

**RESOLUTION 12-09-2015 (as amended and adopted)**

**DIGEST**

Healthcare: Enable Employee Choice in Use of Sick Leave

This resolution amends Labor Code section 233 to enable employees the choice to use their sick leave for themselves or their families under the Healthy Workplaces, Healthy Families Act.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Association recommends that legislation be sponsored to amend Labor Code section 233, to read as follows:

§233

1 (a) Any employer who provides sick leave for employees shall permit an employee to use  
2 in any calendar year the employee's accrued and available sick leave entitlement, in an amount  
3 not less than the sick leave that would be accrued during six months at the employee's then  
4 current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic partner  
5 of the employee. All conditions and restrictions placed by the employer upon the use by an  
6 employee of sick leave also shall apply to the use by an employee of sick leave to attend to an  
7 illness of his or her child, parent, spouse, or domestic partner. This section does not extend the  
8 maximum period of leave to which an employee is entitled under Section 12945.2 of the  
9 Government Code or under the federal Family and Medical Leave Act of 1993 (29 U.S.C. Sec.  
10 2606 et seq.), regardless of whether the employee receives sick leave compensation during that  
11 leave. This Section does not limit the benefits and protections provided to employees covered by  
12 the Healthy Workplace, Healthy Families Act of 2014.

13 (b) As used in this section:

14 (1) "Child" means a biological, foster, or adopted child, a stepchild, a legal ward, a child  
15 of a domestic partner, or a child of a person standing in loco parentis.

16 (2) "Employer" means any person employing another under any appointment or contract  
17 of hire and includes the state, political subdivisions of the state, and municipalities.

18 (3) "Parent" means a biological, foster, or adoptive parent, a stepparent, or a legal  
19 guardian.

20 (4) "Sick leave" means accrued increments of compensated leave provided by an  
21 employer to an employee as a benefit of the employment for use by the employee during an  
22 absence from the employment for any of the following reasons:

23 (A) The employee is physically or mentally unable to perform his or her duties due to  
24 illness, injury, or a medical condition of the employee.

25 (B) The absence is for the purpose of obtaining professional diagnosis or treatment for a  
26 medical condition of the employee.

27 (C) The absence is for other medical reasons of the employee, such as pregnancy or  
28 obtaining a physical examination.

29 "Sick leave" does not include any benefit provided under an employee welfare benefit  
30 plan subject to the federal Employee Retirement Income Security Act of 1974 (Public Law 93-  
31 406, as amended)<sup>1</sup> and does not include any insurance benefit, workers' compensation benefit,  
32 unemployment compensation disability benefit, or benefit not payable from the employer's  
33 general assets.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** The Bar Association of San Francisco

## **STATEMENT OF REASONS**

The Problem: There is an ambiguity in the new Healthy Workplaces, Healthy Families Act of 2014 (“Paid Sick Leave law”) because it fails to address the pre-existing kin care law. Under the existing kin care law set forth in Labor Code section 233, “[a]ny employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee’s accrued and available sick leave entitlement, 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 attend to an illness of a child, parent, spouse, or domestic partner of the employee.” On the other hand, under Labor Code section 246.5 of the Paid Sick Leave law, employers must provide sick days for certain specified purposes, including “the diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee’s family member.” There is no provision in the Paid Sick Leave law limiting use of paid sick leave for an employee’s ill family member to only half the annual entitlement (as required by the kin care law) or any other amount, and the Paid Sick Leave law does not reference the pre-existing kin care law. Accordingly, it appears that the full amount of paid sick leave may be used for any of the designated purposes in the Paid Sick Leave law, including caring for an employee’s family member.

The Solution: This resolution addresses the problem by clarifying that the kin care law does not apply to employees not covered by Paid Sick Leave law. Employees covered by the Paid Sick Leave law will receive the benefit of being able to use the full amount of any accrued paid sick leave for any specified purpose, including caring for an ill family member. Employees excluded from coverage under the Paid Sick Leave law will have the benefit of the kin care law in Labor Code section 233, which allows them to use at least half their annual entitlement of sick leave to care for an ill family member.

