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## California expands paid sick leave

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On September 9, 2020, California Governor Gavin Newsom signed Assembly Bill (AB) 1867, which enacts various COVID-19-related requirements and other programs. Specifically, these include:

- New supplemental COVID-19 paid sick leave requirements
- COVID-19 supplemental paid sick leave for food sector workers
- A mediation program for small employers
- Additional handwashing requirements for food workers
- Revised enforcement provisions in California's general paid sick leave law, the Healthy Workplace Healthy Family Act of 2014.

This alert primarily discusses the COVID-19 food sector supplemental paid sick leave (food sector leave) and COVID-19 supplemental paid sick leave for covered workers, which go into effect no later than ten days after enactment and expire on December 31, 2020, or upon the expiration of the Emergency Paid Sick Leave Act if extended past December 31, 2020.

### COVID-19 supplemental paid sick leave

The bill established COVID-19 supplemental paid sick leave for covered employers, including certain persons employed by private businesses of 500 or more employees or certain persons employed as health care providers or emergency responders by public or private entities. It essentially fills in the gap left by the [federal Family First Coronavirus Response Act](#) (FFCRA), which only covered private employers with fewer than 500 employees and permitted employers to exclude from coverage certain health care providers or emergency responders.

#### ***Which employees are now covered in California?***

Employees who:

- Are employed by a hiring entity in California or are employed as a health care provider or emergency responder, as defined pursuant to the FFCRA for a hiring entity, whether public or private, that opted not to provide leave under the federal law; **AND**
- Leave their home or place of residence to perform work for the hiring entity.

### ***Which employers (i.e., hiring entities) are covered?***

- Any other kind of business enterprise that has 500 or more employees in the United States. (NOTE: 29 CFR 826.40(a)(1) and (2) shall be used to determine the number of employees that the hiring entity employs.)
- An entity, including a public entity, that employs health care providers or emergency responders as defined per the FFCRA and has elected to exclude such employees from the federal COVID-19 emergency paid sick leave.

### ***Eligible uses for the sick leave***

A covered employer shall provide COVID-19 supplemental paid sick leave to each covered worker who performs work for employer if that worker is unable to work due to any of the following reasons:

- (A) The covered worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19:
- (B) The covered worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19: or
- (C) The covered worker is prohibited from working by the covered worker's hiring entity due to health concerns related to the potential transmission of COVID-19.

### ***How much leave is the eligible employee entitled to?***

- 80 hours for employees considered to be full-time employees or employees who worked or were scheduled to work, on average, at least 40 hours per week in the two weeks preceding the date the covered worker took COVID-19 supplemental paid sick leave.
- The total number of hours the employee is normally scheduled to work over two weeks if the employee has a normal weekly schedule.
- 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 if the employee works a variable number of hours.
- If the employee has worked over a period of fewer than six months, but more than 14 days, this calculation shall instead be made over the entire period the employee has worked.
- If the employee works a variable number of hours and has worked over a period of 14 days or fewer, the total number of hours the employee has worked.
- Separate rules apply to firefighters and fire departments.

This is in addition to any paid sick leave the employee has accrued or has under Labor Code Section 246. A covered employer shall not require a covered worker to use any other paid or unpaid leave, paid time off, or vacation time provided by the employer before the covered worker uses COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave. However, if the covered employer supplemental benefit, provided for the "eligible uses," would compensate the employee for the amounts greater than or equal to what is provided by this law, then the employer may count the hours of this supplemental benefit toward the total number of hours required by this law.

### *Payment of sick leave & caps*

A covered employer must pay the employee's regular rate of pay for the employee's last pay period, the state minimum wage, or the local minimum wage to which the employee is entitled, whichever is greater, but the covered employer shall not be required to pay more than \$511 per day and \$5,110 in the aggregate to the employee for COVID-19 supplemental paid sick leave.

### *Immediate use*

The covered employer shall make COVID-19 supplemental paid sick leave available for immediate use by the eligible employee, upon the oral or written request of the worker.

### *Wage statement requirement*

Covered employers must update their wage statements to provide notice of the amount of paid sick leave available under this new law, and could be subject to liability for failure to do so.

### *Retroactive application*

If a covered employer already provided supplemental paid leave between March 4, 2020, and the effective date of this bill for the uses specified above, but did not compensate the employee in an amount equal to or greater than the amount of compensation for COVID-19 supplemental paid sick leave to which the employee is entitled, the employer may retroactively provide supplemental pay to the employee to satisfy the compensation requirement, in which case those hours may count towards the total number of hours of COVID-19 supplemental paid sick leave required.

