Paid Sick Leave
State/Local Mandate Differences Create Compliance Confusion

California’s paid sick leave law, the Healthy Workplaces, Healthy Families Act (Act), went into effect on July 1, 2015. The law requires all employers, regardless of size, to provide employees who have worked in California for 30 or more days with paid sick leave, at an accrual rate of 1 hour for every 30 hours worked.

After the 90th day of employment, employees are allowed to utilize their paid sick leave to care for themselves or a family member. Any unused sick leave accrued in the preceding year is carried over to the next year, but may be capped by an employer policy. Exempt, nonexempt, part-time and full-time employees are all entitled to paid sick leave. Temporary, seasonal and even out-of-state employees can be covered too, if they spend enough time working in California.

While the Act is well-intentioned, employers in this state struggle with proper compliance for several reasons.

SICK LEAVE USED AS VACATION

Since the implementation of the Act, suspected abuse of the law by employees is common and the Act’s ambiguities have become more prevalent, leaving employers uncertain about proper compliance and, at times, understaffed. The Act does not require an employee to provide any specific amount of advance warning for an “unplanned” illness. The Act also is silent as to whether employers may request documentation for an illness. However, there are concerns that requesting a doctor’s note could expose employers to liability for interfering with an employee’s right to sick leave.

Due to this ambiguity, employees can and likely have used paid sick leave as vacation. Anecdotal examples of this abuse have been provided, such as in the airlines industry, in which last-minute “no shows” during the holiday season have occurred and can leave passengers who are trying to fly home to see their own families stuck on the ground. The intended purpose of the Act was to provide employees time off from work when they are sick or a family member is ill, not for vacation.

CHALLENGES WITH LOCAL ORDINANCE OVERLAP

The biggest compliance hurdle for California’s employer community is that the Act allows local cities and counties to adopt different sick leave mandates. Currently, seven cities/counties have their own paid sick leave laws in addition to California’s own nuanced law (Berkeley, Emeryville, City of Los Angeles, Oakland, City of San Diego, San Francisco and Santa Monica). Notably, this does not include two ordinances applicable to hotel workers only.

Continuing to authorize these local ordinances creates inconsistency and confusion for California employers who operate in multiple jurisdictions because each city or county may have vastly different requirements, and the employer must ensure that any employee who works in those local jurisdictions is provided the protections afforded by the specific local ordinance as well as California law.

Below is a brief summary of how the Act differs from the specific local ordinances and creates compliance burdens for employers:

• Permitted Use of Verification or Documentation. As indicated above, while California’s Department of Industrial Relations has suggested that requiring documentation (that is, a doctor’s note) could be considered interference with an employee’s right to take leave under the Act, the Act itself is silent on the issue. However, verification or documentation is permitted under some local ordinances. For example, Los Angeles, Oakland, San Diego and San Francisco all allow documentation to be requested for absences exceeding three consecutive work days. Because these local ordinances explicitly allow for documentation, but California’s sick leave law is silent on the issue, employers are left confused with what is permissible regarding documentation and verification of sick leave.

• Accrual Method. Even the basic methods of accruing sick leave differ. The local ordinances and the Act each require an accrual of 1 hour for every 30 hours worked in the state or the prescribed city. However, the Act offers other accrual method options that differ from the local ordinances. For example, under...
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the Act, an employer can alternatively use a front load method rather than an hourly accrual method. This requires the employer to provide 24 hours or 3 days of paid sick leave upfront.

The local ordinances have more complex options for accrual methods. For example, San Francisco’s paid sick leave law states that the employer may front load any sum of paid sick leave at the start of each employment year, calendar year or 12-month period, so long as the employee can accrue additional paid sick leave after working enough hours to have accrued the amount allocated upfront.

If that is not confusing enough, Emeryville, Los Angeles, Oakland, San Diego and Santa Monica all differ from San Francisco—some saying that, if the employer utilizes a front loading option, the employer must provide 40 hours at the start of the year, while others require 48 hours and others specify an amount of paid sick leave equal to the applicable accrual cap (that is, 40, 48 or 72 hours) depending on each local city ordinance’s accrual cap.

• Accrual Use Cap. The accrual caps are not much clearer. The Act states employers may cap the amount of paid sick leave an employee can accrue in a year to no less than 48 hours or 6 days, whichever is greater. However, Berkeley, Emeryville, Oakland, San Francisco and Santa Monica all base the accrual cap on the number of employees the employer has, and each city has a different employee threshold. For example, in Berkeley, if you have 24 or fewer employees, the annual accrual cap is 48 hours; however, if you have 25 or more employees, then the annual accrual cap is 72 hours.

