-month basis.
 - San Francisco & Oakland: Require accrual, and fail to provide an unaccrued alternative.

Accrued v. Unaccrued Options

Threshold	Accrued	*Unaccrued
Rate	1 hour per 30 hours work (8.7 days over a 2080 work-hour year)	24 hours (3 days) at beginning of each year of employment, calendar year, or 12-month period.
Accrual Cap	48 hours (6 days)	N/A
Usage Cap	24 hours (3 days)/year	N/A

*** San Francisco sick leave ordinance and Oakland municipal code do not provide an unaccrued option.**

Qualifying Reasons

- Diagnosis, care or treatment of, or preventive care for an existing health condition of:
 - Employee
 - Employee's Family Member:
 - Child, Stepchild, or Legal Ward
 - Parent (including in *loco parentis*), Stepparent, or Legal Guardian of Employee or Employee's Spouse or Domestic Partner.
 - Spouse or registered domestic partner
 - San Francisco & Oakland: Designated person if no spouse/domestic partner.
 - Grandparent or grandchild
 - Sibling
- Victim of domestic violence, sexual assault, or stalking.



Usage

- Employee may use accrued sick days beginning the 90th day of employment.
 - Oakland Municipal Code: 90-day rule applies only to employees hired after March 2, 2015.
- Employee Notice: reasonable advance notice required for foreseeable leave; otherwise, as soon as practicable.
- Employer may not require as a condition of using leave that the employee to search for or find a replacement worker.
- The law does not address whether an employer may require medical documentation as a condition to using sick leave.
 - This implies that the employer may *not*, unless authorized by another law (e.g., FMLA, CFRA, PDL, ADA, etc.)

Usage

- Employer may set a reasonable minimum usage increment of not more than 2 hours.
 - San Francisco Ordinance: 1 hour minimum increment allowed (larger minimum increment requirements may be permitted based upon circumstances).
 - Oakland Municipal Code: Does not directly address the issue, but may be interpreted to permit minimum usage increments of not more than 1 hour.

Pay Rate

- Default: Sick leave paid out at employee's hourly wage.
- But, if in the 90 days before sick leave employee had different hourly pay rates, was paid by commission or piece rate, or was nonexempt salaried employee, then rate calculated by dividing total wages (not including overtime premium pay) by total hours worked in preceding 90 days.
 - San Francisco Ordinance:
 - Commissions/Piece Rates: Base plus commission/piece rate wages divided by total hours worked for prior calendar year, or since hire date if no full prior calendar year.
 - Capped at 2 times San Francisco minimum wage.
 - Different Hourly Rates: Use rates for work scheduled during leave.

Notice Requirements

- Could be deemed effective *January 1, 2015*:
 - Each Pay Date: Employer must provide written notice “that sets forth the amount of paid sick leave available, or paid time off leave [provided] in lieu of sick leave” on either:
 - The employee’s itemized wage statement, or
 - A separate writing.
 - Workplace Posting (to be published by California Labor Commissioner).
 - Revised Non-Exempt New-Hire Notice (California Labor Code Section 2810.5) referencing sick leave entitlement.
- Oakland Municipal Code: Notification of rights to current and new employees to be created by City Administrator



Retaliation

- Employer may not retaliate against an employee for using, or requesting to use, accrued sick days.
- Rebuttable presumption of retaliation if employer denies employee the right to use accrued sick days or retaliates against an employee for doing so within 30 days of:
 - Employee filing Labor Commissioner complaint or alleging violation of the law.
 - Employee participating in investigation or prosecution of violation.
 - Employee opposing act prohibited by the law.
- Oakland Municipal Code:
 - Requires clear and convincing evidence of just cause for discharge within 120 days of protected activity
 - Prohibits funding sick leave via reduction in compensation or benefits of non-management employees

Record Keeping Requirements

- Could be deemed effective *January 1, 2015*:
 - Maintain for at least 3 years records of:
 - Hours worked
 - Paid sick days accrued
 - Sick days used for each employee
 - Pay rate (Oakland)
- Consequences of failure:
 - Penalties
 - Employee presumed to be eligible for maximum number of hours
 - Consider “wrongful termination” claim risk of inadequate documentation



Hypothetical

- Karma Cloud is a venture-backed start-up that touts itself as having a relaxed, laid back culture. Part of this involves eliminating recordkeeping for various matters such as sick leave. Instead, Karma Cloud just tells its employees they are entitled to three days of sick leave per year upon hire, and they should use it whenever they or a family member is ill. Karma Cloud does not provide any payroll date notice regarding how much sick leave employees have available.
- As 2016 rolls around, Miley, the Company's Events Manager, has been employed with the Company for five years. She regularly calls her manager, informing him that she won't be in to work for various reasons including illness, car trouble, and house repairs.

Hypothetical (cont'd.)

- As a result of her attendance problems, Miley receives a final warning in July 2016. In August 2016, the Company has a major customer appreciation event – its largest event of the year. Miley is the employee who was primarily responsible for preparing for the event, and is responsible to oversee important activities the day of the event. The morning of the event, Miley calls her manager, Jerry, and leaves him a voice mail stating that she'll be out sick that day with a cold. Infuriated, Jerry sends an email to Hillary, Director of HR, stating: “Unbelievable! I cannot tolerate this any longer. Please prepare for termination tomorrow.”
- Hillary asks Jerry if he can document that Miley has taken more than three days off for sickness in the last year. Jerry responds: “I don't have any documents, but trust me, it's been excessive.”
- What should Hillary do?

Existing Sick Leave Policies

- Most important provisions to review and revise:
 - Eligible employees: no exclusions based upon introductory, temporary, or part-time status.
 - Consider different levels of sick leave.
 - Review accrual rates, timing, caps, and pay rates.
 - Add or review/revise carry over language.
 - Update “family member” definition.
 - Review usage conditions and revise as needed, including with respect to:
 - Work coverage
 - Advance notice
 - Medical documentation
 - Minimum usage increments
 - Re-hire sick leave reinstatement language.



Existing Accrued PTO Policies

- Most important provisions to review and revise:
 - Same as for sick leave policies, and
 - Review/revise disciplinary language re excessive unscheduled PTO use.
- Recommendations:
 - Realize: Having all PTO subjected to the new law's protections may significantly complicate attendance management.
 - Alternative: Consider replacing PTO with separate vacation and sick leave policies.
 - Attendance Policies: Also review to ensure that all protected absences are treated as excused.



What About “Unaccrued” Vacation or PTO?

- Vacation Only Policy: employer must ensure that it has a separate, compliant sick leave policy.
- PTO Policy (covering both vacation and sick leave):
 - The new law’s requirements to guarantee a minimum amount of sick leave, track its use, and provide ongoing notice of the available amount of sick leave are incompatible with unaccrued PTO.
 - Any guaranteed minimum amount of general PTO will be deemed “accrued” under California law—requiring any unused amount to be paid out upon cessation of employment.
 - Recommendation--Consider replacing with separate policies:
 - Unaccrued vacation (i.e., not PTO): *not* to be used for sick leave purposes, so that it is not subject to the new law’s requirements.
 - Sick leave: consistent with the new law’s requirements.

Conclusion

- Q&A
- Thank You!
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