Legal Lectern: Paid Sick Leave

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It's formally– and rather verbosely– named the Healthy Workplaces, Healthy Families Act of 2014, but most folks will probably just call it the Paid Sick Leave Law, since paid sick leave is what it creates. It's in addition to the unpaid leave we've worked with under the federal Family and Medical Leave Act and the California Family Rights Act. It's also in addition to whatever rights employees already have under disability discrimination statutes like the State Fair Employment and Housing Act and ADA, and to the Personal Family Leave program that provides for public benefits from the SDI program primarily for those who take time off work to care for a seriously ill family member or for child bonding. It may or may not be in addition to whatever private paid leave policy you already have in force– that will depend on whether you make the effort to sync the two– and it will supplement paid leave policies created by local ordinances (lookin' at you, San Francisco, Oakland and Emeryville, with your longer sick leave periods), so that the provisions most favorable to the employee will always control. And– you expected this, right?– you'll have to post more notices, give employees more informational handouts, and toss a few extra lines on employee paystubs as well. Yes, there will be problems, but they're manageable.

All employers who are likely to read this must comply with the new law. You have one employee and are exempt from almost everything but workers' compensation? No longer; you have to provide paid sick leave, too. How much? Keep "three days a year if you do it right" in your mind as we go through the gears and pulleys of the statute, so that your eyes don't glaze over.

The basic rule is that employers must provide paid sick leave to any employee who works in California for 30 days. Starting on July 1, 2015 for current employees, and from the date of hire for future employees, it accrues at one hour for every 30 hours worked for the employer. Accrued paid sick leave can be used starting on the 90th day of employment. Current employees who have already served 90 days should be entitled to start drawing down leave as it accrues starting July 1; new hires must pass through this 90 day "probationary period." The wage rate of sick leave is the regular wage rate. For exempt employees, the hourly rate is calculated on the basis of a forty hour week, unless their workweek is expressly fewer hours.

If you do the math, you'll quickly discover that *absent a cap,* a full time employee will accrue about eight days of sick leave a year. Accrued but unused time carries over to the next year of employment. However, employers can limit both the amount carried over and the yearly use.

The statute states that "an employer may limit an employee's *use* of paid sick days to 24 hours or three days in each year of employment." This can apparently be done simply by adopting a policy that expressly caps usage of leave at the maximum of three days. Carryover would apparently still occur, but this is of little importance since the cap would remain in effect for each year of employment, and no payment of unused leave is required at termination.

Multiyear *accrual* can also be limited by policy. The statute provides that an employer can limit an employee's total accrual of paid sick leave to a no less than 48 hours or six days, "provided that an employee's rights to accrue and use paid sick leave under this [law] are not otherwise limited." If no such accrual limiting policy is adopted, some large amounts of leave can accrue for use during employment.

It's a little more complicated to limit *carryover*. A minimum paid leave or paid time off policy is required, and it has two elements. First, the full amount of leave must be granted "up-front" at the beginning of each year of employment– there's no accrual. Second, the amount so granted cannot be less than "24 hours or three days of paid sick leave, or equivalent paid leave or paid time off, for employee use for each year of employment or calendar year or 12-month basis." Hence, all the requirements are met, and administrative complexity is greatly reduced, if an employer simply adopts a policy granting at least three days or 24 hours of fully accrued annual sick leave every January 1 or other convenient yearly start date. However, new hires must still satisfy the 90 day probationary period before they can use the leave.

What's this "days or hours" stuff? I mean, isn't three days the same as 24 hours, given an 8-hour day? Yep, but not all employees work a full 8-hour day. A part-timer might work four. And since the employee is entitled to the greater of the hour or day totals, the part-timer would actually be entitled to six days off, the "days" being of four hours each. It works in the other direction, too. If the employee works four days a week, 10 hours a day, he's entitled to three days of 10 hours, or 30 hours total, rather than 24.

The accrual requirement can be avoided by using a "frontloaded" plan that grants three days in one fell swoop. I'll talk about that method below.

