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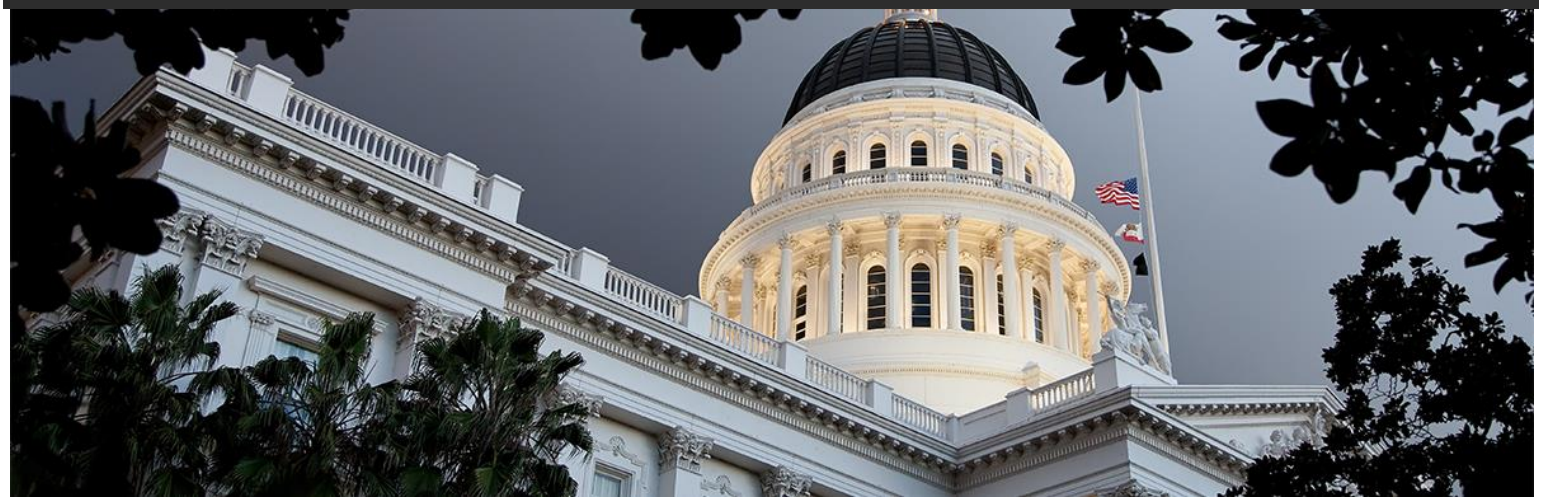

October 2023

California Expands Paid Sick Leave Entitlements, Effective Jan. 1, 2024

Go-To Guide:

- Employers that provide sick leave or other paid leave on an upfront basis will be required to provide **five days/40 hours** (up from 3 days/24 hours).
- Employers that provide sick leave or other paid leave on accrual basis will be required to increase the overall accrual amount that employees can maintain to **10 days/80 hours** (up from 6 days/48 hours).

On Oct. 4, 2023, California Governor Gavin Newsom signed into law Senate Bill No. 616 (SB 616). Effective Jan. 1, 2024, SB 616 expands the existing paid sick leave entitlements currently available to employees under the Healthy Workplaces, Healthy Families Act of 2014 (HWHFA). This GT Alert provides an overview of the HWHFA as it currently exists, summarizes what is and what is not changing as a result of SB 616, addresses the interplay between state law and the patchwork of local legislation, and offers considerations to prepare for 2024 and beyond.

The HWHFA Today

The HWHFA originally went into effect in 2015, and has seen minor amendments over the years. Below is a summary of some of the key provisions of the HWHFA as it currently stands:

- Employers with at least one employee in California must provide paid sick leave (PSL) to all eligible employees (including part-time and temporary or seasonal employees) who have worked for the same employer for at least 30 days within a year.
- PSL can be provided (1) at the rate of one hour for every 30 hours worked, (2) based on an alternative method that provides accrual on a regular basis and results in employees receiving at least three days/24 hours by the 120th day of each year that they are employed, or (3) on an upfront basis, such that employees receive at least three days or 24 hours of PSL per year.[1]
- A waiting period at the start of employment is permitted, as long as the employee can begin to use PSL by their 90th day of employment.
- Employers can cap usage of PSL at three days/24 hours[2] per year.
- Employees must be able to carry over accrued but unused PSL from year to year, up to an overall cap of six days/48 hours, *unless* the PSL is frontloaded in full (i.e., at least three days/24 hours is provided upfront), in which case no carryover is required.
- Employees may use PSL in a minimum increment of two hours for their own or a family member's diagnosis, care, or treatment of an existing health condition or for preventive care, or if the employee is a victim of domestic violence, sexual assault, stalking, or certain other designated crimes.
- For non-exempt and outside sales employees, the rate of pay for PSL must be calculated based on either (1) the employee's regular rate of pay for that workweek or (2) a 90-day lookback. Exempt employees are paid in the same manner as other forms of paid leave time (i.e., they continue to receive their salary).
- Employers can use a paid time off (PTO) (or similar) policy to comply with the HWHFA.
- Certain "grandfathered" PSL/PTO policies can remain in effect.

What's Changing?

The SB 616 amendments to the HWHFA are significant. Below is a summary of the key changes:

- The annual front-load amount and annual usage cap is increasing to five days/40 hours (*an increase of two days/16 hours*).
- The overall accrual cap applicable for employees who receive PSL on an accrual basis is increasing to 10 days/80 hours (*an increase of four days/32 hours*).
- Employers utilizing an alternative accrual method (other than allowing employees to accrue one hour of PSL per every 30 hours worked) also will need to ensure that employees are able to accrue no less than 40 hours of PSL by the 200th calendar day of employment or each calendar year, or in each 12-month period (in addition to the existing requirement).
- For "grandfathered" PSL/PTO policies in effect prior to Jan. 1, 2015, to be compliant without modification, employees must be eligible to accrue at least five days or 40 hours of PSL within six months of employment (among other requirements) (*rather than three days/24 hours within nine months*).

