Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Paid Administrative Leave: There Ought To Be A Law

Law360, New York (February 24, 2017, 12:51 PM EST) --

Gregory J. Rolen

You've had your coffee and you're on your way to the office. You have had a fine career in public service and you're at the pinnacle of your profession. You like your job and privately congratulate yourself for helping people and not chasing the almighty dollar. Things are good. Suddenly, your expressionless boss walks in and instructs you to leave immediately because you are on, "paid administrative leave." You've heard the term, "paid administrative leave" it's usually reserved for criminals and people who are about to be fired.

"Why?" you ask.

"I don't have to answer your questions," your boss responds.

You are ordered away from your computer, to relinquish your cellphone, keys and to not contact anyone. You are locked out of your email and ignominiously escorted out the door in plain view of your friends and coworkers who awkwardly avoid eye contact.

You compose yourself and scour your memory for what possible reason you were placed on paid administrative leave (PAL). There must be some mistake, but there isn't. You receive a letter confirming you are on PAL pending an "investigation." You must remain available for work, but cannot speak with anyone concerning the circumstances. Really? What do you do about meetings, appointments or assignments? Who is doing your work? How much is this costing them? All these questions remain unanswered, including the question of why you were originally placed on PAL. Days go by, then weeks, months, sometimes years. Your anxiety becomes excruciating, yet you receive nothing from work, except your paychecks. Finally, you summon the nerve to call an attorney and ask, "Can they get away with this?"

The answer is devastating: "They kinda can."

California public entities and employees are being increasingly victimized by PAL abuse. PAL is leave from a job, with pay and benefits intact. Although sometimes an indispensable practice, PAL is metamorphosing as a means to not only shortcut public employees' workplace rights, but also to destroy reputations. Simultaneously, PAL is becoming an avatar for government ineptitude. Recent government and media reports paint a picture of a surreptitious, underreported and inconsistently applied practice where taxpayers pay employees to lounge around watching soap operas. Such abuses motivated an otherwise gridlocked Congress to sponsor legislation to regulate PAL.

Do we need similar legislation in California, and what would that mean for public employment?

How Did We Slip on this Slope?

PAL was traditionally a legitimate personnel practice reserved primarily for employees who posed an immediate threat to person property. To understand its genesis, one must understand one of the only existing regulations authorizing PAL: OPM regulation at 5 CFR §752.404 (b) (3):

> Under ordinary circumstances, an employee whose removal … has been proposed will remain on duty … during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace … may pose a threat to the employee or others, result in loss or damage to government property, or otherwise jeopardize legitimate government interest, the agency may … place the employee in a paid, nonduty status for such time as is necessary ...”

It is important to note that this regulation allows PAL in "rare circumstances," for a finite time frame. PAL runs concurrent with the issuance of a disciplinary action, not before, as has become the case. This misapplication is likely because agencies rely on the “otherwise jeopardize legitimate government interests” language and there is no mechanism forcing agencies to justify this determination. The same holds true in California, where the problem is magnified by the increased difficulty disciplining public employees.

California employees have a "property interest" in their employment derived from the 14th Amendment to the U.S. Constitution, which provides, "nor shall any state deprive any person of life, liberty or property without due process of law …" Many public employees have additional rights derived from case law, statute, property and contract. These include representation, notice, discovery, motion practice and an evidentiary hearing. This must all be consistent with notions of progressive discipline. Thus, tremendous time, energy and money can be expended to simply demote a poor employee. It is only natural to try to streamline this process by theorizing that since the employee is still getting paid, there is no property deprivation.

So the public employer effectively disciplines the employee by removing them from the workplace, yet keeping them on the public dole. How can this be?

PAL is a personnel action. Public employees have privacy rights related to personnel actions. The California Constitution, Article 1, §1 creates a private cause of action for a violation of privacy rights. Public employees’ privacy is protected by the Brown Act[1] and the Public Records Act[2]. Therefore, an employee's work status is, “a confidential personnel matter.” Similarly, public entities do not have a separate PAL payroll category, therefore they are forced to record it as other leaves. The employee's salary and benefits remain in the budget, however, associated costs such as legal fees and substitutes are hidden in seemingly unrelated budget entries. As such, it is nearly impossible to track the taxpayer dollars spent on PAL. This confluence of factors has made it so PAL abuse rarely sees the light of day.

Government now has a convenient means to address, or not address, difficult personnel issues. Although there is absolutely no California statute authorizing PAL, it is ingrained in our public sector management culture. PAL has become so commonplace that it can take on a life of its own. Public entities find themselves in the unenviable position of placing an employee on PAL “pending an investigation,” but finding no wrongdoing. Without cause to bring a disciplinary action, they must either return the employee to work, institute a flimsy disciplinary action or keep them on PAL. Returning the

employee to work is uncomfortable and embarrassing, and no one wants to bear the cost and uncertainty of a disciplinary hearing, so employees simply languish on PAL. Such is the plight of Inspector General Paul Brachfeld.

