Special Alert: California Reinstates Expanded Version of its COVID-19 Supplemental Paid Sick Leave

On March 18, 2021, the California Legislature passed a budget bill (AB 84/SB 95), which:

(1) Largely reinstates California's supplemental paid sick leave law (AB 1867), which expired on December 31, 2020 -- the same time as the federal Families First Coronavirus Response Act (FFCRA).
(2) Expands this COVID-19 supplemental paid sick leave to more employers and allows it to be used for more qualifying reasons; and
(3) Will take effect ten days after Governor Gavin Newsom signs it (which he will likely do very shortly) and will apply retroactively to January 1, 2021 but is only effective through September 30, 2021.

Each of these items is discussed in greater detail below.

COVID-19 Supplemental Paid Sick Leave

For Context: Previous Federal and State Legislation as well as Local Ordinances

To understand this new state law, it is helpful to understand the legislative backdrop and the gaps it is trying to fill. In Spring 2020, the federal government enacted the FFCRA creating a paid sick leave entitlement for COVID-19 purposes that only applied to employers with fewer than 500 employees. The FFCRA also authorized health care or emergency responder employers to exclude certain health care providers and emergency responders from the FFCRA.

Concerned about the FFCRA's apparent exclusion of larger employers and various health care providers, California enacted AB 1867 to apply COVID-19 Supplemental Paid Sick Leave (COVID-19 SPSL) to larger employers (i.e., "hiring entities" with 500 or more employees) and the excluded health care providers/emergency responders. Simply put, AB 1867 was intended to fill in coverage gaps that existed under the federal FFCRA. In turn, several California cities and counties enacted their own versions of "supplemental paid sick leave" ordinances to also extend the FFCRA's provisions to larger employers within California, albeit each with their own variations and often differing in some respects from AB 1867.

Perhaps assuming, however, that the FFCRA would be extended if needed, AB 1867 and these local ordinances consistently tied their sunset provisions to the FFCRA's expiration date. Accordingly, when the federal government subsequently only extended the FFCRA's tax credits for SPSL-related leave purposes if voluntarily extended but did not also actually extend the FFCRA's leave requirements beyond December 31, 2020, AB 1867 and nearly all these local ordinances similarly expired on December 31, 2020.

Understandably concerned that the need for COVID-19 SPSL did not automatically expire when a new calendar year dawned, California and these municipalities have attempted to reinstate and often expand their COVID-19 SPSL requirements to once again fill in the gaps caused by the FFCRA's expiration. For example, San Francisco, Oakland, Los Angeles (City and County), Sacramento, Long Beach, San Jose, San Mateo (County), Santa Rosa and Sonoma, have all extended their supplemental leave ordinances, and in many instances have expanded them to apply to employers previously covered by the FFCRA (i.e., those with 500 or fewer employees) and made these ordinances retroactive to January 1, 2021. Readers with operations within these (and perhaps other municipalities with similar ordinances) may wish to examine those local ordinances.

The new law just passed by the Legislature similarly reflects California's statewide effort to reinstate and expand its COVID-19 SPSL requirements to fill in for the now-expired FFCRA.

Employers Required to Provide COVID-19 SPSL

One of the immediate differences between this new law and the prior FFCRA and AB 1867 are the "employers" required to provide COVID-19 SPSL. While previously almost any employer had to provide COVID-19 SPSL, with the only difference being whether it was required under the FFCRA (for employers with 500 or fewer employees) or AB 1867 (for employers with more than 500 employees), this new California law only applies to employers with more than 25 employees. Thus, any employer with more than 25 employees must provide COVID-SPSL under this new California law, and there is no longer any exclusion for so-called larger employers (i.e., with more than 500 employees).

Who is Eligible for COVID-19-SPSL?

Given the law's purpose of ensuring employees have paid time off related to COVID-19, it has a broad definition of eligibility. For instance, while AB 1867 defined "covered worker" to mean someone who left their home or residence to perform work, this law defines "covered employee" broadly as an employee "who is unable to work or telework for an employer" for any of the qualifying reasons discussed below. Also, as with AB 1867 and in contrast to the generally applicable statewide Paid Sick Leave law (Labor Code section 245), COVID-19-SPSL is immediately available to any eligible employee (i.e., unlike for general paid sick leave purposes, the employee need not have worked for 30 calendar days and need not wait 90 days before usage).

What Qualifies for COVID-19 SPSL?

