haynesboone

August 24, 2016

Do you have California employees? Compliance with California's paid sick leave laws just became more complicated…

By Tamara Devitt and Kimberly Chase

Employers with employees in California will recall the enactment of California's Healthy Workplaces, Healthy Families Act of 2014 (the "California statute"), which has required employers to provide paid sick leave to nearly all California employees since 2015. Compliance with the California statute just became more complicated with the recent enactments of several local paid sick leave ordinances. Los Angeles and San Diego have now joined cities like San Francisco, Oakland, and Emeryville on the growing list of California municipalities that have enacted paid sick leave ordinances, and Santa Monica will join that list in 2017. The Los Angeles and San Diego ordinances took effect in July 2016 (with further changes to the San Diego ordinance taking effect on September 2, 2016 pursuant to San Diego's implementing ordinance approved on August 3, 2016). This alert will focus on some of the key differences between the California statute, the Los Angeles ordinance, and the San Diego ordinance (as updated effective September 2, 2016).

Because each ordinance differs in some respects from the California statute, employers with employees in the affected cities should closely review and update their policies, handbooks, posters, new hire paperwork, payroll systems, and record-keeping systems to ensure they are in compliance with not only the state statutory requirements, but also the requirements of any applicable local ordinance. Drafting a policy that comports with both the California statute and one or more of the local ordinances is more easily said than done. As a general rule, where a conflict exists between the California statute and a local ordinance on a given point, employers should follow the law that is more generous to employees, so it is important to be aware of the ways in which the California statute and the local ordinances differ. Compliance with all applicable laws becomes particularly onerous for employers with employees in multiple affected cities, as these employers are faced with the task of either designing one compliant omnibus paid sick leave policy for all California employees, or instead creating multiple paid sick leave policies that are location-dependent.

Covered Employees

The California statute applies to almost all employees, irrespective of whether they are full-time or part-time, exempt or non-exempt, employed privately or by the government, or seasonal workers. It even applies to out-of-state residents if they work 30 or more days per year in California. There are only a few excepted employees, such as employees subject to certain collective bargaining agreements ("CBAs"), certain in-home support service providers, and certain airline employees.

By comparison, the Los Angeles ordinance applies to any employee who works at least two hours in Los Angeles in a particular week and at least 30 days in Los Angeles for the same employer within a year. The San Diego ordinance applies to any employee who works at least two hours in San Diego in a calendar week, although it excludes employees paid a sub-minimum wage under a specific license, employees of publicly subsidized summer or short-term youth employment programs, and certain camp counselors.

Notably, neither ordinance excludes the categories of employees excluded under the California statute (listed above). Accordingly, such employees are now presumably entitled to paid sick leave under the local ordinances, if applicable, even though they were not previously entitled to paid sick leave under the California statute. This is particularly significant for employers with union employees subject to CBAs. Also, both ordinances implicitly

require employers outside of Los Angeles and San Diego to anticipate whether employees will frequently travel to and work in either of those cities so as to qualify for paid sick leave under the local ordinances' weekly and/or annual time requirements.

Permitted Uses of Paid Sick Leave

Under the California statute, paid sick leave may be used for the diagnosis, care, or treatment of oneself and certain family members—namely, "children" (*i.e.*, a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis, regardless of age or dependency status), grandchildren, siblings, spouses or registered domestic partners, parents (*i.e.*, the biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child), and grandparents. The California statute also allows victims of domestic violence, sexual assault, or stalking to use paid sick leave to seek medical attention, to obtain certain services or counseling, and to participate in safety planning.

The Los Angeles ordinance adds that paid sick leave may be used for the care of "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship," although it provides no guidance as to what type of relationship meets that definition or what steps employers might lawfully take to ascertain whether a relationship meets that definition.

The San Diego ordinance includes step-siblings in the definition of "sibling," and further adds that paid sick leave may be used if the employee's place of business is closed by order of a public official due to a public health emergency, or if the employee is providing care or assistance to a child whose school or child care provider is closed by such an order.

When Accrual Begins

Under the California statute, paid sick leave must begin to accrue either on the first day of employment or July 1, 2015, whichever is later; probationary periods are not permitted. The Los Angeles and San Diego ordinances specify that paid sick leave begins to accrue on (1) the first day of employment or (2) July 1 or 11, 2016, respectively, whichever is later, though presumably most employees who were employed in Los Angeles or San Diego before July 2016 were already accruing paid sick leave under the California statute.

Accrual Rates and Amount of Paid Sick Leave

The California statute gives employers several options for calculating accrual: (1) provide at least one hour of paid sick leave for every 30 hours worked; (2) provide a lump sum of three days or 24 hours of paid sick leave at the start of each employment year, calendar year, or 12-month period; (3) provide for accrual of paid sick leave "on a regular basis" so that the employee accrues 24 hours by the 120th calendar day of employment or each calendar year or 12-month period; or (4) for new hires, provide 24 hours or three days of paid sick leave for use by the completion of the employee's 120th day of employment. To the extent an employer uses Option 2, the California Labor Commissioner maintains that a part-time employee who works six hours per day and who has accrued 24 hours of paid sick leave may use three days or 24 hours of paid sick leave, "whichever is more," and is thus not limited to just 18 hours, or the equivalent of three workdays, of paid sick leave.