[1] Pursuant to Division of Labor Standards Enforcement guidance, whichever amount provides a greater benefit to the employee based on their work schedule will apply. So, for example, an employee working six-hour shifts being able to accrue 24 hours provides a greater benefit than three days; by contrast, an employee who works nine-hour shifts benefits more from three days per year.
[2] *See* n. 1.

- Employees subject to a collective bargaining agreement and otherwise excluded under the existing HWHFA will, for the first time, be entitled to certain protections under Labor Code section 246.5 (e.g., not being required to find a replacement when taking sick leave and protection against discrimination and retaliation).
- Railroad carrier employees and employers covered by the federal Railroad Unemployment Insurance Act will be expressly excluded from the definitions of "employee" and "employer."
- As described further below, certain contrary provisions of local ordinances will be preempted.

A number of local communities have passed sick leave ordinances, including the City of Berkeley, the City of Emeryville, the City of Los Angeles, the City of Oakland, the City of San Diego, the City/County of San Francisco, and the City of Santa Monica.[3] As amended, the HWHFA will preempt any "contrary" provision of a local ordinance relating to:

- Compensation upon separation (which is *not* required);
- Reinstatement of PSL for an employee rehired within one year of separation;
- An employer's right to advance leave (i.e., lend leave to employees before accrual);
- An employer's obligation to provide written notice of amount of PSL (or PTO) available for use on or along with an employee's wage statement;
- Applicable rates of pay;
- An employer's right to require "reasonable advance notification" for foreseeable absences, and notice "as soon as practicable" for unforeseeable absences;
- Payment for sick leave by no later than the payday for the next regular payroll period after it was taken.

SB 616 provides no clarity as to what constitutes a "contrary" provision. In other words, is a provision only considered contrary if it provides *lesser* benefits or protections, or is it also contrary if the provision provides a *greater* benefit or level of protection? Section 249(d) of the HWHFA, which was *not* amended in connection by SB 616, states that the purpose of the law is to provide "minimum requirements pertaining to paid sick days," and therefore it is not intended to "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, whether paid or unpaid, or that extends other protections to an employee." It's unclear how courts may interpret the apparent inconsistency created by these two preemption provisions. Nevertheless, because most of the local ordinances currently in effect are either silent on or generally in alignment with California law in the above-referenced areas, this new preemption provision may not carry much significance for employers.

The legislature's decision to specifically identify only certain provisions for which "preempt[ion of] any local ordinance to the contrary" applies, but not others, is helpful, but only to a degree. In other words, for requirements that are *not* identified above, employers will still need to assess whether the state law or the applicable local ordinance provides the greater benefit/protection to employees. For example, although several local ordinances (including Berkeley, Emeryville, Los Angeles, Oakland, San Francisco, and Santa Monica) currently permit overall accrual caps of between 48 and 72 hours (depending on the employer's

[3] The city of West Hollywood mandates paid leave/paid time off, which can be used for sick leave or any other reason. Additionally, some localities – namely, Los Angeles and Long Beach – have industry-specific ordinances in effect.

size), the increased accrual cap of 10 days/80 hours will apply to all employers, regardless of size, as of Jan. 1, 2024.

It remains to be seen whether these localities – and perhaps others – will use the enhanced entitlements under SB 616 as an invitation to promulgate, increase, or otherwise modify existing PSL entitlements.

What's Staying the Same?

SB-616 provides greater benefits and entitlements to California employees. Employers reviewing and revising their current PSL/PTO policies and practices in anticipation of January's effective date should re-familiarize themselves with provisions of the HWHFA that are *not* changing, including:

- *Rate of pay requirements*. Particularly for employers that pay commissions, non-discretionary bonuses, shift differentials, and other forms of supplemental compensation to non-exempt and outside sales employees, it's critical to understand how these payments will impact the rate of pay.
- *The right (or lack thereof) to request medical or other documentation*. Even though employees will under SB-616 have the right to use two additional days (16 hours) of PSL/PTO per year, there is still no express right to request medical or other documentation.
- *Wage statement content*. Employers still need to provide PSL/PTO balance information on employees' wage statements (or another document provided in connection with wage payment each pay period). As such, employers (and particularly those that front-load) should ensure their payroll and/or paid leave accrual tracking systems are updated.

Getting Ready

With less than two months until SB 616 takes effect, employers should ensure their payroll and/or paid leave accrual tracking systems and wage statements are ready to reflect the new accrual and usage caps; confirm they are properly calculating the rate of pay for PSL (particularly given the high cost of mistakes in these areas); replace the PSL poster when an updated version becomes available; update their PSL/PTO policies to comply with the new entitlements; and inform and train managers, HR, and payroll on the changes. Additionally, employers should be on the lookout for an updated wage theft notice (since it contains a section requiring the employer to identify their method for complying with the state paid sick leave law).

Authors

This GT Alert was prepared by:

- Ellen M. Bandel | +1 310.586.7798 | Ellen.Bandel@gtlaw.com
- Vanessa C. Krumbein | +1 310.586.7727 | krumbeinv@gtlaw.com
- Stephanie D. Ahmad | +1 650.289.7806 | ahmads@gtlaw.com
- Heather R. Lanyi | +1 415.590.5134 | Heather.Lanyi@gtlaw.com

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