



Law Offices of Mary L. Topliff

Workplace Wave



Kin Care & Paid Time Off Policies: Recent Case Law And Legislative Updates

By Mary L. Topliff, Esq.

Employers with California employees are routinely challenged by the variety of legal protections for employees taking time off. Two recent California cases have been favorable to employers.

Kin Care

In February 2010, the first reported case involving Labor Code sections 233 and 234 (commonly referred to as the "kin care" law) was decided by the California Supreme Court in *McCarther v. Pacific Telesis Group*. The kin care law requires employers that provide sick leave to permit employees to use "accrued and available sick leave" in an amount no less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement to care for an ill family member. The law also prohibits employers from punishing employees through discipline or termination for such absences covered by applicable sick leave. It was enacted as a result of inequities in the application of sick leave policies which covered only employee illness absences. When employees, typically women, had to be absent to care for minor illnesses of young children, they were subject to termination since sick leave did not apply. Thus, the legislation dictated that employers who had sick leave policies ought to extend their application to family illness absences.

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Public Speaking

6/29/10
'Managing California Employment Laws from Afar'
Society for Human Resource Management Annual Conference
San Diego, CA

6/30/10
'Fit For Duty? When Medical Examinations Are the Answer'
Society for Human Resource Management Annual Conference
San Diego, CA

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The *McCarther* case involved a collective bargaining agreement which included a sickness absence policy, providing paid time off for up to five consecutive days for an employee's own illness or injury. It did not cover family illness absences. Under the policy, employees did not incrementally accrue a bank of paid sick days over a period of time, nor was there a cap on the number of these paid days. However, the company had an attendance policy with a progressive discipline scheme in which a paid sick day could

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nonetheless result in an attendance violation, unless the absence was legally protected.

McCarthy and another employee requested to be paid under the sickness absence policy for absences caused by the care of ill family members. The employer refused and this lawsuit ensued with the employees claiming that the policy was subject to the kin care law.

The Supreme Court noted that the statutory language and legislative history made clear that only sick leave policies that involve an accrual and a cap of hours are covered by the kin care law. The policy at issue, however, did not so provide; rather, an employee could be compensated for the time off without any maximum limit and subject only to the attendance policy. Since the policy was not covered by the law, the employer was not obligated to extend the paid sick time to scenarios in which the employee was taking time off for family illnesses. The family illnesses in question were, in turn, not legally protected and were properly subject to the employer's attendance policy.

Important Points

* Pursuant to the San Francisco Paid Sick Leave ordinance, employers who have employees working in San Francisco must provide paid sick leave for employees taking time off to care for ill family members and must not take any adverse employment action as a result. Thus, the type of policy at issue in the McCarthy case would not satisfy the San Francisco law. Rather, sick leave or other paid time off policies must provide San Francisco employees with one hour of accrued paid time off for every 30 hours worked and all of the time accrued could be used for purposes of family illness and none of the time off would be subject to any attendance policy violation or other adverse action.

* Although not central to the court's opinion, it should be noted that the court did not express any concern regarding the employer's attendance policy which allowed for disciplinary action even though absences might be paid under its sickness absence policy. Employees often believe that if they are paid for their time off, then it is unfair for them to be disciplined as a result. This case suggests that the court did not view the employer's attendance policy in a negative light. Employers are also reminded that any attendance policy must also provide exceptions for any legally protected time off.

Vacation Policy

Another recent case involved the validity of a vacation policy. In *Owen v. Macy's, Inc.*, the plaintiff (in a putative class action) contended that Macy's vacation policy was unlawful because it required employees to complete six months of employment before they began earning and vesting paid vacation, which did not occur until May 1 of each year.

The California Court of Appeals noted that the law does not require employers to provide any vacation time off benefits and it is up to the employer to determine when vacation time accrues and vests. Labor Code Section 227.3 requires that once vacation is earned, it cannot be forfeited and must be paid at the time of the employee's termination of employment. The court held that the employer's policy, requiring a delay before vacation began to accrue, was lawful.

Important Point

* This case highlights that vacation benefits need not begin accruing upon date of hire. However, if an employer's policy is intended to delay the accrual of vacation benefits, it must be explicitly stated and the internal recordkeeping must so reflect. A vacation policy that

merely delays the taking of vacation time until after an initial period but that allows for the accrual of vacation upon hire would require the employer to pay the employee for any accrued time if the employee left the company before that initial period. It is important to ensure that the policy accurately reflects its intended purpose.

Legislative Update

In the 2009 legislative session in California, a bill that would have mandated state-wide Paid Sick Leave stalled in committee. Since Governor Schwarzenegger vetoed virtually all substantive employment-related bills in this session and previously vetoed a Paid Sick Leave bill, this was no surprise. However, California voters will be electing a new Governor in 2010. The result could be a new section to the Labor Code requiring Paid Sick Leave throughout the state.

At the federal level, the Healthy Families Act (S. 1152 and H.R. 1902) has been pending for the last four years. In the fall of 2009, Congress held hearings on the proposed Act, which would require employers with more than 15 employees to provide employees with up to seven paid sick days per year for their own or certain family members' illness. The fate of pending health care reform and upcoming elections will likely dictate whether this bill gains any traction.

For more information on these issues, contact the author at topliff@joblaw.com.

Topliff Selected For Leadership Program

Leadership California has selected Ms. Topliff as a member of the Class of 2010 for its 2010 California Issues & Trends Program (CIT). This is a prestigious, yearlong program for 60 women leaders from across the state of California.

The California Issues & Trends Program provides focused development of women leaders, exposing them to critical public and private sector issues and enhancing their competitive knowledge on California from state, national and global perspectives. It connects women leaders from across the state with each other and with top decision-makers, thinkers and practitioners. It promotes creativity and innovation through the sharing of ideas and best practices. Graduates of the CIT are empowered to contribute more fully to California's vision of excellence and to the communities and companies in which they live and work.

Leadership California began in 1992 with a dream to inspire, inform, and advance women leaders who would influence California's future. It provides a critical pathway for successful women who care about advancement, achievement, and significance.

Articles about Ms. Topliff's experience in the program will be published in upcoming issues of the Workplace Wave. For more information on these issues, contact the author at topliff@joblaw.com.