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HRcalifornia extra

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# New Paid Sick Leave Law Giving You a Headache? Here are the Basics

On September 10, California became the second state in the nation, after Connecticut, to provide paid sick leave when Governor Edmund G. Brown signed the Healthy Workplaces, Healthy Families Act of 2014 (AB 1522, the "Act").

The effective date for employers to begin providing the paid sick leave benefit is July 1, 2015.

This article will address some of the key points of the new Act, but employers beware: There are many nuances to this particular piece of legislation, which are not covered in this article.

### Who is covered under this law?

The Act applies to private and public employers regardless of size; there is no small employer carve out.

An employee who has worked in California for 30 or more days within a year from the beginning of his/her employment will be entitled to paid sick days under the Act. Part-time and full-time employees are covered as well as exempt and non-exempt employees.

Out-of-state employees can be covered too, if they spend enough time working here in California. Let's say, for example, that your business is in Oregon, but you have an employee that routinely comes into California to work for one week out of every month; this employee will be covered under the new paid sick leave law because the employee will be here for 30 or more days in a year.

There are some employees who are not covered under the Act. Employees not covered by the new law are limited to the following four groups:

- Employees covered by a union contract that specifically provides for paid sick leave, has binding arbitration and meets other specified requirements;
- Construction employees covered by a valid union contract;
- State providers of in-home supportive services under certain sections of the Welfare and Institutions Code; and
- Certain air carrier employees.

### How much paid sick leave will employees get?

An eligible employee earns one hour of sick pay for every 30 hours worked beginning either July 1, 2015 or, if hired after July 1, on the employee's first day of work. Both regular and overtime hours are counted toward the accrual rate of one hour for every 30 hours worked. Employees exempt under the administrative, executive or professional exemption are deemed to work 40 hours a week, but if they don't, then accrual will be based on their normal workweek.

### What limits or caps can an employer put on paid sick leave?

Employees cannot start using accrued sick days until the 90th day of employment, after which the employee can use paid sick leave as it is accrued.

Accrued paid sick days can carry over to the following year of employment, just like vacation. But, an employer can limit the amount of paid sick days an employee can use in each year of employment to 24 hours/three days. In addition, an employer can cap the employee's total accrual amount at 48 hours/six days.

The carry-over provision allows an employee to have paid sick days available at the start of the next year, depending on how much he/she has already used and accrued. Take the following examples, which assume your company limits use of sick leave to 24 hours/three days each year, and caps total accrual at 48 hours/six days:

- An employee who works 900 hours in a year (regular or overtime) will accrue 30 hours of sick leave. The employee could conceivably use 24 hours of sick leave during that year and carry six hours over to the beginning of the next year.
- An employee who works 1800 hours a year (regular or overtime) would conceivably accrue 60 hours of sick leave. But, if you have a policy capping the maximum accrual amount at 48 hours and, if the employee does not take any paid sick leave that year, he/she will only accrue and carry over 48 hours. The employee can't accrue any additional paid sick days until some of the "banked" time is used.

An employer can, of course, choose to have a more generous plan, allowing the employee to use and accrue more than the minimum amounts required under the Act.

Importantly, an employer can avoid having to calculate the accrual and the carry-over amounts by providing the full amount of leave (24 hours or three days) to the employee at the beginning of each year under an employer policy. In this "lump-sum" situation, an employee won't be able to carry over unused sick days but will get three new sick days the following year. The employer policy will need to meet certain requirements (see the discussion of employer policies in following section).

### What if I already have a policy?

An employer is not required to provide the additional paid sick days provided for by the Act if the employer has a paid leave or paid time off policy in place that makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in this new law. The employer's policy must either:

- Satisfy the accrual, carry over and use requirements of the new law; or
- Provide no less than 24 hours or three days of paid sick leave, or equivalent paid leave or paid time-off for employee use each year of employment or calendar year or 12-month basis.

Employers will have to make sure that any existing policies can be used for all the same purposes and conditions specified

under this new law and adjustments to existing policies will likely be necessary. (See the discussion of how an employee can use paid sick leave, below.)

### What happens when an employee leaves?

Unlike unused, accrued vacation -- which is treated like wages -- sick leave under this Act does not need to be paid out at the end of employment. However, if you combine the sick leave and vacation into a paid time off (PTO) policy, you will have to follow the rules relating to vacation and PTO including paying out accrued but unused PTO upon termination.

Previously accrued and unused paid sick days must be reinstated if an employee leaves employment and then is rehired within one year, and the rehired employee must be allowed to use those previously accrued sick days and begin accruing additional paid sick days upon rehire.

### How can an employee use paid sick leave?

An employee can use paid sick time for an existing health condition or preventive care for themselves or a “family member.” Family member has a broader definition than the current one found in existing kin care or Family and Medical Leave Act/California Family Rights Act (FMLA/CFRA). A family member under the Act is a:

- Child
- Parent
- Spouse or registered domestic partner
- Grandparent (outside of kin care and FMLA/CFRA laws)
- Grandchild (outside of kin care and FMLA/CFRA laws)
- Sibling (outside of kin care and FMLA/CFRA laws)

Paid sick leave may also be used for an employee who is a victim of domestic violence, sexual assault or stalking.

