



**RX FOR THE PAID SICK LEAVE BLUES:  
COMPLIANCE STRATEGIES FOR DEALING  
WITH CALIFORNIA'S NEW HEALTHY  
WORKPLACES HEALTHY FAMILIES ACT**

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PRESENTED BY: MILLER LAW GROUP

**WALTER M. STELLA AND HOLLY R. LAKE**

CALIFORNIA HR CONFERENCE



Holly R. Lake  
Shareholder

**Miller**  
LAW GROUP



Walter M. Stella  
Shareholder

**Miller**  
LAW GROUP

# The Paid Sick Leave Trend

- States, cities and other jurisdictions that have adopted paid sick leave laws (varying effective dates):

- California
- Connecticut
- Massachusetts
- District of Columbia
- Oregon
- Emeryville, CA
- Oakland, CA
- San Francisco, CA
- Montgomery County, MD
- Bloomfield, NJ
- East Orange, NJ
- Irvington, NJ
- Jersey City, NJ
- Montclair, NJ
- Newark, NJ
- Passaic, NJ
- Paterson, NJ
- Trenton, NJ
- New York, NY
- Eugene, OR
- Portland, OR
- Philadelphia, PA
- Seattle, WA
- Tacoma, WA
- Los Angeles (Hotels only)

# Overview of California Law

- California Healthy Workplaces, Healthy Families Act
  - As of July 1, 2015, requires that all employees, with limited exceptions, accrue paid sick leave
  - Balances must be reported on paystubs
  - New paid sick leave poster
  - Revised Labor Code 2810.5 Notice
  - DLSE FAQs - [http://www.dir.ca.gov/dlse/Paid\\_Sick\\_Leave.htm](http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm)

# New Amendments!

- A.B. 304, effective July 13, 2015, amends the California Healthy Workplaces, Healthy Families Act
  - New accrual methods
  - How to pay for sick days
  - Grandfathered plans
  - Unlimited sick or PTO plans
- DLSE is updating the FAQs to reflect A.B. 304 changes

\* indicates AB 304 change



## Coverage and Eligibility

# Employer-Employee Coverage

- Applies to all employers in California
- Covers all employees (with specific exceptions)
  - No minimum number of hours
  - Part-time or full-time
  - Regular, temporary, or per diem
  - Exempt or non-exempt
  - No length of service with the employer – except that:
    - An employee cannot **use** paid accrued sick days until 90 days of employment
    - On or after Jan. 1, 2015, an employee must work in California for the same employer\* at least 30 days in a year from the commencement of employment

# Employee Exclusions

- “Employee” does **NOT** include:
  - An employee covered by a valid collective bargaining agreement that expressly provides for paid sick days or paid time off
  - An employee in the construction industry covered by a valid collective bargaining agreement if the agreement was either (A) was entered into before January 1, 2015, or (B) expressly waives the requirements of the paid sick leave law clear and unambiguous terms
    - A.B. 304 deletes requirement that employee perform “onsite work” \*
  - A provider of in-home supportive services
  - An individual employed by an air carrier as a flight deck or cabin crew member, provided the individual is provided with compensated time off equal to or exceeding the amount established in the paid sick leave law
  - Certain public-sector retired annuitants \*



## Accrual and Amounts



# Accrual Requirements

- Accrual options:
  - One hour per 30 hours worked
    - Accrues on regular and overtime hours
    - Exempt employees are deemed to work 40 hours/week, unless normal workweek is shorter
  - Any other accrual method that: \*
    - Accrues on a regular basis; and
    - Employee has at least 24 hours/3 days of accrued sick leave by the 120<sup>th</sup> calendar day of employment or each calendar year or 12-month period
- Employers can choose to provide MORE paid sick leave, but not less

# Caps and Carryover

- Accrued paid sick days **carry over** to the following year
- Employers may set an accrual cap of no less than 48 hours/6 days
- Employers can limit use to 24 hours/3 days in each year of employment, calendar year or 12-month period\*
- Caps on accrual and use should be in writing – or *no* cap may be assumed!
- Employers, at their discretion, may advance or lend paid sick days in advance of accrual – but documentation of this is required

# Accrual and Cap Conundrums

- What if employee works shifts longer or shorter than 8 hours, or is part-time?
  - The employer must provide the amount of sick leave that is most generous to the employee (*e.g.* 3 full days based on the employee's work days or 24 hours)
- Why does the law permit an employee to accrue more than can be used in a year?
  - Accrual
  - Carryover
  - Use

