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PERSPECTIVE

The good, the bad and the ugly of new sick leave guidance

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As California employers settle into their second year of complying with California's paid sick leave law — the Healthy Workplace Healthy Family Act of 2014 — they continue to grapple with questions regarding how to calculate paid sick leave for commissioned and exempt employees. Shedding light on those questions, the office of the California labor commissioner for the Division of Labor Standards Enforcement (DLSE) released a new opinion letter in October, which clarifies the methods for calculating paid sick leave for such employees. This much-needed guidance from the DLSE addresses two important issues: How should an employer calculate paid sick leave for exempt employees who are almost entirely paid by commissions, and should an employer consider nondiscretionary bonus payments when calculating paid sick leave for exempt, salaried employees?

California's paid sick leave law distinguishes between exempt and nonexempt employees for the purpose of calculating paid sick leave. Labor Code Section 246(k). The code requires employers to pay nonexempt employees for paid sick days taken at the employee's "regular rate of pay." A nonexempt employee's regular rate of pay is determined by adding together the employee's total remuneration as defined by state and federal law (e.g., regular hourly wages, commission, piece rate, incentive/performance bonuses, etc.).

Section 246(k) of the California Labor Code requires employers to use one of two methods for calculating paid sick leave for nonexempt employees. The first method calculates paid sick time owed to nonexempt employees in the same manner as the "regular rate of pay" for the workweek in which the employee uses paid sick time, regardless of whether the employee actually works overtime in that workweek. Section 246(k)(1).

The second method calculates paid sick time owed to nonexempt employees by dividing the employee's total wages (excluding overtime premium pay) by the total hours worked during the full pay periods in the 90 days preceding the employee's use of paid sick leave. Section 246(k) (2).

This much-needed guidance from the DLSE addresses two important issues: How should an employer calculate paid sick leave for exempt employees who are almost entirely paid by commissions, and should an employer consider nondiscretionary bonus payments when calculating paid sick leave for exempt, salaried employees?

In contrast, Section 246(k) (3) identifies a third method for calculating paid sick leave for exempt employees — in the same manner as the employer calculates wages for other forms of paid leave time. Simple, right? Not so much.

The Bad and the Ugly

The new DLSE opinion letter aggressively interprets Labor Code Section 246(k) to require employers to treat exempt employees who are paid by commissions as if they were nonexempt for the purpose of calculating paid sick leave. In other words, even if employees who earn commissions are classified as exempt under the inside or outside sales exemption, the DLSE has taken the position that employers are nonetheless required to calculate the employees' "regular rate of pay" using either method one or two.

According to the DLSE, method three does not apply to exempt commissioned salespeople — it only applies to employees that are classified as exempt under the administrative, professional, or executive exemptions. The DLSE bases its novel interpretation of Section 246 on a legislative committee analysis that briefly mentioned (in a parenthetical) that the calculation in method three only applies to employees who satisfied one of the three so-called white collar exemptions.

This is a significant departure from the plain language of the statute. In other words, this is "the bad and the ugly" part of the DLSE opinion letter. If the Legislature had intended to require employers to use the nonexempt calculation methods to calculate paid sick leave for certain exempt employees, it could have

expressly included such a provision in the statute. The DLSE's decision to require employers to apply the nonexempt calculation to exempt salespersons will significantly increase the cost of providing paid sick leave to such employees during times in which they receive large commission or bonus payments.

The DLSE's opinion letter also creates incentives for opportunistic employees to creatively plan the timing of their paid sick leave requests in order to capitalize on a recent commission or bonus payment in order to secure an inflated paid sick leave payment. The only comfort for employers is that they can still calculate paid sick leave based on an average of the employee's earnings during the full pay periods in the preceding 90 days (method two).

The Good

And now, the good news. The DLSE's opinion letter helpfully concludes that nondiscretionary bonuses paid to exempt (administrative, professional, executive) employees need not be included in calculating paid sick leave for an exempt employee. According to the DLSE, an employer should simply divide an exempt employee's annual salary by 52 weeks and then by five days in order to calculate the daily wage owed to such an employee for a day of paid sick leave under method

three. This calculation does not change even if the exempt employee received a nondiscretionary bonus. As a result, the DLSE opines that an exempt employee who uses paid sick leave will simply be paid his or her normal salary without a deduction from that salary for the sick day and the sick day will be applied against the exempt employee's paid sick leave balance.

While the DLSE letter delivers a mixed dose of disconcerting and helpful guidance, it may ultimately have little effect in a court proceeding. As the court recently emphasized in *Alvarado v. Dart Container Corp.*, 243 Cal. App. 4th 1200 (2016), "DLSE opinion letters are not controlling upon the courts as binding legal authority," nor are they entitled to "judicial deference." Nonetheless, although the DLSE opinion letter does not constitute binding legal authority, it does provide insight to employers regarding how the DLSE will interpret and enforce the law if an employer is involved in an audit or proceeding before the DLSE.

Moreover, a California court could adopt the logic outlined in the DLSE opinion letter and interpret the California paid leave law similarly. Employers are cautioned therefore to review their practices for calculating paid sick leave in light of this development.

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