

## California Employers Must Implement Paid Sick Leave Notice Requirements by January 1, 2015

By Tom Geidt

As most of you know, California has enacted a new Paid Sick Leave (“PSL”) Law – the “Healthy Workplaces, Healthy Families Act of 2014” – that will require employers to begin providing paid sick leave to employees after July 1, 2015. The provisions of the new law will be found at Labor Code section 245 *et seq.*, and related amendments to the Wage Theft Prevention Act will be found at new Labor Code section 2810.5(a)(1)(H). Although employers need not provide paid sick leave until next July, the statute containing the PSL Law (Assembly Bill No. 1522) actually takes effect *on January 1, 2015*, and certain of the bill’s new requirements will go into effect then.

The California Division of Labor Standards Enforcement (“DLSE”) has posted new enforcement guidance interpreting certain provisions in the PSL Law. This guidance includes an overview of the law, a set of FAQs, a bulletin board posting, and a template notice under the Wage Theft Prevention Act. This guidance is available on the DLSE’s website at [www.dir.ca.gov/dlse/ab1522.html](http://www.dir.ca.gov/dlse/ab1522.html).

Importantly, the DLSE’s new enforcement guidance clarifies that employers will need to take two affirmative steps *by January 1, 2015*, or very soon thereafter: (1) the posting of its new DLSE Notice describing the PSL Law, and (2) the issuance of new Wage Theft Prevention Act notices, or equivalent information, to new and current employees.

### 1. DLSE Poster

Employers must post the new DLSE Notice in a conspicuous place at its California workplaces, where employees can easily read it, *by January 1, 2015*. The DLSE’s poster can be reproduced on 8 ½ x 11 paper and posted in its current form. This posting requirement applies to virtually all California employers in the private sector, large and small. There is no “small employer” exemption from the PSL Law, as is found in many other employment laws.

### 2. Wage Theft Prevention Act Notices

Since January 1, 2012, California employers have been required to provide certain notices to newly-hired employees – and sometimes to current employees – pursuant to the Wage Theft Prevention Act (Labor Code Section 2810.5). The PSL Law amends that Act by including new information describing employees’ rights under the PSL Law. The new DLSE FAQs state that employers must begin providing these amended notices to employees hired after January 1, 2015, even though employees do not begin accruing paid sick leave until July 1, 2015, at the earliest.

Moreover, the FAQs state that employers must provide the new paid sick leave information on the template form to *current* employees within seven days of “the change.” Although the FAQs are not entirely clear, they appear to treat the January 1, 2015 change in the law as the “change” that triggers the issuance of new notices to current employees. To be safe, therefore, we recommend that employers issue the amended

notice information to current non-exempt employees by *Wednesday, January 7, 2015* (not necessarily the full Section 2810.5 notices, but only the new information on paid sick leave).

Compliance with this requirement is complicated by the fact that the DLSE's new template notice requires employers to check a box to indicate which of three methods they intend to use to provide paid sick leave: (1) a separate paid sick leave policy that tracks the statute but does not go beyond the three days per year provided by the statute; (2) an existing PTO or paid sick leave policy that satisfies or exceeds the accrual, carryover and use requirements of the statute; or (3) a policy of granting at least 24 hours (or three days) of paid sick leave at the beginning of each year for use during the year. The DLSE's template form, alternatively, provides a box for employers to check if they believe the employee receiving the notice is exempt from the PSL Law under one of the enumerated exemptions. If so, employers must identify the applicable exemption. (The exemptions are discussed below.)

Some California employers may not have decided yet which method of providing paid sick leave they will be adopting by the July 1, 2015 date on which sick leave begins to accrue. Therefore, the DLSE template appears to require employers to specify a compliance method before they may be ready to do so. Each employer will need to decide how it wishes to address this issue on the notices they will be issuing after January 1, 2015. If necessary, an employer that ends up adopting a different approach than the one it identified in an earlier notice can send out an amended notice later.