# The Lump Sum Method

- The law provides a lump sum alternative to the accrual method -- employer can grant the full amount of leave at the beginning of each year:
  - Full amount of leave means 24 hours/3 days\*
  - No accrual necessary
  - No carryover necessary
  - Each year of employment, calendar year or other 12-month period\*
- For new hires:\* Can provide lump sum of not less than 24 hours/3 days that is available to the employee to use by the completion of 120th calendar day of employment
- Can the lump sum be pro-rated for part-time employees? No

# PTO Policies

- An employer can provide PTO or other “paid time off” to employees, in place of paid sick days
- The PTO policy must:
  - Satisfy all paid sick leave requirements (accrual, use, carryover)
  - Specify any additional terms
- An employer may have different plans for different categories of employees (*e.g.* PTO for full-time and paid sick days for part-time)
- With a compliant PTO plan, the employer does not have to separately designate or grant paid sick days
- Best practices?
  - Consider specifying that the PTO may be used for any reason, including for any reason covered by the new law
  - Consider a California paid sick days “carve-out”

# Grandfathered Policies

- Certain policies that do not satisfy the accrual or lump sum requirements can be grandfathered:\*
- Policy must have been in effect prior to January 1, 2015; **and**
- Policy must provide for regular accrual of paid sick leave or PTO; **and**
- Employees must accrue no less than one day or 8 hours within three months of employment of each calendar year or 12-month period; **and**
- Employees (including those hired after January 1, 2015) were eligible to earn at least 24 hours/3 days of sick leave or PTO within 9 months of employment
- Grandfathering is lost if accrual method is modified -- however, employers can increase the accrual amount or rate

# What About Kin Care?

- California's existing "Kin Care" law (Labor Code 233-234) requires employers to permit employees to use at least one half of accrued sick leave for purposes of caring for a parent, child, spouse, or domestic partner
- How does kin care interact with the new law?
  - An employer does not have to provide *additional* sick days just for kin care purposes
  - Half of annual sick leave amount must be permitted for kin care purposes – if employer offers more than the new paid sick leave law minimum, half that larger amount must be available for kin care
  - If employee exhausts annual sick leave for non-kin care purposes, additional sick leave does not have to be provided for kin care purposes



## Use of Paid Sick Leave



# How to Use

- The employee may determine how much paid sick leave to use
- An employer may set a “reasonable” minimum increment for the use of leave, but the minimum must be two hours or less
- An employee can use paid sick leave as it accrues (after 90 days of employment)
- An employer *cannot require* that an employee search for or find a replacement worker to cover days when an employee is using paid sick leave

# Reasons for Use

- For diagnosis, care, or treatment of an existing health condition of the employee or a family member
- For preventive care (physicals, flu shots, etc.) of the employee or a family member
- For an employee who is a victim of domestic violence, sexual assault or stalking to obtain relief, including medical attention and psychological counseling

# Who's a Family Member?

- Child -- biological, adopted, foster, step, legal ward, or child to whom employee stands *in loco parentis*; no age or dependency status restrictions
- Parent -- biological, adoptive, foster parent, stepparent, legal guardian or a person who was *in loco parentis* when the employee was a minor
- Parent-in-law -- through a spouse or domestic partner
- Spouse
- Domestic partner
- Grandparent
- Grandchild
- Sibling

# Employee Requests

- An employee must make an oral or written request to use paid sick days, for a qualifying reason
- If the need for leave is foreseeable, the employee must provide reasonable advance notice
  - The law does not define “reasonable”
- If the need for leave is unforeseeable, the employee must provide notice as soon as practicable

# Verification

- Can the employer require a doctor's note or other documentation to verify the use of paid sick leave?
  - The law is silent on the issue of verification!
  - Any limitations on the right to verify likely would not apply after the 24 hours or 3 days of paid sick leave are used
  - Verification based on other laws?
    - Labor Code 230 and 230.1, regarding leave for victims of domestic violence, stalking and sexual assault, provides a separate employer right to obtain certification for the absence
    - FMLA/CFRA certification



Pay for Sick Days



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DOLLARS



# Pay for Sick Days

- An employer must pay for sick days taken no later than the payday for the next regular payroll period after the sick leave was taken
- How is sick pay calculated?\*
- For nonexempt employees, paid sick time must be calculated using either of these methods:
  1. in the same manner as the regular rate of pay for the workweek in which the employee uses the sick time, regardless of whether the employee works overtime in that same week; *or*
  2. by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment
- For exempt employees, paid sick time must be calculated in the same manner as the employer calculates wages for other forms of paid leave

