SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1359 (Schiavo)
Version: June 26, 2023
Hearing Date: July 11, 2023
Fiscal: Yes
Urgency: No
ID

SUBJECT

Paid sick days: health care employees

DIGEST

This bill provides for one hour of unpaid sick leave per 30 days of employment, or four days of unpaid sick leave a year, for employees of specified healthcare facilities, in addition to the paid sick leave currently available by law.

EXECUTIVE SUMMARY

Under current California law, workers are only guaranteed three paid days of sick leave a year. The federal government only guarantees unpaid sick leave, and under very narrow circumstances. This lack of significant guaranteed time off for illness was exacerbated by the COVID-19 pandemic, when a highly contagious respiratory illness that posed the risk of complications and death for many spread across the United States and the globe. Healthcare workers were on the frontlines in the fight against COVID-19. While federal and state laws were passed in response to the pandemic to provide more than the three days sick leave otherwise allowed under law, those laws now all have expired. Yet COVID-19 continues to exist in California communities, and healthcare workers continue to risk illness on a daily basis at work. Recognizing this fact and the importance of preventing the further spread of illness at healthcare facilities, AB 1359 aims to provide an additional four days a year of unpaid sick leave to healthcare workers at specified healthcare facilities. It also allows for this sick leave to carry over to subsequent years, as specified, and provides employees with a private right of action to recoup damages suffered as a result of an employer's violations of the bill's provisions.

AB 1359 is sponsored by SEIU California, and is supported by AFSCME and the California Long-term Care Ombudsman Association. It is opposed unless amended by the California Hospital Association. This bill passed out of the Senate Labor, Public Employment and Retirement Committee on a vote of 4 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

1) The Healthy Workplaces, Healthy Families Act of 2014, provides, with limited exceptions, that an employee who works in California for 30 or more days for an employer within a year is entitled to paid sick days for specified purposes, to be accrued at a rate of no less than one hour for every 30 hours worked, and to be available for use beginning on the 90th day of employment. (Labor Code § 246.)

2) Authorizes an employer to use a different accrual method than providing one hour for every 30 hours worked, as long as an employee has no less than 24 hours (or three days) of accrued sick leave by the 120th calendar day of employment or each calendar year, or in each 12-month period. (Labor Code § 246(b)(3).)

3) Provides that an employer has no obligation to allow an employee's total accrual of paid sick leave to exceed 48 hours or six days, provided that an employee's rights to accrue and use paid sick leave are not otherwise limited, as specified. (Labor Code § 246(j).)

4) Requires that unused sick leave carry over to the following year of employment, but permits an employer to limit the use of the carryover amount, in each year of employment, calendar year, or 12-month period, to 24 hours or three days. (Labor Code § 246(d).)

5) Specifies that in-home supportive services providers, as defined, accrue sick leave in accordance with a schedule that is based on the timeline for state minimum wage increases up to a maximum of 24 hours or three days when the minimum wage reaches 15 dollars per hour. (Labor Code § 246(e).)

6) Requires an employer, upon the oral or written request of an employee, to provide paid sick days for the following purposes:
    a) diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member;
    b) for an employee who is a victim of domestic violence, sexual assault, or stalking, as specified. (Labor Code, § 246.5.)

7) 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 or attempting to use accrued sick days (Labor Code §246.5)

8) Prohibits an employer from requiring as a condition of using paid sick days, that the employee find a replacement worker. (Labor Code § 246.5(b).)

9) Establishes a rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use accrued sick days, discharges, threatens to discharge, demotes, suspends, or in any manner discriminates against an employee within 30 days of any of the following:
    a) the filing of a complaint by the employee with the Labor Commissioner alleging a violation, as specified;
    b) the cooperation of an employee with an investigation or prosecution of an alleged violation, as specified; and
    c) the opposition by the employee to a policy, practice, or act that is prohibited, as specified. (Labor Code, § 246.5 (c)(2).)

