Paid Sick Leave

Conflicting Rules Create Confusion; No Penalty Needed for Honest Errors

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.

Just last year, the Legislature enacted AB 1867 as part of the budget to provide supplemental paid sick leave related to COVID-19.

While the Act and AB 1867 are well-intentioned, California employers struggle with proper compliance for several reasons. If the Legislature considers expanding or extending either of these protected leaves, it should address the employer challenges outlined below so that the laws can work as intended.

LIMITED ABILITY TO REQUEST DOCUMENTATION

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 advanced warning for an "unplanned" illness and it is silent as to whether an employer may request documentation before or after granting the leave.

Due to this ambiguity, employees can and likely have used paid sick leave as vacation. Anecdotal examples of this abuse include airlines industry last-minute "no shows" during the holiday season that leave stuck on the ground passengers who are trying to fly home to see their own families. There are concerns, however, that requesting a doctor's note could expose employers to liability for interfering with an employee's right to sick leave and employers are therefore generally better off not requesting documentation.

WAGE STATEMENT REQUIREMENTS

Under Labor Code Section 246(i), an employer is required to provide written notice on employee wage statements of the amount of paid sick leave an employee has available. Because this requirement is identified separately from the remaining wage statement requirements outlined in Labor Code Section 226, some employers have faced wage claims and Private Attorneys General Act (PAGA) lawsuits for failing to realize that this is a requirement. *See Ramirez v. C and J Well Service, Inc.*, et al., 2020 WL 5846464 (C.D. Cal. Mar. 27, 2020) (explaining employees have consistently tried to seek PAGA penalties for violations of Section 246(i) even though penalties are not intended for violations of notice requirements).

Notably, these wage claims and litigation under PAGA and the significant financial burden created on the employer are for a paper error that did not actually deny an employee leave.

CHALLENGES WITH LOCAL ORDINANCE OVERLAP

The biggest compliance hurdle for California's employer community about paid sick leave under the Act is that it allows local cities and counties to adopt different sick leave mandates. Continuing to authorize these local ordinances creates inconsistency and confusion for California employers that 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:

CalChamber

Agenda for California Recovery

2021 Business Issues and Legislative Guide

See the entire CalChamber 2021 Business Issues and Legislative Guide at www.calchamber.com/businessissues
Free PDF or epub available to download.

Special Thanks to the Sponsors
Of the 2021 Business Issues and Legislative Guide

Major

AUTOMOBILE CLUB • SOUTHERN CALIFORNIA • AAA

Gold

Frontier COMMUNICATIONS

Silver

AAA | CSAA Insurance Group, a AAA Insurer

• **Permitted Use of Verification or Documentation**. As indicated above, while the California 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, Berkeley and San Francisco all allow employers to either request "reasonable" documentation or to request documentation 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 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, 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 9 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 who 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 is entitled to the protections provided by the specific local ordinance. In San Francisco, any employee is entitled to paid sick leave as long as they work 56 hours or more in San Francisco during one calendar year.

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

• **Permitted Paid Sick Leave Use**. Even the permitted use of paid sick leave may differ from city to city. While the Act states 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 are permissible uses for paid sick leave, 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, child care 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.

• **Other Differences**. 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, if 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 2020 AND SUPPLEMENTAL COVID-19 PAID SICK LEAVE

In the wake of COVID-19, on March 18, 2020, the federal government enacted the Families First Coronavirus Relief Act (FFCRA). The FFCRA includes a new federal paid sick leave law that requires employers with fewer than 500 employees to provide up to 80 hours of paid sick leave for qualifying reasons related to COVID-19.

