Paid Sick Leave Law, Background Checks, and Protecting Donor Information

PLUS: Upcoming Seminar on Nonprofit Formation

New California Paid Sick Leave Law Applies to Nonprofit Organizations

On September 10, 2014, Governor Jerry Brown Jr. signed Assembly Bill 1522, also known as the Healthy Workplaces, Healthy Families Act of 2014. This law provides paid sick leave for roughly forty percent of California's workforce, making it possible for approximately 6.5 million workers to better care for themselves and their families. Under AB 1522, both full-time and part-time employees can accrue paid sick leave. The law does not contain any provision limiting applicability to employers of any particular size, and makes no distinction between for-profit and nonprofit employers, or between tax-exempt and taxing organizations. Thus, the law will apply to even very small nonprofit organizations with relatively few employees.

When does the Law Take Effect?

Employees who as of July 1, 2015, or after have worked for at least 30 days within a year from commencement of their employment will begin accruing one hour of paid sick leave for every 30 hours worked (which means even part-time workers are entitled to paid sick leave). The employee can begin using accrued sick leave on the 90th day of employment, and any paid sick leave not used within the year it is accrued carries over to the following year. However, the law allows an employer to limit the use of paid sick leave by a single employee to 24 hours (three full days) in any one-year period.

The law applies to all California employees, with the exception of providers of in-home supportive services, certain air carrier employees, and employees covered by collective

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CDP eNewsletter Archive

Have you recently joined our mailing list and feel like you’ve been missing out on great information? If so, we have good news! Previous issues of the CDP eNewsletter are available on our website.

Legal Services for Nonprofits

The Community Development Project builds strong foundations for healthy, vibrant and economically stable communities by providing comprehensive legal and capacity building services to organizations serving people with lower-incomes in the Los
bargaining agreements that expressly provide for paid sick leave or other forms of paid time off. The law does not apply to employers with an existing paid sick leave policy, provided said policy satisfies the minimum accrual, carry over, and use requirements of AB 1522.

When can an Employee Use Paid Sick Leave?

An employee can use paid sick leave to care for him or herself, as well as to care for a family member, which includes children, spouses and domestic partners, parents, grandchildren, grandparents, and siblings. Additionally, the employee can use paid sick leave for reasons other than an illness, including preventative care, and issues related to domestic violence, sexual assault, and stalking. In instances where use of paid sick leave is foreseeable, the employee is required to provide reasonable advance notice; otherwise, the employee need only provide notice as soon as it is practicable. An employer cannot require the employee to find a replacement worker as a condition of using paid sick leave.

What is the Paid Sick Leave Rate of Pay?

The rate of pay for sick leave hours will be the employee’s hourly wage. In cases where an employee’s wages vary over the accrual period, where an employee is paid by commission or piece rate, or where the employee is salaried, the rate of pay for sick leave hours will be calculated by dividing the total wages earned (not including overtime) by the total number of hours worked over the previous 90 days of employment. Paid sick leave must be paid no later than the normal pay period following use of the sick leave.

What Happens Upon Separation of Employment?

Upon termination, resignation, retirement, or in any other instance of employment separation, an employer is not required to pay the employee for any unused paid sick leave hours the employee has accrued. However, if the employee is rehired within one year of the separation date, the law requires that all previously accrued, unused sick leave hours be reinstated.

What are the New Administrative Requirements?

AB 1522 imposes several administrative requirements on employers, including:

- Written notice that sets out the amount of paid sick leave available for use by a particular employee. This notice must be provided on the employee’s itemized wage statement or in a separate writing that is given to the employee on the employee’s date of pay.
- Placement of workplace poster clearly visible and noticeable by employees that contains employee rights under AB 1522.
- The employer is required to maintain (3) years of records setting out the number of hours worked by an employee and the amount of paid sick leave hours accrued over that period.

 Angeles area. CDP provides assistance on a wide range of matters to community organizations, including:

Contract & Lease Negotiation

Does your nonprofit need to terminate or renegotiate contractual or lease obligations? Do you know whether your nonprofit is legally permitted to sublet unused space?