An oral or written request by the employee is sufficient to trigger the right to use earned sick leave. It must be for a covered purpose, namely, diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member. Victims of sexual assault, domestic violence, or stalking are also allowed to use the leave for court proceedings. The employee is the one determining how much paid sick leave is needed, but the employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave. In terms of advance notice, the statute says, "If the need for paid sick leave is foreseeable, the employee shall provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for the leave as soon as practicable." Unlike some local laws, the State statute contains no requirement that the employee provide a doctor's note under any circumstances, and we'll see how the caselaw develops under the "reasonable advance notification" standard. My advice: now is not the time to stand on your putative rights when they may very well not exist– don't be the test case for doctors' notes. Also, to state a clear principle, the employer is completely prohibited from requiring the employee to provide a replacement during the leave, a work rule that many restaurant employers have enforced in the past.

There are significant notice and posting requirements. The new poster should have gone up at work no later than January 1, but put it up now if you didn't do it then. It's available on the DLSE

website (dir.ca.gov/dlse) by following the Paid Sick Leave links, or here. New nonexempt employees must be notified of their rights through the recently revised "DLSE NOTICE TO EMPLOYEE- Labor Code section 2810.5" which, as previously, advises employees of their pay rates, overtime rates, employer name and address, workers' compensation carrier, and other basic information, and now adds a section on Paid Sick Leave with a check box to inform an employee of the accrual and use policy an employer has selected. (You should have been giving the prior versions of this form, also known as the Wage Theft Protection Act notice, to new nonexempt employees since 2012, and employees should receive notice of their new PSL rights on or before July 8.) It can also be accessed through the DLSE website or here. Current employees are to be advised of their rights to Paid Sick Leave through a "written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee's itemized wage statement . . . or in a separate writing provided on the designated pay date with the employee's payment of wages." Employers should work this out with their payroll services. If the payroll service can't figure out how to do it, it may be time to change services. In the meantime, as a workaround, you should provide the information in a supplementary notice provided with the usual payroll information.

So here's the first takeaway, in four parts: First, every employer with at least one employee must adopt a written policy that complies with the law. Second, all employees must be notified of that policy by giving them a statutory form available from the website of the Division of Labor Standards Enforcement (DLSE). Third, an information poster, also available from the DLSE website, must be prominently posted. Fourth, employees must be notified of the amount of sick leave they have accrued on each pay stub or on an equivalent document. If the employer adopts the accrual system, employees will accrue one hour of sick leave for every 30 hours worked, and this is what will be reported, less whatever has been used. If you have a frontloaded plan, it's three days (24 hours) minus the hours or days used.

Perhaps the biggest downside of not having a written policy is that the employer is unable to take advantage of the statute's permissible cap on accrual and use of sick leave to three days or 24 hours per year. Worse, it can't prevent leave from carrying over from year to year. Put simply, a *lot* of sick leave can accrue, and the employer has to honor it.

Now, about the frontloaded plan: In my own law practice, I've found this to be a good solution for many employers as an alternative to the accrual method, because it's simple to administer. Under this plan, employees get all three days credited– frontloaded– into their sick leave banks at the moment the law and the plan become effective, on July 1, 2015. Employees may draw against their banks at any time during the next 12 months, but on the anniversary date– the first would be July 1, 2016– any time remaining in the bank is lost and replaced with a new three days of leave. And this continues to go on, year after year.

There are a few frontloading wrinkles. For employees hired after July 1, they'll be frontloaded with the three days on the day of hire. But under the law, you don't have to allow them to *use* any sick days from their banks until the 90th day after the date of hire– a "probationary period." On the other hand, since an employer can always adopt a more generous policy than that

required by law, it can waive or shorten the probationary period.

There's a second wrinkle with new hires: the employer has a choice to pick the last day that the employee can use "this year's" banked leave days. Since the employee is entitled at minimum to three days every twelve months, the last allowable date of use is the day before the employee's anniversary with the employer. However, for convenience, the employer can simply use the same turnover date as other employees, July 1 in our example. This would make June 30 the last day of allowable use. It is allowable, again, because it is more generous than the statutory scheme. The new employee is effectively given more than three days of leave a year since the turnover date comes up in less than 12 months, but it's a lot easier to administer than different PSL turnover dates for every employee.

Those of you who don't do work in San Francisco or Oakland should stop here, under pain of the severe brain cramps that result from trying to administer three similar but different statues together. But if you do work in those cities, sorry, you have to continue. Also, Emeryville has just joined the list of local PSL jurisdictions, with a provision similar to San Francisco's and Oakland's, and its explanation of its new ordinance is here; I may explore it more fully as part of a future printed column.

