

RESOLUTION 10-04-2007

DIGEST

Labor Law: Paid Sick Leave

Amends Labor Code section 233 to require all employers to provide paid sick leave benefits.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Labor Code section 233 to require all employers to provide paid sick leave benefits. This resolution should be disapproved because it imposes an undue burden on California business owners to provide what has been optional employee welfare benefits.

This resolution is modeled after San Francisco’s mandatory paid sick leave ordinance, which became effective on February 5, 2007. (S.F. Admin. Code, ch. 12W.) The resolution seeks to provide paid sick leave benefits for California workers to use to care for themselves, their children, domestic partners and anyone else that a worker may be charged with caring for. San Francisco’s law is the first of its kind in the nation, and its impact on businesses is not yet known.

While proponents argue that mandatory paid sick leave rights promote public policy, a law that forces start-up businesses and entrepreneurs to assume one more additional cost, in an already expensive local economy, could be just enough to force these businesses out of California. Because the majority of businesses in this state are made up of small and midsize enterprises, it is unfair and overly burdensome to require all employers to furnish workers with paid sick leave and this resolution should be disapproved.

Additionally, as drafted, this resolution is unworkable because it fails to consider the interplay of other leave laws and does not contemplate the administrative difficulties involved in managing multiple leave policies. It is also unclear as to whether mandatory sick leave would afford protections beyond those provided by the California Family Rights Act, the Pregnancy Disability Leave, or the Family Medical Leave Act.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend section 233 of the California Labor Code to read as follows:

- 1 §233.
- 2 (a) Employers shall provide paid sick leave to all employees, after the employee
- 3 has completed 90 days of employment. Paid sick leave shall accrue at a rate of not less than
- 4 1 hour for each 30 hours the employee is regularly scheduled to work. Sick leave need not

5 accrue for the employee's first 90 days of employment, for any time worked in excess of the
6 employee's regular schedule, or for any time the employee is in an unpaid leave status. Sick
7 leave for exempt employees shall be determined based upon a 40 hour work week. Any
8 employer who provides sick leave for employees shall permit an employee to use in any
9 calendar year the employee's accrued and available sick leave entitlement, in an amount not
10 less than the sick leave that would be accrued during six months at the employee's then
11 current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic
12 partner of the employee. All conditions and restrictions placed by the employer upon the
13 use by an employee of sick leave also shall apply to the use by an employee of sick leave to
14 attend to an illness of his or her child, parent, spouse, or domestic partner. This section does
15 not extend the maximum period of leave to which an employee is entitled under Section
16 12945.2 of the Government Code or under the federal Family and Medical Leave Act of
17 1993 (29 U.S.C. Sec. 2606 et seq.), regardless of whether the employee receives sick leave
18 compensation during that leave.

19 (b) Accrued, unused sick leave shall be carried over from year to year. Employers
20 may cap sick leave accrual of sick leave at 72 hours and employers meeting the definition of
21 "small business" may cap accrual of sick leave at 40 hours. An employer need not
22 compensate an employee for any accrued, unused sick leave upon the employee's
23 termination, resignation, retirement, or other separation from employment.

24 (c) If an employer has a paid leave policy, such as a paid time off policy, that makes
25 available to employees an amount of paid leave that may be used for the same purposes as
26 sick leave under this section and that is sufficient to meet the requirements for accrued sick
27 leave stated in subsections (a), the employer is not required to provide additional paid sick
28 leave.

29 (d) An employer may not require, as a condition of an employee's taking paid sick
30 leave, that the employee search for or find a replacement worker to cover the hours during
31 which the employee is on paid sick leave.

32 (e) An employer may require employees to give reasonable notification of an
33 absence from work for which paid sick leave is or will be used.

34 (f) An employer may take reasonable measures to verify or document that an
35 employee's use of paid sick leave is lawful.

36 (g) This section shall not apply to employees covered by a bona fide collective
37 bargaining agreement to the extent that such requirements are expressly waived in the
38 collective bargaining agreement in clear and unambiguous terms.

39 (h)(b) As used in this section:

40 (1) "Child" means a biological, foster, or adopted child, a stepchild, a legal ward, a
41 child of a domestic partner, or a child of a person standing in loco parentis.

42 (2) "Employer" means any person employing another under any appointment or
43 contract of hire and includes the state, political subdivisions of the state, and municipalities.

44 (3) "Parent" means a biological, foster, or adoptive parent, a stepparent, or a legal
45 guardian.

46 (4) "Sick leave" means accrued increments of compensated leave provided by an
47 employer to an employee as a benefit of the employment for use by the employee during an
48 absence from the employment for any of the following reasons:

49 (A) The employee is physically or mentally unable to perform his or her duties due
50 to illness, injury, or a medical condition of the employee.

