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Nathan W. Powell

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# The Absence of Control: Employers' Inability to Apply Family Sick Leave to Absence Control Policies

Nathan W. Powell

## Code Section Affected

Labor Code § 234 (new).

SB 1471 (Romero); 2002 STAT. Ch. 1107.

## I. INTRODUCTION

With the increase of two-income families and single-parent families, California has passed several laws which cater to the concerns associated with families and employment. One of those laws permits employees who receive sick-leave benefits to use a portion of the benefits to care for family members.<sup>1</sup> However, the existing language of the law allowed employers to penalize employees who take family sick leave.<sup>2</sup> Chapter 1107 corrects the language and closes the loophole.

The existing language penalizes women most significantly.<sup>3</sup> Over twenty-three million mothers work outside the home.<sup>4</sup> In addition, working mothers are more likely to care for sick children and parents.<sup>5</sup> Therefore, employers are mostly reprimanding or terminating mothers for caring for their children or family members.

However, individuals are concerned that Chapter 1107 may in fact create a "safe harbor" for employees to take advantage of sick-leave benefits.<sup>6</sup> For example, an employee who is one personal absence away from a reprimand or suspension can falsely take a family sick-leave day, and the employer would

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1. CAL. LAB. CODE § 233(a) (West Supp. 2002).

2. See *infra* Part II (explaining how Section 233 of the California Labor Code allows employers to use absence control policies towards family sick leave).

3. See Letter from Rosemary DaSilva, Project Coordinator, California National Organization of Women, to Richard Alarcon, Chair, Senate Labor and Industrial Relations (Apr. 19, 2001) (on file with the *McGeorge Law Review*) (stating that "women . . . are the primary caregivers" and that "[i]n most instances women use their sick leave to take care of their children, parent/parents, or spouse. . .").

4. Letter from Elmy Bernejo, Chairperson, State of California Commission on the Status of Women, to Dede Alpert, Chairperson, Senate Appropriations Committee (Apr. 26, 2002) [hereinafter Bernejo Letter] (on file with the *McGeorge Law Review*) (stating that "[s]eventy-three percent of the thirty-two million mothers work outside the home").

5. See *id.* (noting that working mothers are "[e]ighty-three percent] more likely to take time off to care for their child than working dads in dual-earner couples.").

6. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1471, at 2 (Apr. 10, 2002) (citing that a criticism of Chapter 1107 is that it "creates a 'safe harbor' excuse that promotes abuse of the system . . .").

have no recourse.<sup>7</sup> The Legislature may have had good intentions, but ultimately it may create more problems than solutions.

## II. EXISTING LAW

Existing law does not require an employer to provide sick-leave benefits.<sup>8</sup> However, existing law does require that any employer who offers sick-leave benefits to allow employees to use a portion of their personal sick-leave days to attend to the illness of “a child, parent, spouse, or domestic partner.”<sup>9</sup> All conditions and restrictions apply equally to sick leave taken for personal reasons and to sick leave taken to care for family members.<sup>10</sup> Accordingly, an employer may not terminate, threaten to terminate, demote, or take any other action against an employee because the employee uses his or her sick leave to attend to a family member.<sup>11</sup> If an employer violates this law by taking any of the aforementioned actions against the employee, the employee is entitled to reinstatement and to recover the greater of either actual damages or a day’s wage.<sup>12</sup> Further, the employee may also be entitled to equitable relief.<sup>13</sup>

In response to the constraints of existing law, employers created absence control policies (ACPs).<sup>14</sup> These policies discourage all types of absences by establishing discipline measures for employees who exceed a certain number of absences within a given period of time,<sup>15</sup> usually twelve months.<sup>16</sup> Although the

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7. See Letter from Julianne Broyles, Director, Insurance, Employee Relations and Small Business, California Chamber of Commerce, to Members, Assembly Labor and Employment Committee (May 3, 2002) [hereinafter Broyles Letter] (on file with the *McGeorge Law Review*) (stating that Chapter 1107 “bar[s] employers from taking any type of disciplinary action” if the employee uses family sick leave); Letter from Steve L. Toth, Director, California Governmental Relations, British Petroleum, to Richard Alarcon, Chair, Senate Labor and Industrial Relations (Apr. 2, 2002) [hereinafter Toth Letter] (on file with the *McGeorge Law Review*) (explaining that Chapter 1107 “creates a situation where the employer has no recourse to control excessive absenteeism.”).

8. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1471, at 3 (June 12, 2002).

9. *Id.* I will refer throughout the rest of this article to children, parents, spouses, and domestic partners as “family members.”

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. See Letter from Karen Keeslar, Executive Director, California Independent Public Employees Legislative Council, to Paul Koretz, Chair, Assembly Labor Committee (June 19, 2001) (on file with the *McGeorge Law Review*) (explaining that “[u]nder existing law, an employer may have an ‘absence control policy’ which allows the employer to discipline an employee for excessive absenteeism.”).

15. See Toth Letter, *supra* note 7 (describing an ACP as “establishing a threshold number of permissible absences and instituting graduated discipline for absences in excess of the established threshold.”).

16. See Baltimore County Office of Human Resources, *Absence Control Policy*, at <http://www.co.ba.md.us/p.cfm/agencies/humanresources/absence.cfm> (last visited July 31, 2002) (copy on file with the *McGeorge Law Review*) (describing the Baltimore County ACP time period used as “a consecutive [twelve]-month period.”).

sick-leave time is allotted to the employee, ACPs state that the leave time is not a right, but a privilege.<sup>17</sup> For example, just because an employee has sick-leave days available does not mean that the employee can take the sick leave if he or she is not ill. Thus, employers have the right to monitor the use or misuse of sick leave.<sup>18</sup>

Although not designed to be punitive, ACPs create different levels of discipline for violations.<sup>19</sup> The discipline levels increase from written or oral reprimands to suspension or termination according to the number of absences exceeding the target number.<sup>20</sup> Some ACPs provide factors that help determine if discipline is necessary.<sup>21</sup> These factors include the length of the illness, the severity of the illness, prior attendance record, and the employee's efforts to improve attendance.<sup>22</sup>

ACPs may appear to violate existing law; however, existing law states "[a]ll 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, or spouse."<sup>23</sup> This ambiguous language permits employers to apply the same penalty to personal sick leave and family member sick leave when calculating their ACPs.<sup>24</sup> Accordingly, an employer can reprimand or suspend an employee for taking family sick leave so long as the penalty is equal to the penalty incurred for personal sick leave.<sup>25</sup>

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17. See *id.* (stating "[a]lthough the County grants its employees up to [fifteen] sick days per year, use of this leave time is not an entitlement.").

18. See *id.* (noting that "when an employee fails to make the necessary arrangements to ensure their regular attendance at work, morale among co-workers suffers, the cost of operating . . . escalates and there may be significant delays in the delivery of service to the [clients or customers].").

19. See *id.* (explaining that "[t]he policy is not intended to be punitive in nature, but to help employees work toward identifying causes of their excessive absenteeism and assist in correcting possible reasons for unplanned absences through counseling.").

20. See Toth Letter, *supra* note 7 (stating that under an ACP "[d]iscipline commences with counseling and warnings, progresses to reprimands and may, ultimately, result in suspension or termination."); see also Baltimore County Office of Human Resources, *supra* note 16 (describing the ACP as follows: (1) "meet with and counsel the employee"; (2) "[i]f appropriate, supervisor will initiate a request to place the employee on Excessive Absenteeism Notice"; (3) "[i]f appropriate, the supervisor will issue a written notice informing the employee that his/her use of sick leave is excessive, and that further corrective action may result if there is not improvement"; (4) "[i]f appropriate, the supervisor will issue a written final notice that termination may result if there is not improvement in the employee's attendance"; and (5) "[i]f appropriate, the supervisor will initiate charges for removal").

21. See Baltimore County Office of Human Resources, *supra* note 16 (describing "[f]actors which tend to moderate the need for corrective action").

22. *Id.*

23. CAL. LAB. CODE § 233(a) (West Supp. 2002).

24. See Toth Letter, *supra* note 7 (stating that British Petroleum "obtained a Legislative Counsel Opinion . . . which concluded that Section 233 does not prohibit an absence control or attendance incentive program if leave under Section 233 is treated 'in the same manner' as leave taken by an employee for personal illness.").

25. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1471, at 3 (June 12, 2002) (explaining that "under current law, all conditions and restrictions that the employer places on the employee's use of sick leave also apply to the employee's use of sick leave to attend to a family illness, an employer may use family illness sick leave absences in calculating an absence control policy.").

