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PERSPECTIVE

## Welcome guidance on paid sick leave

By Hilary Weddell

Since California's new paid sick leave law was passed in late 2014, employers have been struggling to understand the law's requirements. To provide guidance to employers, the California Division of Labor Standards Enforcement — the agency that enforces the Labor Code — recently posted answers to frequently asked questions on its website. Here are a few of the clarifications made. A number of issues, however, remain unclear.

How the year is measured for accrual and use purposes. All employees employed as of July 1, 2015, will begin accruing sick leave on that date, and the FAQs state each successive July 1 starts a new year for accrual and use calculations. Employees hired after July 1, 2015, however, will start accruing from the date of hire and each successive anniversary starts a new year. Following the FAQs, employers would be required to track separately each employee's sick leave bank. The statute provides employers utilizing the lump sum method with the option of giving employees the 24 hours or three sick days at the start of each calendar year, thereby lessening the administrative burden on employers to track separately each employee's sick leave accrual. Employers should consult counsel when choosing an accrual method.

*Cap on use for part-time and alternative work schedule employees.* Employers may cap employees' use of paid sick leave at three days or 24 hours per year. The FAQs clarify that for enforcement purposes, employees who do not work a typical eight-hour day are to be afforded the more generous of the two options. Thus, an employee who typically only works six hours per day gets to take up to 24 hours (four days) of sick leave per year, while an employee who works 10 hour days may take only three days (30 hours) per year.

The sick leave law sets minimum requirements, so employers may provide more sick leave than required. The new law is unclear whether the accrual, use and carry-over requirements apply to all of the paid sick leave provided by an employer, or just to the minimum three days/24 hours required under the law. Unfortunately, the FAQs do not specify how employers' existing sick leave and paid time off policies interact with the new law.

*Permissible use of paid sick leave.* Under the new law, employees may use paid sick leave for:

- the diagnosis, care or treatment of an existing health condition of, or preventive care for, an employee;
- the diagnosis, care or treatment of an existing health condition of, or preventive care for, an employee's family member; or
- an employee who is a victim of domestic violence, sexual assault or stalking seeking relief, including medical attention and psychological counseling.

The law defines "family member" broadly. It includes the employee's child (biological, adopted, foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis, regardless of age or dependency status); parent (biological, adoptive, foster parent, stepparent, legal guardian or a person who was in loco parentis when the employee was a minor); parents-in-law through an employee's spouse or registered domestic partner (based on the above definition of "parent"); spouse; registered domestic partner; grandparent; grandchild; and sibling.

For employers who currently have paid sick leave or paid time off policies, the permissible uses allowed under the new law are likely more expansive than current sick leave policies. The new law is also broader than California's Kin Care law as it includes the use of sick leave to care for a parent-in-law, sibling, grandchild or grandparent, who are not covered under



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Kin Care. However, the sick leave law did not amend the Kin Care law so if an employer provides leave beyond the requisite three days/24 hours, part of that leave may be still subject to the Kin Care law.

*Requiring employees to give notice, find a replacement or provide medical documentation.* Employees must be allowed to take paid sick leave upon request. The request may be made either orally or in writing. If the need for taking leave is *foreseeable* (preventative doctor appointments), employers can require employees provide reasonable advance notice. If the need for leave is *unforeseeable* (sudden illness), the employee needs only provide notice as soon as possible. Employees *cannot be required* to find a replacement as a condition for taking leave. Employers should review their attendance and absenteeism policies to be sure that they do not run afoul of the new law's requirements.

Although not expressly prohibited under the new law, it appears employers may no longer request medical verification from employees who take sick leave. The new law requires employers to provide the employee with time off upon request, and allows an employee to decide how much time he or she needs to use. The law also states that employers cannot deny employees the right to use paid sick leave or retaliate against employees who exercise their right to take paid sick leave. Consequently, employers who insist on medical verification risk employees claiming they were denied coverage of paid sick leave under the law. It is unclear whether

this prohibition applies only to the required three days/24 hours of paid sick leave or to all paid sick leave provided by the employer. Employers should treat at least the first three days/24 hours of sick leave each year as protected.

*Companies that utilize unlimited paid time off plans.* The FAQs opine that unlimited paid time off plans — plans that allow employees to take paid time off whenever they need or want — do not comply with the new law's requirements. Under the new sick leave law, employers are required to track separately each employee's accrual and use, which many employers with these unlimited plans do not currently do. Employers that offer unlimited paid time off plans should consult counsel to ensure compliance as the penalties under the new law are significant.

Since the law states employers may use their existing sick leave policies if the specific policy complies with the minimum requirements of the law, many employers who provide more than the minimum three paid sick days mistakenly assume that their current plans are sufficient. However, the new law has several requirements often overlooked, such as recordkeeping, paystub and reinstatement rules. All employers should review their policies and procedures closely as most will need to be updated to comply with the new law's mandates.

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