ALERTS AND UPDATES

California Supreme Court Rules "Kin Care" Law Inapplicable to Leave Plans Providing Unlimited or Uncapped Paid Sick Time

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California Labor Code section 233 states that employers providing employees with paid sick leave must allow employees to use, in any calendar year, the amount of sick leave that would be accrued during six months at the employees' then-current rate of entitlement, for care of an ill child, parent, spouse or domestic partner. An additional condition is that the amount of time to be used must have actually been accrued—and the law does not require the employer to provide "advances" on paid sick time. In the past, many employers provided paid sick time, but their policies maintained that paid sick time was to be used only for the employee's own illness. Labor Code section 233 required a change for those employers, and up to half of employees' annual sick-time accrual could be used to attend to a sick family member, as long as the time was already accrued and available for use.

Some employers had what may be viewed as generous policies, in which employees were provided with an unlimited number of sick days for their own illnesses. This raised the question: How much of the "unlimited" sick time, if any, could be used by the employee to attend to a family member's illness? Labor Code section 233 defines "sick leave" as "accrued increments of compensated leave." If the increments are unlimited, are they "accrued"?

In *McCarther v. Pacific Telesis Group, et al.*,[1] decided on February 18, 2010, the California Supreme Court held that Labor Code section 233 applies only to employers who provide their employees with "a measurable, banked amount of sick leave." The sick-leave plan in this case allowed for employees to be compensated for up to five consecutive days of absence due to personal illness. If employees returned to work, their entitlement to another five days of sick pay would renew, and it would renew after every personal illness absence that was followed by a return to work. The only limitation on the employees' use of the sick-leave plan was a separate "attendance management policy," which provided for discipline at various levels of cumulative absence.

In *McCarther*, the plaintiffs were not compensated for time they were absent to care for sick family members. They contended that such absences should have been compensable under Labor Code section 233, even though the amount of sick leave to which employees would be entitled in a six-month period was not calculable with any mathematical certainty.

The court noted that the structure of the plan—which placed a cap on the number of compensable days within a seven-day period (*i.e.*, five)—did not allow for a calculation of a specific number of days the employee would be able to take within a six-month period. Engaging in a detailed analysis of the meaning of "accrued," the court concluded that the plan in question was not an accrual or accumulation plan.

While the court noted that the California State Legislature's intention in enacting Labor Code section 233 was to protect employees, it also maintained that employers are not required to provide paid sick time under current state law, though some municipalities require it. The court also noted that an employer is within its rights to provide employees with uncapped sick time for their own illnesses, and to require employees to use personal days or vacation time if they wish to be compensated for days lost due to family members' illnesses.

What This Means for Employers

Employers with California employees who have paid sick-leave policies may want to review those policies and revise them, if necessary. "Traditional" sick-leave policies that provide employees with a finite number of paid sick days in a given year *are* subject to Labor Code section 233. However, the court's ruling in *McCarther* indicates that employers wishing to maintain limitless or uncapped paid sick leave may do so without the risk of being required to allow employees to take unlimited paid-time off to care for family members. This may be an issue worth considering for employers that provide unlimited paid-sick time for employees and are FMLA employers. Before *McCarther*, it was possible for employees taking FMLA to care for a family member to seek 12 weeks of paid leave, if the employer had an unlimited sick-time policy. Relatively few employers have such unlimited policies. The decision in *McCarther* underscores that employers may want to review the language of their paid sick-leave policies and determine whether their policies are subject to Labor Code section 233.

However, the direct application of this case is likely to be limited, since relatively few employers provide their employees with unlimited, paid sick days for the employees' own illnesses. The case appears to create a potential inconsistency—employers who provide workers with a finite number of paid sick days must allow them to use half of those days to attend to sick family members, while employers who provide unlimited paid sick days do not have this obligation. This issue may be reconciled by the fact that employers are not required to give paid sick days and can determine the terms upon which they will provide such time, subject to state and local laws. The decision in *McCarther* may encourage the implementation of legislation requiring all employers to provide a finite number of paid sick days to attend to family.

For Further Information

If you have any questions about this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

Note

1. *McCarther v. Pacific Telesis Group, et al*., 2010 Cal. LEXIS 1050 (Cal. Feb. 18, 2010).