

SUMMARY OF AB 304 AMENDMENTS TO THE PAID SICK LEAVE LAW

AB 304 amends the Paid Sick Leave Law as follows:

Public Agency Retired Annuitants Are Excluded From the Definition of “Employee” (Labor Code Section 245.5(a))

AB 304 expressly excludes CalPERS and '37 Act retired annuitants from being eligible to receive paid sick leave. Previously, it was unclear whether the Public Employees' Pension Reform Act of 2013 (“PEPRA”) prohibitions that precluded retired annuitants from receiving fringe benefits such as paid sick leave preempted such sick leave benefits provided by the Paid Sick Leave Law. With AB 304 adding in this express exclusion for retired annuitants, employers will be able to confidently exclude retired annuitants from the benefits of the Paid Sick Leave law.

Clarifies the Paid Sick Leave Law Applies to an Employee Who Works In California “For the Same Employer” for 30 or More Days Within a Year (Labor Code Section 246(a))

The Paid Sick Leave law allows employers to set a 30-day waiting period before employees are entitled to paid sick leave. Prior to AB 304, it was unclear how employers were supposed to measure this 30-day eligibility period for employees who may have worked with other employers previously within a year.

AB 304 amends Labor Code section 246(a) to clarify that the 30-day eligibility period applies to time worked “with the same employer.” This will mean that the 30-day eligibility period begins for a new employee with the first date of employment with a specific employer.

Provides Alternative Accrual Methods of Paid Sick Leave (Labor Code Section 246(b)(3)-(4))

In addition to the standard 1 hour of paid sick leave for every 30 hours worked accrual method, AB 304 now adds two additional alternative accrual methods under Labor Code section 246(b)(3)-(4) to allow alternative accrual methods that are not necessarily tied to hours worked, but yet accrued on a regular basis:

“(3) An employer may use a different accrual method, other than providing one hour per every 30 hours worked, provided that the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period.

(4) An employer may satisfy the accrual requirements of this section by providing not less than 24 hours or three days of paid sick leave that is available to the employee to use by the completion of his or her 120th calendar day of employment.”

Under the new accrual method in Labor Code section 246(b)(3), an employer can allow an employee to accrue paid sick on a regular basis through an accrual rate other than hours worked (e.g., per week, per pay period, per month, etc.) so long as the employee has accrued no less than 24 hours of accrued sick leave by the 120th calendar day of employment, or each calendar year, or applicable 12-month period. The new accrual

method in Labor Code section 246(b)(4) appears to allow an alternative method for new employees that would allow an employer to provide no less than 24 hours or 3 days of paid sick leave for use by the completion of the 120th calendar day of employment.

Although these new accrual methods are now a part of the Paid Sick Leave Law following the passage of AB 304, there has been very little analysis on their application to date and we anticipate further clarification from the Labor Commissioner in the near future. Employers are cautioned to be careful about applying such alternative accrual methods absent further clarification from the Labor Commissioner.

Clarifies That Providing the “Full Amount Of Leave” Under the Frontloading or Lump-Sum Method Means the Employer Must Provide Three Days or 24 Hours at the Beginning of Each Year, Calendar Year, Year of Employment, or 12-Month Basis. (Labor Code Section 246(d))

Labor Code section 246(d) discusses the ability for an employer to frontload the “full amount of leave” to an employee at the beginning of each year to avoid having to deal with accruals or the potential of paid sick leave carryover from year to year. Prior to AB 304, it was not clear what constituted the “full amount of leave” or the measurement of a “year.” AB 304 amended Labor Code section 246(d) to provide: “The term ‘full amount of leave’ means three days or 24 hours.” As a result, an employer only needs to frontload 3 days or 24 hours of paid sick leave to satisfy this method of compliance. AB 304 will also clarify that providing paid sick leave at the beginning of the year means providing it at the beginning of each calendar year, year of employment, or 12-month basis as determined by the employer.

Modifies the Requirements for Existing Paid Sick Leave and PTO Policies to Comply With the Paid Sick Leave Law. (Labor Code Section 246(e))

Labor Code section 246(e) is the provision of the Paid Sick Leave Law that provides that employers who already have sick leave/PTO policies in effect need not provide any additional paid sick leave under AB 1522 if their current policies make paid sick leave available for the same purposes and conditions as AB 1522. Section 246(e) provides two options for compliance:

The first option merely provides that the existing sick leave/PTO policy satisfy the accrual, carry over, and use requirements of the Paid Sick Leave Law; or

For the second option, AB 304 revised Labor Code section 246(e)(2) to now include a “grandfather clause” for existing paid sick leave/PTO policies provided to a class of employees that were in effect prior to January 1, 2015. Under this option, the Paid Sick Leave Law allows such grandfathered policies to continue going forward for both current and new employees in the class covered by such policies where their accrual method is different than one hour per 30 hours worked and instead provides at least one day or eight hours of paid sick leave/PTO within three months of employment and the employee was eligible to earn at least three days or 24 hours of paid sick leave/PTO within nine months of employment. Any changes to a grandfathered paid sick

leave/PTO policy that lowers employee accruals will lose the grandfathered status and all other AB 1522 accrual requirements will then apply going forward.

