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Supplemental COVID-19 Paid Sick Leave Under AB 1867

On September 9, 2020, California Governor Gavin Newsom signed AB 1867 into law creating two new Labor Code sections: 248 (food service workers) and 248.1 (covered workers), and also amending Labor Code section 248.5 (enforcement procedures). The provisions are effective immediately, and require all private businesses with 500 or more employees nationwide (as well as certain health care providers and emergency responders) to provide their California employees with COVID-19 related supplemental paid sick leave no later than September 19, 2020.

The bill was intended to close the gaps between federally mandated paid COVID-19 related sick days and the Governor's previous Executive Order that only provided paid sick leave for "food sector" workers. The new law implicates all private employers in California with over 500 employees, as well as public and private employers of first responders and health care employees who opted not to provide leave under the federal law.

Under this new California law, employees who must leave their home to perform work are entitled to COVID-19 supplemental paid sick leave if they are unable to work when they are:

Subject to a federal, state, or local quarantine or isolation order related to COVID-19;

Advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or

Prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

Employees are entitled to COVID-19 supplemental sick pay based on their regular schedules as follows:

For employees who work "full time" and were scheduled to work or did work on average at least 40 hours per week in the two weeks preceding the date of taking this leave, 80 hours (with exceptions for certain firefighters);

For employees with a normal weekly schedule, the total number of hours the employee is normally scheduled to work over two weeks;

For employees who work a variable number of hours, 14 times the average number of hours the employee worked each day in the six months preceding the date the employee took COVID-19 supplemental paid sick leave (or, if the employee has worked less than six months but more than 14 days, the average hours worked over the entire employment period);

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For employees who work a variable number of hours and have worked for a period of 14 or fewer days, the total number of hours the employee has worked for that employer.

The law authorizes the employee to determine how many hours of COVID-19 supplemental paid sick leave to use. The law also requires the employer to make COVID-19 supplemental paid sick leave available for immediate use upon the employee's oral or written request.

The COVID-19 supplemental sick pay must be paid at an hourly rate of the highest of: (1) the employee's regular rate of pay for the last pay period (including amounts subject to any applicable collective bargaining agreement); (2) state minimum wage; or (3) local minimum wage. However, like the federal law, employers are not required to pay any more than \$511 per day and \$5,110 total to an employee for COVID-19 supplemental sick pay.

The law prohibits employers from requiring an employee to use any other paid or unpaid leave, paid time off, or vacation time before COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave, and expressly provides additional leave on top of any paid sick leave that may already be available to employees under Labor Code Section 246. The supplemental sick leave requirement runs concurrently with other types of leave other than regular paid sick leave.

There is some good news for employers who have already provided COVID-19 related paid sick leave, even where they were not required to do so. Where an employer provided leave, but did not pay it at the rates required under the new law, the law expressly authorizes an employer to retroactively provide supplemental pay to that covered worker in an amount equal to or greater than that required under the law, rather than providing additional leave time. Also, if an employer already provides or provided employees with a supplemental benefit, such as supplemental paid leave, that is payable for the COVID-19 reasons identified in the statute, then the employer may count the hours of that other paid benefit or leave toward the total number of hours of COVID-19 supplemental paid sick leave that it is required to provide under this law. These provisions are effective until the latter of December 31, 2020, or expiration of any federal extension of the Families First Coronavirus Response Act.

Food sector employees. Specific to employees in the food sector, the law requires employees working in any food facility (as defined by the Health & Safety Code) be permitted to wash their hands every 30 minutes and additionally as needed and, retroactive to April 16, 2020, mandates supplemental paid sick leave for food sector workers if they are unable to work due to any of the specified reasons relating to COVID-19 (codifying Executive Order N-51-20).

Update Wage Statements/Written Notice. Employers outside of the food sector must update their wage statements (or separate writing) to provide notice of the amount of supplemental paid sick leave available each pay period under this new law, and could be subject to liability for failure to do so starting with the next full pay period following the bill's September 9, 2020, enactment. We recommend doing so as a separate line item for tracking purposes (such as CA Supp. Sick Leave or COVID Leave). Employers should be sure to apply any applicable offsets for supplemental COVID paid time already granted

to an employee for a reason covered by the new law. Note: Food sector employers are not subject to the every pay period notice requirement of Labor Code § 246(i) for the new leave available under new Labor Code § 248.

Enforcement. The law authorizes the Labor Commissioner to cite employers for a failure to provide paid sick days, which the Governor states is “a critical enforcement tool that will promote safety for employees and customers alike.” The Labor Commissioner issued a model notice for posting in the workplace which you can access here:

Food Sector: <https://www.dir.ca.gov/dlse/COVID-19-Food-Sector-Workers-poster.pdf>

Non Food Sector: <https://www.dir.ca.gov/dlse/COVID-19-Non-Food-Sector-Employees-poster.pdf>

What This Means for Employers:

Navigating federal, state and local COVID-19 related laws and ordinances remain a significant challenge, particularly in California. Because these new provisions are effective immediately, employers must take care to ensure implementation in a short window. If you have questions or concerns regarding which types of regulations may apply to your workforce, and how to implement them, reach out to Barsamian & Moody.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.