### *Employer notice requirement*

Employers must display a poster that explains the nature of COVID-19 supplemental paid sick leave. The Labor Commissioner will make available a model notice relating to COVID-19 supplemental paid sick leave for covered workers for purposes of the posting requirements. The bill permits notice by electronic means in lieu of posting at the workplace if a hiring entity's covered workers do not frequent the workplace.

### *Enforcement*

The Labor Commissioner may enforce the provisions. 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.

### *Expiration*

This requirement expires on December 31, 2020, or upon the expiration of any federal extension of the Emergency Paid Sick Leave Act established by the FFCRA, whichever is later

## **Food sector leave**

With the addition of Labor Code section 248, AB 1867 largely codifies [Governor Newsom's Executive Order N-51-20 issued April 16, 2020](#).<sup>1</sup> Section 248 applies to hiring entities with 500 or more employees in the United States.

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<sup>1</sup> Section 248 applies retroactively to April 16, 2020.

### ***Eligibility of food sector workers***

The new law clarifies who is eligible to receive the food sector leave. Notably, it removes the Executive Order N-51-20 requirement that the food sector worker must qualify as an essential worker.

Section 248 defines “food sector workers” as any person who satisfies one or more of the following criteria:

- The person works in an industry or occupation defined in paragraph (B) of Section 2 of IWC Wage Order 3-2001 (Canning, Freezing, and Preserving Industry), paragraph (H) of Section 2 of IWC Wage Order 8-2001 (Industries Handling Products After Harvest), paragraph (H) of Section 2 of IWC Wage Order 13-2001 (Industries Preparing Agricultural Products for Market, on the Farm), or paragraph (D) of Section 2 of IWC Wage Order 14-2001 (Agricultural Occupations).
- The person works, including delivering food, for a food facility, as defined in Section 113789 of the Health and Safety Code (i.e. a facility that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level).

### ***Qualifying reasons for sick leave***

A food sector worker may take the food sector leave for the following reasons:

- The food sector worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The food sector worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
- The food sector worker is prohibited from working by the food sector worker’s hiring entity due to health concerns related to the potential transmission of COVID-19.

### ***Amount of leave***

A food sector worker is entitled to 80 hours of the food sector leave if their hiring entity considers them to work “full time” or they worked or were scheduled to work, on average, at least 40 hours per week in the two weeks preceding the date the food sector worker took the food sector leave.

Part-time food sector workers are still entitled to (i) the total number of hours the food sector worker is *normally* scheduled to work, for or through a hiring entity, over two weeks, or (ii) if the food sector worker works a variable number of hours, 14 times the average number of hours the food sector worker worked each day for or through the hiring entity in the six months preceding the date the food sector worker took the Food Sector Leave.<sup>2</sup>

The food sector leave is supplemental to any standard paid sick leave that may be available to the food sector worker under Section 246, and a hiring entity cannot require a food sector worker to use any other paid or unpaid leave, paid time off, or vacation time prior to, or in lieu of, the food sector leave.

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<sup>2</sup> If the food sector worker has worked for the hiring entity fewer than six months, the calculation is made over the entire period the food sector worker has worked for the hiring entity.

If a hiring entity, however, already provides a supplemental benefit that is payable for the reasons listed above and would compensate the food sector worker in an amount equal to or greater than the amount of compensation for taking COVID-19 food sector supplemental paid sick, then the hiring entity may count the hours of the other paid benefit or leave towards the total number of hours of the food sector leave that the hiring entity is required to provide. Such leave may include supplemental paid leave pursuant to Executive Order N-51-20 or federal or local law.

The hiring entity must make the leave available for immediate use by the food sector worker, upon the *oral or written* request of the worker to the hiring entity. The food sector worker may determine how many hours of their Food Sector Leave to use.

***Pay during leave***

The food sector worker must be compensated at a rate equal to the highest of the following: (i) the food sector worker's regular rate of pay for the food sector worker's last pay period, (ii) the state minimum wage, or (iii) the local minimum wage to which the food sector worker is entitled.

A hiring entity, however, is not required to pay more than \$511 per day and \$5,110 in the aggregate.

***Handwashing in the food sector***

AB 1867 also requires food sector employees be permitted to wash their hands every 30 minutes, and additionally as needed.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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