Employment Advice

Is your nonprofit exploring reduction of employee benefits, salaries or hours? Do you know the criteria to use when downsizing staff? Are you attempting to reclassify employees as independent contractors? Are you aware of the legal implications of all of these actions?

Corporate Governance

Is your board aware of its duties during a period of financial difficulty? Do your board members know how to conduct financial and programmatic oversight? Has your organization adopted a conflict of interest policy? Are your directors aware of the situations where they could incur personal liability for the acts of the corporation, and do you have appropriate controls and procedures in place to protect them?

Debt Reorganization & Cash Flow

Does your nonprofit need to renegotiate debt repayment terms? Do you know what agreement terms you should pay special attention to if applying for or increasing a line of credit? Have any of your key vendors filed for bankruptcy?

Fundraising & Social Enterprise
Upon hiring, the employer must provide written notice to the employee containing several pieces of information outlined in the law, including wage information, certain employer contact information, and the employee’s rights under AB 1522.

What are the Penalties for AB 1522 Violations?

The California Labor Commissioner is responsible for enforcement of the law. Each offense is subject to a $100 fine. Further, an administrative penalty of $50 for each day a violation occurs or continues may be assessed (not to exceed $4000). With regard to paid sick leave owed, the employer will be liable for three times the amount of paid sick days withheld or $250, whichever is greater (also not to exceed $4000). The Labor Commissioner or Attorney General may alternatively bring a civil suit against an employer, where penalties may exceed the penalties allowed under law.

Importantly, only intentional violations will be penalized; no penalties will be assessed if the Labor Commissioner finds that a violation was the result of an isolated and unintentional payroll error, or some other inadvertent clerical mistake.

New Best Practices Guide: Background Checks

In the hiring process, an employer typically seeks a candidate who is the best "fit" for a position, evaluating a candidate’s skills, abilities and personal characteristics in light of the job requirements. Employers often try to confirm the veracity of the information contained in the candidate’s application materials and learned through the interview process. Beyond an assessment of a potential employee’s qualifications and truthfulness, an employer should also attempt to insure that the candidate does not pose a risk to other employees or to third parties. The challenge for the employer in addressing these important hiring goals is to make sure that the background check process does not unfairly discriminate against any applicant or otherwise breach the law.

Our new FREE guide: Background Checks in the Hiring Process: A Guide for California Nonprofits and Small Businesses provides practical advice for avoiding the legal pitfalls in designing a background check process that works for your nonprofit. You can access a copy of the guide on the Public Counsel website here.

Questions? The Community Development Project can provide legal assistance to help in creating effective background checks if this is a matter of concern. For more information, please call our intake line at (213) 385-2977 ext. 200 or email cdp@publiccounsel.org.

"Launching and Sustaining a New Nonprofit" - February 25, 2015
Protecting Donor Lists as Trade Secrets

Can Donor Lists Ever Be Protected as Trade Secrets?

Nonprofits expend considerable energy and resources to cultivate reliable donors. In an environment where funds are scarce and nonprofits compete to find private support for their programs and services, personal information about the philanthropic intentions of private individuals and donor lists are very valuable assets. Though relationships with major donors are typically cultivated through personal interactions with nonprofit gift and executive officers over time, the first connection to a potential donor may well be developed through internet research, and partially maintained through social media outlets such as LinkedIn. Is there anything to prevent a former employee from cultivating and soliciting donations for Nonprofit B by using such social media accounts and donor relationship data developed during his previous tenure at Nonprofit A? The answer may depend on whether the nonprofit can claim that the donor data is a trade secret.

What is a trade secret?

A trade secret is any type of confidential information that gives a business (including a nonprofit) a competitive edge. It may be anything from a recipe or formula to a business process or strategy. To gain trade secret status in California, information must: a) not be generally known in the industry, b) have independent economic value derived from its secrecy and c) be subject to efforts reasonable under the circumstances to maintain its secrecy. A trade secret is the property of the company or organization that develops it, and the trade secret owner can prevent disclosure and use of the information by third parties.

