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Governor Signs Healthy Workplaces, Healthy Families Act of 2014: Paid Sick Days To Be Provided To Nearly All California Employees Effective July 1, 2015

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On September 10, 2014, Governor Brown signed into law the Healthy Workplaces, Healthy Families Act of 2014, which will require California employers to provide to nearly all employees — exempt and non-exempt — paid sick days effective July 1, 2015.

The Basics:

With limited exceptions, beginning July 1, 2015, every employee, whether exempt or non-exempt, who is employed in California for 30 days or more will be entitled to accrue paid sick leave at the employee's regular rate of pay of not less than one hour per every 30 hours worked commencing on the first day of employment or the effective date of the new law (July 1, 2015), whichever is later. Exempt employees are deemed to work 40 hours per week, unless the employee normally works a workweek of less than 40 hours. An employee shall be entitled to use accrued paid sick days beginning on the 90th day of employment, after which the employee may use paid sick days as they are accrued. However, an employer may limit an employee's use of accrued paid sick days to three days or 24 hours per year of employment. These are the basics. As with most things, the devil is in the details, and there are numerous details employers should be aware of and should prepare to comply with.

Are There Exceptions For Small Employers?

No. The Act applies to all "employers" regardless of the number of employees and defines the term "employer," as "any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities."

Are There Exceptions For Certain Employees?

Yes and no. The Act applies equally to exempt and non-exempt employees, but there are some exceptions, primarily for unionized employees subject to a collective bargaining agreement. The four exceptions are: (1) employees covered by a valid collective bargaining agreement that expressly provides for the wages, hours, and working conditions and that also expressly provides for paid sick days and other requirements; (2) persons employed in the construction industry covered by a valid collective bargaining agreement that satisfies certain requirements; (3) a provider of in-home support services under specified parts of the Welfare and Institutions Code; and (4) persons employed by an airline as a flight deck or cabin crew member subject to certain provisions of the federal Railway Labor Act.

Are There Exceptions For Employers With Existing Paid Leave Policies?

Yes and no. "An employer is not required to provide additional paid sick days pursuant to [the Act] if the employer has a paid leave policy or paid time off policy, the employer makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in [the Act], and the policy does either of the following: (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

--> "The Act applies to all "employers" regardless of the number of employees…"

or paid time off, for employee use for each year of employment or calendar year or 12-month basis." However, an employer with an existing paid leave policy or paid time off policy, or that adopts after July 1, 2015, a compliant policy, will still be required to comply with the notice, posting, reporting, and recordkeeping requirements of the Act discussed below.

For What Purposes Will Employees Be Entitled To Use Paid Sick Days?
An employer will be required to permit an employee to use paid sick days for:

(1) "Diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or an employee's family member." The term "family member" is defined as:

- "A child, which . . . means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis" and that definition applies "regardless of age or dependency status."

- "A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child."

- "A spouse."
- "A registered domestic partner."
- "A grandparent."
- "A grandchild."
- "A sibling."

(2) "For an employee who is a victim of domestic violence, sexual assault, or stalking" [to take "time off from work to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief" or to obtain as specified in *Labor Code* section 230.1 various services available to victims of domestic violence or sexual assault.]"

How Much Notice Will Employees Be Required To Give When Paid Sick Days Are To Be Used?
An employer is required to provide paid sick days as required by the Act "upon the oral or written request of an employee." "If the need for paid sick leave is foreseeable, the employee shall provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for the leave as soon as practicable."

In What Increments Can Paid Sick Days Be Used?
"An employee may determine how much paid sick leave he or she needs to use" in a given instance, "provided that an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave." Thus, the Act expressly contemplates the use of partial sick days when, for example, an employee wishes to leave work early on a given workday for a permitted purpose.

Can Employees Be Required To Find Someone To Cover For Them When Paid Sick Days Are Used?
No. "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 the days during which the employee uses paid sick days."

When Must Paid Sick Days Be Paid?
"An employer must provide payment for sick leave taken by an employee no later than the payday for the next regular payroll period after the sick leave was taken."

Are There Notice Requirements For New Hires?
Yes. The law amends the requirements for the *Labor Code* Section 2810.5 notice to be provided to newly hired non-exempt employees at the time of hiring. Employers must add the following additional information to the statement: "[t]hat the 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."

Are There Posting Requirements?
Yes. An employer will be required to display in each workplace of the employer a poster stating all of the following:

(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.