Bear in mind that the Wage Theft Prevention Act notices, as before, do *not* need to be provided to exempt employees – only to non-exempt workers. Moreover, the notices do not need to go to employees who are covered by a collective bargaining agreement if the CBA: (1) expressly provides for wages, hours of work, and working conditions of the employee (as virtually all CBAs do); (2) provides premium wage rates for all overtime hours worked; and (3) provides a regular hourly rate of pay for the employees of not less than 30% more than the state minimum wage. In 2015 this threshold amount will be \$11.70 per hour based on California's minimum wage rate of \$9. Beginning in 2016 this 30% threshold will increase to \$13.

### 3. Summary of the Paid Sick Law

These two notice requirements represent, of course, only a small piece of the PSL Law. We summarize below the other key provisions of the law:

- Which employees are covered: With a few specified exceptions, the law covers all exempt and non-exempt full-time, part-time, temporary, and per diem employees of an employer (no matter how small the employer) who have worked at least 30 days in California within a year from the beginning of employment.
- Which employees are exempt: The law exempts four categories of employees: (1) certain providers of in-home supportive services; (2) certain flight deck or cabin crew members employed by air carriers; (3) employees covered by a collective bargaining agreement in the construction industry if the CBA expressly waives the requirements of the PSL Law in clear and unambiguous terms and meets certain other criteria; and (4) employees covered by a CBA in all other industries if the CBA meets certain criteria. The latter CBAs need not include an express waiver of the statutory requirements, but they

must provide for “paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees.”

- How much paid sick leave must be provided: Employers must provide eligible employees with up to 24 hours (three days) of PSL in one year.
- The rate of sick leave accrual: Employees will accrue one hour of paid sick leave for every 30 hours worked. Exempt full-time employees are presumed to work no more than 40 hours per week for purposes of this accrual provision.
- Carryover and accrual caps: Although accrual at the rate of one hour for every 30 hours worked could result in more than eight days of accrual in a 12-month period, employers may limit the amount of PSL that an employee can *take* to no more than 24 hours in any one year. The law permits employees to carry over any unused PSL into the next year. However, employers can establish a cap of 48 hours (six days) on the amount of PSL that an employee may accrue at any one time.
- When sick leave accrual will begin: Accrual will begin on July 1, 2015, or, for employees hired after July 1, 2015, their date of hire.
- When paid sick leave may be taken: Employees must be employed 90 days before they can take paid sick leave. They also must have worked in California for at least 30 days within a year since being hired. Once these eligibility criteria are met, employees who have accrued PSL based on their hours worked on and after July 1, 2015 will be able to take PSL immediately.
- The purposes for which eligible employees may take paid sick leave: Employees may take paid sick leave for the diagnosis, care, or treatment of an existing health condition of an employee or an employee’s family member; preventive health care (doctors’ routine check-ups, etc.) for the employee or the family members; or to attend to court matters, seek medical attention, or pursue counselling in connection with incidents of domestic violence, sexual assault, or stalking.
- Which family members are covered: The statute protects PSL taken for a child (biological, adopted, foster, or stepchild); a parent (biological, adoptive, foster, stepparent, or legal guardian) of the employee or the employee’s spouse or registered domestic partner; a spouse; a registered domestic partner; a grandparent; a grandchild; or a sibling.
- Alternative methods for providing paid sick leave: Employers have the option of creating a PSL policy that tracks the requirements of the statute or relying on an existing paid leave or paid time off policy, as long as the latter policy makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in the statute. The policy must either (1) satisfy the accrual, carryover, and use

requirements of the statute; or (2) grant at least 24 hours of paid sick leave at the beginning of each year for employee use during the year.

