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February 23, 2010

California Supreme Court Unanimously Holds That Unlimited Sick Leave Is Not Subject To California's "Kin Care" Law

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Last week the California Supreme Court, ruling in favor of an employer, limited benefits offered under the "kin care" provision of California Labor Code Section 233. In *McCarther v. Pacific Telesis Group*, Case No. S164692, the Court held that "kin care" leave does not apply to unlimited sick leave policies.

What is "Kin Care"?
California's "kin care" law, as codified in Labor Code Section 233, requires employers who provide sick leave to permit employees to use a portion of sick leave benefits to care for a sick child, parent, spouse, or domestic partner. Section 233 defines "sick leave" as "accrued increments of compensated leave" for use because of the employee's illness, injury, or medical condition; for obtaining professional diagnosis or treatment; or for other medical reasons, such as medical appointments. The law requires an employer providing sick leave to permit an employee to use "the employee's accrued and available sick leave" in "an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement" to care for family members.

"Kin Care" Leave Does Not Apply To Policies That Do Not Provide Accrued Increments Of Sick Leave.
At issue in *McCarther* was Pacific Telesis's "sickness absence" policy, which provided an *unlimited* amount of sick leave, pursuant to a collective bargaining agreement. Under the policy, there was no bank of paid sick days that employees incrementally accrued over a period of time. Also, there was no cap on the number of days employees could be absent from work, nor was there a particular number of days that employees vested, earned, or accrued under the company's "sickness absence" policy.

In *McCarther*, the plaintiffs filed a class action against Pacific Telesis claiming that employees were not allowed to use this uncapped sick leave under the "kin care" statute to care for others. Pacific Telesis filed

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for summary judgment, arguing that the provisions of Section 233 did not apply to its "sickness absence" policy because its unlimited sick leave policy did not provide any measurable or banked amount of sick leave and, thus, the company had no way of determining how much sick leave an employee might be entitled to use in a six-month period. The trial court granted Pacific Telesis's summary judgment motion, which was later overturned by the Court of Appeal, which found that the provisions of the "sickness absence" policy were subject to Section 233.

On February 18, 2010, the California Supreme Court reversed the Court of Appeal's ruling in *McCarther*, finding that Pacific Telesis's unlimited sick pay policy was not "sick leave" under Labor Code Section 233. Accordingly, the Court found that there was no "kin care" obligation and no obligation to permit employees to use up to one-half of the annual sick pay benefit. The Court held that the "kin care" provisions of Labor Code Section 233 apply *only* to policies that provide "accrued increments of compensated leave" and are not meant to apply to all types of sick leave policies. In its decision, the Court recognized that where a sick leave policy was indefinite, "kin care" cannot be applied because it would be "impossible to determine the amount of compensated time off for illness to which an employee might be entitled in a six-month period."

Whether Employers Can Apply Attendance Control Measures To "Kin Care" Leave Is Still An Open Question.

Although *McCarther* is an important and positive victory for employers, it does not fully resolve all of the issues raised in the case. Specifically, the Court of Appeal opinion, vacated after the Supreme Court granted review, had held that Pacific Telesis was well within its rights to apply its attendance control policy to the use of sick leave to care for a relative when the company applied the policy to time off for an employee's own illness. Notably, the California Supreme Court opinion did not address the question of whether an employer could apply the same conditions to "kin care" as to sick leave for an employee's own illness. Thus, this remains an open question.

Given the Court's ruling in *McCarther*, employers should note that if they offer a sick leave policy where employees do not accrue a bank of sick leave, and there is no cap on sick leave, an employee is not entitled to any protected "kin care" leave under California law. Employers who intend to implement such a policy and choose not to recognize "kin care" leave should consult with counsel prior to doing so.

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