51 (B) The absence is for the purpose of obtaining professional diagnosis or treatment
52 for a medical condition of the employee.

53 (C) The absence is for other medical reasons of the employee, such as pregnancy
54 or obtaining a physical examination.

55 (D) The absence is for the purpose of the employee taking time off to provide care
56 or assistance to attend to an illness or injury of a child, parent, spouse, or domestic partner of
57 the employee.

58 "Sick leave" does not include any benefit provided under an employee welfare
59 benefit plan subject to the federal Employee Retirement Income Security Act of 1974
60 (Public Law 93-406, as amended) and does not include any insurance benefit, workers'
61 compensation benefit, unemployment compensation disability benefit, or benefit not payable
62 from the employer's general assets.

63 (E) "Small business" shall mean an employer for which fewer than ten persons work
64 for compensation during a given week. In determining the number of persons performing
65 work for an employer during a given week, all persons performing work for compensation
66 on a full-time, part-time, or temporary basis shall be counted, including persons made
67 available to work through the services of a temporary services or staffing agency or similar
68 entity.

69 ~~(i)(e)~~ No employer shall deny an employee the right to use sick leave or discharge,
70 threaten to discharge, demote, suspend, or in any manner discriminate against an employee
71 for using, or attempting to exercise the right to use, sick leave ~~to attend to an illness of a~~
72 ~~child, parent, spouse, or domestic partner of the employee.~~

73 ~~(j)(d)~~ Any employee aggrieved by a violation of this section shall be entitled to
74 reinstatement and actual damages or one day's pay, whichever is greater, and to appropriate
75 equitable relief.

76 (k) This Chapter provides minimum requirements pertaining to paid sick leave and
77 shall not be construed to preempt, limit, or otherwise affect the applicability of any other
78 law, regulation, requirement, policy, or standard that provides for greater accrual or use by
79 employees of sick leave, whether paid or unpaid, or that extends other protections to
80 employees.

81 ~~(l)(e)~~ Upon the filing of a complaint by an employee, the Labor Commissioner shall
82 enforce the provisions of this section in accordance with the provisions of Chapter 4
83 (commencing with Section 79) of Division 1, including, but not limited to, Sections 92,
84 96.7, 98, and 98.1 to 98.8, inclusive. Alternatively, an employee may bring a civil action for
85 the remedies provided by this section in a court of competent jurisdiction. If the employee
86 prevails, the court may award reasonable attorney's fees.

87 (m)(f) This section is intended to create a uniform State-wide standard governing
88 sick leave and, as such, is intended to supersede any local ordinance regarding paid sick
89 leave. The rights and remedies specified in this section are cumulative and nonexclusive
90 and are in addition to any other rights or remedies afforded by contract or under other
91 provisions of law.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Does not mandate that employers provide any amount of paid time off to employees who are sick or injured or who must take time off to care for sick or injured family members.

This Resolution: Would guarantee paid time off for employees who take time off due to their own illness or injury or to provide care to a sick or injured member of the employee's immediate family.

The Problem: The number of single parent households and households where both parents work has increased over time. When a wage earner is injured or too sick to work, or when that wage earner is needed to care for a sick family member, the family suffers. The loss of income often occurs when the family is experiencing increased expenses for medical care.

California provides limited replacement income through the State Disability Insurance program, but this compensation is only a portion of the income lost. The California Legislature has already recognized that it is in the public benefit to provide income to workers who are needed to care for their family members. This resolution shifts a small portion of the burden of meeting the employee's needs from the employee to the employer.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENTS

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

This resolution will have little impact on mid-sized and larger employers who already provide paid time off for illness. But it *will* cost California jobs at the low end – mom & pop businesses, one-of-a-kind retailers and home-based startups that can't afford to budget 40 hours' a year in paid time off for each of a handful of employees. After they become established, the vast majority of businesses offer paid sick leave, because the labor market demands it. This state-imposed mandate will raise the hurdle for those of modest means who want to start a business, because the cash that must be available in reserve will now go up the minute the first employee is hired, and the second, and the third, just to pay for time when the employee is *not* working. California already mandates other time off, but without pay. While unpaid leave imposes a burden on a small business, a paid leave mandate could put it *out* of business. This resolution also would expand the current "kin care" requirement so that *all* of an employee's sick leave –

not half, as it is currently – could be used to care for a sick family member. Thus, full utilization of each employee’s sick leave annually will be virtually assured, at maximum expense to employers. California needs to encourage new businesses, allow them to incubate and grow, on terms their employees agree on, until they get some momentum – after that, the labor market will ensure that their employees have paid time off.

SAN DIEGO COUNTY BAR ASSOCIATION

The resolution would burden business owners with a requirement to provide paid leave regardless of the size and nature of the business. This would unfairly burden small businesses that simply cannot afford burdensome legal requirements and survive.