# Pay on Termination?

- Accrued and unused paid sick leave does NOT have to be paid out on termination, resignation, retirement, or other employment separation
- However, if an employee separates and is rehired within one year, the paid sick leave balance at termination must be reinstated
  - Upon rehire, the employee will also be entitled to accrue additional paid sick days
  - Reinstated sick leave is subject to the use and accrual limits of the law\*
- PTO or other paid leave that *is* paid out on termination does not have to be reinstated upon rehire\*



## Notice, Posting and Recordkeeping

# Notice of Sick Leave Available

- The employee must be provided with *written notice each payday*, with the employee's payment of wages, that indicates how much paid sick leave (or PTO) the employee has available
  - May be provided on the itemized wage statement or another writing
  - This requirement took effect as of July 1, 2015 (or January 1, 2016 for employers covered by Wage Orders 11 and 12\*)

# “Unlimited” Policies

- Recent trend toward “unlimited” PTO policies -- what are they?
  - No PTO “accrues”
  - No (specified) limit on how much can be used
  - Use may or may not be tracked
- Does an “unlimited” PTO/vacation policy satisfy the paid sick leave law?
  - To satisfy payday notice requirement, employer must write “UNLIMITED” on wage statement or other notice\*

# Workplace Poster

- Employers must post a new paid sick leave poster in the workplace, in a conspicuous place
- Posting deadline was January 1, 2015
- [http://www.dir.ca.gov/dlse/Publications/Paid\\_Sick\\_Days\\_Poster\\_Template\\_\(11\\_2014\).pdf](http://www.dir.ca.gov/dlse/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf)

# Labor Code 2810.5 Notice

- The DLSE has updated the Labor Code 2810.5 Notice to Employee, which must be provided to non-exempt new hires, and to a non-exempt employee when any information in the form changes (within 7 days of the change)
- The revised version with paid sick leave information must be used as of January 1, 2015
- Notice was required no later than July 8, 2015 for new/modified sick leave policies as of July 1
- [https://www.dir.ca.gov/dlse/LC\\_2810.5\\_Notice.pdf](https://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf)

# Recordkeeping

- An employer must keep records for three years documenting:
  - Hours worked
  - Paid sick days accrued
  - Paid sick days used
- Failure to retain records raises presumption that the employee is entitled to the maximum number of hours accruable, unless the employer can show otherwise by clear and convincing evidence
- Notwithstanding the recordkeeping or other provisions of the statute, an employer is not obligated to inquire into or record the purposes for which an employee uses paid leave or PTO\*



## Violations and Enforcement



# Prohibited Acts

- An employer shall not:
  - Deny the right to use accrued sick days
  - Discharge, threaten to discharge, demote, suspend discriminate for requesting or using paid sick days or making a complaint
- Rebuttable presumption of unlawful retaliation if the employer denies an employee the right to use sick days or discharges/discriminates against an employee within 30 days of the employee filing a complaint regarding paid sick leave, cooperating in a paid sick leave investigation, or opposing a policy or practice that is unlawful under the paid sick leave law

# Violations and Enforcement

- An employee may file a claim with the Labor Commissioner, which may order reinstatement, back pay, payment for sick days, and an administrative penalty
  - If the employer failed to provide sick days, the penalty includes the dollar amount of the withheld days multiplied by three, or \$250, whichever is greater up to a maximum of \$4,000
  - The Labor Commissioner may also order the employer to pay up to \$50 for each day (or portion) that a violation occurs or continues, for each employee whose rights were violated – without any dollar limit
- Alternatively, the Labor Commissioner may file a civil action
- An employee may seek PAGA penalties for violations



Interaction with  
Other Laws



# San Francisco – Key Differences

- No accruals until 90 days of employment and then can be used as it accrues
- Accruals can be capped at no less than 72 hours
- Employer may not limit amount used within a year
- Sick leave can be used in increments of one hour (or shorter if permitted by employer)
- No provision for lump sum grants of paid sick days
- Use of paid sick leave can be verified
- Fewer excluded employees (working under a collective bargaining agreement, or work in SF fewer than 56 hours/year)
- Permits use for “designated person”