The Los Angeles ordinance, by contrast, requires employers to provide either (1) one hour of paid sick leave for every 30 hours worked; or (2) a lump sum of 48 hours of paid sick leave at the start of each employment year,

calendar year, or 12-month period. Option 2 under the Los Angeles ordinance is more generous to employees than the California statute's Option 2.

The San Diego ordinance requires employers to provide either (1) one hour of paid sick leave for every 30 hours worked within the geographic boundaries of San Diego; or (2) a lump sum of 40 hours of paid sick leave at the beginning of each benefit year. Again, Option 2 under the San Diego ordinance is more generous to employees than the California statute's Option 2. Also, it should be noted that San Diego's Option 1, under which employees accrue paid sick leave for time "worked by the Employee within the geographic boundaries of the City," has the potential to create major administrative burdens for employers with employees who frequently travel in and out of city limits, as employees only accrue paid sick leave for time actually worked within the city.

Neither the Los Angeles ordinance nor the San Diego ordinance contains accrual options comparable to the California statute's Options 3 or 4, begging the question of whether employers may still utilize those options for employees covered by the Los Angeles and San Diego ordinance. Option 2 under both ordinances (awarding 40 or 48 hours at the beginning of the year) is more generous to employees than the California statute's Options 3 or 4 (accrual of 24 hours over 120 days) because Option 2 awards more paid sick leave earlier.

Accrual Caps

Under the California statute, employers may choose to set an accrual cap at 48 hours or six days. By comparison, the Los Angeles ordinance allows employers to set a cap of 72 hours or higher, and the San Diego ordinance, as updated, will permit employers to cap accrual at 80 hours. Again, these caps are more generous to employees than the California statute's permitted cap.

Limitations on Timing of Use

Under the California statute, employers may prevent employees from using their paid sick leave until the 90th day of employment. Similarly, the Los Angeles and San Diego ordinances allow employers to restrict use of paid sick leave until (1) the 90th day of employment or (2) July 1 or 11, 2016, respectively, whichever is later.

Use Caps

Under the California statute, employers may limit an employee's use of accrued paid sick days to 24 hours or three days in each year of employment, calendar year, or 12-month period. Thus, although a full-time employee could theoretically accrue about 8.6 paid sick days per year under the California statute (or six days if the employer sets an accrual cap), the employer may cap the employee's use of that time to three days per year. By comparison, the Los Angeles ordinance permits employers to limit use of paid sick leave to 48 hours in each year of employment, calendar year, or 12-month period, and the San Diego ordinance permits employers to limit use of paid sick leave to 40 hours in a benefit year. The ordinances' use caps are more generous to employees than the California statute's use cap and should thus be followed if applicable.

Carry Over

Under the California statute, any accrued paid sick leave must carry over from year to year, unless the employer automatically grants its employees a lump sum of three days or 24 hours of paid sick leave at the start of each employment year, calendar year, or 12-month period. Under the Los Angeles ordinance, all unused paid sick leave (regardless of whether an employer uses the lump allotment or a gradual accrual method) must carry over

to the following year of employment, subject to the employer's accrual cap. The same goes for the San Diego ordinance: all paid sick leave must carry over to the following year, subject to any use limitation.

Requiring a Doctor's Note

Although the California statute is silent as to whether an employer may require documentation in support of an employee's request for paid sick leave, the Labor Commissioner has taken the position in some publications and presentations that requiring documentation runs afoul of the statute. This position is perhaps bolstered by the statutory language allowing employees to make an "oral or written request" for sick leave and allowing employees to provide such notice "as soon as practicable" if the need is not foreseeable. The Los Angeles and San Diego ordinances, by comparison, both allow employers to require reasonable documentation of the need for paid sick leave, but these provisions arguably conflict with the California statute (or at least the Labor Commissioner's position). Employers should therefore refrain from requiring supporting documentation, even if permitted by local ordinance.

Termination

Under the California statute and both the Los Angeles and San Diego ordinances, unlike with accrued vacation or paid time off, employers need not compensate employees for any unused paid sick leave at the time of termination. However, if an employee is rehired within one year of termination, the California statute and the Los Angeles ordinance require that any previously accrued paid sick leave be reinstated, unless the employer opted to pay out that paid sick leave at the time of termination. By comparison, the San Diego ordinance only gives a re-hired employee that same right if he is rehired within six months of his termination. The San Diego ordinance is less generous to employees than the California statute on this point, so employers should consider using the one-year rule instead.

Posting and Record Keeping Requirements

Under both the California statute and the San Diego ordinance, employers must keep records documenting the hours worked and paid sick days accrued and used by each employee for at least three years. By comparison, Los Angeles requires that such records be kept for four years.

The California statute requires employers to display posters regarding the law in each workplace. Similarly, Los Angeles requires employers to post the Los Angeles Minimum Wage & Sick Leave Poster in English, Spanish, and any other language spoken by 5 percent or more or employees at the workplace or job site. San Diego also has its own required Earned Sick Leave Notice, and an updated poster is expected to issue in the near future.

Next Steps

In light of the foregoing, employers with employees who work in Los Angeles or San Diego more than two hours per week should revisit and revise their existing paid time off or paid leave policies, posters, and record-keeping systems to ensure compliance with any local requirements. Employers with employees in San Francisco, Oakland, Emeryville, and Santa Monica are also cautioned to review their policies.

haynesboone

For more information or for further assistance, please contact the lawyers listed below.

Tamara Devitt +1 949.202.3060 tamara.devitt@haynesboone.com	Kimberly Chase +1 949.202.3058 kimberly.chase@haynesboone.com