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DIVISION OF LABOR STANDARDS ENFORCEMENT  
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SUSAN A. DOVI  
Staff Attorney

October 11, 2016

Lawrence S. Branton  
Seltzer Caplan McMahon Vitek  
750 B Street, Suite 2100  
San Diego, CA 92101

Dear Mr. Branton:

Re: Healthy Workplace Healthy Families Act of 2014 – Calculating Payment of Paid Sick Leave - Exempt Non-Exempt Employees, Employees Paid by Commission

Your letter dated December 16, 2015, seeks clarification regarding which method of calculation for paid sick leave (PSL) as required by Labor Code section 246(k)(1); (2) & (3) should be used for employees paid by commissions and employees exempt from the payment of overtime. You ask whether an exempt employee who is paid almost entirely by commissions has to be paid a separate amount of PSL or whether amounts that an employee regularly receives in commissions which happen to be paid on a sick day would suffice.<sup>1</sup> Secondly, you ask for clarification regarding how to calculate PSL for an exempt employee who also receives an annual bonus at the end of each year.

Labor Code section 246(k) allows, as discussed below, an employer to pay PSL to an employee who is not exempt from overtime under the professional, administrative or executive exemption in one of two ways. The employer may calculate the regular rate of pay for the workweek in which the paid sick leave was taken (under (k)(1)) or the employer may calculate the total non-overtime earnings for the prior 90 days divided by the total hours for the prior 90 days (under (k)(2)). A non-exempt employee is paid based upon their total compensation which includes all forms of compensation (hourly, commissions, piece rate, incentive/performance bonuses).<sup>2</sup>

Answering your first question, computing the amount of PSL due to an employee who is paid almost entirely by commissions may be calculated by either method available under Labor Code

<sup>1</sup> The Labor Commissioner addressed a similar question in an Opinion Letter dated May 14, 1987. In the May 14, 1987 Opinion Letter, the Labor Commissioner stated that previously earned commissions paid while an employee was off work on unpaid leave did not constitute vacation pay. Rather, the letter reasoned that the compensation was earned while working. It was simply paid while the employee was off on an unpaid leave.

<sup>2</sup> For non-exempt employees paid by salary, the salary constitutes non-overtime pay. In calculating the regular rate under (k)(1), the salary is divided by non-overtime hours. When calculating total non-overtime earnings for the previous 90 days, the salary is divided by total non-overtime hours. Although the statute states that non-overtime pay should be divided by total hours under (k)(2) – that provision is only applicable when payment is made by commission, piece rate or bonus which require that total hours be used to calculate the regular rate of pay for the prior 90 days.

section 246(k)(1) or (2). Labor Code section 246(k)(3) would not apply to an employee paid almost entirely by commissions because that employee is not as we understand your letter, earning a salary of at least two times the minimum wage in addition to commissions.

At the outset it is important to understand that generally an employee paid almost entirely by commissions is only exempt from overtime if one's earnings exceed one and one-half times the minimum wage and more than one half of all compensation represents commissions for each pay period pursuant to Labor Code Section 515(b) and Section 3(D) of the Industrial Welfare Commission Orders, or if the employee qualifies as an outside sales person under Labor Code Section 1171 (and Section 1 (C) of the Industrial Welfare Commission Orders. Under both instances, employees are commonly understood to be "exempt" from different aspects of minimum labor standards (overtime or minimum standards under the IWC Orders, respectively). These two exemptions are independent exemptions which apply separately from paid sick leave requirements including the calculation for payment for sick leave taken by employees who receive commissions.

In Labor Code section 246(k), the reference to "exempt" and "nonexempt" employee for purposes of selecting the appropriate calculation under Labor Code section 246(k) refers to an employee who satisfies both the salary and duties tests in Labor Code section 515(a), and *not* to the outside sales exemption pursuant to Labor Code 1171 and Section 1(C) of the IWC Orders, nor to the overtime exemption for commissioned salespersons pursuant to Section 3(D) of the Wage Orders as authorized under Labor Code section 515(b).

To the extent there is ambiguity regarding the meaning of "exempt" in the calculation for paid sick leave in Labor Code section 246(k), intent can be ascertained from the statute's context and legislative intent. The language of Section 246 evidences an intent that the distinctions for how to compute PSL is based on whether an employee is exempt (paid a minimum salary for all hours worked and meets the duties test) as a professional, executive, or administrative employee and therefore meets the requirements of Labor Code section 515(a).<sup>3</sup>

When the Healthy Workplaces, Healthy Families Act of 2014 was amended by Assembly Bill 304 in 2015, the Legislature created flexibility by allowing employers to calculate a non-exempt employee's pay either by looking back 90 days and dividing total wages paid, excluding overtime pay, by total hours in the full pay periods in the prior 90 days of employment, or by using the regular rate of pay in the pay period in which the leave was taken. An analysis by the Senate Committee on Labor and Industrial Relations at the time AB 304 was being considered indicates that the language in Labor Code 246(k)(3) was meant to apply to an employee exempt as "administrative, executive, or professional". (See Senate Committee on Labor and Industrial Relations, Analysis, Hearing date July 8, 2015.)