Because the definition of family member is broader than that under FMLA/CFRA, if, for example, an employee used three days of paid sick leave under the Act to care for a grandchild, those particular three days could not be charged against an employee’s FMLA/CFRA entitlements because those leaves only cover children, parent, spouses and (CFRA only) registered domestic partners.

Paid sick leave must be provided upon an employee’s oral or written request. If the need for paid sick leave is foreseeable, an employee must provide reasonable advance notice. If not, the employee must provide notice as soon as practicable.

An employee may determine how much paid sick leave he/she needs to use. An employer, however, can set a “reasonable minimum increment,” not to exceed two hours, for the use of paid sick leave.

An employer cannot require an employee to search for or find a replacement worker for the days off.

### How do I pay the employee for the sick day?

Paid sick leave must be compensated at the employee’s hourly wage, and must be paid no later than the next payday after the

sick leave was taken.

### What are the documentation/notice requirements?

The Act contains several notice and posting requirements.

First, an employer must provide an employee with a written notice setting forth the amount of paid sick leave available to the employee each pay period. An employer can either provide this notice to the employee on the already required itemized wage statement or in a separate writing provided to the employee with the payment of wages.

Second, the Wage and Employment Notice (Labor Code section 2810.5), which employers have been required to provide since 2012, will now need to contain information about an employee's right to accrue and use paid sick leave and about employee protections under the Act. The Labor Commissioner is required by law to develop this form and will need to provide an updated version. HRCalifornia will update the form once it is released by the Labor Commissioner.

Third, and not a surprise, there is a required poster advising employees of their sick leave rights. The Labor Commissioner will also produce this poster.

Employers will need to keep records for at least three years that document the number of hours that the employee worked and paid sick days accrued and used by an employee. If the employer does not keep adequate records, there is a presumption that the employee is entitled to the maximum number of hours accruable.

### What happens if I don't comply?

The Act forbids employers from denying employees the right to use accrued paid sick days. Employers cannot discriminate or retaliate against an employee for using or attempting to use accrued sick days or filing a complaint or cooperating in an investigation alleging a violation of the Act.

The Act contains various stiff fines and penalties for not providing sick days -- ranging from $50 to $4,000 aggregate. In addition, the employer can be required to compensate the state up to $50 for each day or portion of a day where a violation occurs or continues. This sum can be assessed for each employee and there is no maximum aggregate. There is also fine for willfully violating the posting requirement of up to $100 for each offense.

The Act further authorizes the Labor Commissioner or the Attorney General to bring a civil action to enforce the law and obtain relief on behalf of any employee, including back pay, payment of sick days unlawfully withheld, penalties, liquidated damages, attorneys' fees and costs.

Isolated, unintentional payroll errors or notice errors that are clerical or inadvertent mistakes will not be considered violations of the Act. The determination as to whether an employer has committed a violation may include an examination of whether the employer has compliant policies and practices in place.

### What about city ordinances?

San Francisco's paid sick leave ordinance has been on the books for several years now. San Diego recently passed an

ordinance effective in April of next year – although there is a move on-foot to have it repealed before it even goes into effect.

Employers in cities with existing paid sick leave ordinances will need to review them carefully as local laws may provide more benefits to employees than the new state law. The employee will be allowed to use whichever law provides the most benefit to him or her.

### Conclusion

As is clear, this new law is not simple. CalChamber will continue to provide updated information regarding its implementation. For now, employers can at least start discussing the details and figuring out what they will need to do to be ready for July 1.

For additional information, join us for a webinar on November 5 to discuss this new law.

CalChamber will be updating HRCalifornia for 2015 with more information on this new law and its impact on California employers.

## Governor Acts on Employment Related Bills

Gov. Edmund G. Brown has now signed or vetoed employment-related legislation passed by the California Legislature this year. This year, the governor's deadline for signing bills was September 30, 2014.

**CalChamber employment law experts will cover new employment laws for 2015 in the October 16 issue of our *HRCalifornia Extra* newsletter.**

A few of the new laws that employers will need to be aware of this year include:

- New mandatory paid sick leave benefits for California employees effective July 1, 2015 (AB 1522);
- Expansion of mandatory supervisor sexual harassment prevention training to include training on the prevention of "abusive conduct" in the workplace (AB 2053);
- Change to the Fair Employment and Housing Act to extend protections against harassment to unpaid interns and volunteers (AB 1443);
- Increased liability for employers that contract with a third party for labor. Requires contracting employers to share all civil legal responsibility and liability for payment of wages to workers supplied by the contractor and for any failure to obtain workers' compensation coverage (AB 1897).

