Paid Sick Leave

Conflicting Rules Cause Confusion; Honest Errors Don't Deserve Penalties

In recent years, California has enacted multiple different forms of paid sick leave requirements. The first was the Healthy Workplaces, Healthy Families Act (Act), which 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. The leave must be provided at an accrual rate of 1 hour for every 30 hours worked or under a different accrual method as long as the employee has at least 24 hours of leave, or three days, by their 120th day of employment.

In the wake of COVID-19 in 2020, the federal government, California Legislature, and California Division of Occupational Safety and Health (Cal/OSHA) all enacted various additional COVID-19 paid sick leave on top of what was required by the Act. Each of these different leaves has presented its own challenge to employers over the last few years.

COMPLIANCE CHALLENGES WITH THE ACT

CHALLENGES WITH LOCAL ORDINANCE OVERLAP

The biggest compliance hurdle for California employers regarding paid sick leave under the original Act is that it allows cities and counties to adopt different sick leave mandates. The proliferation of local ordinances creates inconsistency and confusion for California employers that operate in multiple jurisdictions.

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

• **Permitted Use of Verification or Documentation:** The Department of Industrial Relations has opined that requiring documentation (that is, a doctor's note) could be considered interference with an employee's right to take leave under the Act. However, 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 have no idea what is permissible regarding documentation and verification of sick leave.

• **Accrual Method:** The local ordinances have more complex options than the Act 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. Emeryville, Los Angeles, San Diego and Santa Monica take different approaches, such as 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 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 per employer, and each city has a different employee threshold.

• **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:** In Berkeley, Emeryville, Los Angeles, Oakland, San Diego and Santa Monica, an employee need work

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in the city for only 2 hours per calendar week and be entitled to minimum wage. That means, for any employee who travels for work, the employer must keep track of how long the employee is in each city. If the employee meets the 2-hour threshold, then that employee is entitled to the benefit of the local sick leave 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.

• **Permitted Paid Sick Leave Use:** Even the permitted use of paid sick leave may differ from city to city. While the Act states that 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. San Diego adds public health emergencies resulting in the closure of the employee's worksite, child care or a child's school as valid reasons to utilize paid sick leave. San Francisco adds bone marrow or organ donation as a permitted use.

LIMITED ABILITY TO REQUEST DOCUMENTATION

The Act does not require an employee to provide any advance warning for an "unplanned" illness and it is silent as to whether an employer may request documentation before or after granting the leave. The Department of Industrial Relations has opined 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.

Due to this ambiguity, employees can and likely have used paid sick leave as vacation. Anecdotal examples of this abuse include last-minute "no shows" during the holiday season that are requested as sick leave. Even the author of the Act has boasted on social media on Super Bowl Sunday that employees have the right to sick leave and employers can't ask for documentation — appearing to imply that employees can use the leave for purposes other than being ill.

WAGE STATEMENT REQUIREMENTS

Under the Act, 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 paperwork error that did not actually deny leave to an employee.

PROPOSAL TO INCREASE LEAVE UNDER THE ACT TO FIVE DAYS WOULD BURDEN SMALL BUSINESSES

In 2021, Assemblymember Lorena Gonzalez (D-San Diego) introduced AB 995, which would have increased the minimum number of paid sick days employers are required to provide from three days to five days, increased the cap that employers can place on paid sick days from six days to 10 days, and increased the number of paid sick days an employer can roll over to the next year from three days to five days.

The business community, especially small businesses, raised significant concerns over the proposal. This change would have harmed even those businesses that operate in local jurisdictions that already require five days of leave because the Act discourages requesting documentation. While a city like San Diego requires five days, employers are explicitly permitted to ask for documentation after three days of leave. The proposed changes to the statewide Act did not grant employers that right.

Similarly, employers that currently offer more than three days have the right to set certain parameters around that extra time, such as requesting documentation or specifying that leave may be limited during a busy or holiday season. Under AB 995, they would no longer have that right.

The bill failed to come up for a vote on the Assembly floor.

SUPPLEMENTAL COVID-19 PAID SICK LEAVE AND CAL/OSHA EMERGENCY TEMPORARY STANDARD (ETS)

On March 18, 2020, the federal government enacted the Families First Coronavirus Relief Act (FFCRA). The FFCRA included a new federal paid sick leave law that required 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 mandated 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.