- Requesting leave and providing advance notice: Employees may request PSL orally or in writing; they are not required to make a written request for the time off. If the need for the sick leave is foreseeable, employees must provide reasonable advance notification. If the need for the sick leave is unforeseeable, the employee must provide notice of the need for the leave “as soon as practicable.” Therefore, employers who wish to use their existing vacation or PTO policies as the basis for compliance with the PSL Law will need to make allowances for these provisions, rather than requiring that PSL always be scheduled and approved in advance by a supervisor.
- When sick leave must be paid: Employers must pay for PSL no later than the next payday following the end of the pay period in which the sick leave was taken.
- Calculating the rate for paying sick leave: Employees who are paid by the hour must be paid sick leave at their hourly rate. For employees who have been paid – at least in part – by commission, piece rate, multiple hourly rates, or other fluctuating amounts in the prior 90 days, the employer must calculate their PSL rate by dividing the employee’s total straight-time wages by the total hours worked in the full pay periods of the prior 90 days. Thus, the PSL rate will differ as employees take PSL at different times. This, unfortunately, will be a huge administrative burden for many employers. Under the San Francisco Paid Sick Leave Ordinance, employers are allowed to avoid this burden by paying a flat rate equivalent to two times the San Francisco minimum wage. However, the California PSL Law does not provide any such alternative “shortcut” calculation method.
- Time increments for taking paid sick leave: Employers may set a reasonable minimum increment, *not to exceed two hours*, for the use of PSL. Employees may determine how much paid sick leave they need to use, subject to this minimum. Thus, for example, an employer may not have a policy requiring exempt or non-exempt employees to use statutory paid sick leave only in half-day or full-day increments.
- Relationship with San Francisco Paid Sick Leave Ordinance and other laws: The PSL Law is different in a number of ways from San Francisco’s Paid Sick Leave Ordinance, which has been in effect since 2007. In many respects, the San Francisco Ordinance provides greater benefits for employees than the state law, but in some ways the California statute provides broader protection. Employers who have employees in San Francisco will need to comply with both laws, whichever is more protective for employees on any given issue. Likewise, as other jurisdictions establish paid sick leave laws or ordinances, employers will need to comply with those laws as well. California employers also will need to ensure continued compliance with the state kin care law (Labor Code sections 233-234), which requires that employers who maintain accrued sick leave policies for

employee illnesses allow employees to use a portion of that sick leave for family member illnesses.

- No payout at termination: Accrued but unused sick leave under the PSL Law does not need to be paid out to employees at the time of termination. However, to the extent an employer's PSL policy is rolled into a PTO plan that allows PTO to be taken for any purpose, the employer may have a duty to pay out accrued but unused PTO at termination, in accordance with California law.
- Payday disclosure of sick leave availability: On paydays, along with employees' paychecks, employers will be required to provide written notice to each employee of the amount of paid sick leave (or equivalent paid time off) available to the employee. This notice must either be included on the employees' wage statements or provided in a separate writing on the designated pay day. The DLSE's new FAQs state that this information can be stored on documents made available to employees electronically.
- Recordkeeping requirements: In addition to this payday disclosure requirement, employers must keep records for at least three years showing "the hours worked and paid sick days accrued and used by an employee." As with other payroll records, these records must be made available to employees upon request. The statute appears to require employers to track usage of paid sick leave for the purposes specified in the statute, both for exempt and non-exempt employees, even when the employer uses a more generous PTO policy or "unlimited vacation" policy as its method of complying with the PSL Law. Thus, for example, in its new FAQs, the DLSE has commented that even when an employer offers unlimited paid time off that can be used for any purpose, the employer still must separately track sick leave accrual and usage.
- Medical confidentiality: In administering their PSL policies and tracking PSL usage, employers must maintain the confidentiality of employees' medical information and that of employees' family members.
- Penalties and remedies: The Labor Commissioner's office (i.e., the DLSE) is charged with enforcing the PSL Law through investigations, hearings, and civil lawsuits. This includes the provisions in the law that prohibit discrimination or retaliation against employees for exercising their rights under the law. The PSL Law contains a complicated scheme of civil penalties, liquidated damages, and other remedies in the event a violation is found.

This is not an exhaustive description of the new statute, but it covers most of the key provisions. This information is not to be relied on as legal advice for any particular employer in melding its existing time-off policies into the statute or otherwise complying with the statute. There still are many unanswered questions about how certain of the provisions in the PSL Law are to be interpreted, and counsel should be consulted to help bring your policies into compliance.



We hope that some additional enforcement guidance will be provided by the DLSE on some of the unanswered questions. If so, we will pass that information on. Inevitably, however, some of the unresolved issues will end up in the courts.

The PSL Law is the most momentous of the new California laws that will take effect on January 1. A dozen or so other new employment laws will take effect on January 1 as well. We will report on those laws in a separate posting.

If you have any questions about the new PSL Law, please feel free to contact us.