Also, the same Legislative Committee Analysis described above also stated a concern regarding commissioned sales persons. The committee analysis stated that paid sick leave could be paid based on either the regular rate of pay in the pay period the paid sick leave is taken or the average pay for the prior 90 days for commissioned sales persons which is consistent with the view that the options provided in (k)(1) and (k)(2) would apply to a commissioned salesperson. This allows

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<sup>3</sup> The fact that an employee receives at least the minimum salary amount under Labor Code section 515(a) is not itself sufficient to qualify as an exempt employee because the duties test must also be met for an employee to be exempt for purposes of overtime and, as discussed in this letter, for calculation of PSL as well.

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employers to choose either method of calculating payment that would compensate the employee for the sick day but not lead to an inflated rate for the leave if, in fact, a payment was just received for commissions. The Analysis is attached here for your review.

Based on the above, in the first scenario you describe, employees who are paid by commissions must be paid according to Labor Code sections 246(k)(1) or(2).

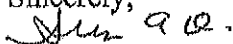
Secondly, you ask how an employee who is exempt and is entitled to a non- discretionary bonus is required to be paid for a sick day. Normally, an exempt employee would be entitled to continue to receive his or her full pay without deduction for a sick day of less than 8 hours but the day or partial day of sick leave may be deducted from earned or fronted leave balances. (See discussion regarding application of leave for exempt employees in DLSE Opinion Letter 2009.11.23, pp. 4-7).

If the employee is exempt under the administrative, executive or professional exemption and no leave time is provided for any other purpose, then normally the salary would continue without deduction for a sick day with the time applied against leave balances and tracked in accordance with Labor Code section 246(h). The non-discretionary bonus would not figure into the salary of an employee exempt under Labor Code section 515(a) because such bonuses are only figured into the pay of a non-exempt employee in order to determine the regular rate of pay for overtime and to figure the paid sick leave rate under Labor Code section 246(k)(1)-(2). Here, an employee who is exempt under the administrative, executive or professional exemption and uses a full sick day would be paid for an amount of pay which equals his or her regular salary for the sick day because the leave would be computed based on the regular salary, pursuant to Labor Code section 246(k)(3). For a full-time employee, the annual salary would be divided by 52 weeks and then by 5 days to determine the daily wage that would have to be paid for a sick day.

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

Thank you for your inquiry.

Sincerely,



Susan A. Dovi  
Attorney for the Labor Commissioner

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SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS  
Senator Tony Mendoza, Chair  
2015 - 2016 Regular

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Bill No: AB 304 Hearing Date: July 8, 2015  
Author: Gonzalez  
Version: June 22, 2015  
Urgency: Yes Fiscal: Yes  
Consultant: Alma Perez-Schwab

Subject: Sick leave: accrual and limitations.

KEY ISSUE

Should the Legislature amend the paid sick leave law enacted last year, which requires employers to provide specified employees with up to three days per year of leave, in order to address some stakeholder concerns and ensure proper implementation?

ANALYSIS

Under the existing Healthy Workplaces, Healthy Families Act of 2014, starting on July 1, 2015, an employee who works in California for 30 or more days within a year from the commencement of employment is entitled to *paid sick days* at the rate of not less than *one hour per every 30 hours worked*.

Among other things, the Act (Labor Code §245-249):

1. Authorizes the use of accrued paid sick days beginning on the 90<sup>th</sup> day of employment.
2. Allows employers to limit the use of paid sick days to 24 hours or three days per year.
3. Upon the oral or written request of an employee, requires an employer to provide paid sick days for:
  - a. Diagnosis, care, or treatment of an existing health condition of, or preventive care for, the employee or the employee's family member (*defined as a child, parent, spouse, registered domestic partner, grandparent, grandchild and sibling*).
  - b. For specified purposes, as defined, for an employee who is a victim of domestic violence, sexual assault, or stalking.
4. Prohibits an employer from denying an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with the department or alleging a violation of this article, cooperating in an investigation or prosecution of an alleged violation of this article, or opposing any policy or practice or act that is prohibited by this article.

This Bill would make a number of changes to the Healthy Workplaces, Healthy Families Act enacted last year. Specifically, this bill:

- 1) Provides that the definition of "employee" does not include specified retired annuitants.