(4) That retaliation or discrimination against an employee who requests paid sick days or uses paid sick days, or both, is prohibited and that an employee has the right under [the Act] to file a complaint with the Labor Commissioner against an employer who retaliates or discriminates against the employee."

The Act directs the Labor Commissioner to create a poster containing the required information and to make it available to employers, which should simplify employer compliance once the Labor Commissioner makes the required poster available.

Are There Reporting Requirements?
Yes. Employers will be required to provide to each employee "with written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee's itemized wage statement [i.e., check stub] or in a separate writing provided on the designated pay date with the employee's payment of wages." Thus, employers will be required to continuously track and report the amount of paid sick leave available to each employee based on the amount of paid sick leave an employee has accrued and on the amount of paid sick leave an employee has used.

Are Accrued Paid Sick Days Carried Over From Year To Year?
Yes. "Accrued paid sick days shall carry over to the following year of employment. However, an employer may limit an employee's use of paid sick days to 24 hours or three days in each year of employment." Further, "[an] employer has no obligation to allow an employee's total accrual of paid sick leave to exceed 48 hours or six days, provided that an employee's rights to accrue and use paid sick leave . . . are not otherwise limited."

Are Employers Required To Pay Employees For Accrued Paid Sick Days When Employment Terminates?
No. The Act does not require employers to pay employees for paid sick days accrued under the Act. The Act expressly states, "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 is rehired within one year from the date of termination, "previously accrued an unused paid sick days shall be reinstated," and "[t]he employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehiring."

Are There Record Keeping Requirements?
Yes. As with time and payroll records, employers will be required to keep for at least three years paid sick leave records as follows: "An employer shall keep for at least three years records documenting the hours worked and paid sick days accrued and used by an employee." Furthermore, an employer will be required to make such records available for inspection by the Labor Commissioner and will be required to make such records available for inspection and copying by employees as employers are required to do as to other employment records of an employee. Notably, "[i]f an employer does not maintain adequate records pursuant to [the Act], it shall be presumed that the employee is entitled to the maximum number of hours accruable under [the Act], unless the employer can show otherwise by clear and convincing evidence."

Does The Act Contain Anti-Discrimination And Anti-Retaliation Provisions?
Yes. The Act states, "[a]n 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 a complaint with the department or alleging a violation of this [Act], cooperating in an investigation or prosecution of an alleged violation of this [Act], or opposing any policy or practice or act that is prohibited by this [Act]. The

Act carries a rebuttable presumption of 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 an employee doing any of 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]. (C) Opposition by the employee to a policy, practice, or act that is prohibited by [the Act]. Thus, under such circumstances, retaliation will be presumed as a matter of law unless the employer can meet its burden of proving retaliation in fact did not occur.

Does The Act Provide For Civil Or Administrative Penalties For Violations?

Yes. The Act provides for a variety of monetary and non-monetary remedies for violations of its various provisions.

Is There A Private Right Of Action For Violations Of The Act?

As introduced on January 15, 2014, Assembly Bill 1522 would have expressly provided for an "aggrieved employee" or "an entity a member of which is aggrieved," such as a labor union, to bring an action in court to enforce its provisions. AB 1522 then stated, in pertinent part, "The Labor Commissioner, the Attorney General, a person aggrieved by a violation, or an entity a member of which is aggrieved by a violation of this article may bring a civil action in a court of competent jurisdiction against the employer...." As enacted, the Act states, "the Labor Commissioner or the Attorney General may bring" such an action, thus eliminating the references to an "aggrieved employee" and to "an entity a member of which is aggrieved," which suggests the Act currently does not permit a current or former employee to enforce its provisions, at least not directly. However, it remains unclear and remains to be seen whether a current or former employee could seek to enforce the Act indirectly via the California Private Attorney General Act of 2004 ("PAGA"), which provides a procedural mechanism of an "aggrieved employee" to bring an action in his or her own behalf and on behalf of other allegedly "aggrieved employees" to obtain penalties for violation of nearly any provision of the *Labor Code* and/or of any Industrial Welfare Commission Wage Order, even those that do not otherwise provide for a private right of action.

What about local sick leave ordinances?

The Act provides that it does not preempt local ordinances that provide for greater accrual or use of sick leave by employees. This means employers in San Francisco and San Diego will be required to provide sick leave that complies with both state and local laws.

What Do Employers Need To Do Now?

The Act does not become effective until July 1, 2015, but employers should prepare in advance to meet the various requirements of the Act. For many employers, the notice, posting, reporting, and recordkeeping requirements of the Act will likely prove to be more onerous and more costly than providing employees three paid sick days each year.