

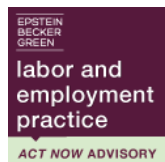
PUBLICATIONS

New Laws Affecting California Employers: Anti-Harassment Protections for Unpaid Interns, Anti-Bullying Training for Managers, and Mandatory Paid Sick Leave

Act Now Advisory

September 18, 2014

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California employers need to be aware of three important employment laws that were recently enacted. Effective immediately, California's existing discrimination and harassment laws have been extended to unpaid interns. Additionally, an anti-bullying component has been added to the sexual harassment prevention training required for supervisors working for employers with 50 or more employees. Last but not least, the much-anticipated Healthy Workplaces, Healthy Families Act of 2014, which will require most employers to provide their employees with paid sick leave, will go into effect next summer on July 1, 2015. Below are summaries of these laws.

I. Discrimination and Harassment Protections Extended to Unpaid Interns

On September 9, 2014, California Governor Jerry Brown signed into law AB 1443. This law amended California Government Code section 12940 to add unpaid interns (and persons under limited-duration programs that provide unpaid work experience) to the list of persons protected by California's anti-discrimination and anti-harassment laws.

II. Anti-Bullying Component Added to Mandatory Sexual Harassment Prevention Training for Supervisors

Also on September 9, 2014, Governor Brown signed AB 2053, which amended California Government Code section 12950.1 to add an "abusive conduct" component to the mandatory sexual harassment prevention training that employers with 50 or more employees must provide to supervisors within six months of their assumption of a supervisory position, whether the employee is hired or promoted into such supervisory position, and every two years thereafter.

According to the amendment's proponents, abusive work environments are a growing epidemic that can reduce productivity and morale, leading to higher absenteeism rates, frequent turnover, and even increases in medical and workers' compensation claims.

"Abusive conduct" is defined in the amendment as:

conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.

This amendment does not make "abusive conduct" unlawful or remove the requirement that harassment be on the basis of a protected category in order to be actionable.

III. Paid Sick Days Mandated by Healthy Workplaces, Healthy Families Act of 2014

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On September 10, 2014, Governor Brown signed into law AB 1522, known as the Healthy Workplaces, Healthy Families Act of 2014 (“Act”). The Act, California Labor Code sections 245, *et seq.*, requires most California employers to offer paid sick days to their employees, regardless of the number of employees they have.

A. Features of the New Law

- › Effective Date: July 1, 2015.
- › Coverage: With few exceptions, any employee who works at least 30 days in California within a year from the commencement of employment accrues time under the Act. There is no minimum number of employees that an employer must have to trigger application of this law. The Act makes certain exceptions for in-home health care workers, flight deck and cabin crew members covered by the Railway Labor Act, and some workplaces with collective bargaining agreements in place.
- › Accrual: Employees accrue paid sick time at the rate of one hour for every 30 hours worked, subject to the permissible limits described below.
- › Permissible Limits on Usage:
 - Be advised that the below are listed as *permissible* restrictions in the Act, not mandatory limitations (presumably, in the absence of a policy including these limitations, employees will accrue one hour of paid sick time for every 30 hours worked, with no waiting period for use and no accrual or usage caps):**
 - Employers may establish a 90-day waiting period after hire before accrued paid sick time may be used.
 - Employers may cap usage at 24 hours (or three days) each year if they give all available time to employees at the beginning of each year. Employers that would rather have employees accrue time as they work may use a 48-hour (or six-day) cap.
 - Employers may establish a reasonable minimum increment of not more than two hours for employees’ use of sick time.
- › Impermissible Limits on Usage: Employees may not be required to find replacement coverage as a condition of using paid sick leave.
- › “Use It or Lose It” Policies Are Acceptable: Employers are not required to pay out accrued unused paid sick time upon termination of employment. However, this provision does not exempt employers from paying out unused time under an all-purpose paid time off (“PTO”) policy that also permits employees to use the time for the purposes covered by the Act. Also, if an employee is rehired within a year of termination, all accrued unused sick time is restored.
- › Purposes for Usage:
 - Accrued paid sick time 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; and
 - an employee who is a victim of domestic violence, sexual assault, or stalking to engage in protected activities, such as obtaining a restraining order, seeking medical attention or psychological counseling, or participating in safety planning.
 - “Family member,” as used in the Act, includes an employee’s:
 - child (i.e., a biological, adopted, or foster child; stepchild; legal ward; or child to whom the employee stands in loco parentis), regardless of age or dependency status;
 - parent (i.e., a biological, adoptive, or foster parent; stepparent; legal guardian; or person who stood in loco parentis) of an employee or the employee’s spouse or registered domestic partner;
 - spouse;
 - registered domestic partner;
 - grandparent;
 - grandchild; or
 - sibling.
- › Paystub Requirement: Employees’ available paid sick time (or vacation/PTO time that satisfies the requirements of the Act) must be reflected on their wage statements or in a separate writing provided at the same time.
- › Posting Requirement: The Labor Commissioner will be preparing a poster that complies with the requirement that employers post, in a conspicuous place, a notice that that includes all of the following information:
 - that employees are entitled to accrue, request, and use paid sick days;
 - the amount of sick days provided for by the Act;

