



California Paid Sick Leave  
Law and Cell Phone  
Reimbursement Plans

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Cell Phone Reimbursement Plans

1. Do you have employees that must use personal cellular telephones for their job duties?
  - A. Do you have employees that do use personal cellular telephones for their job?
2. Do you reimburse employees for a reasonable percentage of their cellular telephone bills?

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**Why Are We Talking About This?**

- Because of the California Court of Appeals ...
  - *Cochran v. Schwan's Home Service, Inc.* (Cal. Ct.App. August 12, 2014)
  - Labor Code section 2802
    - Employers are required to indemnify (pay \$) employees for all necessary expenditures or losses incurred by their employees in direct consequence of the discharge of their employment duties.
  - *Cochran's* interpretation: Employers must reimburse employees for expenses pertaining to their work-related use of personal cell phones.

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**No Problem ...**

- Most employees have their own cellular phones with unlimited minutes and unlimited text messaging and unlimited data packages ...
- PROBLEM!
- *Cochran*: "reimbursement is always required" irrespective of "[w]hether the employees have cell phone plans with unlimited minutes" and irrespective of whether an employee "incurred an extra expense that he or she would not have otherwise incurred absent the job"

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**Practical Application**

- "To show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed."
  1. Do you "require" employees to use personal cell phones for work-related reasons?
  2. Do you reimburse employees for a "reasonable percentage" of the cell phone bill?

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### Implication

- Compliance Requires Reimbursement
  - "Because of the differences in cell phone plans and work-related scenarios, the calculation of reimbursement must be left to the trial court and parties in each particular case."
- Attorney's Fees
  - Labor Code section 2802 permits the recovery of "attorney's fees incurred by the employee enforcing the rights granted by this section."

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### Compliance v. Avoidance

- Hypothetical:
  - 30 employees
  - \$50 per month cell phone bill
  - Reasonable percentage 25%
  - $[(30 \times 50) \times .25] \times 12 = \$4,500$
  - Three-year statute of limitations  $[\$4,500 \times 3 = \$13,500]$
  - Attorney's fees for a wage-and-hour class action of 30 employees over 3-year duration?

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### Potential Pitfalls and Implementation Issues

- Employer Bans
  - ⚠ Undermines the threshold question, re: liability (employee must show "that he or she was required to use a personal cell phone to make work-related calls")
  - ⚠ Might not be feasible
- Employer-Provided Cell Phones
  - ⚠ Might be cheaper than reimbursement of employee expenses (e.g., administrative savings and economies of scale)
  - ⚠ Expensive for smaller employers
- Flat Reimbursement
  - ⚠ Might be cheaper than employer-provided cell phones
  - ⚠ Proper (adequate) amount is difficult to calculate ("reasonable percentage"); over payment
- Individualized Reimbursement
  - ⚠ Overpayment avoidance
  - ⚠ Administrative costs

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Preparing for Mandatory Paid Sick Leave

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Who is Covered?

- Employer
  - "Any person employing another under any appointment or contact of hire"
  - No exemption for small employers

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Who is Covered?

- Employee
  - Most employees who work 30 or more days within a year in California
    - Includes part-time and temporary employees
  - Limited exclusions for:
    - Employees under collective bargaining agreements meeting specific requirements
    - On-site construction workers covered by a valid collective bargaining agreement
    - Certain state-funded in-home healthcare providers
    - Airline flight deck or cabin crew members subject to federal labor law

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**Accrual of Paid Sick Leave**

- Accrue 1 hour of paid sick leave for every 30 hours worked (including overtime)
- Employers may limit use of paid sick leave to 24 hours/3 days each year
- Accrual Cap/Carryover: must allow carryover, subject to 48-hour/6-day accrual cap

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**Compliance without Formally Implementing the New Law**

- No requirement that employers with an existing paid leave policy (which meets the requirements of the Act) provide additional paid sick leave
- May satisfy accrual and carryover requirements by providing full amount of leave at beginning of each year

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**When Can Employees Begin to Take Paid Sick Leave?**

