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AB 1867: California Enacts Supplemental COVID-19 Paid Sick Leave Law

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Background and Purpose of the Bill

On September 9, 2020, Governor Newsom signed Assembly Bill 1867 (the “Act”), which requires private employers that employ 500 or more employees in the United States to provide California employees with paid sick time for COVID-19-related absences. The Act also codifies Executive Order N-51-20, signed on April 16, 2020, which provided supplemental paid sick leave to food sector workers. The Act further closes the gaps left open by the Families First Coronavirus Response Act (“FFCRA”) by expanding coverage to any employer that employs healthcare providers or emergency responders.

The Act and its provisions become effective on September 19, 2020 and expire on December 31, 2020, or upon the expiration of any federal extension of the FFCRA, whichever is later. Therefore, California employers subject to the new law should immediately review and update their paid sick leave policies.

Which Employers Are Covered

The Act applies to private employers with 500 or more employees in the United States. For purposes of calculating the number of employees, the Act incorporates a recent federal Department of Labor regulation implementing the FFCRA (29 CFR § 826.40), which provides that “employees” includes: (i) all employees currently working, (ii) employees on leaves of any kind, (iii) employees of temporary placement agencies who are jointly employed under the Fair Labor Standards Act, and (iv) day laborers.

The Act also expands coverage to all employers—including public entities and irrespective of the number of employees—that employ healthcare providers or emergency responders who were excluded from emergency paid sick leave under the FFCRA.

Qualifying Reasons for Paid Sick Time

A covered employer must provide an employee supplemental paid sick leave under the Act for any of the following reasons:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee is advised by a healthcare provider to self-quarantine or self-isolate due to concerns related to COVID-19; or

- The employee is prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

Duration and Use of Paid Sick Time

The Act defines employees eligible to use COVID-19 supplemental paid sick leave as those who “leave[] the . . . home or other place of residence to perform work for the person’s hiring entity.”

An employee is entitled to 80 hours of COVID-19 supplemental paid sick leave, if the employee satisfies either of the following criteria:

- The employer considers the employee to work “full time”; or
- The employee worked or was scheduled to work, on average, at least 40 hours per week for the employer in the two weeks preceding the date the employee took COVID-19 supplemental paid sick leave.

For all other employees (e.g., part-time employees), the minimum amount of COVID-19 supplemental paid sick leave shall be calculated as follows:

- *If the employee has a normal weekly schedule*, the total number of hours the employee is usually scheduled to work for the employer over two weeks;
- *If the employee works a variable number of hours*, 14 times the average number of hours the employee worked each day in the six months prior to taking COVID-19 supplemental paid sick leave or, if the employee has been employed for less than six months, over the entire period the employee has worked for the employer; or
- *If the employee works a variable number of hours and has worked for the employer over a period of 14 days or fewer*, the total number of hours the employee has worked.

COVID-19 supplemental paid sick leave is in addition to any paid sick leave the employee may be entitled to under the Healthy Workplaces, Healthy Families Act of 2014, Labor Code section 246 (“HWHFA”). Further, an employer *may not* require an employee to first use other paid leave provided by the employer.

Employees may use COVID-19 supplemental paid sick leave immediately for any of the above-listed reasons. An employee may determine how many hours of COVID-19 supplemental paid sick leave to use, up to the total number of hours to which the employee is entitled.

If the Act expires while an employee is taking COVID-19 supplemental paid sick leave, the employee shall be permitted to take the full amount of COVID-19 supplemental paid sick leave to which he or she otherwise would have been entitled to.

Compensation for Paid Sick Time

Employees using COVID-19 supplemental paid sick leave shall be compensated at the highest of (i) their regular rate of pay for their last pay period, (ii) the state minimum wage, or (iii) the local minimum wage to which the employee is entitled.

Notwithstanding the above, an employee's pay for COVID-19-related sick leave is capped at \$511 per day and \$5,110 total.

Relief for Employers that Previously Provided COVID-19-Related Sick Leave

Employers that previously provided employees with leave for the reasons described above, and compensated the employee at an amount equal to or greater than what the Act requires, may count the hours of the other paid benefit or leave towards the total number of hours of COVID-19 supplemental paid sick leave required under the Act.

Alternatively, if the employer provided leave, but did not compensate its employees in an amount equal to or greater than the compensation required under the Act, the employer may retroactively provide supplemental pay to the covered worker to satisfy the Act's compensation requirements and, thereafter, count those hours towards the total number of hours of COVID-19 supplemental paid sick leave required under the Act.

Leave provided pursuant to the HWHFA is excluded from these setoffs.

Employer Notice Requirements

Pursuant to Labor Code Section 247, employers must display a poster that explains the nature of COVID-19 supplemental paid sick leave. The Labor Commissioner shall make publicly available a model notice for purposes of Section 247 by September 16, 2020. This notice must be posted at workplaces before September 19, 2020. If an employer's employees do not frequent the workplace, then it may disseminate the notice through electronic means, such as by email.

Employers must also provide notice in a wage statement (or a separate writing provided on pay day) of an employee's available COVID-19 supplemental paid sick leave each pay period. That requirement takes effect in the first pay period following the date of enactment.

Enforcement

The Act expressly authorizes the Labor Commissioner to enforce its requirements, including investigating violations and ordering temporary relief to mitigate violations. In the event COVID-19 supplemental paid sick leave is unlawfully withheld, the employer may be subject to an administrative penalty of at least \$250 per day, but not to exceed \$4,000 in the aggregate. The Labor Commissioner or the Attorney General may also bring civil action to collect other legal or equitable relief, including reinstatement, back pay, the payment of sick days unlawfully withheld, and liquidated damages.

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