State Leave

With less than two weeks remaining in the 2020 legislative session, the Legislature passed AB 1867 (Committee on Budget) as a part of the State Budget. The bill mandated up to 80 hours of sick leave for all workers who work for employers with 500 or more employees and for any publicly employed first responders or health care providers whose employers had exempted them from the federal law. Unlike the FFCRA, AB 1867 did not include a tax credit to offset the cost of providing the leave.

AB 1867's expiration date was tied to related federal legislation: if the sick leave mandate in the FFCRA was extended past December 31, 2020, then AB 1867 would be extended as well. If not, it would expire at the end of 2020.

Rather than extend the FFCRA leave mandate, Congress offered tax credits to employers that voluntarily continued to offer paid sick leave. AB 1867 therefore expired on December 31, 2020. In response to its expiration, the California Legislature pushed SB 95 (Skinner; D-Berkeley) through the early State Budget process in March 2021. The bill provided all employees who work for an employer with more than 25 employees an additional 80 hours of sick leave for COVID-19-related reasons, including getting the vaccine or recovering from vaccine side effects. Employees were entitled to the additional 80 hours even if they already used 80 hours under the FFCRA or AB 1867.

Retroactive Leave Mandate

The mandate was retroactive to January 1, 2021. This left employers with the administrative burden of figuring out how to issue retroactive pay to employees who had taken time off for a covered reason between January 1 and the effective date, March 19. It also led to unanswered questions about scenarios where an employee may have used sick leave or paid time off (PTO) and now needed to have that time credited back and whether the bill could retroactively trigger any of the many penalties in the Labor Code.

Documentation Still Issue

The biggest issue employers faced with SB 95 was the inability to request documentation. Like the Act and AB 1867, SB 95 was silent as to whether employers may request documentation for use of the COVID-19 paid leave. The Labor Commissioner issued the same frequently asked question (FAQ) as it had for AB 1867, 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, the Commissioner's FAQs were hardly a safe harbor, and it is likely that many employers never did so for fear of litigation.

The California Chamber of Commerce polled our members on the topic of COVID-19 paid sick leave and more than 60% of the 900 respondents raised concerns about employees fraudulently using the leave. Employers reported employees requesting multiple days off for vaccine side effects before even getting the shot, with some requesting the entire 80 hours up front.

Balancing State Law with Cal/OSHA Exclusion Pay

The second biggest issue was balancing SB 95 with the exclusion pay mandate in the Cal/OSHA Emergency Temporary Standard. Under the ETS, any employee of any business of any size in California who has COVID-19, is subject to a local or state isolation order, or was in "close contact" with a COVID-19 case and is either unvaccinated or vaccinated and showing symptoms is entitled to:

- Be excluded from the workplace for at least 10 days, or potentially longer if they are symptomatic;
- Continue being paid their full wages and benefits while they are excluded; and
- Receive a COVID-19 test at the expense of the employer.

There is no cap on the amount of paid leave an employee can receive, and an employer cannot compel the employee to use existing, accrued paid sick leave prior to receiving exclusion pay.

The ETS presumes that an employee who tests positive for COVID-19 was exposed in the workplace. Even assuming that the employer demonstrates the employee was not exposed in the workplace — which is very difficult to do — the employee still is entitled to unpaid leave. Because of the difficulty in meeting this burden, employees generally are receiving the paid sick leave under the ETS, regardless of the source of COVID-19, for the duration of their exclusion. Obviously unwilling to risk violating the ETS, employers usually have paid the sick leave even if they suspected the employee was exposed outside of work.

GOVERNOR CALLS FOR MORE COVID-19 LEAVE IN 2022

Days before releasing his proposed 2022–2023 budget, Governor Newsom issued a press release asking the Legislature to enact additional COVID-19 paid sick leave in light of the high infection rates caused by the omicron variant. No guidelines were provided as to what the bill should look like — that was left to the Legislature. The CalChamber intends to raise to the Legislature many of the issues our members saw with SB 95.

CALCHAMBER POSITION

Although the CalChamber supports the need for employees to stay home from work while they are sick, especially during a pandemic, the proliferation of different types of leaves and differences between state and local leave laws has placed an enormous burden on businesses to keep up with these requirements. The availability of the COVID-19 vaccines also has reduced the chance of workers being exposed to and getting ill from COVID-19.

Employers are making good faith efforts to comply with all the existing mandates, but struggle with the lack of clarity on how to calculate leave entitlements, how to update wage statements, and the interaction of state mandates with local ordinances. These uncertainties make businesses of all sizes vulnerable to litigation, including PAGA, even when the mistakes are unintentional.

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

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