- Employees who have been employed for more than 90 days on July 1, 2015: immediately upon accrual
- Otherwise, beginning on the 90<sup>th</sup> day of employment
- Employers may impose a reasonable minimum increment for use (≤ 2 hours)

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### Permissible Uses

- Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member
  - Covered family members: spouse, registered domestic partner, children (regardless of the child's age or dependency status), parents (incl. step-parents and parents-in-law), grandparents, grandchildren, and siblings
  - Expansion of Kin Care
- For an employee who is a victim of domestic violence, sexual assault or stalking to seek aid, medical attention, obtain services or counseling, or participate in safety planning

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### Payment of Sick Leave

- Rate of Pay for Sick Leave:
  - “[T]ime that is compensated at the same wage as the employee normally earns during the regular work hours”
  - Hourly rate of pay, **unless** fluctuating hourly rate, paid commission or piece-rate, or nonexempt salaried
    - Total wages earned (excl. OT) ÷ total hours worked in full pay periods of prior 90 days
- No requirement to pay out accrued, unused sick days upon separation
  - Reinstatement of accrued/unused sick leave

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### Wage Theft Prevention Act

- AB 1522 amends the Wage Theft Prevention Act
- Notice must state
  - EEs may accrue & use paid sick leave
  - Right to request sick leave
  - May not be terminated or retaliated for requesting/using sick leave
  - Right to file a complaint

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### Workplace Posting

- Must display a poster containing all of the following:
  - Employee entitlement to accrual, use, & requests for sick leave
  - Minimum amount of sick days provided by law
  - Terms of Use
  - Redress for retaliation & discrimination
- Poster must be displayed
  - In a conspicuous place
  - In “each workplace of the employer”
- Willful violations of the posting requirements carry a \$100 fine for each offense

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### Changes to Pay Stubs

- Must provide “written notice” of available sick hours or PTO on each pay date
- Written notice must appear either
  - On the itemized wage statement; or
  - In “a separate writing” at the time of pay with the employee’s payment of wages

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### Changes to Pay Stubs- Separate Writing (cont’d)

- Separate Writing?
  - Pay Stub Insert?
  - Posting on an Electronic Portal?
    - Compare Electronic Itemized Wage Statement
    - DLSE Op. Letter 2006.07.06 –electronic wage statements compliant with Lab. Code §226
    - Must meet six safeguards ensuring transparency and accessibility

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### Changes to Pay Stubs (cont'd)

- Six Safeguards (*DLSE Op. Letter 2006.07.06*)
  - Elect to receive paper statement
  - Posted on secure portal by the pay date
  - Contained required information
  - Accessible on work computer at no cost to EE
  - Employer-provided printers
  - Maintained for the duration of doc. retention period

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### Record Retention & Inspection

- Employers must keep a record of:
  - Hours employee worked
  - Accrued sick days
  - Amount of used sick days
- Minimum retention period: 3 years
- DLSE §1174 inspection & investigations
- Employee may inspect under §226 demand

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### Record Retention & Inspection (cont'd)

- Inadequate records - presumption that employee is entitled to 48 accrued hours (or 6 days) **UNLESS** employer can prove to the contrary by "clear and convincing evidence"

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Navigating the Overlap between California's Paid Sick Leave Law and Local Ordinances

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**Preempting Local Ordinances**

Lab. Code §249(d)

- Statewide law establishes "minimum requirements"
- "Does *not preempt*, limit, or otherwise affect the applicability of *any other law*, regulation, requirement, policy, or standard *that provides for greater accrual or use* by employees of sick days"

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**San Francisco's More Generous Policies**

- Applies to persons working within in City/County of SF- including employees who work more than 56 hours in the geographical area within a calendar year
- No annual use/accrual cap – just cap on how much in the employee's "bank"
- 1-hour increments of use
- Employees with no spouse or domestic partner may use paid sick leave on a "designated person"
- Sick leave must be paid at no less than SF minimum wage

