

## RESOLUTION 08-02-2010

### DIGEST

#### Labor Law: Paid Sick Leave

Amends Labor Code sections 233 and 234 and adds Labor Code sections 244, 244.1-3, 245-249, and 249.1-2 to require employers to provide paid sick leave benefits.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

Similar to Resolution 10-04-2007 which was disapproved and 11-05-2008 which was approved.

#### Reasons:

This resolution amends Labor Code sections 233 and 234 and adds Labor Code sections 244, 244.1-3, 245-249, and 249.1-2 to require 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, to date, an optional employee benefit and creates an overly broad statutory scheme.

This resolution increases the obligation of California businesses to provide paid sick leave benefits to their employees in several ways. First, it requires all businesses that average 10 or more employees over the course of a week to provide paid sick leave benefits for all of their workers, up to 9 days per year. Second, employees would be able to use all of the sick leave for diagnosis, care, treatment, and/or preventative care, for themselves, their children, their spouses/domestic partners, their family members, and anyone else that a worker may be caring for. The resolution also allows victims of sexual assault or domestic violence to use sick leave.

Although the resolution apparently seeks to avoid causing hardship to small businesses by exempting employers with less than 10 employees (on average) from these requirements, it would nevertheless require all employers (including those with less than 10 employees) to comply with the resolution's proposed sick leave requirements when the employer already provides some sick leave to its employees. Thus, a small employer that had made a business decision to provide a limited amount of sick leave to its employees, would now be required to provide an additional amount (up to 9 days per year) of total sick leave to all employees, to allow all employees to use the sick leave for additional purposes, and to allow all employees to use their sick leave for an expanded list of family and non-family members. The unfortunate result would likely be that these small employers would end all sick leave benefits to their employees.

Moreover, because the majority of businesses in this state are made up of small and midsize enterprises, it is overly burdensome to require virtually all employers to furnish workers with paid sick leave. Also, while the resolution purports to provide an exemption for employers already providing paid leave, the exemption applies only if the employer's sick leave policy provides the exact same benefits as the proposed resolution. Thus, the exemption is not really an exemption at all.

Finally, as it applies to businesses that average 10 or more employees in a week, the requirements would apply in some weeks during the year, but not in others, adding further administrative difficulties in managing one's leave policies.

This resolution is similar to Assembly Bill 1000 (Ma and Skinner), currently pending in the Legislature.

## TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Labor Code sections 233, and 234 and to add Labor Code sections 244, 244.1, 244.2, 244.3, 245, 246, 247, 248, 249, 249.1, and 249.2 to read as follows:

- 1 § 233
- 2 (a) ~~Any~~ An employer who provides sick leave for employees shall permit an
- 3 employee to use in any calendar year the entire amount of employee's accrued and
- 4 available sick leave entitlement, ~~in an amount not less than the sick leave that would be~~
- 5 ~~accrued during six months at the employee's then current rate of entitlement, to attend to an~~
- 6 ~~illness of a child, parent, spouse, or domestic partner of the employee. All for the~~
- 7 diagnosis, care, or treatment of an existing health condition of, or preventive care for, an
- 8 employee's family member. The conditions and restrictions placed by the employer upon
- 9 the use by an employee of sick leave for himself/herself, also shall apply to the use by an
- 10 employee of sick leave ~~to attend to an illness of his or her child, parent, spouse, or~~
- 11 ~~domestic partner.~~ for the diagnosis, care, or treatment of an existing health condition of, or
- 12 preventive care for an employee's family member. This section does not extend the
- 13 maximum period of leave to which an employee is entitled under Article 1.5 (commencing
- 14 with Section 244 of this chapter), Section 12945.2 of the Government Code, or under the
- 15 federal Family and Medical Leave Act of 1993 (29 U.S.C. Sec. 2606 et seq.), regardless of
- 16 whether the employee receives sick leave compensation during that leave.
- 17 (b) As used in this section:
- 18 (1) ~~Child~~ Family member" means ~~a~~ any of the following:
- 19 (i) A biological, foster, or adopted child, a stepchild, a legal ward, a child of a
- 20 registered domestic partner, or a child of a person standing in loco parentis to whom the
- 21 employee stands in loco parentis.
- 22 (ii) A biological, foster or adoptive parent, stepparent, legal guardian of an
- 23 employee or the employee's spouse or registered domestic partner, or person who stood in
- 24 loco parentis when the employee was a minor child.
- 25 (iii) A spouse.
- 26 (iv) A registered domestic partner.
- 27 (v) A grandparent.
- 28 (vi) A grandchild.
- 29 (vii) A sibling.
- 30 (2) "Employer" means any person employing another under any appointment or
- 31 contract of hire and includes the state, political subdivisions of the state, and
- 32 municipalities.
- 33 (3) ~~"Parent"~~ means ~~a biological, foster, or adoptive parent, a stepparent, or a legal~~
- 34 ~~guardian.~~
- 35 (4)(3)(A) "Sick leave" means accrued increments of compensated leave provided
- 36 by an employer to an employee as a benefit of the employment for use by the employee
- 37 during an absence from the employment for any of the following reasons:
- 38 (A)(i) The employee is physically or mentally unable to perform his or her duties
- 39 due to illness, injury, or a medical condition of the employee.