Customer Lists

In California, a customer list developed by a for profit organization will be considered to have satisfied the criteria listed above, and therefore be a trade secret, if the organization expends a substantial amount of time, effort and expense in creating the list and maintains a certain degree of privacy about its contents. The list cannot be common knowledge and cannot be readily ascertainable from publicly available sources. One could argue that a nonprofit’s donor list is analogous to a customer list and, in fact, a Connecticut court found that a state university could prevent a freedom of information act disclosure of its donor list of athletic program supporters by asserting trade secret status. Similar trade secret arguments have been made with mixed success by nonprofits before New York, Texas and Florida courts. California courts have not yet ruled on this specific issue.

Social Media

Join us on Wednesday, February 25, 2015 from 5:30 PM to 8:00 PM for an affordable seminar for new nonprofits, co-sponsored by Public Counsel and the Center for Nonprofit Management.

Startups and new nonprofits face a number of planning, financial, and legal challenges from the outset. This introductory course will cover both legal and programmatic fundamentals, including best practices for designing successful programs, recruiting an effective board, developing a sustainable fundraising plan, forming a California nonprofit corporation and applying for tax exemption, and complying with ongoing tax and legal requirements.

Seminar attendees are eligible to participate in a FREE “Ask A Lawyer” Nonprofit Formation Clinic (date TBA at the seminar), where they will be able to meet one-on-one with an attorney to discuss specific questions relating to forming a nonprofit and obtaining tax exemption.

Advance registration is required. For more information and to register for the seminar, please visit our website.
Beyond disclosure of the list as a whole, a prospective donor list may be partially publicly accessible through social media. For example, a nonprofit employee or independent contractor may maintain some form of a donor prospect list through a set of contacts in LinkedIn or other professional networks, or may develop a list of followers for an agency through Twitter or Facebook. Ordinarily, data collection that is to some degree available to many others would seem inconsistent with the "not generally known" requirement of the trade secret definition. However, most states, including California, adhere to the Uniform Trade Secrets Act, which requires only "substantial secrecy" to maintain trade secret status.

Courts in California and elsewhere have signaled that in an appropriate case, information may keep its trade secret status even if partially disclosed through social media. For example, a federal court in California recently held that the employer that created a Twitter account adequately pleaded a claim of trade secret misappropriation when a former employee refused to relinquish the log-in information to the account (and therefore access to the 17,000 followers he developed on behalf of the employer) after moving to a competitor. In a pre-trial motion, another federal district court in California determined that a customer list developed in part through LinkedIn contacts during the course of employment might be considered a trade secret under California law if it met certain criteria. The question of whether the list was in fact a trade secret was left to be determined at trial, where the employer will have to show that the time, effort and expense involved in developing the list are sufficient to establish it as a trade secret. Outside of California, a Pennsylvania court reached a similar conclusion but with different reasoning. As in the California Twitter case, the Pennsylvania court considered company actions regarding the creation, maintenance and confidentiality of a LinkedIn account crucial in determining whether the employer could maintain possession of the account of a departing executive.

Best Practices

What advice should a nonprofit take away from this developing area of case law? If the agency wants to improve its chances of successfully preventing use of a prospective donor list by a former employee or competitor, then a nonprofit should:

- avoid unnecessary disclosure of donor information through the internet or other public outlets;
- document the time, effort and expense spent in creating the list;
- develop a list that includes detailed qualitative information beyond a simple list of name and contact information (which alone is likely not protectable); and
- establish a set of policies and procedures designed to maintain the confidentiality of the list, including entering into confidentiality agreements with key employees and labeling sensitive donor data as confidential.

For a donor list at least partially developed through social media, a nonprofit should:
open the social media account itself;
generate the username and password itself;
set appropriate privacy settings so that the identity of
social media followers are not easily accessible by
others;
establish a set of policies and procedures for the
design and format of content as well as the method for
making connections;
establish policies that deal with the transfer of such
accounts at the end of an employment or independent
contractor relationship; and
inform the employee or independent contractor in
writing of these policies and procedures.

The law is not yet well-established either in terms of trade
secret protection of donor lists generally or the protection of
donor/customer lists developed through social media.
Adopting a set of best practices, however, puts a nonprofit in
the strongest position to be able to mitigate risks and
successfully prevent involuntary disclosure and use.