COVID Supplemental Paid Sick Leave: Large vs. Small Employer

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We are now halfway through the first week since California's 2022 COVID-19 Supplemental Paid Sick Leave (SPSL) became effective. To assist with the efficient processing of requests, we have prepared the attached SPSL Pay Request Form in English, with a Spanish translation courtesy of FELS.

As employers adjust to the new rules, we have received a lot of questions about how to calculate the number of employees to determine if the employer is subject to the SPSL law. Similar to AB 1066 (overtime) and SB 3 (minimum wage), the SPSL regulations also distinguish between "large" employers (26 or more) and "small" employers (25 or fewer). During a recent webinar presented by the Department of Labor Standards and Enforcement (DLSE), the presenting Labor Commissioner attorneys said that employers should calculate the number of employees in the same manner as they would for minimum wage; i.e.; the large and small employer thresholds under AB 3. For purposes of minimum wage determinations, we look at the Labor Commissioner's SB 3 guidance, which provides that the employee count is based on the applicable pay period, meaning that here, for SPSL, when the employee requests the leave. Based on this information, we suggest employers consider the following when checking to see if they are subject to the SPSL:

1. Where a grower's direct hire employees and any FLC employees combine to total 26 or more employees, the grower is subject to the new SPSL requirements;

2. Where an FLC has a total of 26 or more direct hires, the FLC must provide SPSL, regardless of where the FLC's direct hire employees are working (thus, a grower who is not subject to SPSL may still see the applicable labor cost charges because the FLC has to comply with the SPSL);

3. Employers should look at the number of employees (direct hires and FLC) employed at the time of the request for SPSL. For employers who are on the cusp of large employer status, we recommend that if the employer has reached the large employer status (26 or more employees), the safest course of action is to consider your company a large employer even if you later qualify for small employer (25 or less employees) status unless the reduction in employees will be for a significant period of time; i.e. a month or more. This reduces risk of errors in applying the SPSL, prevents a breakdown of employee morale and reduces employee confusion as to why one employee qualified for SPSL one week and the next week the company is no longer required to provide SPSL.

4. For employers paying retroactive leave, the safest option is to pay the requested SPSL if at **either** (a) the time the leave was taken, or (b) at the time of the request for SPSL, the employer was subject to the SPSL law.

When making the determination as to whether an employer is subject to the SPSL law, and thus required to provide SPSL to its employees, employers should keep in mind that the Labor Commissioner has a long-standing position that when the law creates an ambiguity, employers should adopt the policy that provides the greater benefit to employees.