40 ~~(B)~~(ii) The absence is for the purpose of obtaining professional diagnosis or  
41 treatment for a medical condition of the employee.

42 ~~(C)~~(iii) The absence is for other medical reasons of the employee, such as  
43 pregnancy or obtaining a physical examination.

44 (B) "Sick leave" includes paid sick days as defined in Section 244.3.

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

50 (c) No employer shall deny an employee the right to use sick leave or discharge,  
51 threaten to discharge, demote, suspend, or in any manner discriminate against an employee  
52 for using, or attempting to exercise the right to use, sick leave to attend to an illness of a  
53 child, parent, spouse, or domestic partner of the employee.

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

57 (e) Upon the filing of a complaint by an employee, the Labor Commissioner shall  
58 enforce the provisions of this section in accordance with the provisions of Chapter 4  
59 (commencing with Section 79) of Division 1, including, but not limited to, Sections 92,  
60 96.7, 98, and 98.1 to 98.8, inclusive. Alternatively, an employee may bring a civil action  
61 for the remedies provided by this section in a court of competent jurisdiction. If the  
62 employee prevails, the court may award reasonable attorney's fees.

63 (f) The rights and remedies specified in this section are cumulative and  
64 nonexclusive and are in addition to any other rights or remedies afforded by contract or  
65 under other provisions of law.

66

67 § 234

68 An employer absence control policy that counts sick leave taken pursuant to  
69 Section 233 or paid sick days taken pursuant to Article 1.5 (commencing with Section 244)  
70 as an absence that may lead to or result in discipline, discharge, demotion, or suspension is  
71 a per se violation of Section 233. An employee working under this policy is entitled to  
72 appropriate legal and equitable relief pursuant to Section 233.

73

74 § 244

75 This article shall be known and may be cited as the Healthy Workplaces, Healthy  
76 Families Act of 2009.

77

78 § 244.1

79 The Legislature finds and declares the following:

80 (a) Nearly every worker in the State of California will at some time during the year  
81 need some time off from work to take care of his or her own health or the health of family  
82 members.

83 (b) Many workers in California do not have any paid sick days, or have an  
84 inadequate number of paid sick days, to care for their own health or the health of family  
85 members.

86 (c) Low-income workers are significantly less likely to have paid sick time than  
87 other workers.

88 (d) Providing workers time off to attend to their own health care and the health care  
89 of family members will ensure a healthier and more productive workforce in California.

90 (e) Paid sick days will have an enormously positive impact on the public health of  
91 Californians by allowing sick workers paid time off to care for themselves when ill, thus  
92 lessening their recovery time and reducing the likelihood of spreading illness to other  
93 members of the workforce.

94 (f) Paid sick days will allow parents to provide personal care for their sick children.  
95 Parental care ensures children's speedy recovery, prevents more serious illnesses, and  
96 improves children's overall mental and physical health.

97 (g) Providing paid sick days is affordable for employers and good for business.

98 (h) Employers who provide paid sick days enjoy greater employee retention and  
99 reduce the likelihood of employees coming to work sick. Studies have shown that costs of  
100 decreased productivity caused by sick workers exceed the costs of employee absenteeism.

101 (i) Many adults have significant elder care responsibilities requiring them to take  
102 time off from work or to work reduced hours.

103 (j) Employees frequently lose their jobs or are disciplined for taking sick days to  
104 care for sick family members or to recover from their own illnesses.

105 (k) Workers whose jobs involve significant contact with the public, such as service  
106 workers and restaurant workers, are very unlikely to have paid sick days. Often, these  
107 workers have no choice but to come to work when they are ill, thereby spreading illness to  
108 coworkers and customers.

109 (l) Domestic violence and sexual assault affect many persons without regard to age,  
110 race, national origin, sexual orientation, or socioeconomic status.

111 (m) Domestic violence is a crime that has a devastating effect on families,  
112 communities, and the workplace. It impacts productivity, effectiveness, absenteeism, and  
113 employee turnover in the workplace. The National Crime Survey estimates that 175,000  
114 days of work each year are missed due to domestic violence.

115 (n) Survivors of domestic violence and sexual assault may be vulnerable at work  
116 when trying to end an abusive relationship because the workplace may be the only place  
117 where the perpetrator knows to contact the victim. Studies show that up to one-half of  
118 domestic violence victims experience job loss. Forty percent reported on-the-job  
119 harassment. Nearly 50 percent of sexual assault survivors lose their jobs or are forced to  
120 quit in the aftermath of the assaults.

121 (o) Affording survivors of domestic violence and sexual assault paid sick days is  
122 vital to their independence and recovery.

123

#### 124 § 244.2

125 In enacting this act, it is the intent of the Legislature to do the following:

126 (a) Ensure that workers in California can address their own health needs and the  
127 health needs of their families by requiring employers to provide a minimum level of paid  
128 sick days including time for family care.

129 (b) Decrease public and private health care costs in California by enabling workers  
130 to seek early and routine medical care for themselves and their family members and to  
131 address domestic violence or sexual assault.

132 (c) Protect employees in California from losing their jobs while they use sick days  
133 to care for themselves or their families.

134 (d) Provide economic security to employees in California who take time off work  
135 for reasons related to domestic violence or sexual assault.

136 (e) Safeguard the welfare, health, safety, and prosperity of the people of and  
137 visitors to California.

138

#### 139 § 244.3

140 For the purposes of this article the following terms have the following meanings:

141 (a) "Employee" shall mean any person who performs an average of at least (10)  
142 hours of work per week within the state of California for an employer. For employees  
143 whose work hours fluctuate from week to week, eligibility will be determined based on the  
144 average number of hours worked per week during the applicable quarter.

145 (b) "Employer" shall mean any person who employs an average of ten (10) or more  
146 persons per week to perform work for compensation, and includes the state, political  
147 subdivisions of the state, and municipalities.

148 (c) "Family member" is defined pursuant to Labor Code Section 233(b)(1).  
149 (d) "Paid sick days" means time that is compensated at the same wage as the  
150 employee normally earns during regular work hours and is provided by an employer to an  
151 employee for the purposes described in Section 246.

152  
153 § 245

154 (a) An employee is entitled to paid sick days as specified in this section.  
155 (b)(1) An employee shall accrue paid sick days at the rate of not less than one hour  
156 per every 30 hours worked, beginning at the commencement of employment or the  
157 operative date of this article, whichever is first. There shall be a cap of 72 hours of paid  
158 sick days.

159 (2) An employee who is exempt from overtime requirements as an administrative,  
160 executive, or professional employee under a Wage Order of the Industrial Welfare  
161 Commission is deemed to work 40 hours per workweek for the purposes of this section,  
162 unless the employee's normal workweek is less than 40 hours, in which case the employee  
163 will accrue paid sick days based upon that normal workweek.

164 (c) An employee shall be entitled to use accrued paid sick days beginning on the  
165 90th calendar day of employment, after which day the employee may use paid sick days as  
166 they are accrued.

167 (d) Accrued paid sick days shall carry over to the following calendar year, subject  
168 to the accrual caps under subdivision (b)(1).

169 (e) An employer is not required to provide additional paid sick days pursuant to this  
170 section if the employer has a paid leave policy or paid time off policy and the employer  
171 makes available an amount of leave that satisfies the accrual requirements of this section  
172 and that may be used for the same purposes and under the same conditions as specified in  
173 this section.

174 (f)(1) Except as specified in paragraph (2), an employer shall not be required to  
175 provide compensation to an employee for accrued, unused paid sick days upon  
176 termination, resignation, retirement, or other separation from employment.

177 (2) If an employee separates from an employer and is rehired by the employer  
178 within one year, previously accrued and unused paid sick days shall be reinstated. The  
179 employee shall be entitled to use those paid sick days and to accrue additional paid sick  
180 days upon rehiring.

181 (g) An employer may lend paid sick days to an employee in advance of accrual, at  
182 the employer's discretion and with proper documentation.

183  
184 § 246

185 (a) Upon the oral or written request of an employee, an employer shall provide paid  
186 sick days for the following purposes:

187 (1) Diagnosis, care, or treatment of an existing health condition of, or preventive  
188 care for, an employee or an employee's family member.

189 (2) For an employee who is a victim of domestic violence or sexual assault, the  
190 purposes described in subdivision (c) of Section 230 and subdivision (a) of Section 230.1.

191 (b) An employer shall not require as a condition of taking paid sick days that the  
192 employee search for or find a replacement worker to cover the days during which the  
193 employee is on paid sick days.

194 (c) An employer shall not deny an employee the right to use sick days, discharge,  
195 threaten to discharge, demote, suspend, or in any manner discriminate against an employee  
196 for using sick days, attempting to exercise the right to use sick days, filing a complaint  
197 with the department or in a court alleging a violation of this article, cooperating in an  
198 investigation or prosecution of an alleged violation of this article, or opposing any policy  
199 or practice or act that is prohibited by this article.

200  
201 § 247

202 (a) An employer shall give each employee written notice of the requirements of this  
203 article in English, Spanish, Chinese, and any other language spoken by at least 5 percent of  
204 the employees. The written notice shall state the following:

205 (1) That an employee is entitled to accrue, request, and use paid sick days.

206 (2) The amount of paid sick days provided for by this article.

207 (3) The terms of use of paid sick days.

208 (4) That retaliation or discrimination against an employee who requests paid sick  
209 days or uses paid sick days, or both, is prohibited and that an employee has the right under  
210 this article to file a complaint or bring a civil action against an employer who retaliates or  
211 discriminates against the employee.

212 (b) In each workplace of the employer, the employer shall display a poster in a  
213 conspicuous place containing all the information specified in subdivision (a). The Labor  
214 Commissioner shall create a poster containing this information and make it available to  
215 employers.

216 (c) An employer who willfully violates the notice and posting requirements of this  
217 section shall be subject to a civil penalty of not more than one hundred dollars (\$100) per  
218 each offense.

219

220 § 248

221 An employer shall keep for at least five years records documenting the hours  
222 worked and paid sick days accrued and used by an employee. An employer shall allow the  
223 Labor Commissioner access to these records with appropriate notice and at a mutually  
224 agreeable time to monitor compliance with this article. An employer shall make these  
225 records available to an employee. If an employer does not maintain adequate records  
226 pursuant to this section, it shall be presumed that the employee is entitled to the maximum  
227 number of hours accruable under this article, unless the employer can show otherwise by  
228 clear and convincing evidence.

229

230 § 249

231 The Labor Commissioner is authorized and directed to coordinate implementation  
232 and enforcement of this article and to promulgate guidelines and regulations for those  
233 purposes.

234

235 § 249.1

236 (a) The Labor Commissioner is authorized and directed to enforce this article,  
237 including investigating an alleged violation, and ordering appropriate temporary relief to  
238 mitigate the violation or to maintain the status quo pending the completion of a full  
239 investigation or hearing.

240 (b) If the Labor Commissioner, after a hearing that contains adequate safeguards to  
241 ensure that the parties are afforded due process, determines that a violation of this article  
242 has occurred, he or she may order any appropriate relief, including reinstatement, backpay,  
243 the payment of sick days unlawfully withheld, and the payment of an additional sum in the  
244 form of an administrative penalty to an employee or other person whose rights under this  
245 article were violated. If paid sick days were unlawfully withheld, the dollar amount of  
246 paid sick days withheld from the employee multiplied by three, or two hundred fifty  
247 dollars (\$250), whichever amount is greater, shall be included in the administrative  
248 penalty. In addition, if a violation of this article results in other harm to the  
249 employee or person, such as discharge from employment, or otherwise results in a  
250 violation of the rights of the employee or person, the administrative penalty shall include a  
251 sum of fifty dollars (\$50) for each day or portion thereof that the violation occurred or  
252 continued.

253 (c) Where prompt compliance by an employer is not forthcoming, the Labor  
254 Commissioner may take any appropriate enforcement action to secure compliance,  
255 including the filing of a civil action. In compensation to the state for the costs of

256 investigating and remedying the violation, the commissioner may order the violating  
257 employer to pay to the state a sum of not more than fifty dollars (\$50) for each day or  
258 portion of a day a violation occurs or continues for each employee or other person whose  
259 rights under this article were violated. These funds shall be allocated to the Labor  
260 Commissioner to offset the costs of implementing and enforcing this article.

261 (d) An employee or other person may report to the Labor Commissioner a  
262 suspected violation of this article. The commissioner shall encourage reporting pursuant to  
263 this subdivision by keeping confidential, to the maximum extent permitted by applicable  
264 law, the name and other identifying information of the employee or person reporting the  
265 violation. However, the commissioner may disclose that person's name and identifying  
266 information as necessary to enforce this article or for other appropriate purposes, upon the  
267 authorization of that person.

268 (e) The Labor Commissioner, the Attorney General or a person aggrieved by a  
269 violation of this article may bring a civil action in a court of competent jurisdiction against  
270 the employer or other person violating this article and, upon prevailing, shall be entitled to  
271 such legal or equitable relief as may be appropriate to remedy the violation, including  
272 reinstatement, backpay, the payment of sick days unlawfully withheld, the payment of an  
273 additional sum as liquidated damages in the amount of fifty dollars (\$50) to each employee  
274 or person whose rights under this article were violated for each day or portion thereof that  
275 the violation occurred or continued, plus, if the employer has unlawfully withheld paid sick  
276 days to an employee, the dollar amount of paid sick days withheld from the employee  
277 multiplied by three; or two hundred fifty dollars (\$250), whichever amount is greater; and  
278 reinstatement in employment or injunctive relief; and further shall be awarded reasonable  
279 attorney's fees and costs, provided, however, that any person or entity enforcing this article  
280 on behalf of the public as provided for under applicable state law shall, upon prevailing, be  
281 entitled only to equitable, injunctive, or restitutionary relief, and reasonable attorney's fees  
282 and costs.

283 (f) In an administrative or civil action brought under this article, the Labor  
284 Commissioner or court, as the case may be, shall award interest on all amounts due and  
285 unpaid at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code.

286 (g) The remedies, penalties, and procedures provided under this article are  
287 cumulative.

288  
289 § 249.2

290 (a) This article does not limit or affect any laws guaranteeing the privacy of health  
291 information, or information related to domestic violence or sexual assault, regarding an  
292 employee or employee's family member. That information shall be treated as confidential  
293 and shall not be disclosed to any person except to the affected employee, or as required by  
294 law.

295 (b) This article shall not be construed to discourage or prohibit an employer from  
296 the adoption or retention of a paid sick days policy more generous than the one required  
297 herein.

298 (c) This article does not lessen the obligation of an employer to comply with a  
299 contract, collective bargaining agreement, employment benefit plan, or other agreement  
300 providing more generous sick days to an employee than required herein.

301 (d) This article establishes minimum requirements pertaining to paid sick days and does  
302 not preempt, limit, or otherwise affect the applicability of any other law, regulation,  
303 requirement, policy, or standard that provides for greater accrual or use by employees of  
304 sick days, whether paid or unpaid, or that extends other protections to an employee

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

**PROPONENT:** Bar Association of San Francisco

## **STATEMENT OF REASONS**

Existing Law: Existing state law does not require employers to provide any paid sick leave for an employee's own illness or to care for a family member with an illness.

This Resolution: This bill would provide that covered employees are entitled to paid sick days, as defined, which shall be accrued at a rate of no less than one hour for every 30 hours worked. This bill applies to employers with 10 or more employees, and to employees who perform an average of at least 10 hours of work per week. An employee would be entitled to use accrued sick days beginning on the 90th calendar day of employment. The bill would require employers to provide paid sick days, upon the request of the employee, for diagnosis, care, or treatment of health conditions of the employee or an employee's family member, or for leave related to domestic violence or sexual assault. An employer would be prohibited from discriminating or retaliating against an employee who requests paid sick days. The bill would require employers to satisfy specified posting and notice and recordkeeping requirements.

This bill would require the Labor Commissioner to administer and enforce these requirements, including the promulgation of regulations, investigation, mitigation, and relief of violations of these requirements. This bill would authorize the Labor Commissioner to impose specified administrative fines for violations and would authorize the Labor Commissioner, the Attorney General or an aggrieved person to bring an action to recover specified civil penalties against an offender, as well as attorney's fees, costs, and interest.

The resolution is similar to Assembly Bill 1000 introduced by Assembly Members Ma and Skinner on February 27, 2009, but there are some differences, including coverage of employers and employees.

### The Problem:

Many workers in California, especially low income workers, do not have any paid sick days, or have an inadequate number of paid sick days, to care for their own health or the health of family members.

## **IMPACT STATEMENT**

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

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