### III. CHAPTER 1107

Chapter 1107 provides that ACPs attempting to penalize employees for taking family member sick-leave days are a per se violation of the sick-leave law.<sup>26</sup> The new language closes an apparent loophole in the existing law.<sup>27</sup> As a result, employers are no longer allowed to use family member sick leave in calculating their ACPs.<sup>28</sup> However, Chapter 1107 does not completely eliminate ACPs.<sup>29</sup> Employers are still permitted to calculate an employee's personal absences for purposes of the employer's absence maintenance.<sup>30</sup> Further, Chapter 1107 does not affect attendance incentive programs, which provide "rewards for employees who meet the attendance threshold established by the employer."<sup>31</sup>

### IV. ANALYSIS

ACPs attempt to balance the needs of both the employee and the employer.<sup>32</sup> Chapter 1107 may also be an effective answer to ACPs and close the loophole employers use to take away employees' earned, necessary sick-leave days.<sup>33</sup> However, Chapter 1107 may create a "safe harbor" for employees, resulting in lower morale and ultimately the elimination of voluntary sick leave as a benefit.<sup>34</sup>

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26. *Id.* at 1.

27. See Letter from Tom Rankin, President, California Labor Federation (AFL-CIO), to Richard Alarcon, Chair, Senate Labor and Industrial Relations (Apr. 1, 2002) [hereinafter Rankin Letter] (on file with the *McGeorge Law Review*) (stating that "some employers have found a loophole to get around the intent of [existing law]" and that Chapter 1107 "clarifies state law regarding the use of sick leave"); ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1471, at 3 (June 12, 2002) (explaining that Chapter 1107 "seeks to close a loophole in current law whereby an employer provides sick leave for an employee, and then penalizes an employee for using that sick leave.").

28. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1471, at 3 (June 12, 2002) (stating that ACPs "which count sick leave used to care for family as absences which may result in discipline, constitute a per se violation of the law relating to sick leave.").

29. *Id.*

30. See *id.* (commenting that Chapter 1107 "does not address an employer's use of . . . an employee's personal sick leave absences in the calculation of an employee's record for the purposes of an [ACP].").

31. See *id.* (adding that Chapter 1107 "does not address an employer's use of . . . family related illness absences in the calculation of an employee's record for the purposes of attendance incentive policies").

32. See Letter from Matt Moretti, Legislative Advocate, California Health Care Association, to Richard Alarcon, Chair, Senate Labor and Industrial Relations (Apr. 2, 2002) [hereinafter Moretti Letter] (on file with the *McGeorge Law Review*) (proposing that ACPs "are designed to balance employees' need for time-off for various legitimate reasons against the employers need for reliable staffing.").

33. See Rankin Letter, *supra* note 27 (suggesting that ACPs "are intended to keep workers from using sick days that the law allows and that they have earned.").

34. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1471, at 4 (June 12, 2002) (describing generally Chapter 1107's opponents' arguments).

A. Chapter 1107 as a “Safe Harbor”

Family sick leave usually covers children’s illnesses, such as colds, which are less likely to require a doctor or hospital.<sup>35</sup> Therefore, there is little evidence that the sick leave is actually necessary, and many employees take advantage of this ambiguity.<sup>36</sup> Employers implemented the ACPs out of a fear that employees would exploit the low threshold and circumvent any disciplinary action.<sup>37</sup> After employers were required to allow employees to use a portion of their personal sick-leave days to attend to the illness of a family member, employers began to see an increase in the abuse of sick leave.<sup>38</sup>

By statutorily prohibiting employers from controlling family sick leave, Chapter 1107 may lead to greater abuse of absences.<sup>39</sup> The concern with Chapter 1107 is that employees will use the statute as a “safe harbor” and hide behind family sick leave,<sup>40</sup> thus making it more difficult for employers to discipline for the unnecessary use of sick leave.<sup>41</sup> Employees who take excessive Fridays, Mondays, or days preceding a holiday would be untouchable so long as the employees took the day off for family sick leave.<sup>42</sup> According to Chapter 1107, employers essentially lack the power to monitor any abuse of family sick leave.<sup>43</sup> In cases of healthcare, such abuse can jeopardize the safety of patient care.<sup>44</sup>

35. See Cal. Mfrs. & Tech. Ass’n, *CMTA Gets Veto on Bill Restricting Sick Leave*, LEGIS. WKLY., Nov. 3, 2001, available at <http://www.cmta.net/legweekly/110301.php> (copy on file with the *McGeorge Law Review*) (stating that Chapter 1107 “covers brief illnesses such as colds, high temperature, sore throats etc., that are more likely to be associated with children and is less likely to involve physician or hospital care.”).