Given that the FFCRA applied only to companies with fewer than 500 employees, Governor Gavin Newsom issued Executive Order N-51-20, which provided up to 80 hours of paid sick leave to food sector employees who work for employers with 500 or more employees that could be used if the worker was subject to a federal, state or local quarantine or isolation order related to COVID-19, advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19, or prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

With less than two weeks remaining in the legislative session, the Legislature introduced AB 1867 and passed AB 1867 as a part of the budget. AB 1867 codified Executive Order N-51-20 as the new Labor Code Section 248. It also created Labor Code Section 248.1, which expands supplemental paid COVID-19 sick leave to nonfood sector workers who work for employers with 500 or more employees and to any publicly employed first responders or health care providers whose employers had exempted them from the federal law. Unlike the FFCRA, the bill did not include a tax credit to offset the cost of providing the leave.

As a part of the budget, AB 1867 took effect immediately, leaving employers to deal with many similar challenges in complying with this new law as they do with the Act:

• **Documentation**: Like the Act, Labor Code Sections 248 and 248.1 are silent as to whether employers may request documentation for use of the COVID-19 paid leave. The Labor Commissioner issued FAQs clarifying that employers may not request any certification from a health care provider unless the employer has reason to doubt that the employee is using the leave for a legitimate purpose. The FAQ explains, for example, that it would be reasonable to request documentation if a worker informs the employer that he or she is subject to a local quarantine order, "but the hiring entity subsequently learns that the worker was at a park." While it is beneficial that the Labor Commissioner has recognized some instances in which it would be reasonable to request documentation to support the leave, whether the employer actually does so is a difficult judgment call. Employers should think carefully about whether to request documentation from an employee at the risk of the employee filing a complaint with the Labor Commissioner or a PAGA action.

• **Wage Statement Requirement**: Labor Code Section 248.1 requires employers with 500 or more employees to add the amount of COVID paid sick leave that employees have available to their wage statements. Many employers struggled to update wage statements to accurately reflect that amount due to conflicting local ordinance requirements as well as uncertainty about how to calculate leave entitlements for employees with variable schedules. The new law required these changes to be made the pay period immediately following its enactment.

• **Overlap with Local Ordinances**: Several cities, including Los Angeles and San Francisco, had enacted local ordinances requiring larger employers to provide COVID-19 supplemental paid sick leave several months ago. Those ordinances exempted certain businesses from that leave requirement. AB 1867 contains no such exemptions. Further, the method by which an employer must calculate the employee's regular rate of pay to pay out the leave is different than most local ordinances. Employers that operate throughout the state have been struggling to determine which calculation they should comply with for each of their locations.

The FFCRA and AB 1867 have a sunset date of December 31, 2020. In December 2020, Congress elected not to extend the FFCRA mandate, only to make it voluntary. It is therefore likely that AB 1867 also expired on December 31. If COVID-19 remains prevalent in 2021, even if the FFCRA is not extended, expect to see an extension of this leave mandate and possible efforts to expand it. For example, Cal/OSHA's emergency regulations on COVID-19 included mandating that all employers, regardless of size, not penalize workers who miss work if they show any symptoms of COVID-19, even if there is no positive diagnosis, and provide exclusion pay.

In addition, the Governor signed AB 2017 (Mullin; D-South

San Francisco), which addresses the "kin care" statute, Labor Code Section 233. The law allows an employee to use 50% of their paid sick leave for purposes of kin care. The bill clarifies that it is at the sole discretion of the employee to designate the sick leave as being used for kin care or for their own illness.

CALCHAMBER POSITION

While California Chamber of Commerce appreciates and understands the need for employees to stay home from work while they are sick, especially during a pandemic, the growing number of different types of leaves and differences between state and local laws has made it very difficult for businesses to keep up with these requirements.

Employers are trying their best to comply, but are struggling given the lack of clarity on issues regarding how to calculate leave entitlements, how to update wage statements, and interaction with local ordinances. The uncertainties that exist in how to implement these leave laws makes businesses of all sizes vulnerable to litigation, including PAGA, even where honest, unintentional mistakes are made.

Any changes made to paid sick leave mandates should be minimal and easy for employers to implement and understand with no penalty for honest errors.

Staff Contact
Ashley Hoffman
Policy Advocate

ashley.hoffman@calchamber.com
January 2021