
EMPLOYMENT LAW ALERT

California Uses the FFCRA as a Guide to Provide Employees of Large Employers, 500 plus Employees, COVID Related Leave

On September 9, 2020, Governor Newsom signed Assembly Bill 1867 (the “Act”), a five-part bill that: (1) codifies existing COVID-19 supplemental paid sick leave (“CPSL”) requirements for certain food sector workers, (2) adds CPSL requirements for other employers, those with five hundred (500) or more employees and certain health care providers that opted out of the Families First Coronavirus Response Act (“FFCRA”), (3) creates a small-employer family leave mediation pilot program [\[1\]](#), (4) codifies existing COVID-19 handwashing requirements [\[2\]](#), and (5) amends enforcement provisions in California's pre-COVID paid sick leave law, i.e., the Healthy Workplace Healthy Family Act of 2014, California Labor Code 246.[\[3\]](#)

The Act codifies Executive Order N-51-20, signed on April 16, 2020, (the “Executive Order”) which provided supplemental paid sick leave to food sector workers. Additionally, it now requires employers with five hundred (500) or more employees in the United States to provide California paid sick time for specified COVID related absences. Finally, it expands coverage of the FFCRA to apply to employers of healthcare providers or emergency responders that could opt out of the FFCRA.

The Act becomes effective on September 19, 2020 and expires on December 31, 2020, or upon the expiration of any federal extension of the FFCRA, whichever is later.

COVID-19 Supplemental Paid Sick Leave (Labor Code 248.1)

Employers under the Act.

Previously, the federal government enacted the FFCRA to provide paid leave to employees of businesses with less than five hundred (500) employees. With California’s passage of AB 1867, California has created paid sick leave provisions applicable to employers with more than five hundred (500) employees and employers of healthcare and emergency responders that could previously opt out of compliance with the FFCRA.

For purposes of calculating the number of employees, the Act incorporates a recent federal Department of Labor regulation implementing the FFCRA, 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.

Employees Qualifying for CPSL.

The Act applies to individuals who leave their home or place of residence to perform work for their employer if leave is requested 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 by the employer from working due to health concerns related to the potential transmission of COVID-19.

How much leave is provided?

An employee subject to the Act will be entitled to leave in an amount that coincides with the amount the employee works. Thus, an employee that the hiring entity considers to work “full time” or if the employee worked or was scheduled to work, on average, at least forty (40) hours per week for the hiring entity in the two (2) weeks preceding the date on which the worker commenced his/her leave, will be entitled to eighty (80) hours of CPSL.

Not as simple is the amount of time that employees who are not full time should receive. It depends on whether or not they have a normal weekly schedule or work variable hours.

- Employees with a normal weekly schedule receive an amount of CPSL equal to the total number of hours that they are normally scheduled to work for the hiring entity over two (2) weeks.
- Employees who work a variable schedule, receive fourteen (14) times the average number of hours that they worked each day for the hiring entity in the six (6) months preceding the date on which they commenced their leave. If their employment tenure includes fewer than six (6) months, the total length of employment is to be used, unless they have been employed for fourteen (14) days or fewer, in which case, the total number of hours worked must be used.^[4]

Note that CPSL is in addition to California paid sick leave provided under the Healthy Workplaces, Healthy Families Act of 2014 (“HWHFA”), Labor Code 246. CPSL does not replace HWHFA and cannot be deducted from it. Additionally, employers cannot require employees to use other paid or unpaid leave, time off or vacation that it provides before, or *in lieu* of, using CPSL.

An exception may be created where an employer has already provided a supplemental paid leave benefit for the COVID-related reasons above pursuant to federal or local law. In those cases, the business may count the other paid benefit or leave hours towards the total number of CPSL hours that it must provide to the covered worker. Additionally, if the business already provided supplemental paid leave between March 4, 2020, and September 19, 2020, for the law's covered reasons, but did not compensate the worker in an amount equal to or greater than the amount of compensation required under the Act, the business may retroactively provide supplemental pay to the worker in order to satisfy the law's pay requirements and apply those hours towards the total number of hours of CPSL the worker is entitled to receive.

Rate of Pay.

Employees utilizing CPSL must be paid (1) their regular rate of pay for the last pay period (including pursuant to any collective bargaining agreement that applies), (2) state minimum wage or (3) local minimum wage, whichever rate is highest.^[5] Regardless of the rate utilized, the law caps the maximum amount of pay an employer must provide for CPSL at \$511 per day and \$5,110 overall. Payment for CPSL must be made by no later than the payday for the next regular payroll period after leave was taken.

Notice to Employees.

Labor Code 248.1 requires the California Labor Commissioner to make available a model notice to provide to workers. That notice must either be placed in a common area frequented by employees or disseminated electronically. The Labor Commissioner notice is currently available at <https://www.dir.ca.gov/dlse/COVID-19-Non-Food-Sector-Employees-poster.pdf>.

Additionally, employers are required to provide employees with written notice concerning the amount of leave available to the employee on either an itemized wage statement or in a separate writing provided on designated pay dates. CPSL leave should be segregated from California paid sick leave.

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 CPSL 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 a civil action to collect other legal or equitable relief, including reinstatement, back pay, the payment of sick days unlawfully withheld and liquidated damages.

Food Sector Workers Supplemental Paid Sick Leave

Food Sector Workers Supplemental Paid Sick Leave is largely identical to the provisions of Labor Code 248.1. In fact, Labor Code 248.1 was mirrored off of the Executive Order and, now, Labor Code 248. Thus, qualified reasons for leave, amount of leave and rate of pay they are virtually identical.

Unlike Labor Code 248.1, which takes effect on September 19, 2020, Labor Code 248 will take effect immediately, and due to its relationship to the Executive Order, will be retroactive to April 16, 2020. Currently, Labor Code 248 will be operative until December 31, 2020, and expire with the FFCRA. However, if the FFCRA is extended by the federal government, Labor Code 248 shall be extended to mirror the FFCRA's extension date. The same is true for Labor Code 248.1.

Employers that already provided their food sector workers with leave pursuant to the Executive Order, are not required to provide additional leave under Labor Code 248. Additionally, supplemental paid leave provided under federal or local law for the reasons specified in Labor Code 248, will satisfy Labor Code 248's requirement to provide food sector workers with CPSL.

Like Labor Code 248.1, the Executive Order required the Labor Commissioner to create a poster to distribute to workers regarding CPSL. It is unclear whether employers will be required to update the previous notice they provided per the Executive Order, given its codification. Regardless, the Labor Commissioner notice that for CPSL for food sector workers is available at <https://www.dir.ca.gov/dlse/COVID-19-Food-Sector-Workers-poster.pdf>.

If you have any questions about the new employment laws, please do not hesitate to contact us.

[1] The family leave mediation pilot program is for employers with between 5 and 19 employees and will help employers resolve allegations of non-compliance with expanded family and medical leave rights.

[2] AB 1867 codifies another Executive Order into California Health and Safety Code section 113963, Executive Order N-51-20. Under this Executive Order and now the California Health and Safety Code, food employees working in any food facility must be permitted to wash their hands every 30 minutes and additionally as needed.

[3] This article focuses on the COVID-19 supplemental paid sick leave requirements.

[4] There is a separate calculation utilized for active firefighters. Active firefighters scheduled to work more than 80 hours for the hiring entity in the two (2) weeks preceding the date the firefighter took leave are entitled to an amount of CPSL equal to the total number of hours they were scheduled to work for the hiring entity in those two (2) preceding weeks.

[5] A different rate may apply to firefighters.



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