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Preemption of San Francisco's Law		
	San Francisco	Statewide Law
Accrual Period	After 90 days	After 30 days
Accrual Cap	"Small" employers- 40 hours "Large" employers - 72 hours	All employers - 48 hours or 6 days
Availability of Sick Leave for Crime Victims	Not available	Leave available for victims of sexual assault, stalking, and domestic violence
"Year"	Calendar or Fiscal	Accrual of Paid Sick Days: year of employment PTO or Frontload Sick Days: year of employment, calendar year, or 12-month basis
Reinstatement upon reemployment	Not Required	Must re-instate within 1 year of separation
Rate of Pay for EEs with Fluctuating Pay <i>(May preempt in certain circumstances)</i>	The "scheduled rate(s) of pay during which sick leave is taken"	Total wages (excluding OT) ÷ total hours worked in prior 90 days of employment

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Long Beach Hotel Employers

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Long Beach's More Generous Policies

- Usage cap: 5 days
- No certification of illness required
- Annual payout at the end of any calendar year

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Preemption of Long Beach's Law		
	Long Beach	Statewide Law
Eligibility	Hotel workers only	Employees who have worked at least 30 days
Accrual	$\frac{5}{12}$ of a day for each month the hotel worker has been employed	1 hour for every 30 hours worked
Re-instatement	Not contemplated	1 year
Increments of use	No less than a day	Employee may choose, but no less than 2-hour increments
"Year"	Calendar	Accrual of Paid Sick Days: year of employment PTO or Frontload Sick Days: year of employment, calendar year, or 12-month basis

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### Enforcement and Penalties

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### Rebuttable Presumption of Retaliation

- Rebuttable presumption of retaliation exists if an employer does any of the following within 30 days of the employee engaging in protected activity
  - Denies the employee the right to use accrued sick days
  - Discharge/threaten to discharge
  - Demote, suspend, or "in any manner discriminate"

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**Rebuttable Presumption of Retaliation**

- **Protected Activity**
  - Filing a complaint with the Labor Commissioner or alleging a violation of the paid sick leave law
  - Cooperating with an investigation or prosecution
  - Opposing a prohibited policy, practice, or act

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**Enforcement & Penalties**

- **Labor Commissioner**
  - Investigations (Lab. Code §1174)
  - Conduct administrative hearings
- **DLSE Administrative Hearing**
  - Reinstatement, backpay, payment of sick days plus fines (up to \$4,000), administrative penalty
- **Class Actions**
  - New breed of class actions?

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**Enforcement & Penalties (cont'd)**

- **Civil Actions**
  - Labor Commissioner & Attorney General
    - Legal and Equitable relief
    - Penalties (up to \$4,000)
    - Liquidated damages (\$50/per employee for each day of the violation)
    - Reasonable attorney fees and costs
  - PAGA enforcement
- **Delay in compliance**
  - Lab. Commissioner can take “any appropriate action” including filing a civil action
  - \$50/day for length of violation
- Remedies, penalties and procedures are cumulative

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### Enforcement & Penalties (cont'd)

- **Safe Harbor**
  - Isolated and unintentional payroll or written notice error
  - Error must be "clerical" or an "inadvertent mistake" regarding accrual or available use of leave
  - Factfinder must consider whether the employer has adopted compliant policies, practices and procedures and any past violations

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### Notification and Verification Considerations

- Reasonable advance notification for foreseeable need for paid sick leave
- "As soon as practicable" for unforeseeable need for paid sick leave
  - Defining "as soon as practicable"
  - Discipline for failing to comply with employer's notification policy?
- Reasonable to require employees to provide a doctor's note for every use of paid sick leave?

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### Considerations in Implementing a PTO Policy to Meet Paid Sick Leave Requirements

Pros	Cons
Existing policy: "We don't have to do anything because we already have a more generous PTO policy in place."	Given the accrual, usage, and reinstatement provisions of the new law, an employer with an existing PTO policy (even one more generous than what is required under the Act) will likely need to update its policy, as well as its documentation and recordkeeping practices.
Frontloaded policy: avoids administrative hassle of calculating accrual and carryover.	Does the company want to extend an existing policy to all employees? Separate policies for part-time/temporary employees? Result in employees moving away from PTO?
	Must cash out PTO upon separation
	Must reinstate accrued paid sick leave for rehired employees--no credit for the amount previously cashed out at time of separation.

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**Questions**

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**Thank You**

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