10) Exempts an employee covered by a valid collective bargaining agreement from these provisions if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate. (Labor Code § 245.5(a)(1).)

11) Provides that the Labor Commissioner shall enforce the provisions of the code related to sick leave, including by investigating an alleged violation, ordering appropriate temporary relief, issuing citations, or filing a civil action against an employer. Specifies that the procedures for issuing, contesting, and enforcing judgements for citations and civil penalties issued by the Labor Commissioner shall be the same as specified in Section 98.74 or 1197.1. (Labor Code § 248.5(a).)

12) Provides that the Labor Commissioner, if it finds a violation of the sick leave provisions, may order appropriate relief, including reinstatement, backpay, payment for sick days unlawfully withheld, and the payment of an administrative penalty, as specified, to the employee whose rights were violated. (Labor Code § 248.5(b).)

13) Provides that the Labor Commissioner shall award interest on all amounts due and unpaid at an interest rate as specified in subdivision (b) of Civil Code Section 3289. (Labor Code § 248.45(f).)

14) Provides that the Labor Commissioner may order the violating employer to pay for the costs of investigating or remedying the violation, as specified. (Labor Code § 248.5(c).)

This bill:

1) Guarantees for healthcare workers at specified healthcare facilities four unpaid sick days of leave a year, in addition to guaranteed paid sick days required by law.

2) Specifies that, if the healthcare facility has a paid leave policy, an employee must be allowed to use their available paid leave under that policy during the four unpaid days guaranteed by this bill.

3) Specifies that healthcare facilities cannot limit an employee's use of their unpaid sick leave.

4) Specifies that healthcare worker sick leave shall carry over to the following year, unless the leave is made available in full at the beginning of each year of employment, calendar year, or 12-month period.

5) Defines various healthcare facilities and centers to which this policy applies.

6) Provides that a healthcare employee may bring a civil action in a court of competent jurisdiction against an employer for a violation of the provisions of this bill, and upon prevailing in their suit, be entitled to legal and equitable relief, including backpay, pay for sick days unlawfully withheld plus interest, reinstatement, or injunctive relief. Provides that an employee that prevails in such a suit shall be entitled to recover reasonable attorney's fees and costs.

COMMENTS

1. Author's statement

According to the author:

> We depended on healthcare workers throughout the pandemic and we will always look to them for assistance. It wasn't right to limit their sick days, but we intend to fix this issue with AB 1359. Giving our healthcare workers 7 sick days and the ability to defend that right in court will be a huge step forward ensuring they can take the necessary relief time to provide high-quality care for their patients.

2. Sick leave currently guaranteed by law

Federal law does not require employers to provide any paid sick leave to their employees. The Family Medical Leave Act, while providing up to 12 weeks of unpaid leave, is only available for illness if a worker has a defined serious health condition, and does not apply to every employer or employee. (29 U.S.C. §§ 2601-2654.) Where the Federal government has failed, California has stepped up. In 2014, the Legislature passed the Healthy Workplaces, Healthy Families Act (Gonzalez, Ch. 317, Stats. 2014), providing employees with paid sick leave at a rate of one hour per every 30 hours worked and a possible maximum of 24 hours (three days) each year of employment. Some employers provide additional sick leave, but they are not required to do so. While California's paid sick leave is an improvement from the lack of federal guarantees, it is

well behind that of other states. New Mexico, the state that provides the most paid sick days in the United States, provides 64 hours of leave, and the majority of states that provide sick leave provide between 40 and 48 hours.[1] Furthermore, a study shows that there are incredible disparities in sick leave access by income; while 87 percent of private-sector workers in the top 10 percent of wages earn sick days, only 27 percent of such workers in the bottom 10 percent receive sick days.[2]

When the COVID-19 pandemic began, hospitals were overwhelmed. The coronavirus was incredibly transmissible, often evaded detection for many days, and remained capable of being spread for two weeks or more after infection. It also often made those who caught it quite ill, and some experienced ongoing symptoms known as "long COVID." In total, over 1 million people have died from coronavirus in the United States since the pandemic began.[3]