- 2) Specifies that an "employee in the construction industry" means an employee performing work -- deleting the reference to "onsite work" in the current provisions of the law.
- 3) Specifies that the law applies to an employee who works in California "for the same employer" for 30 or more days within a year.
- 4) Provides that an employer may use a different accrual method, other than providing one hour per every 30 hours worked, provided that the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period.
- 5) Provides that an employer may satisfy the accrual requirements of this section by providing not less than 24 hours or three days of paid sick leave that is available to the employee to use by the completion of his or her 120th calendar day of employment.
- 6) Amends the law to specify that an employer is not required to provide additional paid sick days if the employer has a paid leave policy or paid time off policy, the employer makes available (beginning July 1, 2015) an amount of leave that may be used for the same purposes and under the same conditions, and the policy satisfies one of the following options:
  - a) Satisfies the accrual, carry over, and use requirements of the law.
  - b) Provided paid sick leave or paid time off to a class of employees before January 1, 2015, pursuant to a sick leave policy that used an accrual method different than providing one hour per every 30 hours worked, provided that the accrual is on a regular basis so that an employee, including an employee hired into that class after January 1, 2015, has no less than one day or eight hours of accrued leave within three months, and the employee was eligible to earn at least three days or 24 hours within nine months. If an employer modifies the accrual method used in the policy it had in place prior to January 1, 2015, the employer shall comply with any accrual method set forth in existing law or provide the full amount of leave at the beginning of the year. This bill shall not prohibit the employer from increasing the accrual amount or rate.
  - c) Provides that specified sick leave or annual leave benefits provided to specified state employees or officers by statute or the provisions of a memorandum of understanding meet the requirements of the paid sick day's law.
- 7) Provides that an employer is not required to reinstate accrued paid time off to a rehired employee that was paid out at the time of termination, resignation, or separation of employment.
- 8) Provides that if an employer provides unlimited paid sick leave or unlimited paid time off, the employer may satisfy a specified written notice requirement of existing law by indicating on the notice or the employee's itemized wage statement that such leave is "unlimited."

- 9) Delays application of provisions related to the inclusion of the amount of paid sick leave available on itemized wage statements or separate writings until January 21, 2016, for employers in the broadcasting and motion picture industries.
- 10) Provides that an employer shall calculate paid sick leave using any of the following calculations:
- a) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.
  - b) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
  - c) Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.
- 11) Provides that an employer is not obligated to inquire into or record the purpose for which an employee uses paid leave or paid time off.
- 12) Provides that the provisions of this bill are severable, as specified.
- 13) Contains an urgency clause.

### COMMENTS

#### 1. Need for this bill?

AB 1522 (Gonzalez), Chapter 317, Statutes of 2014, enacted the Healthy Workplaces, Healthy Families Act of 2014 to provide paid sick days to specified California employees effective July 1, 2015. AB 1522 was landmark legislation that extended the right to paid sick days to an estimated 6.5 million California workers. However, the passage of such a sweeping workplace benefit has spurred a robust public discussion regarding the implementation of the law. As such, the author wishes to clarify a handful of the law's requirements in order to ease implementation of California's new paid sick leave law.

This bill would amend the Act in order to provide clarification regarding which workers are covered, how the paid time off is accrued, and protections for employers that already provide paid sick leave. Previous versions of the bill were opposed by various employer organizations, however, the author and stakeholders were able to reach agreement on the language before us which has addressed most of the employer concerns. In a letter dated June 19, 2015, the California Chamber of Commerce and a coalition of employer organizations removed their opposition to the bill.

#### 2. Summary of changes to the Healthy Workplaces, Healthy Families Act of 2014:

Below is a summary of the changes to the paid sick law that are proposed with this bill:

*Conforms to State Law Governing CalPERS Retired Annuitants:* Under the Government Code, CalPERS retired annuitants are not allowed to receive any form of compensation in addition to their pay as it could affect their status under CalPERS. By exempting retired annuitants from the provisions of AB 1522, retired persons will be able to return to work while still receiving their pension annuity.

*Flexibility for Existing Paid Sick Leave Plans:* Prior to the signing of AB 1522, some employers were already engaged in the practice of providing paid leave or paid time off. This bill will clarify that employers are not required to provide additional paid sick days if the employer had a policy prior to January 1, 2015 that meets certain conditions, as specified.

*Alternative Accrual for Non-Hourly Payroll:* The payroll systems for many employers do not track their employees on an hourly basis. This bill will allow employers to comply with state law if they accrue or front-load their sick leave policies so employees receive three paid sick days by the 120th day of the year.