36. See *id.* (stating that “many employees take advantage of the easy threshold and use it to avoid workplace sanctions.”).

37. See *id.* (suggesting the ease of abusing the system).

38. *Id.*

39. See Letter from Willie Washington, Director of Human Resources, California Manufacturers & Technology Association, to Senator Gloria Romero (Apr. 9, 2002) (on file with the *McGeorge Law Review*) (explaining that “employers fear [Chapter 1107] may lead to greater use and abuse that would further impact attendance and production.”).

40. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1471, at 4 (June 12, 2002) (stating that the “California State Association of Counties and League of California Cities . . . contend that [Chapter 1107] could serve to create a ‘safe harbor’ for certain types of employee sick leave usage”).

41. See *id.* (stating that a “safe harbor” “would make it [sic] more difficult for employers to evaluate and discipline employees regarding sick leave abuse.”).

42. See Cal. Mfrs. & Tech. Ass’n, *supra* note 35 (suggesting that “if an employee’s attendance records were examined and patterns of use involving sick leave were to show unusually high usage on Fridays, Mondays and holiday weekends and the employee were to declare that the absences were for family member sick leave purposes, no disciplinary action could be taken.”).

43. See Broyles Letter, *supra* note 7 (noting that Chapter 1107 “bar[s] employers from taking any type of disciplinary action if the worker always declares the Monday or Friday absences to be for family member sick leave purposes.”).

44. Moretti Letter, *supra* note 32 (suggesting that the lack of proper staffing in a healthcare facility is “especially problematic”).

However, Chapter 1107 is not designed to create a “safe harbor” for the dishonest employee.<sup>45</sup> Instead, it protects the employee who truly needs sick leave.<sup>46</sup> Without this law, such employees are in a predicament, essentially deciding between their job and their family.<sup>47</sup> Further, an employer should not be able to punish an employee for using sick leave that was given to him as a benefit.<sup>48</sup> Although opponents agree that employees need to be present to be productive, employees must know that their family members “are well cared for when they are ill.”<sup>49</sup>

### *B. Increased Litigation and Elimination of Sick-Leave Benefits*

Some express concern that Chapter 1107 will lead to increased litigation.<sup>50</sup> Since any use of family sick leave in connection with an ACP would be a per se violation of Chapter 1107, employers fear that this protection will give incentive for employees to try to collect damages.<sup>51</sup> In addition, Chapter 1107 does not require an employer to provide sick leave, and it only applies to employers who provide sick leave.<sup>52</sup> With the threat of increasing abuse and increased litigation, some employers may eliminate sick-leave benefits altogether.<sup>53</sup> Unfortunately, Chapter 1107 may ultimately harm employees instead of protecting them.<sup>54</sup>

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45. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1471, at 1 (Apr. 10, 2002) (stating the purpose of Chapter 1107 is

[t]o provide that an employer absence control policy which counts sick leave used to care for a child, parent, spouse, or domestic partner as an absence which may lead to or result in discipline, discharge, demotion, or suspension shall constitute a per se violation of the law relating to sick leave.)

46. See Rankin Letter, *supra* note 27 (explaining that “[w]ithout this family-oriented legislation, workers would be unable to use sick days to care for family members.”).

47. See Letter from Richard Holoher, Consultant, Coalition of University Employees, to Senator Dede Alpert, Member, Senate Appropriations Committee (Apr. 12, 2001) (on file with the *McGeorge Law Review*) (stressing that “[w]hen a child is ill, a working parent should not have to choose between care for their child and keeping their job.”).

48. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1471, at 1 (Apr. 10, 2002) (suggesting that “[a]n employer should not be able to offer sick leave on the one hand, and punish an employee for using sick leave on the other.”).

49. Letter from Patty Siegel, Executive Director, California Child Care Resource & Referral Network, to Senator Gloria Romero (June 3, 2002) (on file with the *McGeorge Law Review*).

50. See Broyles Letter, *supra* note 7 (explaining that Chapter 1107 “creates a new reason to sue California employers by providing that an employee working under such an [ACP] would be entitled to appropriate legal and equitable relief.”).

51. *Id.*

52. Cal. Mfrs. & Tech. Ass’n, *supra* note 35.

53. See *id.* (describing that “[w]hen laws become overly restrictive or very difficult to comply with and the employer is facing sanctions for violations, it provides a strong incentive for the employer to simply eliminate their sick leave program.”).