Recognizing these facts and that hospitals and their workers needed to be able to prevent the spread of the virus in American communities and their hospitals, the federal government passed the Families First Coronavirus Response Act to require certain employers to provide two weeks at least of paid sick leave for specified reasons related to COVID-19. The FFCRA ended on December 31, 2020. California went further by providing its own supplemental paid sick leave, providing 80 hours of supplemental paid sick leave for food sector and healthcare workers. When that program expired, the state passed a number of other laws to extend Supplemental Paid Sick leave, considering that the COVID-19 pandemic was not over. The last extension expired December 31, 2022.

3. AB 1359 would provide additional guaranteed days of unpaid sick leave for healthcare workers

In light of the recent expirations of COVID-related sick leave, California healthcare workers are back to only three days of paid sick leave, while nonetheless still dealing with COVID-19. As the sponsor argues, healthcare workers continue to get sick and not have enough sick days to adequately take time off to recover. AB 1359 attempts to provide healthcare workers some relief by guaranteeing workers four extra days of sick leave a year. Unlike the guaranteed paid sick leave currently provided by California law, the sick leave provided under AB 1359 would be unpaid. Nonetheless, it would

[1] Hannah Orbach-Mandel, "California Workers Left Behind Due to Inadequate Paid Sick Leave," California Budget and Policy Center (May 2023), available at https://calbudgetcenter.org/resources/california-workers-left-behind-due-to-inadequate-paid-sick-leave/.
[2] Elise Gould & Jessica Schieder, "Work sick or lose pay? The high cost of being sick when you don't get paid sick days," Economic Policy Institute (June 28, 2017), available at https://www.epi.org/publication/work-sick-or-lose-pay-the-high-cost-of-being-sick-when-you-dont-get-paid-sick-days/.
[3] "COVID Data Tracker," U.S. Center for Disease Control (Jun. 24, 2023), available at https://covid.cdc.gov/covid-data-tracker/#datatracker-home.

allow healthcare workers to take time off when they are sick beyond the time they currently are provided under law, and would prohibit their employers from disciplining them for doing so.

AB 1359 also provides a number of protections for the use of the sick leave it provides. It states that an employee who has a paid sick leave plan provided by their healthcare facility employer must be allowed to use any accrued paid sick leave under their policy during the four additional days provided by AB 1359. This would ensure that an employer's paid sick leave program is only additional coverage over what's provided under the law, and not a way of circumventing the guaranteed sick days provided by law. If an employer provides paid sick leave but limits the number of days that an employee can take off with that sick leave per year, they would still be able to utilize the four additional days provided by AB 1359. Moreover, AB 1359 explicitly states that an employer shall not limit an employee's use of their sick leave. This provision is ostensibly aimed at preventing an employer from creating technical or administrative barriers to an employee's use of the sick leave they are guaranteed. Lastly, AB 1359 aims to ensure that employees do not have to wait for sick leave to accrue, by guaranteeing four days per year and an one for every 30 days of employment. It provides that extra sick leave must either carry over from year to year, or that an employer make sick leave amounts available in full at the start of each year. This would help ensure that an employee can use their guaranteed sick leave whenever they need it and not have to wait to have sufficiently accrued enough leave. If an employee is not ill during the year and not in need of their sick leave, that leave carries over to the next year.

While the COVID-19 pandemic may have been declared over, the coronavirus is still here, and healthcare workers continue to be on the front lines of the fight against the virus and other deadly illnesses or future pandemics. As frontline workers, healthcare workers will remain the most susceptible to illness, and will likely continue to need additional sick time off to account for the fact that they may catch illnesses more frequently due to this exposure. Moreover, to be able to do their jobs protecting communities, prevent the further spread of viruses, and remain healthy, healthcare workers need the ability to take time off work when they are ill. Doing so will help them recover and keep up the highest quality, essential work, and will help medical environments prevent being the source of further spreading of disease. AB 1359 helps ensure this by giving healthcare workers protection when they need to take time off when they are ill.

