

EMPLOYMENT LAW UPDATE

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Prepare for California's Paid Sick Leave Law

Summary. The Healthy Workplaces, Healthy Families Act of 2014 ([Labor Code sections 245 to 249](#)) requires that all California employers provide employees with paid sick leave; it takes effect July 1, 2015, though the notice should already be posted. The Act will considerably impact employer handbooks, leave and time off policies, payroll and recordkeeping practices, and employee notice procedures. It differs from the paid sick leave ordinances in Oakland and San Francisco. Accordingly, employers should review their workplace policies, practices, and procedures to ensure compliance with the new law before July 1.

Discussion. Under the Act, all employees who work in California at least 30 days per year are entitled to paid sick leave. Paid sick leave accrues at the rate of one hour per every 30 hours worked, but employers may cap accrued time at 48 hours. Employees may use their leave hours as the hours accrue, unless the employer imposes the 90-day waiting period permitted by the Act. Employers may also limit the use of paid sick leave to 24 hours per year, but unused leave hours carry over annually.

The Act contains many other intricacies. Both accrued sick hours and the rate of pay at which employees must be compensated during leave must be calculated according to the formulas set forth in the statute. Employers must also provide notice to employees of the availability of paid sick leave, modify employee wage statements, and maintain for three years employee records of all accrued sick leave. The Act also excludes certain industry-specific employees from coverage; addresses the effect of waivers, modifications, and collective bargaining agreements; and identifies when an employee may properly use sick hours.

In addition to the statewide law, Oakland passed a separate sick leave ordinance that will take effect on March 2, 2015. Oakland joins San Francisco as the only other city in California with a separate paid sick leave law. Companies with employees in these cities must comply with both the state and city paid sick leave laws. When the two laws conflict, employers must follow the rule that is more favorable to the employee. Employers without employees in Oakland or San Francisco only need to comply with the state legislation.

Please review your policies before the law takes effect. We are happy to help.

Disloyal Employee Conduct Protected

Summary. Employers may not discipline or terminate employees engaged in group protest relating to working conditions, even if the employee engages in disloyal conduct.

Discussion. Section 7 of the National Labor Relations Act (NLRA) provides that all employees, both union and non-union, have the right to engage in "concerted activities for the purpose of ... mutual aid or protection." The National Labor Relations Board (NLRB) recently held that a sandwich shop owner could not terminate employees who posted signs detrimental to the business's operations because the signs constituted protected concerted activity under Section 7. The posters included photos of the restaurant's sandwiches along with the caption: "Can't tell the difference? That's too bad because Jimmy John's workers don't get paid sick days ... We hope your immune system is ready because you're about to take the sandwich test." The NLRB disagreed that the actions of these **non-union employees** were disloyal and afforded them protection on the basis that the signs were posted during a labor dispute, thus protecting the workers from any discipline.

Before disciplining an employee, employers must consider whether they are penalizing an employee for collaborating with other employees on issues relating to working conditions. If there is a reasonable basis to believe so, the employee's activities are likely protected under the NLRA.

E-Mail Communications Also Protected Activity

In another Section 7 decision, the NLRB held that an employee's use of company e-mail to complain to other employees about working conditions is a protected activity. Accordingly, employers cannot discipline employees on this basis. Employers must carefully draft e-mail and electronic communication policies to prevent misuse of company e-mail systems without hindering the Section 7 rights of employees.

Employer Handbooks Must Comply With Section 7

The NLRB routinely holds that employers are in violation of the NLRA if their employment handbooks limit an employee's Section 7 rights. Handbooks with professionalism provisions, courtesy clauses, and confidentiality policies have been found to violate Section 7. To remain compliant, employers should take great care to ensure that their handbooks contain the necessary Section 7 language.

[Review Employment Agreements: PAGA Waivers Unenforceable in California](#)

Summary. Employers must utilize a number of drafting strategies to avoid potentially costly liability under the Private Attorneys General Act because waivers of these representative claims, although enforceable in federal court, are unenforceable in California state courts and arbitration.

Discussion. The Private Attorneys General Act (PAGA), which has become increasingly popular with plaintiffs' attorneys, allows employees to initiate civil actions against their employers for violations of the Labor Code. The law incentivizes employees to bring representative claims by granting them 25 percent of any civil penalty recovered from the employer: fines are generally \$100 per employee per pay period for the initial violation and \$200 for subsequent or willful violations. Depending on the number of employees and the length of time during which the violation goes unknown, liability can be significant. While federal courts do enforce PAGA waivers, California courts hold that employees may not waive PAGA claims in arbitration or state court. Thus, employers must implement a number of strategies beyond the use of waivers to limit exposure to costly PAGA claims.

Even though class action waivers remain fully operative in employment agreements, California courts hold that PAGA waivers are unenforceable. However, employers should still consider using waiver language in their standard employment contracts because federal courts hold that PAGA waivers remain valid. As a result, employers must ensure that their contracts include PAGA specific severability clauses.

Employers should also consider the impact and extent of arbitration clauses in their agreements. For instance, employers might want to subject certain claims to arbitration, but reserve PAGA, wage and hour, and class claims for litigation. The contract should also specify that all claims subject to arbitration must be finally resolved before the employee can bring a lawsuit for the remaining claims.