On the other hand, in the neighboring city of Oakland, the annual accrual cap is 40 hours for nine or fewer employees and 72 hours for 10 or more employees. Thus, if the employer has locations throughout California, the employer will need to comply with and keep track of conflicting methods just for the annual accrual cap.

• Use Increments. The Act and most local ordinances state that an employer cannot require that paid sick leave be used in increments longer than 2 hours. However, Berkeley differs in that the employer cannot require use in increments longer than an hour for the initial hour, or longer than 15 minutes thereafter. Oakland and San Francisco do not allow employers to require that paid sick leave be used in increments longer than 1 hour, and Santa Monica does not address use increments at all.

• Covered Employees. This is where the local ordinance issue becomes even more burdensome on employers that have employees who work in different cities. For instance, in order for the paid sick leave laws of Berkeley, Emeryville, Los Angeles, Oakland, San Diego and Santa Monica to apply to the employee, the employee needs to work in the city only for 2 hours in 1 calendar week and be entitled to minimum wage.

That means, for some employees who travel for work, the employer must keep track of how long the employees are in each city. If the employee is there for at least 2 hours, then that employee may be entitled to the protections provided by the specific local ordinance.

In some instances, the employee will be entitled to the protections of all eight different local ordinances and California’s own paid sick leave law. Thus, the employer must navigate the nuances of each ordinance and ensure the employee is provided the most lenient protections of each separate ordinance.

To complicate things even further, San Francisco’s paid sick leave law has no durational requirement at all. This means that any employee in California who spends any time working in San Francisco may be subject to San Francisco’s paid sick leave law.

• Permitted Paid Sick Leave Use. Even the permitted use of paid sick leave may differ from city to city. While the Act states that permissible uses for paid sick leave are the medical need of the employee or employee’s family member or for purposes related to domestic violence, sexual assault or stalking suffered by the employee, Emeryville adds that the need to provide care of a guide dog, signal dog or service dog of the employee or family member also is a permissible use of paid sick leave.

The City of San Diego also differs by requiring that public health emergencies resulting in the closure of the employee’s worksite, childcare or a child’s school count as valid reasons to utilize paid sick leave. San Francisco adds bone marrow or organ donation as a permitted use.

• First Day of When Paid Sick Leave Can Be Used. Most local ordinances are standard with the Act with regards to the first day paid sick leave can be used, but San Diego differs in that paid sick leave cannot be used until the 91st day after employment begins. However, employers must remember to follow the Act since California is more protective of employees, allowing sick leave to be taken on the 90th calendar day after the employee begins work.

In addition to this long, complex list of nuanced differences, the local ordinances also differ in the application and requirements for how much paid sick leave can carry over from year to year, the amount of paid sick leave that can be used per year, the rate of pay for paid sick leave, whether the employer can require advance notice of paid sick leave usage, posting notice obligations, effect at rehiring, retaliation, and even enforcement
procedures. Because of the difficulty in keeping up with the all the different requirements, such ambiguity also creates litigation traps for employers who are actively trying to comply with all these conflicting laws.

**LEGISLATION IN 2019**

**AB 555 (Gonzalez; D-San Diego)** would have amended the Healthy Workplaces, Healthy Families Act to expand the number of paid sick days employers are required to provide from 3 days to 5 days. Although the proposed legislation did provide some state preemption, it was very limited, providing preemption only to specific provisions of the Act. Therefore, AB 555 would not have provided much compliance relief for employers. The California Chamber of Commerce anticipates that the author will propose similar legislation in 2020.

**CALCHAMBER POSITION**

While the CalChamber appreciates and understands the need for employees to stay home from work while they are sick, expanding another leave mandate that primarily harms small employers is concerning. Such an expansion also is challenging without clarifying amendments to the Act and preemption of local ordinances. The Act is already a huge financial and compliance burden on employers. Unscheduled absenteeism costs roughly $3,600 per year for each hourly employee. (See “The Causes and Costs of Absenteeism in The Workplace,” a publication of workforce solution company Circadian.)

Given the cumulative costs and existing protected leaves of absence with which California employers already are struggling, California should refrain from mandating additional sick days and instead allow employers and employees to manage the leave of absence policies as needed to accommodate both the employee’s and employer’s needs.

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