4. <u>AB 1359 could be enforced by civil suit in a court of competent jurisdiction</u>

AB 1359 also provides for a mechanism through which employees could enforce their right to sick leave. Its provisions allow for an employee of a covered healthcare facility to bring a civil action against their employer for a violation of the bill's provisions. It specifies the remedies that an employee shall be entitled to upon prevailing: legal or equitable relief, reinstatement, backpay, payment for sick days unlawfully withheld

plus interest, and appropriate injunctive relief. If an employee prevails, they should also be entitled to recover reasonable attorney's fees and costs. AB 1359 specifies that these rights and remedies are cumulative and nonexclusive, such that an employee wronged may be able to recover whatever of the available remedies to which they are entitled.

The new provisions added by AB 1359 could also be enforced by the Labor Commissioner, as section 248.5 of the Article of the code within which AB 1359's provisions will be added provides for enforcement by the Labor Commissioner. (Labor Code § 248.5.) The Labor Commissioner is authorized by section 248.5 to order the same remedies for a violation as the enforcement provisions of AB 1359 allow, except that it also allows the Labor Commissioner to order an administrative penalty for such violation. (Labor Code § 248.5(b)(1).)

It should also be noted that the provisions of AB 1359 could also in theory be enforced through a suit under the Private Attorneys General Act (PAGA). That is because the new sections of law it creates are within the Labor Code and enforceable by the Labor Commissioner, and PAGA by its provisions applies to all sections of the labor code that provides for a civil penalty enforceable by the Labor and Workforce Development Agency or any of its departments. (Labor Code § 2699(a).) However, by PAGA's own provisions, a claim may only be brought under PAGA if the Labor Commissioner does not bring a claim for civil penalties itself.

One of the arguments the opposition to AB 1359 has raised is that its provisions providing for relief through a civil action by the wronged employee would allow an employee to sue their employer twice – once through the provisions of the bill and once through PAGA – for the same violation. Such an argument fails on multiple fronts. First, common concepts of res judicata and issue and claim preclusion would still apply if ever there are multiple suits arising out of the same violations of law. Case law has established that issue preclusion mandates that, if a plaintiff fails to establish a violation of labor law occurred on the merits, they will be precluded from bringing a PAGA claim based on the same alleged violation. (*Rocha v. U-Haul Co. of California*, 88 Cal. App. 5th 65 (2023).) In *Rocha*, the plaintiff employee was precluded from pursuing a PAGA claim brought with individual claims because they had received a finding from an arbitrator of the individual claims that there had been no violation of their labor law claims. Claim preclusion similarly would bar subsequent suits based on the same violations if not raised in the original suit that was concluded on the merits. Thus, despite opposition's claim that including a private right of action in AB 1359 would result in plaintiffs bringing multiple causes of action for the same violation, current legal concepts already would prevent claimants from retrying or collecting twice for the same violation.

Furthermore, it should be clarified that the provisions of AB 1359 providing a private right of action do not provide for civil penalties; thus, such a suit would be for different remedies and purposes than would be a PAGA suit. PAGA suits are specifically for civil

penalties. Damages, as are provided under the provisions of AB 1359, are meant to redress the harm done to the aggrieved party and make them whole, while civil penalties are aimed at discouraging future bad behavior through set punitive fines. These are substantively different remedies. As California Courts have said, PAGA "is legally and conceptually different from an employee's own suit for damages and statutory penalties. […] Relief under PAGA is designed primarily to benefit the general public, not the party bringing the action." (*Kim v. Reins International California Incorporated*, 9 Cal.5th 73, 82 (2020).) That is to say, "civil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones,' not to redress employees' injuries." (*Id.* at p. 86.)

Ultimately, the opposition's main concerns here appear to be with the overall availability and existence of PAGA suits, not the design of AB 1359 itself. There are numerous instances throughout the labor code where PAGA is available, along with a separate private right of action.[4] Thus, AB 1359's arrangement is not uncommon or uniquely punitive in the labor code.