[Reporting, Hiring, and Posting Compliance Checklists](#)

Both state and federal law impose numerous notice and posting requirements on California employers. These requirements often go unnoticed and expose a company to significant fines or liability in the event of regulatory or civil action. The following checklists provide an overview of required respective notices that must be reported to various government agencies, provided to newly hired employees, or posted at all times in a conspicuous area in the workplace.

Reporting Checklist. The following documents must be completed and submitted to the corresponding government agency:

- Employers must complete Form I-9 for each person on their payroll at the time of hiring. The form must be retained and stored by the employer for three years after the date of hire or for one year after employment is terminated, whichever is later. For more information on Form I-9, see: <http://www.uscis.gov/i-9>.
- All California employers must report the following information within twenty days of an employee's first day of work: (1) Employer's business name, contact person name, address, phone number, California employer account number, and Federal Employer Identification Number; (2) Employee's full name, SSN, address, start-of-work date. For more information, see: http://www.edd.ca.gov/pdf_pub_ctr/de340.pdf.

Hiring Checklist. The following notices must be furnished to all newly hired employees:

- Employee's Withholding Allowance Certificate
http://www.edd.ca.gov/pdf_pub_ctr/de4.pdf
- Notice that Employer May Be Required to Send Copies of Employee's Tax Forms to the Franchise Tax Board
http://www.edd.ca.gov/pdf_pub_ctr/de35.pdf
- Paid Family Leave Benefit Notice
http://www.edd.ca.gov/pdf_pub_ctr/de2511.pdf
- Sexual Harassment Brochure
<http://www.dfeh.ca.gov/res/docs/publications/DFEH-185.pdf>
- California Family Rights Act Brochure
<http://www.dfeh.ca.gov/res/docs/publications/DFEH-188.pdf>
- Time of Hire Pamphlet from the Division of Workers' Compensation
<http://www.dir.ca.gov/dwc/DWCPamphlets/TimeOfHirePamphlet.pdf>
- Disability Insurance Provisions Brochure
http://www.edd.ca.gov/pdf_pub_ctr/de2515.pdf
- Wage Theft Prevention Act Notice (Applies to non-exempt employees only)
http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf

Posting Checklist. California law requires employers to post the following notices in an area frequented by employees where they may be easily read during the workday:

The following notices apply to all employers:

- Industrial Wage Commission Wage Orders 1-17 (Postings are industry-specific)
<http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>
- State Minimum Wage
<http://www.dir.ca.gov/iwc/MW-2014.pdf>
- Paid Sick Leave (Effective Jan. 1, 2015)
[http://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Poster_Template_\(11_2014\).pdf](http://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf)
- Notice of Regular Pay Days
<http://www.dir.ca.gov/dlse/PaydayNotice.pdf>
- Safety and Health Protection on the Job
http://www.dir.ca.gov/dosh/dosh_publications/shpstren012000.pdf
- Emergency Telephone Numbers
http://www.dir.ca.gov/dosh/dosh_publications/s500pstr.pdf
- Notice to Employee: Injuries Caused by Work
<http://www.dir.ca.gov/dwc/NoticePoster.pdf>
- Notice of Workers' Compensation Carrier and Coverage (Obtained notice from workers' compensation carrier)
- Whistleblowers Protections
<http://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf>
- No Smoking Signage (Signs must designate where smoking is permitted/prohibited in the workplace)
- Prohibition Against Discrimination and Harassment
<http://www.dfeh.ca.gov/res/docs/Publications/DFEH-162-2014.pdf>
- Unemployment Insurance, Disability Insurance, Paid Family Leave Benefits
http://www.edd.ca.gov/pdf_pub_ctr/de1857a.pdf

- Unemployment Insurance Benefits
http://www.edd.ca.gov/pdf_pub_ctr/de1857d.pdf
- Notice of Time Off To Vote
https://www.sos.ca.gov/elections/tov_final.pdf
- Notice of Equal Employment Opportunity
http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf
- Fair Labor Standards Act Minimum Wage
<http://www.dol.gov/whd/regs/compliance/posters/flsa.htm>
- Employee Polygraph Protection Act Notice
<http://www.dol.gov/whd/regs/compliance/posters/eppabw.pdf>

The following notices apply to different employers:

- Pregnancy Disability Leave Law (Applies to employers of 5 to 49 employees)
http://www.dfeh.ca.gov/res/docs/Publications/NOTICE_A.pdf
- Annual Summary of Work-Related Injuries and Illnesses (Applies to employers with 11 or more employees)
<http://www.dir.ca.gov/dosh/DoshReg/ApndxB300AFinal.pdf>
- Family Care and Medical Leave (CFRA Leave) and Pregnancy Disability Leave (Applies to employers of 50 or more employees)
<http://www.dfeh.ca.gov/res/docs/Publications/NOTICE%20B.pdf>
- Family and Medical Leave Act (FMLA) (Applies to employers of 50 or more employees)
<http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>
- Access to Medical and Exposure Records (Applies only to employers using hazardous substances)
http://www.dir.ca.gov/dosh/dosh_publications/Access_En.pdf

This Update was sent to inform clients and interested parties of recent developments in employment law and should not be regarded as a substitute for comprehensive legal advice.

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