The application of this new “grandfathered paid sick leave/PTO policy” clause will depend on the specific terms and conditions of any paid sick leave/PTO policies in effect prior to January 1, 2015. We strongly recommend working with legal counsel to review its applicability.

Clarifies the Paid Sick Leave Law’s Provisions Regarding the Reinstatement of Paid Sick Leave Upon Rehire Within 12 Months (Labor Code Section 246(f)(2))

AB 304 also provides much needed clarification regarding an employer’s obligation to reinstate paid sick leave to an employee who is rehired within 12-months of separation by amending Labor Code section 246(f)(2) in two ways:

This section is amended to clarify that the reinstatement of paid sick leave upon rehiring would be “subject to the use and accrual limitations set forth in this section.” The significance of this amended language is that an employer who provides a more generous paid sick leave benefit to its employees is not necessarily required to reinstate all unused sick leave accruals upon rehire. Rather, an employer would only have to reinstate up to the accrual cap of 6 days or 48 hours of unused accrued paid sick leave for an employee who is rehired within 12 months of a separation of employment.

Example: Acme Employer allows employees to accrue up to 100 hours of paid sick leave. Employee John Doe works for Acme and accrues 100 hours of paid sick leave. John then separates from his employment with Acme and Acme rehires him within one year from his date of separation. Upon John’s rehire, Acme is only required to reinstate 48 hours or 6 days of his paid sick leave. Acme does not need to reinstate the full 100 hours of paid sick leave John had upon his separation of employment.

This section is also amended to confirm that if an employer is not obligated to restore any sick leave or PTO to an employee who was rehired within 12 months of a separation of employment if such sick leave/PTO was cashed out and no longer exists.

Adds That if an Employer Provides Unlimited Paid Sick Leave or Unlimited PTO, the Employer May Provide Written Notice That Such Leave Is “Unlimited.” (Labor Code Section 246(h))

Pursuant to Labor Code section 246(h), employers are required to provide written notice of the amount of paid sick leave an employee has available 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. For those employers that have policies which provide “unlimited” amounts of paid sick leave or PTO to employees, it was not clear how this requirement would be satisfied.

AB 304 amended Section 246(h) to now allow an employer with an unlimited paid sick leave or PTO policy to simply indicate the leave balance as “unlimited” on an itemized wage statement or written notice provided to the employee each pay period.

Clarifies How to Calculate the Rate of Pay for Paid Sick Leave Provided to Employees. (Labor Code Section 246(k))

AB 304 amended Labor Code section 246(k) to clarify how an employer will calculate the rate of pay for paid sick leave provided to nonexempt and overtime exempt employees. For nonexempt employees, Section 246(k) was amended to now provide two methods to choose from in calculating paid sick time:

Calculating paid sick time for nonexempt employees in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time. This method is more appropriate for nonexempt employees who are paid a regular hourly wage.

Calculating paid sick time by dividing the employee’s total wages, not including overtime pay, by the employee’s total hours worked in the full pay periods of the prior 90 days of employment. This method can be used to determine the paid sick leave rate of pay for nonexempt employees who have varying rates of pay, are paid on a salaried basis, or are paid on a piecemeal or commission basis.

For overtime exempt employees, Section 246(k) was amended to note that paid sick leave wages should be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Provides That an Employer Is Not Obligated to Inquire Into or Record the Purpose for Which an Employee Uses Paid Leave or Paid Time Off. (Labor Code Section 247.5(b))

AB 304 adds a new Subsection (b) to Section 247.5 to clarify that an employer is not required to ask about or record the purposes for which an employee uses paid sick leave or paid time off. We believe that this addition to the law is to address the concern that if an employer provides an unrestricted PTO policy that could be used for Paid Sick Leave Law purposes (among any other purpose), an employer does not have to track which PTO days are for Paid Sick Leave Law purposes or not.

However, if an employer does not have an unrestricted PTO policy in place and is providing a more traditional paid sick leave policy, this revision to the law does nothing to change the right of an employer to require an employee to confirm that the use of paid sick leave meets one of the purposes provided for in the law. Employers with more generous paid sick leave policies should also exercise this right to seek confirmation of the purpose for the paid sick leave to better track compliance with California’s Kin Care law (Labor Code sections 233-234), which requires employers to allow employees to use up to one-half of their annual accrued sick leave or PTO to care for a parent, child, spouse, or registered domestic partner.

CONCLUSION

While the Paid Sick Leave Law still raises a number of questions concerning its interpretation, AB 304 does help clarify some of these issues as employers continue working to implement this new law. Nonetheless, there still remain some areas of uncertainty regarding the application of the Paid Sick Leave Law. We will therefore continue to provide updates on the Paid Sick Leave Law and its interpretation as they become available.

