Paid Sick Leave

Differences Between State, Local Mandates Create Compliance Challenges

- California's paid sick leave law applies to all employers (except those with certain collective bargaining agreements).
- The state law's silence on allowing employers to require documentation to verify sick leave use causes compliance and liability concerns for employers.
- Overlaps and differing requirements of local ordinances pose additional compliance concerns.
- California should refrain from added new mandates and allow employees and employers to manage leave policies to accommodate needs of both parties.

BACKGROUND

The Healthy Workplaces, Healthy Families Act (Act) went into effect on July 1, 2015. This law has become known as California's Paid Sick Leave law. The law requires all employers (regardless of size), except those with certain collective bargaining agreements, to provide any employee who has 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. Finally, all employees are entitled to paid sick leave, including temporary, seasonal, and part-time employees.

SICK LEAVE USED AS VACATION

Since the implementation of the Act, suspected abuses of the law by employees are 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. There are concerns, however, that requesting a note could expose employers to liability for interfering with an employee's right to sick leave.

Due to the ambiguity on this issue, 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 where last-minute "no shows" during the holiday season have occurred, and can leave stuck on the ground passengers who are trying to fly home to see their own families. The intended purpose of the Act was to provide employees time off from work when they were sick or a family member was ill, not for vacation.

CHALLENGES WITH LOCAL ORDINANCE OVERLAP

In addition to employee abuse of the Act, employers in California struggle with proper compliance. 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 (Berkeley, Emeryville, City of Los Angeles, Oakland, City of San Diego, San Francisco, and Santa Monica) in addition to California's own nuanced law. 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 cities is provided the protections afforded by the specific local ordinance as well as California law.

COMPARING STATE WITH LOCAL SICK LEAVE ORDINANCES

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, although the California Department of

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Industrial Relations has suggested that requiring documentation (i.e., 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 just 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, you can alternatively use a front load method rather than an hourly accrual method. This requires the employer provide 24 hours or three (3) days of paid sick leave upfront. The local ordinances, however, 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, Berkeley, 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 (i.e., 40, 48, or 72 hours) depending on each local city ordinance's accrual cap requirement.

• Accrual Use Cap

The accrual caps themselves 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 you have locations throughout California, you may be trying to comply and keep track of eight different 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 may 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 one 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 some instances, the employee will be entitled to the protections of all seven 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.

Additionally, to complicate things more, San Francisco's paid sick leave law has no durational requirement at all. That means that any employee in California who spends any time in San Francisco working 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 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, child care, or a child's school count as valid reasons to utilize paid sick leave.

• First Day of When Paid Sick Leave Can Be Used

Most local ordinances align with the Act about 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 because California is more lenient to employees, allowing sick leave to be taken on the 90th calendar day after the employee begins work.

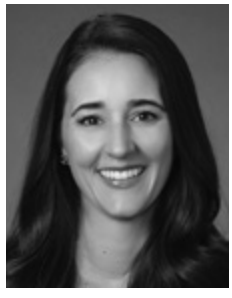
In addition to this long, complex list of nuanced differences, the local ordinances also differ in the application and requirements for how much paid sick leave can carry over from year to year, the amount of paid sick leave that can be used per year, the rate of pay for paid sick leave, if the employer 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 all of the different requirements, such ambiguity also creates litigation traps for employers who are actively trying to comply with all of these conflicting laws.

CALCHAMBER POSITION

Since its passage, there have been proposals to expand the Healthy Workplaces, Healthy Families Act (See 2018 AB 2841 by Assembly Member Lorena Gonzalez Fletcher; D-San Diego). Additionally, there are discussions of a potential bill in 2019.

Although 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 clarification and changes to the existing Act, as well as unifying the Act with local ordinances.

The Act already is 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 are already 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 and employer's needs.



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