One of the more dramatic changes with this newly effective state law is the expanded reasons for which COVID-19-SPSL can be taken. Under AB 1867 in 2020, a "covered worker" could only use COVID-19 SPSL for the following three reasons:

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

In contrast, the new law requires employers to provide COVID-19 SPSL under any of the following seven reasons:

(A) The covered employee is subject to a quarantine or isolation order related to COVID-19 as defined by an order or guideline of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer who has jurisdiction over the workplace (and if more than one of these applies, the employee is entitled to use the COVID-19 SPSL for the minimum quarantine or isolation period under the order or guidelines that provides the longest such minimum period).
(B) The covered employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
(C) The covered employee is attending an appointment to receive a vaccine for protection against contracting COVID-19.
(D) The covered employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.
(E) The covered employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
(F) The covered employee is caring for a family member (as defined under the statewide Paid Sick Leave law [Labor Code section 245.5]) who is subject to an order or guidelines described in subparagraph (A) above or who has been advised to self-quarantine, as described in subparagraph (B).
(G) The covered employee is caring for a child (as defined under the statewide Paid Sick Leave law [Labor Code section 245.5(c)] whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

As noted, in contrast with the current statewide paid sick leave entitlement, this COVID-19 SPSL is available immediately (i.e., no 30-day employment requirement, or 90 days of employment before usage), and *also* applies to those workers otherwise excluded from the general definition of "employee" for paid sick leave purposes in section 245.5(a) (e.g., CBA-covered employees, flight crew members, city/state employees, in-home support workers, etc.).

How Much COVID-19 SPSL is Available to Workers?

As under AB 1867, the amount of COVID-19 SPSL under the new law depends on whether the covered employee is essentially full-time or part-time. For instance, and consistent with AB 1867,

covered employees are entitled to 80 hours of COVID-19 SPSL if either (a) the employer considers the covered employee to be "full time," or (b) the covered 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 worker took COVID-19 SPSL.

Also consistent with AB 1867, other covered employees are entitled to differing amounts of COVID-19 SPSL depending on the type of schedules they work and/or their length of service with the employer. For instance, covered employees with a **normal weekly schedule** are entitled to the total number of hours the covered worker is normally scheduled to work for the hiring entity over a two-week period. Employees with **variable schedules** are entitled to 14 times the average number of hours the employee worked each day for the hiring entity in the six months preceding the date the worker took supplemental paid sick leave. If the employee has worked less than six months but more than 14 days, this calculation is made over the entire period the worker has worked for the hiring entity. Finally, if the employee works a variable number of hours and has worked for the hiring entity for 14 or fewer days, the employee will be entitled to the total number of hours worked for the hiring entity.

Moreover, as under AB 1867, workers can use the sick leave granted upon oral or written request (i.e., no need for medical certification) and the worker determines how much to use.

Two other points about the amount of COVID-19 SPSL are worth making. First, consistent with AB 1867, this "supplemental" paid sick leave is in addition to the amount of paid sick leave provided under California's currently existing statewide paid sick leave law. Second, while many of the recently extended municipal ordinances appear to only allow employees to use the balance of any SPSL not used in 2020 under that ordinance, this new statewide law appears to replenish the amount of COVID-19 SPSL, thus seemingly allowing the employee to use the full amount of COVID-19 SPSL in 2021 regardless of how much may have been used in 2020 under AB 1867.

What is the Applicable Rate for Supplemental Paid Sick Leave?

One difference between the new law and AB 1867 in 2020 is how to pay the employees who use COVID-19 SPSL. Specifically, while AB 1867 used a single standard for identifying the SPSL pay rate for both exempt and nonexempt employees, the new state law identifies different standards depending on whether the employee is exempt or nonexempt.

For nonexempt employees, the employer shall pay the SPSL at the highest rate of the following:

(A) Calculated in the same manner as the regular rate of pay for the workweek in which the covered employee uses COVID-19 SPSL, regardless of whether the employee worked overtime in that workweek.

(B) Calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
(C) The state minimum wage.
(D) The local minimum wage to which the covered employee is entitled.

In contrast, for exempt employees, the COVID-19 SPSL is calculated in the same manner as the employer calculates wages for other forms of paid leave time.

As with the FFCRA and AB 1867, this new law restates the general rule that the employer need not pay more than $511 daily and $5,110 in the aggregate for the employee's COVID-19 SPSL usage. The new law, however, has two new exceptions to this general rule. First, it states these caps (which were originally copied from the federal FFCRA) will automatically be raised to the new levels identified in any federal legislation amending the FFCRA as of the date any such federal amendments take effect. Second, this new law also authorizes a covered employee who has reached the maximum dollar amounts to utilize other available paid leave to fully compensate the employee for leave taken.

How Does COVID-19 SPSL Intersect with Other Paid Time Off?