## Employee Security Threat Warrants Psychological Exam

A professor at the University of San Francisco was terminated because he refused to participate in a fitness-for-duty exam after he showed increasingly "frightening" behavior. He sued the university on various grounds, including violation of the California Fair Employment and Housing Act, which prohibits disability discrimination. A jury rejected the professor's claims, and a California court of appeal recently affirmed that the employer's actions were not unlawful. *Kao v. University of San Francisco*

Fitness-for-duty exams are lawful in certain situations, but employers should be cautious and know the rules.

### Threatening Behavior

Dr. John Kao was a tenured professor of mathematics at the University of San Francisco (USF). In about 2008, Kao began displaying increasingly bizarre and intimidating behavior, described by one professor as a "sudden change to complete irrational, uncontrollable rage…." He shouted and screamed; went on uncontrolled rants; clenched his fists; seemed tense, agitated and angry; was physically intimidating; shook with anger; had a "wild cackling laugh;" showed moments of instantaneous rage; glared at people; and other concerning and upsetting behaviors.

He also became physically confrontational with other professors, including forcefully bumping into them and charging toward them but moving at the last second.

A dean at USF described one incident where Kao became enraged because she asked how his ill mother was doing: "He kind of clenched his jaw and he looked mean and mad and he got right in my face and said 'Fine. Fine. How are you and how are your children doing?'" She got in her car and saw him "standing here with clenched fists glaring at me, like leaned over looking at me angrily … I was really scared." The wife of a professor also experienced Kao's rage when she asked about his ill mother: "He got in her face and very close to her and again rigid with anger and raised his voice and said, 'How's your mother? How's your mother? How's your mother?'" in a "startling frightening way."

### University Requests an Exam

After receiving various complaints, USF began an investigation and received reports from colleagues that they felt threatened, and feared that Kao would become violent and harm himself or others.

The university consulted experts, including a forensic psychiatrist specializing in workplace threat assessments who recommended that USF conduct an independent medical exam to determine if Kao could do his job in a safe way. On this recommendation, USF contacted a doctor to set up an exam for Kao. USF instructed the doctor not to provide them with any medical diagnosis or other clinical information, but only to inform them whether or not Kao was fit-for-duty.

USF tried several times to arrange the exam with Kao and his attorney, but Kao refused to participate. Ultimately, USF terminated Kao, and Kao sued.

### Job Related and Consistent with Business Necessity

Kao's main contention in appealing the jury verdict against him was that USF should not have required the fitness-for-duty exam and should have first engaged in an interactive process with him. The court disagreed.

USF, according to the court, had the right to call for a fitness-for-duty exam because it was job-related and consistent with business necessity. Under Government Code section 12940(f)(2) and 2 CCR sec. 11071:

- An exam is "job-related" if it is "tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to a disability." 2 CCR section 11065(k)

- There is a “business necessity” for a fitness-for-duty-exam if “the need for the disability inquiry or medical examination is vital to the business.” 2 CCR section 11065(b)

Here, the jury had “ample evidence” available to reach a finding that the exam was necessary to determine whether Kao posed a workplace danger and that it was vital to the business. Multiple people reported multiple instances of threatening behavior, and the decision to require the exam was based on the unrefuted advice of experts in the field of workplace threat assessment. The jury heard testimony that Kao frightened school personnel and that his behavior caused “fear and confusion.”

Moreover, under California law, USF has an unquestionable duty to maintain a place where people can safely work -- a fact the threat assessment experts emphasized to the university.

The fitness-for-duty exam is not an accommodation, and the interactive process requirement is part of the reasonable accommodation process. In this case, Kao was not seeking an accommodation and did not even acknowledge that he had a disability.

**Best Practices**

This case is a good illustration both of an employer’s obligation to maintain a safe workplace and of how a fitness-for-duty exam may be both appropriate and necessary for the protection of the workplace.

- Whether a fitness-for-duty exam will be appropriate must be examined in each and every circumstance to determine if it is truly job related and consistent with business necessity, given the particular employee’s actual job duties.
- Don’t take this analysis lightly – any analysis must meet the tests set forth in the regulations. Is the exam tailored to assess whether the employee can perform his/her specific essential job functions or poses a danger? Is the exam “vital” to your business? When in doubt, consult an attorney.
- Any exam or inquiry must be limited only to the extent necessary to meet the need.
- Don’t seek information on the underlying medical diagnosis - just whether the employee can perform the essential functions of the job or whether the employee poses a danger to himself or others.
- Any request should be backed by objective evidence of the need, not mere speculation or opinion. Objective evidence may include such things as eyewitness observations, affected job performance, or other observable behaviors.

## HRWatchdog

Vets 100/100A Reporting Requirements Changed for 2015

Homeland Security Approves Wording for Immigrant Driver’s License

CalChamber, Coalition Opposed to Proposed Heat Illness Regulations

## What’s New in HRCalifornia

## Member Benefits

**Seminar Next Week**
Leaves of Absence: Making Sense of It All

**October 9, 2014**
**9:00 a.m. – 4:00 p.m.**
**Downtown Sacramento**

CalChamber’s employment law experts address some of the most common and more difficult to resolve issues related to leaves of absence. Preferred and Executive members receive their 20 percent discount.

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