

THE ZAPPIA LAW FIRM

A PROFESSIONAL CORPORATION

— Labor & Employment Law —

SPECIAL UPDATE

PRIVATE AND PUBLIC EMPLOYERS

November 24, 2015

New Bill Signed Into Law By Governor Brown Prompts The Question: Can An Employer Require An Employee To Provide A Doctor's Note?

Governor Brown signed Senate Bill 579 into law last month. This bill which goes into effect on January 1, 2016 modifies the current “Kin Care” law in order to bring it in line with the Healthy Workplaces, Healthy Families Act of 2014 (aka Paid Sick Leave law) which went into effect earlier this year on July 1, 2015.

Applicable Law

A. Previous “Kin Care” Law

Before the passage of SB 579, California’s “kin care” law (Labor Code section 233) allowed employees whose employers provided paid sick leave to take up to one-half of their annual accrual of sick leave to “attend to the illness” of a parent, child, spouse, or domestic partner.

Importantly, section 233 formerly provided that “All conditions and restrictions placed by the employer upon the use by an employee of sick leave also shall apply to the use by an employee of sick leave to attend to an illness of his or her child, parent, spouse, or domestic partner.” Based on this language, it was common practice for employers to request a doctor’s note from employees taking “kin care” leave to prevent abuse.

B. New Paid Sick Leave Law Raises Concerns About Doctor’s Notes

Following the enactment of California’s paid sick leave law (AB 1522, the Healthy Workplaces, Healthy Families Act of 2014), many legal observers questioned whether an employer may still require an employee to produce a doctor’s note before/after using paid sick leave for time off. AB 1522 requires employers to provide at least 3 paid sick days upon oral/written request, allows an employee to determine how much leave she needs to use, and mandates an employer cannot deny paid sick leave or retaliate for using paid sick leave. While the law is silent regarding whether employers may ask for doctor’s notes, the Department of Industrial Relations has indicated that an employee may file a paid sick leave claim against an employer who denies sick leave for failure to provide details, such as a doctor’s note.

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Thus, employers should not condition the use of paid sick leave on a doctor's note. The Department of Industrial Relations' position is that employers cannot require an employee to provide a doctor's note or any other details necessarily for the use of the covered Paid Sick Leave law days. Employers should only ask for doctor's notes if an employee uses a certain number of days in a row or the employer has a reasonable basis for believing the employee is abusing sick leave or not using sick leave for a legitimate purpose.

C. New Changes to “Kin Care” Law

Effective January 1, 2016, SB 579 amends Labor Code section 233 to now allow employees to use up to one-half of their sick leave for the following additional reasons (pursuant to section 246.5): (a) if they are victims of domestic violence; (b) diagnosis, care, or treatment of an existing health condition, or preventative care for an employee; or (c) diagnosis, care or treatment of an existing health condition, or preventative care, for an employee's family member (parent, child, spouse, domestic partner, grandparents, grandchildren, siblings, in-laws). Thus, “kin care” leave will now apply to almost any use of covered sick leave.

Notably, the revisions to Labor Code section 233 remove the language that employers have been using to justify requesting a doctor's note for employees using “kin care” leave. Labor Code section 233(c) now states “an employer shall not deny an employee the right to use sick leave or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness or the preventive care of a family member, or for any other reason specified in subdivision (a) of Section 246.5.”

Analysis

It is important to note that SB 579 is silent regarding whether employers can or cannot require a doctor's note for employees to take “kin care” leave. However, based on the Department of Industrial Relations' response to the paid sick leave law and changes to section 233 post-SB 579, an employer who requires medical certification from an employee who has not yet used up her “kin care” (one-half of sick leave) risks an employee's claim that her “kin care” leave has been unlawfully denied, subjecting the employer to potential liability and litigation.

Based on the uncertainty and concern surrounding this new law, employers should allow employees to use at least one-half of their annual sick leave without requesting a doctor's note. Furthermore, use of one-half of sick leave for “kin care” under the new section 233 should not be counted towards absenteeism, performance evaluations, or otherwise used re: disciplinary actions.

Click the following link to be directed to the bill.

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB579