

GONZALEZ
SAGGIO
HARLAN

The GSH 60-Second Memo

February 16, 2011

Sponsored by the GSH Employment Group



Cynthia L. Sands, Esq.

www.gshllp.com

(213) 487-1400

Want more
information on this
topic?

[CLICK HERE!](#)

The California Supreme Court Takes Away "Kin Care" From Employees with Uncapped Sick Leave

By Cynthia L. Sands, Esq.

As any human resources manager in charge of employee leaves knows, sick leave can be a headache to calculate. Not only is there the task of applying the policy consistently, but there is the added difficulty of crafting and applying your sick leave policy to be in compliance with differing federal and state - and even city - laws. For example, some cities have laws that afford employees sick leave, paid or otherwise. California, which already has a reputation among some employers for having employee-friendly laws, is, unsurprisingly, no exception.

In 2002, California enacted Labor Code Section 233, which is referred to as California's "kin care" law. As with vacation time, there is no federal or California state law requiring employers to provide paid sick time. However, as a practical matter, many employers do so, often in the form of an annual allotment. Under the "kin care" law, if an employer provides for paid sick leave, the employer must then allow employees to use one-half of their accrued sick leave to care for their sick child, parent, spouse, registered domestic partner, or the child of a registered domestic partner. "Kin care" applies to all employers, and there is no

requirement that the individual needing the care have a serious illness.

Labor Code Section 233(a) provides that the amount of accrued sick leave available for "kin care" is "an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement..." Section 233(b) further defines "sick leave" to mean "accrued increments of compensated leave provided by an employer to an employee as a benefit of the employment for use by the employee during an absence from the employment."

But what if a California employer sought to lessen the complications of sick leave calculations by agreeing to an unlimited amount of sick leave? Last year, the California Supreme Court answered that question in *McCarther v. Pacific Telesis Group*, 225 P.3d 538 (2010). At issue was Pacific Telesis's "sickness absence" policy that provided an unlimited amount of sick leave pursuant to a collective bargaining agreement. The policy allowed employees to take up to five paid days per week if they became ill, with the only condition being that employees had to return to work for at least part of one day in order to be eligible for another five-day period. This policy in theory provided unlimited sick leave, but Pacific Telesis could discipline employees who had eight or more absences in a 12-month period without extenuating circumstances.

Two Pacific Telesis employees sued the company in 2005 for failing to pay them for sick leave under Labor Code Section 233. One employee sued because the company would not pay him for days he spent caring for his ill mother. The other employee sued because the company would not pay for the seven consecutive days she missed caring for her children. Pacific Telesis claimed it did not have to pay sick leave for these two employees because its "sickness absence" policy fell outside of the provisions of Labor Code Section 233 because the employees technically had no accrual of sick leave benefits.

In the trial court, Pacific Telesis moved for summary judgment and won, but the Court of Appeal overturned the summary judgment. The California Supreme Court reversed and agreed with the trial court. It said the legislature had chosen to limit the "kin care" entitlement only to employees of organizations that maintain capped sick leave policies. The court held that the "kin care" provision of Labor Code Section 233 applied *only* to policies that provide "accrued increments of compensated leave" and are not meant to apply to all types of sick leave policies. The Court recognized that where a sick leave policy was indefinite, "kin care" cannot be applied because it would be "impossible to determine the amount of compensated time off for illness to which an employee might be entitled in a six-month period."

It is important to note that while California does not require employers to provide sick leave for employees, some local governments do - notably San Francisco. Further, the *McCarther* decision does not affect covered employers' obligation to provide unpaid leave under the California Family Rights Act, Government

**GONZALEZ
SAGGIO
HARLAN**

Office Locations:

Arizona
California
Georgia
Illinois
Indiana
Iowa
Nevada
New Jersey
New York
Ohio
Tennessee
Washington D.C.
Wisconsin

www.gshllp.com

Code Section 12945.2, or the FMLA. These same complications apply in other states as well, as more states and cities pass local laws and ordinances that provide sick leave rights.

McCarther is a positive victory for employers, but it leaves open one of the issues raised in the case. Specifically, the Court of Appeal's opinion had held that Pacific Telesis was well within its rights to apply its attendance control policy to the use of sick leave to care for a relative when the company applied the policy to time off for an employee's own illness. Once the Supreme Court granted the petition for review, the Court of Appeal's opinion was vacated. Consequently, whether an employer could apply the same conditions to "kin care" as to sick leave for an employee's own illness remains unanswered and left, perhaps, to be answered in future litigation.

The 60-Second Memo is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Copyright 2011 Gonzalez Saggio & Harlan LLP. All rights reserved.