

SAN FRANCISCO

Daily Journal

May 30, 2008

A KIN CARE CONUNDRUM

by D. Gregory Valenza

Many employers provide some form of paid sick leave to their employees. In fact, employers are required to do so for employees working in San Francisco. Don't be jealous. The Legislature is considering a bill that would mandate paid sick leave statewide. See Assembly Bill 2716.

Employers that provide paid sick leave, voluntarily or otherwise, must comply with California Labor Code Section 233, known as the "kin care" law. The 1st District Court of Appeal in *McCarther v. Pacific Telesis Group*, 2008 DJDAR 7620 (May 23, 2008), interpreted the kin care law for the first time. The court's opinion may change the way employment lawyers advise their clients about attendance policies.

What is 'Kin Care?'

Before 1999, employers only had to allow employees to use paid sick time off for their own illnesses. Employers typically would consider an employee's taking a sick day to take care of an ill spouse or child to be an attendance policy violation. Then the Legislature passed Labor Code Section 233. Section 233 provides that an employee may use a portion of paid sick leave "to attend to an illness of a child, parent, spouse, or domestic partner of the employee;" hence the nickname "kin care."

The amount of kin care available to employees is equivalent to the amount of sick leave an employee would earn in six months. For example, if the employer provides six days of paid sick leave per year, employees may use up to three of

the six days for the illness of the family members listed above.

The law defines the "paid sick leave" subject to kin care as "accrued increments of compensated leave" for use during an employee's absence for any of the following reasons: "the employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition;" to obtain medical diagnosis or treatment; because of pregnancy; or to obtain medical examinations. So, paid leave granted for any of these reasons makes the time off kin care-eligible.

The law excludes from the definition of "paid sick leave" any benefits covered by ERISA, insurance benefits, workers' compensation benefits, unemployment compensation disability benefit or any other benefit not payable from the employer's general assets. Section 233 also says that nothing in the statute extends the right to the maximum time off available under the federal Family and Medical Leave Act or the California Family Rights Act.

Conflicting Rights and Restrictions

The kin care law expressly provides that "all conditions and restrictions placed by the employer upon the use by an employee of sick leave also shall apply to the use by an employee of sick leave to attend to an illness of his or her child, parent, spouse, or domestic partner." At the same time, though, the statute prohibits employers from denying "an employee the right to use sick leave or discharge, threaten to discharge,

demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness of a child, parent, spouse, or domestic partner of the employee." Moreover, Labor Code Section 234, added two years after Section 233 imposed kin care, flat-out prohibits employers from having "an employer absence control policy that counts sick leave taken pursuant to Section 233 as an absence that may lead to or result in discipline, discharge, demotion, or suspension."

So, if an employer grants sick leave but counts employees' absences for their own illnesses against their attendance records, can the employer do so for kin care absences? That is precisely the question the Court of Appeal addressed in *McCarther*.

The 'McCarther' Opinion

Kimberly McCarther was a Pacific Telesis employee. Her employment was governed by a collective bargaining agreement between the employer and the Communications Workers of America. The union contract contains a very generous sick pay plan. That is, employees receive up to five paid sick days for any seven-day period during which they are off work due to an illness or injury. There is no limit to how many paid sick days an employee may receive under the plan. So, an employee could take five paid sick days, come back to work and take five additional paid sick days the following week. The company initially applied this program only to the

employee's own illness. The union had never sought to apply it to kin care-related absences either.

Pacific Telesis had an attendance policy under which employees would receive an "occurrence" for absences covered by the sick pay plan, unless the absence was considered "excluded." Excluded absences included time off covered under the federal Family and Medical Leave Act or due to work-related injuries. Employees who accumulated too many occurrences would be subject to disciplinary action.

McCarthy and another employee filed a class action lawsuit, seeking to extend the sick pay policy to kin care-related absences. The company's primary argument in defense was that the essentially unlimited sick pay benefit did not count as "paid sick leave" under the kin care law because it was not "accrued increments of compensated leave." The trial court agreed and granted the employer's motion for summary judgment.

The 1st District Court of Appeal, Division Two, however, disagreed. The court focused on the definition of "accrued." The court ultimately decided that although employees did not have to "accrue" sick days over time, because the policy automatically provided employees with virtually unlimited sick pay for covered absences, the definition of "accrued" did not require any

accumulation. As a result, employees could use up to one-half of the "unlimited" leave for kin care purposes.

May Employers Discipline Employees for Taking Kin Care?

The court having decided that Pacific Telesis's sick pay plan was kin care-eligible and covered by Section 233, the question then arose whether the attendance control policy was unlawful in light of the restrictions on employers imposed by Sections 233(c) and 234.

Both the plaintiffs and defendants in McCarthy argued that employers are not permitted to count kin care absences against employees' attendance records. The employer naturally complained that the court's decision to include its sick pay plan as kin care-eligible meant that "theoretically" an employee could be out under the 'sickness absence' policy virtually every day of the year, and not be subject to their 'attendance management' policy" under Section 234. The court wryly noted that the plaintiffs "appear to agree with this assessment of Section 234, but do not seem troubled by the issue."

The court's approach differed from the parties' and probably from the conclusions of many employment law practitioners who have been working with the kin care law for over eight years. Noting that its role was to

harmonize statutory provisions and avoid absurd results, the court decided "Section 234 does not prohibit an employer's regulation of 'kin care' leave taken by employees pursuant to Section 233, provided that employers regulate sick leave and 'kin care' leave in the same way." That is, the court held, Section 234 prohibits absence control policies that impose greater consequences on employees taking kin care leave than employees who use sick leave for their own absences.

While Pacific Telesis probably does not view the McCarthy decision as a positive development, employers with traditional sick leave plans will benefit from the decision. It is true that employers with "unlimited" paid sick benefits must extend those benefits to kin care absences. The good news, though is that the opinion breathes new life into employers' absence control policies, such as "no-fault" attendance rules. Employers and their lawyers should review their policies to ensure that kin care leave is administered appropriately in light of McCarthy. At the same time, employers should be cautious, as "no-fault" attendance policies remain subject to other laws, such as the Family and Medical Leave Act, Pregnancy Disability Leave Law and the federal and state "reasonable accommodation" obligations under the anti-disability discrimination laws.

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