- the amount of sick days provided for by the Act,
 - the terms of use of paid sick days; and
 - that retaliation or discrimination against an employee who requests or uses paid sick days is prohibited and that an employee has the right to file a complaint with the Labor Commissioner.
- Addition to Wage Theft Prevention Act Notice: Wage Theft Prevention Act Notices provided to new hires pursuant to Cal. Lab. Code § 2810.5 on or after July 1, 2015, will need to be amended to reflect that an employee:
- may accrue and use sick leave,
 - has a right to request and use accrued paid sick leave,
 - may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and
 - has the right to file a complaint against an employer who retaliates.
- Record-Keeping Requirement: Employers must record, and keep for three years, records of hours worked and paid sick days accrued and used by employees. A failure to keep records will create a presumption (rebuttable only by clear and convincing evidence) that an employee is entitled to the maximum number of hours accruable under the Act.
- Anti-Retaliation Provision: Employers are prohibited from taking, or threatening to take, any adverse action against employees for requesting or using paid sick time.
- Presumption of Retaliation: In a fairly radical departure from other anti-retaliation laws, the Act creates a rebuttable presumption of retaliation, shifting the burden of proving non-retaliation to the employer, in cases where the employer has taken, or threatened to take, an adverse action against an employee within 30 days of an employee:
- filing a claim with the Labor Commissioner alleging a violation of the Act;
 - cooperating in an investigation or prosecution of an alleged violation of the Act; or
 - opposing a policy, practice, or act prohibited by the Act.
- Penalties: The Labor Commissioner has the authority to order relief, including reinstatement, back pay, payment of unlawfully withheld sick days, and an administrative penalty up to \$4,000, additional penalties for non-compliance up to \$50 per day, reasonable attorneys' fees, and costs. Notably, there is no direct provision for a private right of action in the Act. By its terms, the Act permits employees to file claims with the Labor Commissioner, but only permits the Labor Commissioner and Attorney General to bring civil actions.

B. Effect on Current Paid Time Off Policies—Traps for the Unwary

Employers whose vacation/PTO policies provide employees with at least the same rights set forth in the Act are not required to offer employees additional paid sick time benefits. Since most employers' PTO policies provide for the accrual of more time than the Act requires, employers may be lulled into a false sense of security that they are already in compliance with at least the accrual and usage provisions of the new law. However, there are some pitfalls to avoid. Consider the following:

- Most PTO policies apply only to full-time employees working 30+ hours a week. The new law will require employers to give paid sick time to qualifying employees who work in excess of *30 days a year*. Consequently, part-time employees and even temporary and seasonal employees may accrue time under the Act (though, as a practical matter, the use of sick days may be limited by policy to employees working in excess of 90 days).
- California employers that offer separate sick leave policies often restrict employees' use of that time to care for a sick or injured family member to half of the employee's total allotment (in compliance with California's Kin Care Law). This may not be sufficient under the new law because:
- the Act adds three new categories of "family members" not covered by the Kin Care Law—grandparents, grandchildren, and siblings—and sick time policies that define "family member" using the Kin Care Law's definition will need to be amended;
 - 100 percent of the hours accrued under the Act may be used for family members, not just half. Therefore, unless the employer's combined vacation/PTO/sick day policies permit employees to use up to 24 hours/three days a year to care for family members (or to engage in protected activities in connection with domestic violence, sexual assault, or stalking), they are not in compliance with the Act. This may be resolved by adopting a policy that gives employees the greater of either half of their sick time or 24 hours/three days each year to use for family members and other covered purposes, or by adopting an all-purpose PTO policy that combines vacation and sick leave and allows employees to use the time for any reason. Any policy designed to meet the requirements of the new law should be reviewed with counsel before adoption.

What California Employers Should Do Now

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- › Provide unpaid interns and persons under limited-duration programs with the sexual harassment pamphlet already required for newly hired employees, which is available at the [California Department of Fair Employment and Housing's website](#). Communicate to them, in writing, that they are protected by the company's anti-discrimination and anti-harassment policies. Treat any complaints by these unpaid workers the same as you would a complaint by an employee.
- › Prior to conducting the next mandatory sexual harassment prevention training, make sure the training materials include the new anti-bullying component.
- › Review PTO, vacation, and sick day policies and plan ahead for any changes that will need to be made before the law goes into effect on July 1, 2015.
- › Create written time-off policies if you do not already have them. Otherwise, the permissible limits set forth above will likely not apply and employees will accrue one hour of paid sick time for every 30 hours worked, which will carry over year to year with no cap on usage or accrual. While these hours would not have to be paid out upon termination, they would need to be made available to employees to use.
- › Review paystubs to make sure that they reflect available paid sick days and/or PTO. If they are not in compliance, modify the paystubs prior to July 1, 2015.
- › Obtain the new poster for the paid sick leave law and updated Wage Theft Prevention forms for new hires, which should be available from the Labor Commissioner before July 2015.
- › Post the paid sick leave poster prior to July 1, 2015, and use the updated Wage Theft Prevention form for new hires after that date.
- › Before subjecting an employee to discipline or other adverse employment action (or even threatening to do so), determine whether the employee has engaged in protected conduct under the Healthy Workplaces, Healthy Families Act within the preceding 30 days (i.e., filed a claim with the Labor Commissioner, cooperated in an investigation or prosecution, or opposed any policy or practice prohibited by the Act). If any such protected conduct has taken place, consider waiting until at least the 31st day after such protected conduct before taking the adverse action. This will avoid creating a presumption of retaliation.

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