*Labor-Management Consensus in Specific Industries:* The motion picture and broadcasting industry commonly uses different third party payroll companies on each production. This bill will extend the start date for written notice requirements to January 21, 2016 as agreed to by both employer and labor representatives in the industry.

*Flexibility for Calculating Sick Pay:* Nonexempt employees often perform work at varying rates of pay, which can make it difficult to calculate the rates at which sick leave is paid to employees. This bill will allow employers to choose between the methodology required under AB 1522 as well as the "regular rate of pay" that is more familiar to many employers.

### 3. Remaining Concerns:

Committee staff has received information regarding some unresolved concerns with the provisions of the paid sick days law and its implementation. Specifically, stakeholders are seeking clarification in the following areas:

*Calculating Paid Sick Leave for Employees Working on Commission:* Concerns have been raised regarding the calculation of wages to be paid for an employee working on commission that takes their accrued paid sick days.

The bill provides that an employer shall calculate paid sick leave using *any* of the following:

- a) For nonexempt employees:
  - i) In the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not he/she works overtime in that week.
  - ii) By dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days.
- b) Paid sick time for exempt employees (*exempt as an administrative, executive, or professional employee under a wage order of the Industrial Welfare Commission*) shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

The concern is that an outside sales person that essentially sets their own hours and is highly compensated could 'game' the system by planning when to request the paid sick days in

order to get a higher rate by timing the receipt of their income. Staff was given the example of property and casualty insurance agents and brokers who are paid on commission and have both renewal income as well as income based on new sales closed during the year. As an example, they offer the following scenario: an employee that earns \$300,000 annually but takes a smaller monthly draw, say \$8,000 per month, but toward the end of the year draws down the remainder of the income owed would be able to game the system because the balloon payments toward the end of the year will allow that person (for the next 90 days) to request sick pay at a much higher rate than if the sick pay was determined based on the income paid over the entire 12 months.

This is a similar concern for employees who earn bonuses. Stakeholders would like the provisions to align to last year's regular rate of pay concept which stated, "If the employee in the 90 days of employment before taking accrued sick leave had different hourly pay rates, was paid by commission or piece rate, or was a nonexempt salaried employee, then the rate of pay shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment."

*Continuous 90-day employment:* Concerns have been raised by the City and County of San Francisco regarding an individual that works for an employer for part of the year, leaves that job and later in the year returns to work for the same employer. The concern lies in the ability of that employee to regain access to any balance paid sick days if they had such access at the time of separation. Specifically, the concern is that an employee might work for 30 days, then return 8 months later and the employer would have to stitch together the previous employment with the new employment to figure out when 90 days of employment is cumulatively met. They propose the following clarification: "246. (f)(2) If an employee separates from an employer 90 or more days after he or she was hired and is rehired by the employer within one year from the date of separation, previously accrued and unused paid sick days shall be reinstated..." They believe that this revision would allow the employee access to the balance but if the employee did not have access when he/she left, the clock would restart if rehired like any other new hire.

#### 4. Proponent Arguments:

According to the author, in order to help employers meet requirements, clarify provisions and ensure the smooth implementation of the Healthy Workplaces, Healthy Families Act of 2014, this bill aims to conform state law governing CalPERS retired annuitants, provide flexibility for existing paid sick leave plans, allow for alternative accrual for non-hourly payroll, provide for labor-management consensus in specific industries, allow for flexibility in calculating sick pay for nonexempt employees and make a number of minor changes that are clarifying and technical in nature. Proponents state that this bill makes important changes to the sick leave law so that its provisions work better for employers and workers and facilitate an orderly implementation.

#### 5. Opponent Arguments:

None received.



6. Prior Legislation:

**AB 11 (Gonzalez) of 2015:** Held in Assembly Appropriations Committee  
AB 11, effective July 1, 2016, would extend the provisions of paid sick days legislation enacted last year to include providers of in-home supportive services, as described.

**AB 1522 (Gonzalez) of 2014:** Chaptered  
AB 1522 enacted the Healthy Workplaces, Healthy Families Act of 2014 (discussed above) which requires employers to provide paid sick days to employees who work 30 or more days within a year from commencement of employment.

**SUPPORT**

Air Conditioning Sheet Metal Association  
Air-Conditioning & Refrigeration Contractors Association  
Brocade Communications Systems, Inc.  
California Chapters of the National Electrical Contractors Association  
California Employment Law Council  
California Legislative Conference of the Plumbing, Heating, and Piping Industry  
California State Association of Counties  
Finishing Contractors Association of Southern California  
League of California Cities  
Motion Picture Association of America  
State Building and Construction Trades Council  
United Contractors  
Wall and Ceiling Alliance  
Wine Institute

**OPPOSITION**

None received

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