5. Arguments in support of AB 1359

According to SEIU California, which sponsored AB 1359:

> […] Sick leave is critical to ensure that healthcare workers can take the necessary time to care for themselves and their families to be able to provide quality care to their patients.
>
> During the COVID-19 pandemic, the Federal Government established supplemental sick leave protections for workers to allow them to follow public health guidelines and isolate to slow the spread of COVID-19. However, the federal government excluded healthcare workers under the Families First Coronavirus Response Act. Implementing emergency paid sick leave through the Families First Coronavirus Response Act prevented 400 COVID-19 cases per day in each state that previously had lacked paid sick days laws. California stepped in and extended state-level COVID-19 supplemental leave to healthcare workers. After multiple renewals, the COVID-19 supplemental leave expired in December 2022. However, COVID-19 has not disappeared, and hospitalizations and the mental strain on the workforce continue.
>
> Due to the nature of the healthcare industry, which includes long hours in high-stress environments with regular exposure to infectious diseases, physical strain, and mental exhaustion, healthcare workers are regularly put in a position where their critical thinking and decisions are life or death for patients. It is incumbent on healthcare workers to ensure that they are able to perform their functions in service

[4] *See e.g.,* Labor Code § 1194(a).

to their patients. However, some healthcare employers have created policies that discipline workers and, in some cases, terminate workers when those workers act in the patient's interest and take accrued sick leave. Ensuring that workers can take a minimum number of days off will protect not just healthcare workers' livelihoods but also the health and well-being of the patients that we serve.

Current California law does not allow a disciplined or terminated employee to take legal action against an employer for taking accrued sick leave. Healthcare workers deserve the time necessary to recuperate from sickness and the ability to defend their right to take it.

AB 1359 is a modest approach that ensures that healthcare workers can take sick leave without fearing discipline or termination. Our patients expect our healthcare workers to provide quality care, which is limited when a healthcare worker is forced to show up when sick or injured. AB 1359 will ensure that healthcare workers can take up to 7 days of leave due to illness.

According to the American Federation of State, County, and Municipal Employees (AFSCME), which supports AB 1359:

During the COVID-19 pandemic, the Federal Government established supplemental sick leave protections for workers to allow them to follow public health guidelines and quarantine to slow the spread of the disease. Unfortunately, the federal government excluded healthcare workers under the Families First Coronavirus Response Act. The State of California intervened to extend the state-level COVID-19 supplemental leave to healthcare workers. After several renewals, the supplemental leave expired but the threat of the virus remained.

In addition to the potential risk posed by coronavirus, healthcare work requires long hours in high-stress environments with regular exposure to infectious diseases, physical strain, and mental exhaustion. Healthcare workers are expected to make crucial and lifesaving decisions under these stressful conditions, but they cannot perform if they are battling their own exhaustion and illnesses. Additionally, healthcare workers provide care to sick and injured individuals. Expecting them to work while sick puts their patients in danger.

Unfortunately, some healthcare employers have created policies that discipline or even terminate workers who choose to take accrued sick leave in the interest of keeping patients safe. Moreover, current law does not allow a disciplined or terminated employee to take legal action against an employer for taking sick leave.

Assembly Bill 1359 will give health workers additional sick days to perform the best for their patients. This bill will require healthcare employers like hospitals, clinics, and nursing homes to 1) Provide fifty-six hours or 7 days per year in 2024 of sick

leave. 2) Allow a healthcare employee to bring a civil action against an employer who unlawfully disciplines or terminates an employee due to the use of their accrued sick leave. This will help combat the disciplinary actions taken against workers who have taken accrued sick leave.

Though it seems the worst of the COVID-19 pandemic is over, the threat of exposure is still very real and the most vulnerable of us must remain vigilant and protected. California's healthcare workers have worked tirelessly to preserve life and ensure that patients are properly treated and deserve humane treatment.

