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As we previously reported [here](#) and [here](#), under California's Healthy Families, Healthy Workplaces Act, effective July 1, 2015, employees who work 30 days or more a year in California are entitled to at least 3 days (or 24 hours) of paid sick leave per year. The new law is complex and leaves many questions unanswered. Since its passage employers have struggled with implementation, particularly those companies with existing sick leave or paid time off ("PTO") policies. Recently, emergency amendments were passed to clarify many of the law's ambiguities, as well as provide employers with additional options for accrual and payment of sick leave.

Key amendments

Clarification of 30-day requirement. Under the new law, paid sick days must be provided to any employee who works in California for 30 or more days within a year from the commencement of employment. The amendments clarify that the employee must have worked 30 days in California *for the same employer* to qualify for sick leave.

Modifications to accrual requirements. The sick leave law provides employers with two options for providing leave: (1) under the accrual method, sick leave must accrue at a rate of 1 hour for every 30 hours worked; (2) under the "lump sum" method, the 3 days (24 hours) of paid sick leave must be provided to employees in a lump sum at the beginning of the year.

The accrual method is problematic for those employers who do not accrue sick leave or PTO on an hourly basis (e.g., accrual may instead be on a monthly or pay period basis). The amendments provide that an employer may use a different accrual method other than one hour per every 30 hours worked, provided that the accrual is on a regular basis so that employees have no less than 24 hours of sick leave (or PTO in lieu of sick leave) by the 120th calendar day of employment, each calendar year, or 12-month period.

Grandfather provision for existing policies. The law as amended now permits grandfathering in of existing PTO or sick leave policies provided that the policy: (1) was offered to a class of employees before January 1, 2015; (2) sick leave or PTO is made available for the same purposes and under the same conditions as specified in the sick leave law; (3) accrual is on a regular basis so that employees have no less than 1 day (8 hours) of accrued sick leave or PTO within 3 months of employment of each calendar year or each 12-month period, and (4) employees were eligible to earn at least 3 days (24 hours) of sick leave or PTO within 9 months of employment. If, however, an employer modifies the accrual method used in a pre-existing policy, the grandfather clause no longer applies, and the employer must comply with either the accrual or lump sum method for providing sick leave or PTO. (This does not prevent an employer from *increasing* the accrual amount of an existing policy.)

Calculation of paid sick leave. As originally passed, the rate of pay for paid sick time was to be the employee's hourly wage. For employees who have variable hourly wages, are paid by commission or piece rate, or are nonexempt salaried employees, the rate of pay was to be calculated based upon the wages paid, not including overtime premium pay, divided by the hours worked in the full pay periods that the employee worked during the prior 90 days.

The amendments instead now provide for two different methods of calculating paid sick leave for non-exempt employees, and clarify how sick leave should be calculated for exempt employees:

- For non-exempt employees, paid sick leave may be calculated in one of two ways: (1) in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that 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, sick leave shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Unlimited policies. Under the sick leave law, employers must provide their employees with a written notice of the amount of paid sick leave (or PTO) available to the employee on either the employee's itemized wage

statement, or in a separate writing provided on payday. It was previously unclear how employers with unlimited PTO or sick leave policies, who do not track accrual or usage, could comply with this requirement. Now, the law states that employers who provide unlimited paid sick leave (or PTO) may satisfy this requirement by indicating "unlimited" on the notice or wage statement.

No reinstatement of sick leave or PTO that has been "cashed out". The new sick leave law requires that if an employee separates from an employer and is rehired within one year, previously accrued, unused paid sick days must be reinstated. However, because PTO is treated as vacation time (and hence a form of wages) under California law, employers with PTO policies are required to cash out accrued, unused PTO to employees upon termination of employment. It was previously unclear whether PTO that had been cashed out would need to be reinstated to an employee who returns within a year, per the new sick leave law. Now, the amendments make clear that an employer is *not* required to reinstate accrued leave to an employee that was paid out at the time of termination of employment.

No duty to inquire into reasons for taking leave. The sick leave law requires that employers keep for at least three years records documenting the hours worked and paid sick days (or PTO) accrued and used by each employee. It was previously unclear whether employers with PTO policies that do not differentiate between sick and vacation time had to track the reasons why an employee was using PTO. The amendments clarify that employers are *not* obligated to inquire into or record the purposes for which an employee uses paid leave.

Action steps for employers

In light of these amendments, employers should again review their sick leave or PTO policies to ensure compliance with the law. In addition, California's Department of Labor Standards Enforcement ("DLSE") has stated it will revise its Frequently Asked Questions on the sick leave law to reflect the amendments. Employers should therefore monitor the [DLSE's website](#). To discuss these issues further or pose questions about this alert, please contact one of the attorneys shown.

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