This bill is related to the 2015 BASF Resolutions on Paid Sick Leave Use and Paid Sick Leave Accrual.

## **IMPACT STATEMENT**

This proposed resolution does not affect any other law, statute or rule.

## **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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**RESPONSIBLE FLOOR DELEGATE:** Cathleen S. Yonahara

## **RESOLUTIONS COMMITTEE RECOMMENDATION**

### **APPROVE IN PRINCIPLE**

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Labor Code section 233 to enable employees the choice to use their sick leave for themselves or their families under the Healthy Workplaces, Healthy Families Act. This resolution should be approved in principle because it grants employees the freedom to choose how to use their accrued sick leave.

The existing Kin Care Laws, codified in Labor Code section 233 et seq., states that “[a]ny employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee’s accrued and available sick leave entitlement, 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 attend to an illness of a child, parent, spouse, or domestic partner of the employee.” (Lab. Code, § 233.) Thus, an employee may use a maximum of one-half of the accrued annual sick leave to care for an employee’s family member. The policy decision behind this limitation is to ensure that employees not exhaust all of their sick leave on family members, thereby leaving insufficient leave credit for when the employee becomes ill.

This resolution would amend the new Healthy Workplaces, Healthy Families Act of 2014 (“Healthy Families Act”) to permit an employee to use one’s sick leave to care for family members without the limitations imposed by Labor Code section 233. While the resolution states its purpose is merely to clarify an ambiguity (i.e., that the Healthy Families Act inadvertently omitted the limiting provision of Labor Code section 233), the legislative history is silent on that point. Therefore, it cannot be conclusively stated that the omission was accidental. Nonetheless, this resolution should be approved because it would give the employee, rather than the Legislature, the choice of how and when to use the employee’s accrued sick leave.

While there are sound policy reasons for section 233’s limitation: (i) ensure that a sick employee is not docked pay or forced to work because all sick leave is exhausted for the care of family members, or (ii) prevent the spread of illness when a sick employee (i.e., a server in a restaurant) is forced to work because all sick leave is exhausted to care for family members, these reasons should not strip an employee of the right to choose what is best for the employee and his or her family. One size does not fit all where healthcare is concerned. The ultimate decision on how an employee chooses to use the sick leave that the employee accrued should be left to the employee. This resolution is related to Resolution 12-02-2015.

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## COUNTERARGUMENTS TO RESOLUTION 12-09-2015

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### **BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY**

This amendment contradicts the intention of the Healthy Workplaces, Healthy Families Act of 2014, which specifically provides that its provisions are in addition to and independent of any other rights, remedies or procedures available under any other law and does not diminish, alter, or negate any other legal rights, remedies, or procedures available to an aggrieved person. (Labor Code §245(b).) The kin care law likewise provides that the rights and remedies are cumulative and nonexclusive and are in addition to any other rights or renewed afforded by contract or under other provisions of law. (Labor Code §233(f).) The legislature intended for both acts to be available to eligible employees. In addition, the kin care law provides for a private right of action against the employer (including recovery of reasonable attorneys' fees); however, the Healthy Workplaces, Healthy Families Act of 2014 does not. If we want to address the inconsistency in the amount of sick leave that can be used at one time, that should be done in a resolution addressing that specific inconsistency, not by taking away the rights of most employees in California to seek a private right of action against an employer.

### **ORANGE COUNTY BAR ASSOCIATION**

While the Healthy Workplaces, Healthy Families Act of 2014 ("the Act") has arguably generated confusion in its application, nothing in the proposed resolution addresses the specific problem stated. In fact, the proposed amendment would have the chilling effect of making application of the Act or Labor Code section 233 a take-it-or-leave it proposition.

There is no evidence – provided by the proponent, the Act or Labor Code section 233 – that the Legislature intended to exclude employees covered by the Act from being able to receive benefits provided under Labor Code section 233 or vice versa.

The proponent makes no showing of how this specific change addresses the problem outlined. In the end, amending the statute as proposed serves only to create unintended exclusions and take away hard won protections.