The Face of the PAL Abuse Epidemic

In 2012, Paul Brachfeld, was placed on PAL for alleged wrongdoing. He remained on PAL for two years, costing the taxpayers $300,000 in his salary plus several hundred thousand dollars in legal fees, thus starting a national conversation about PAL abuse.

In 2013, then-ranking member of the Senate Judiciary Committee, Sen. Chuck Grassley, R-Iowa, and Rep. Daryl Issa, R-Calif., requested the Government Accounting Office (GAO) examine how federal agencies used PAL. The GAO issued the 2013 GAO report, which concluded that between the fiscal years 2011 and 2013, at least 263 employees were placed on PAL for one to three years, costing the American taxpayers approximately $3.1 billion for employees who were forbidden to work. The 2013 GAO report also found a lack of documentation and consistency in how agencies record PAL.

Sen. Grassley researched 18 additional agencies and issued a memorandum of staff findings, the committee report, detailing further abuses. For example, in FY 2014, the U.S. Department of Homeland Security and the U.S. Department of Veterans Affairs spent more than $40 million in employee salaries on PAL of one month or more. The committee report found that the lack of statutory guidelines and PAL limits led to inconsistent practices. Also, agencies' policies varied widely on the PAL duration. Most agencies placed no specific time limit on the PAL use. Rather, placing employees on PAL for whatever time they felt necessary to effect a personnel action or complete an investigation.

The committee report predictably found that employees were placed on PAL without providing justification, stating that many agencies failed to articulate how employees posed any threat whatsoever. The committee report noted that the U.S. Department of Justice, which required managers to explain a basis for placing an employee on PAL, was more successful in limiting extended administrative leave. Finally, the committee report found that because PAL was not appealable, it was used by agencies to retaliate against whistleblowers[3]. An employee may wait for years while their career languishes because the agencies take no action. According to the Professional Managers Association, administrative leave "has been used by agencies to drag out investigations, leaving workers in limbo for unreasonable periods of time."

Similar problems abound in California. A recent Public Records Act request revealed that in 2011 and the first half of 2012, Humboldt County, California, a county of just over 130,000 residents, spent more than $700,000 on salary and benefits for employees on PAL. The average leave lasted more than seven months. In smaller counties, such as Napa and Nevada, employees' leave averaged eight weeks. Although the data is incomplete, given the inconsistent policies, and lack of regulation and reporting, this is likely the tip of the iceberg.

There is Also a Human Cost

While the financial cost is palpable, the human cost is insidious. Employees generally loathe being placed on PAL. It doesn't end well. Employees understand the PAL is often a one-way ticket to unemployment. Employees do not consider PAL a "paid vacation" because their future is in jeopardy. Also, they must be available for work and account for time, such as medical appointments. It is extremely difficult to seek other employment because of the pervasive and jaundiced attitude about job

applicants on PAL. Why even consider somebody on PAL? They must have done something wrong.

The human cost is intensified by the expanding scope of social media. Blogs and media outlets are rapidly propagating the news of public officials on PAL. This can immediately destroy a promising career, even if the PAL is baseless. In extreme circumstances, unscrupulous individuals need do little else than place someone on PAL to marginalize a personal, political or professional adversary. All of this with no statutory authority, regulation or transparency.

The Administrative Leave Act of 2016

The United States Congress recognized this problem and in February 2016 the Senate Homeland Security and Governmental Affairs Committee approved the Administrative Leave Act of 2016, which would limit federal agencies' PAL use. It would create a new leave category — Investigative Leave — provided agencies meet specific criteria and cannot use other available options. Agencies would have to comply with more stringent reporting requirements, including recording administrative leave separately from other forms of excused absences, and providing employees explanations for why they were placed on leave. To this point, the act has received bipartisan support and in mid-2016 was given a 58 percent chance of passage by GovTrack, a free website that tracks federal legislation for the general public.

Should California adopt legislation similar to the act? This analysis requires a balancing between the rights of the employee and the effectiveness of the organizations, or stated differently, the necessity of the personnel action against the cost and abuse.

Opponents would argue that PAL is necessary to take prompt action and protect workplace efficiency. New requirements would create an additional level of bureaucracy for an already overburdened system. They may argue PAL benefits the employee because it is nondisciplinary and allows for deliberative action, and/or that legislation is an unnecessary overcorrection in response to a "few bad apples." Those opponents are likely right.

However, few opponents would condone the outrageous waste, personal toll and weaponized use of PAL revealed in the federal investigations. The act neither curtails management discretion nor changes the current levels of disciplinary due process. At its essence, it only requires facts supporting the PAL decision. Quoting Sen. Grassley, "Paid leave shouldn't be a crutch for management to avoid making tough personnel decisions or a club for wrongdoers to use against whistleblowers." Where there are no articulable facts, we would all rather keep the employee productive. This idea deserves consideration.

—By Gregory J. Rolen, Haight Brown & Bonesteel LLP

Gregory Rolen is a partner at Haight Brown in San Francisco. He is a member of the firm's public entity and employment and labor practices.

[1] Government Code § 54957 (b)

[2] Government Code § 6254 (c)

[3] Dixon v. United States Postal Service, 69 M.N.S.R. 171 (1995)