All three local PSL cities use the accrual methodology, and in these locations, frontloaded plans have few, if any, advantages over the accrual method, simply because you'll always have to do accrual calculations for work performed there. The state program does not preempt local PSL ordinances, but instead requires employers to apply whichever law provides the greatest benefits to employees, so we really have a mix and match system. Locally, PSL ordinances currently exist in San Francisco, where PSL has been the law since 2007, Oakland, where it has been effective since March 2, 2015, and Emeryville, which joined the party effective July 2, 2015. None of these local laws contain any express provision on frontloading.

When accrual is used, the State PSL law provides for up to three days to accrue per year at the rate of one hour for every 30 hours worked for the employer. The San Francisco ordinance also uses the formula of one hour for every thirty hours worked (although it starts 90 days after the date of hire), but the maximum annual accrual is five days (40 hours) for employers with fewer than ten employees per week– that's ten employees total, not just those working in the City– and eight days (72 hours) for those with ten or more. Accrual is in full hour increments, *e.g.*, one leave hour after 30 hours, two after 60, and so on, with nothing added in between; there are no fractional leave days. Unused sick leave carries over from year to year. Unlike the State statute, the ordinance does not allow an employer policy to cap usage to three days per year, so all that has been accrued or carried over, up to the full five or eight days, can be used at any time.

So how does this apply to a Marin-based employer? If it has employees who perform work in the City, the employees accrue leave for hours worked in San Francisco only if they perform 56 or more hours of work there within a calendar year. Examples might include a Marin law firm that sends an associate to the City to engage in a three week jury trial, a delivery service with stops in the

City, and a construction firm performing a San Francisco contract. Employees who work outside of San Francisco and who travel through, but do not stop in the City as a purpose of their work, are not covered by the ordinance. As with other statutes, the wage rate of sick leave is the regular wage rate, but not less than the City's minimum wage of $12.25.

The Oakland ordinance is much like San Francisco's, uses the same formulas and carryover rules, and is subject to the same minimum wage. Also like San Francisco, and unlike the State PSL law, it under certain circumstances allows a covered employee without a spouse or registered domestic partner to designate one person for whom the employee may use paid sick leave to provide aid or care. Unlike San Francisco, employees are eligible to accrue paid sick leave if they work at least two hours per week in the City of Oakland and are not exempt from state minimum wage requirements; there is no 56 hour safe harbor. Oakland requires pertinent payroll and leave records to be retained for four years, while the State and SF require only three. Both Oakland and San Francisco (and Emeryville) have a required poster available on their websites to advise employees of their rights, so if you do work in all places, you'll have four postings: one for the State, and one for each city.

Where this all gets very complicated is when you have to do the arithmetic combining the benefits for a given employee who works both in Marin and in one, two or all of the cities with a local PSL law. I *think* that leave that is frontloaded into employee banks under State law is credited against accruals under the three cities' laws. In other words, my best guess is that leave accruing in Oakland does not have to be added to an employee's bank until more than three days have accrued. But the courts could decide otherwise, and it thus might be safer to forego frontloading and use the accrual method instead, with accruals continuing for employees working in the local PSL law cities after the State cap is met. In any event, your written policies should *expressly* note that local ordinances will be applied instead of the State rules when they are more generous.

There's another accounting issue, too. Neither the San Francisco nor the Oakland measures have a requirement that employees be advised of the state of their PSL bank on their paystub or equivalent document. But the State law does, and its language appears broad enough to cover not only leave generated under the State statue, but the local laws as well. Given that, if you have employees who have *previously* accrued leave in either city, that should appear on their paystubs from July 1 on, along with any leave accruing later under State or local law.

As you'd expect, there are a lot of penalties under this devil's stew of laws. Looking just at the State law, there's a civil penalty of up to $10,000 for each violation of the Labor Code, and this will surely be invoked in retaliation cases in which the employee is punished for exercising PSL rights. There are specific penalties available for failure to give required notices. All of these will be discussed in my next printed column, so in the meantime, get your policies and notices out NOW!

This article differs from the printed columns on which it is based. It contains more information, and corrects an error in which the sick leave accrual rate was misstated as one day for every 30 hours, rather than one hour for every 30 hours.