# Oakland – Key Differences

- Effective March 2, 2015
- Employees eligible if perform two or more hours of work per week in Oakland and are entitled to minimum wage under state law
- Accruals can be capped at no less than 72 hours (40 hours for small employers with fewer than 10 employees)
- Does not address minimum increments or limits on use within a year
- No provision for lump sum grants of paid sick days
- Permits use for “designated person”
- Permits reasonable measures to verify use of paid sick leave
- FAQs: <http://www.oaklandcityattorney.org/>

# Emeryville – Key Differences

- Effective July 2, 2015
- Accruals can be capped at no less than 48 hours (if 55 or fewer employees) or 72 hours (if 56 or more employees)
- Expands upon California law's covered family members to include:
  - Designated person
  - Service dog of the employee or a family member

# Los Angeles – Key Differences

- Applies to hotels with 300 or more rooms (July 1, 2015) and 150 or more room (July 1, 2016)
- Requires *both* paid and unpaid time off
  - “Paid Time Off” (PTO) = Accruals up to 96 hours (12 days) for FT (proportional for PT), can be used for sick leave, family sick leave, vacation or personal time, carry over required up to cap of 192 hours (24 days)
    - Excess over cap must be paid out every 30 days
  - “Additional Unpaid Sick Leave” (AUSL) = 80 hours for FT employees (proportional for PT), can be used for employee sick leave or immediate family members and only when PTO is exhausted
  - PTO and AUSL can be used after six months of employment
  - No requirement for employees to provide advance notice
  - Employer cannot count days for disciplinary purposes

# Massachusetts

- Effective July 1, 2015
- All employers must provide sick leave – only employers with 11 or more employees must provide *paid* sick leave
- One hour per 30 hours worked, up to cap of 40 hours
- Annual use may be limited to 40 hours
- Verification permitted for absences of more than 24 consecutively scheduled work hours
- No provision for lump sum grants of paid sick days

# New York City

- Effective April 1, 2014
- All employers must provide sick leave – only employers with 5 or more must provide paid sick leave
- One hour per 30 hours worked, up to cap of 40 hours – or employer may do lump sum of 40 hours each year
- Annual use may be limited to 40 hours
- 120 day “probation period” before sick leave can be used
- Verification permitted for absences of more than three consecutive work days



## Compliance and Policy Drafting Tips



# Compliance Tips

- Ensure workplace poster is up!
- Begin using revised Labor Code 2810.5 Notice to Employee
- Notify employees of sick leave or PTO balances or “Unlimited” on paydays, beginning July 1
- Review which state and city paid sick leave laws apply to your company
- Ensure that managers understand the paid sick leave rules, no retaliation, prohibition on requiring employee to find their replacement, etc.
- Create accrual, tracking, and recordkeeping plans

# Policy Drafting Tips

- If multi-state or have employees in San Francisco, Oakland or Emeryville, consider how to structure policy – one policy for all employees, or separate policies based on location
- If single policy, carefully evaluate applicable sick leave laws to ensure that policy incorporates the most employee-protective provisions – *e.g.* if employees in San Francisco, ensure that policy uses a 72-hour cap, rather than the 48-hour cap under the new California law
- Evaluate existing sick leave and PTO/vacation policies
  - Are there categories of employees who are not already covered?
  - Are there provisions that need revision to ensure compliance with:
    - California law
    - Other state or local laws?

# Scenario #1

- Employer hires seasonal workers paid on a piece rate basis.
- Some employees return year after year, while others only work one season.
  1. Does the employer have to maintain records of accrued paid sick leave?
  2. Are returning employees entitled to carry over of unused leave?
  3. Does the employer have to pay out unused sick leave at the end of season?

# Scenario #2

- Employer has four distinct classes of employees:
  - Front office staff
  - Warehouse workers
  - Sales force
  - Managers
- The sales force is paid base salary plus commission. Warehouse workers are members of CBA.
  1. Can the employer offer PTO to managers only?
  2. Does each class of employee accrue paid sick leave at different rates?
  3. How does the employer handle CBA members?



Q&A



# THANK YOU

Thank You For Attending!

[WWW.MILLERLAWGROUP.COM](http://WWW.MILLERLAWGROUP.COM) | 415.464.4300

- Holly R. Lake  
[hlake@millerlawgroup.com](mailto:hlake@millerlawgroup.com)  
310-943-8500
- Walter M. Stella  
[wms@millerlawgroup.com](mailto:wms@millerlawgroup.com)  
415-464-4300