6. Arguments in opposition to AB 1359

According to the California Hospital Association, which opposes AB 1359:

As drafted, AB 1359 prohibits a health facility from placing any limits on the use of accrued sick leave. While some protections on the use of sick leave may be appropriate, a total bar creates significant issues for employers. For example, what if an employee is using sick leave to work for another employer? Or what if an employee is using sick leave as a supplement for vacation? Neither of these uses are in alignment with the goals of sick leave, yet both are permissible under AB 1359. [….]

Under existing law, there are clear guidelines on how sick leave must be accrued. Specifically, existing law permits an accrual rate of one hour of sick leave for every 30 hours worked. This provides clear guidance for the handling of non-traditional employment, like part-time employees or per diem employees. Particularly in the case of per diem employees, who might only work once per year, this guidance was critical to ensure compliance with the law. AB 1359 is silent on accrual rates, leaving health care providers in the dark on how much sick leave to provide part-time or per diem employees. [….]

This bill includes uniquely punitive enforcement language. As the legislation creates new provisions in state Labor Code, the sick leave provided by AB 1359 is under the Private Attorneys General Act (PAGA). However, AB 1359 also has a separate private right of action for enforcement. This means that the sick leave for health care workers falls under two separate private rights of action — permitting an employer to be sued twice for the same purported violation. Noting the compliance issues listed above, expensive litigation is likely, and any claims will be twice as much, as hospitals and other health facilities will be subjected to enforcement actions under two private rights of action.

SUPPORT

SEIU California (sponsor)
AFSCME, AFL-CIO
California Long-Term Care Ombudsman Association

OPPOSITION

California Hospital Association

RELATED LEGISLATION

Pending Legislation:

SB 616 (Gonzalez, 2023) increases the minimum guaranteed paid sick leave under Labor Code section 246 from three days to seven days, or 56 hours, along with other changes to the Healthy Workplaces, Healthy Families Act of 2014. SB 616 is currently before the Assembly Appropriations Committee.

SB 881 (Alvarado-Gil, 2023) amends Sections 246 and 248.5 of the Labor Code to provide 40 hours, or five days, of paid sick leave within an employee's 200th calendar day of employment, along with other changes. SB 881 failed to pass out of the Senate Labor, Public Employment and Retirement Committee.

Prior Legislation:

AB 152 (Committee on the Budget and Fiscal Review, Ch. 736, Stats. 2022) extended COVID-19 Supplemental Paid Sick Leave provisions to December 31, 2022, and established the California Small Business and Nonprofit COVID-19 Relief Grant Program to assist qualified small businesses or nonprofits with costs for COVID-19 supplemental paid sick leave.

SB 1114 (Committee on Budget and Fiscal Review, Ch. 4, Stats. 2022) extended COVID-19 Supplemental Paid Sick Leave until September 30, 2022, providing 40 hours of supplemental paid sick leave for covered employees for reasons related to COVID-19.

SB 95 (Skinner, Ch. 13, Stats. 2021) reestablished COVID-19 Supplemental Paid Sick Leave to provide up to 80 hours of paid sick leave to eligible employees of employers with 25 or more employees. The provisions under SB 95 expired September 30, 2021.

AB 1867 (Committee on the Budget, Ch. 45, Stats. 2020) established COVID-19 Supplemental Paid Sick Leave and COVID-19 Food Sector Supplemental Paid Sick Leave, providing 80 hours of supplemental paid sick leave for food sector employees,

certain healthcare providers, and other specified employees. This supplemental sick leave expired December 31, 2020.

AB 1522 (Gonzalez, Ch. 317, Stats. 2014) established the Healthy Workplaces, Healthy Families Act of 2014 that provided certain employees in the state of California with paid sick days for prescribed purposes, to be accrued at a rate of no less than one hour every 30 hours worked and at least three days in each year.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 0)
Assembly Floor (Ayes 60, Noes 16)
Assembly Appropriations Committee (Ayes 11, Noes 4)
Assembly Labor and Employment Committee (Ayes 5, Noes 1)
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