As with AB 1867, the employer cannot require the worker to use other paid or unpaid leave, paid time off or vacation provided by the hiring entity before or in lieu of the worker using this supplemental paid sick leave. However, the new version has a provision regarding the interplay between COVID-19-SPSL and employees unable to work pursuant to the Cal-OSHA's Emergency Temporary Standards (ETS). Accordingly, to satisfy the ETS' requirement to maintain an employee's earnings when the employee is excluded from the workplace due to COVID-19 exposure, an employer may require a covered employee to first exhaust their COVID-19-SPSL under this new law.

As noted at the outset, the COVID-19 SPSL provisions take effect 10 days after Governor Newsom signs it and apply retroactively to January 1, 2021. And as with AB 1867, employers may wonder how this retroactivity affects time off they may have already provided in the period between AB 1867's expiration on December 31, 2020 and this new law taking effect. Like AB 1867, if the employer paid the covered employee a supplemental benefit for leave taken after January 1, 2021 in an amount equal to or greater than that required under this new law and that was allowed for the same qualifying reasons as under this new law, then the employer may count the hours of this other benefit towards the total number of COVID-19-SPSL otherwise required under this new law. As under AB 1867, this can include paid leave the employer provided pursuant to any federal or local law that became effective on or after January 1, 2021. However, it bears repeating that the employer cannot take a credit for paid sick leave provided under California's generally applicable paid sick leave since the COVID-19 leave is intended to be "supplemental."

Other Retroactivity Issues

As under AB 1867, this new law also provides opportunities for an employer to retroactively compensate employees who may have taken unpaid or not fully paid time off between January 1, 2021 and this new law's enactment. For instance, if the employee took time off for a qualifying reason after January 1, 2021 and before this new law took effect, and the employer did not compensate the employee in an amount at least equal to the amount required under this new law, then the employer must provide a retroactive payment upon the oral or written request of the employee. This retroactive payment must be made on or before the payday for the next full pay period after the oral or written request of the employee and must be reflected on the itemized wage statement reflecting the amount of COVID-19 SPSL available.

Notice Requirements

California's general paid sick leave law requires (per Labor Code section 247) that employers post in a conspicuous place statutorily enumerated information about the Healthy Workplace, Health Families Act. AB 1867 similarly required employers to post a model template the Labor Commissioner would develop regarding COVID-19-SPSL, and it specifically noted employers could satisfy this notice requirement concerning COVID-19-SPSL for workers that do not frequent the workplace by electronic means, including email. This new law similarly requires the Labor Commissioner to develop an updated template for employer notice purposes within seven days of the new law's enactment, and authorizes employers to once again, for employees to do not frequent the workplace, to provide this notice through electronic means, including email.

Moreover, this new law's enforcement provisions once again incorporate section 246(i), requiring that employers provide notice within an itemized wage statement or separate writing of an employee's available COVID-19 supplemental paid sick leave. Such notice must be given each pay period and must set forth COVID-19-SPSL separately from paid sick days. As under AB 1867, this requirement is not enforceable until the next full pay period following the date that this section takes effect.

For employees with variable schedules (as defined when determining how many hours of COVID-19-SPSL are available for non-full-time employees), the employer can satisfy these available balance notice requirements by performing an initial calculation and then noting "variable" next to that calculation. However, this does not exempt an employer from providing the employee an updated calculation when such a covered employee requests to use COVID-19 SPSL or requests relevant records under the record-keeping requirements under Labor Code section 247.5.

When does this New Law Apply?

This new statewide law will remain in effect through September 30, 2021, which coincides with the most recent federal extension of FFCRA tax credits under the American Rescue Plan signed by President Biden. However, as with AB 1867, any employee who is taking COVID-19 SPSL when

this law expires will be permitted to take the full amount of COVID-19-SPSL to which they otherwise would be entitled.

Please note, the various local ordinances (which are once again not preempted) often identify varying expiration dates for those ordinances, and it is possible some may already extend beyond that date or could be extended beyond that date.

How with the New Law be Enforced?

New Labor Code section 248.2(d) provides that any remedies available to enforce "any unlawful business practice" are available to help enforce these provisions. The Labor Commissioner is also authorized to enforce this new law as if COVID-19 SPSL constitutes "paid sick days," "paid sick leave" or "sick leave" under various enumerated Labor Code sections governing the statewide Paid Sick Leave law (e.g., sections 246, 246.5, 247, 247.5 and 248.5),

COVID-19 SPSL for "Firefighters" and In-Home Support Services Workers

As with AB 1867, this new law also enumerates slightly different amounts and guidelines applicable to "firefighters," as defined. These "firefighter" specific requirements are sprinkled within new Labor Code section 248.2, which also sets forth the more broadly applicable COVID-19 SPSL rules discussed above.

This new law also adds Labor Code section 248.3 identifying SPSL requirements applicable to "in-home supportive services workers. These industry specific requirements are beyond the scope of this Alert but are mentioned here in case any of the readers may be interested in consulting the statute for further questions.