54. See *id.* (stating that the “[California Manufacturers & Technology Association] believes that it would be poor public policy to protect those employees who have trouble getting to work . . . and could end up eliminating the benefit for all employees.”).

C. *Delays, Reassignment, and Lower Morale*

Employers are not the only people negatively affected by Chapter 1107.<sup>55</sup> Excessive use of sick leave causes problems for other employees as well.<sup>56</sup> Projects are often reassigned to other employees to complete.<sup>57</sup> This reassignment often leads to additional costs in overtime.<sup>58</sup> Further, even if the work is not reassigned, projects are often delayed.<sup>59</sup> These events lower morale in the workplace, create animosity towards excessively absent employees, and ultimately affect the productivity of the business as a whole.<sup>60</sup>

In addition to low morale, certain types of employment demand high attendance.<sup>61</sup> This is especially true in specialized areas, such as healthcare.<sup>62</sup> Having a sufficient number of skilled employees is essential to patient safety.<sup>63</sup> With the current shortage of nurses, it is imperative that hospitals have some type of recourse in order to deter excessive absences.<sup>64</sup>

D. *Suggested Changes*

The Legislature should consider revising Chapter 1107 in order to provide a review policy in lieu of a per se violation.<sup>65</sup> Under the review policy, employers would only be able to apply family sick-leave days to ACPs if certain elements were present. These elements could include: (1) multiple use of family sick leave on days preceding holidays and weekends, (2) use of family sick leave toward the end of the period where remaining sick-leave days would terminate, (3) use of family sick leave where excessive absences present a danger to patients.<sup>66</sup> Requiring at least one of these elements to be present would protect employees by limiting employers' powers under the ACPs, while still allowing the employer

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55. See Broyles Letter, *supra* note 7 (noting that "indiscriminate use of sick leave accruals causes problems in the workplace, not just for the employer, but for other workers as well.").

56. *Id.*

57. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1471, at 2 (Apr. 10, 2002).

58. *Id.*

59. *Id.*

60. *Id.*

61. See Moretti Letter, *supra* note 32 (stating that in hospitals, "[h]aving sufficient numbers of employees with the necessary skills on duty for each shift . . . is critically important.").

62. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1471, at 2 (Apr. 10, 2002).

63. See Moretti Letter, *supra* note 32 (discussing the importance of qualified employees).

64. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1471, at 2 (Apr. 10, 2002).

65. See Baltimore County Office of Human Resources, *supra* note 16 (describing an example of a review policy).

66. See *id.* (describing an ACP with similar elements).



to deal with employees who abuse the sick-leave policy.<sup>67</sup> Most importantly, this compromise would benefit both sides and cancel the threat of eliminating sick-leave benefits altogether.<sup>68</sup>

## V. CONCLUSION

There is little doubt that the Legislature had good intentions in enacting Chapter 1107. The existing law had a problem because it allowed employers to circumvent the law and penalized employees for taking family sick-leave days.<sup>69</sup> Employers should not be able to arbitrarily punish an employee because he uses a family sick-leave day.<sup>70</sup> However, Chapter 1107 only solves this arbitrary punishment by creating a new problem.<sup>71</sup> By making it a per se violation to punish employees who take family sick leave, Chapter 1107 essentially provides employees with excessive protection.<sup>72</sup> Employees are able to take days off under the guise of a family sick-leave day, and the employer can do nothing about it.<sup>73</sup> Until Chapter 1107 is revised, there is a good chance that employees will exploit its limitless protection.<sup>74</sup> Such exploitation may lead to the termination of sick-leave benefits altogether and ultimately harm employees more than help them.

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67. *See id.* (explaining that the goal of the Baltimore County ACP is to work with both the employee and the employer).

68. *See id.* (addressing the concerns of both the employee and the employer).

69. *See Rankin Letter, supra* note 27.

70. *See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1471*, at 1 (Apr. 10, 2002).

71. *See supra* Part IV.A (stating that Chapter 1107 creates a “safe harbor”).

72. *See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1471*, at 4 (June 12, 2002).

73. *See Broyles Letter, supra* note 7; Toth Letter, *supra* note 7.

74. *See Cal. Mfrs. & Tech. Ass’n, supra* note 35 (explaining that when section 233 of the California Labor Code went into effect, “employers began to see [an increase] in the use and abuse of sick leave”).