

ASAPs

California

California Court of Appeal Interprets "Kin Care" Provisions for the First Time

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NOTE: The California Supreme Court has granted review to *McCarther v. Pacific Telesis Group* and the case is no longer citable as precedent. A decision by the California Supreme Court is likely in 2009.

In *McCarther v. Pacific Telesis Group*, No. A115223 (May 23, 2008), a case of first impression, a California Court of Appeal held that California's kin care statute – Labor Code section 233 – applies where an employer provides employees with an indefinite number of paid sick days on an as-needed basis. In essence, the court held that whenever an employer provides paid sick leave, it must comply with kin care obligations – no matter how it structures and calculates the sick leave entitlement.

The court also considered Labor Code section 234, which regulates employer absence control policies that discipline employees for using kin care. The court held that section 234 does not require special treatment of kin care for attendance discipline purposes. As long as employers treat kin care leave the same as sick leave in terms of discipline and attendance issues, they are in compliance with the law.

Factual and Procedural Background

Pursuant to a collective bargaining agreement, the defendant employers provided their employees an indefinite number of paid sick days. Employees could receive paid sick leave every time they missed work for their own illness up to a maximum of five paid days in any seven-day period. The sickness absence policy did not contain an annual cap or limit on the total number of days that an employee could miss work with pay.

The employers also implemented an attendance management policy that counted employees' sick days as an "occurrence" unless the employee used Paid Time Off or the absence fell within certain designated types of protected leave, including Family and Medical Leave Act leave and worker's compensation leave.

Employees exceeding the number of allowed attendance "occurrences" in a 12-month period were disciplined under the employer's progressive discipline policy, which could ultimately result in termination.

In this case, the plaintiffs took leave to care for ill family members under the kin care statute but were not paid for these days. The employers argued that the kin care provisions in Labor Code 233 only applied to traditional sick leave policies where an employee accrues a fixed number of sick days over the course of a year and not where employees are allowed an indefinite number of sick days. The lower court granted summary judgment in favor of the employers.

Court of Appeal's Analysis

When Leave "Accrues"

Under Labor Code section 233, an employee may use "accrued" sick leave to care for a covered relative. The court clarified that sick leave counts as accrued leave under section 233 whenever the employee receives the right to take sick leave under the employer's policy, even if the leave did not accrue over the course of the year and even if the total amount of sick leave is indefinite.

Attendance Policies

California Labor Code section 234 provides that if an employer has an absence control policy that disciplines an employee for using kin care leave under section 233 or otherwise treats the kin care as something that could lead to discipline, the employer automatically violates section 233. The employers argued that they should not have to comply with the kin care obligations because if they applied, section 234 would prohibit them from ever disciplining an employee for using kin care and could lead to a situation where an employee missed months of work for kin care without consequence.

The court rejected that argument. The court held that nothing in section 234 prohibits an employer from regulating kin care leave, but it only allows such regulation on the same grounds as the employer regulates regular sick leave. An employer may impose attendance penalties or discipline on employees for the use of kin care leave as long as it would impose the same penalties or discipline for regular use of sick leave. An employer only violates the law when it penalizes employees more harshly for kin care absences than for sick leave absences for an employee's own illness or injury.

Practical Implications

The court's interpretation of Labor Code section 233 will have little practical affect for employers who provide their employees with a definite number paid sick days.¹ However, employers that are not currently complying with California's kin care provisions because their employees' sick leave does not accrue in increments over time or does not provide a definite amount of sick days should immediately modify their policies and practices.

The court's clarification on Labor Code section 234 will have greater impact. Many California employers have been operating under the assumption that kin care is a protected leave that must be excluded from their attendance policies in the same manner as CFRA and FMLA leave. The court opened the door for employers to impose discipline for excessive kin care absences so long as their attendance policies apply the same standards to kin care and the employee's own sick leaves of absence.

¹ Under current law, a private employer has no legal obligation to provide employees with paid sick leave. The California legislature is, currently, considering A.B. 2716, which would impose an obligation to provide paid sick leave to all employees in the state. Such a bill would have far reaching implications, including guaranteeing all employees at least some kin care leave.

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