Cooley

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Effective July 1, 2015, under the Healthy Workplaces, Healthy Families Act of 2014, all California employers must provide their California employees with at least 3 days (24 hours) of paid sick leave per year.

Unlike several other California leave laws, there is no exemption for small employers. The new law applies to employees (exempt and non-exempt) who work in California 30 days or more in a year. This includes temporary, part-time, and seasonal employees, and out-of-state employees who work in California 30 or more days in a calendar year. The only employees *not* included are: (1) union-represented employees covered by a valid collective bargaining agreement if the agreement expressly provides for paid sick leave, provides for final and binding arbitration of disputes concerning the application of paid sick day provisions, and meets other requirements; (2) employees in the construction industry covered by a valid collective bargaining agreement that meets certain requirements; (3) providers of in-home supportive services under California law; and (4) employees of an air carrier flight deck or cabin crew members who receive compensated time off equal to the amounts in the new statute.

The specific requirements of the new law are as follows:

- **Accrual requirements:** Sick days must be accrued at the rate of not less than one hour per every 30 hours worked, beginning at the commencement of employment or July 1, 2015, whichever is later. This equates to approximately 1.3 hours per week, or 5.3 hours per month, for employees who work 40 hours a week (subject to a permissible accrual cap discussed below). Exempt employees are deemed to work 40 hours per workweek, unless the employee's normal workweek is less than 40 hours.
- **Use of sick leave:** Employees are entitled to use accrued paid sick days beginning on the 90th day of employment. However, at its discretion, an employer may lend paid sick days to an employee in advance of accrual. Employers may limit the amount of sick leave used to 24 hours or 3 days per year. (The law permits employees to accrue more time than they could use in a year so that if the employee gets sick at the beginning of the year, the employee has some time available in his or her sick leave bank.) Employers may also set a minimum increment not to exceed two hours for use of paid sick leave. The employee must provide reasonable advance notification, orally or in writing, of the need to use sick leave, if foreseeable. If the need to use sick leave is not foreseeable, the employee must provide notice as soon as practicable. The employer cannot condition the use of sick leave on the employee finding someone to cover his/her work.
- **Carry-over and cap on accruals:** Unused, accrued sick days must carry over to the next year, up to a permissible accrual cap of 48 hours, or 6 days. However, if employees are given the total amount of sick leave that may be used per year—24 hours or 3 days—at the beginning of each year, *no* accrual or carry-over is required.
- **Rate of pay:** Sick leave must be paid out at the employee's hourly wage. If the employee is paid by commission or piece rate, or otherwise has a variable hourly wage, or is a non-exempt, salaried employee, then the rate of pay is calculated by dividing the employee's total wages (not including overtime premium pay) by the employee's total hours worked in the full pay periods in the prior 90 days of employment. Payment for sick leave must be made no later than the payday for the next regular payroll period after the sick leave was taken.
- **Purposes of sick leave:** Sick leave may be used for the diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member. The definition of "family member" is broad and includes, for instance, parents-in-law, grandparents, grandchildren, and siblings, among other persons. Sick leave may also be used for victims of domestic violence, sexual assault, or stalking.
- **No pay-out for accrued sick leave upon termination:** Unlike vacation time, employers *are not required* to provide compensation to an employee for accrued, unused paid sick days upon separation of employment. However, if an employee separates from an employer and is rehired within one year, previously unused paid sick days must be reinstated.
- **Employers who already have PTO policies:** An employer that already has a paid leave or paid time off ("PTO") policy is *not* required to provide additional paid sick leave, provided that the employer makes available an amount of leave that may be used for the *same purposes* and under the *same conditions* as the new law, and the policy either: (1) satisfies the accrual, carry-over, and use requirements of the new law; *or* (2) provides at least 24 hours or 3 days of paid sick leave, or equivalent paid leave or PTO, for employee use at the beginning of each year of employment or calendar year. Employers who already

have a PTO policy still must comply with the posting, record-keeping, and other requirements of the new law. Also, employers who combine vacation and sick leave into undifferentiated PTO must continue to pay out all of the PTO upon termination.

- **Notice and posting requirements:** Employers must provide employees with a written notice that sets forth the amount of paid sick leave available (or PTO provided in lieu of sick leave) on either the employee's itemized wage statement, or in a separate writing provided on payday. Employers must also display in a conspicuous place a poster telling employees about their rights under the new law, and provide new employees with written notice of the substantive provisions of the new law at the time of hiring. Both the poster, and a template with the new hire information, will be drafted and made available by the Labor Commissioner.
- **Record-keeping requirements:** Employers must keep for at least three years records documenting the hours worked and paid sick days accrued and used by each employee, and make such records available for employee inspection, if requested.
- **No discrimination or retaliation:** Employers may not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using or attempting to use accrued sick days. The law creates a rebuttable presumption of unlawful retaliation if an employer takes an adverse employment action within 30 days of an employee: (1) filing a complaint with the Labor Commissioner or in court alleging violations of the new law; (2) cooperating with an investigation or prosecution of an alleged violation of the new law; or (3) opposing a policy, practice, or act that is prohibited by the new law.

Accordingly, employers who do not currently provide their employees with sick leave must do so by July 1, 2015. Employers with existing PTO or sick leave policies should review those policies to ensure they are in compliance with the new law, including the notice, posting, and record-keeping requirements. Failure to follow the new law will subject employers to significant penalties.

Note that the new statewide law establishes minimum requirements, and does not preempt or limit other applicable laws that provide greater sick leave benefits (e.g., San Francisco's paid sick leave ordinance).

Until courts and administrative agencies provide additional guidance, questions about proper implementation of the new law, especially as it relates to existing PTO policies, will no doubt arise. To discuss these issues further or pose questions about this *Alert*, please contact one of the attorneys shown.

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