

UPDATED GUIDANCE COVID-19 Paid Sick Leave For Employers With 500+ Employees, Child Care Leave, Payroll Tax Deferrals And New Eeoc Covid-19 Guidelines

CALIFORNIA'S NEW CORONAVIRUS PAID SICK LEAVE

The number of employees in California eligible for two weeks of COVID-19 related paid sick leave has now been expanded to employers with 500 or more employees. Assembly Bill ("AB") 1867 also codifies existing COVID-19 supplemental paid sick leave requirements for food sector workers. The provisions of the new law are effective no later than September 19th, except the food sector worker provisions are effective immediately.

Who is subject to the new requirements? The new COVID-19 supplemental paid sick leave requirements ("CPSL") requirements apply to food sector workers and private "hiring entities" with 500 or more employees in the United States, District of Columbia, or any U.S. Territory. There is no exception for unionized workforces. The new requirements also apply to any entity, including public entities, that are subject to the federal Families First Coronavirus Response Act ("FFCRA") requirements.

How much leave does each employee receive? Subject to a narrow exception discussed below, the amount of CPSL an employee receives depends on whether they are full-time or active firefighters.

- A covered worker is entitled to 80 hours of CPSL if the hiring entity considers the worker to work "full-time" or the worker worked or was scheduled to work, on average, at least 40 hours per week for the hiring entity in the two weeks preceding the date the worker took leave.
- For covered workers who are not full-time or firefighters, the amount of leave they receive depends on whether they have a normal weekly

schedule or work variable hours. Workers with a normal weekly schedule receive an amount of CPSL equal to the total number of hours they are normally scheduled to work for the hiring entity over two weeks. However, if they work a variable number of hours, they receive 14 times the average number of hours they worked each day for the hiring entity in the six months preceding the date they took leave. If they worked for the employer for fewer than six months, the average number of hour is to be determined over total length of their employment, unless they have been employed for 14 days or fewer, in which case, the total number of hours worked must be used.

- Active firefighters scheduled to work more than 80 hours for the hiring entity in the two weeks preceding the date the worker 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 preceding weeks.
- The amount of CPSL that must be provided to employees is reduced if an employer already provides a covered worker with a supplemental benefit, such as supplemental paid leave, that is payable for same as provided under AB 1867 (listed below) and would compensate the worker in an amount equal to or greater than the amount of compensation the law requires. In that case, the employer may count the other leave hours towards the total number of CPSL hours it must provide the covered worker.

When does an employee qualify for CPSL?

Employees may elect to take CPSL, if they are:

1. Subject to a federal, state, or local quarantine or

isolation order related to COVID-19;

2. Advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; and/or
3. Prohibited from working by the hiring entity due to health concerns related to the potential transmission of COVID-19.

It is worth noting that the third reason is not available for paid sick leave under the federal FFCRA. It is also worth noting that it is up to the employee whether they want to use their CSPSL hours, or elect to use PTO or other sick leave if available prior to depleting their CSPSL hours.

What is the Employee's rate of pay while on CSPSL? With a small exception for firefighters, employees using CSPSL must be paid their regular rate of pay for the last pay period (including pursuant to any applicable collective bargaining agreement), or the state or local minimum wage, whichever rate is highest. The maximum amount of pay an employer must provide for CSPSL is \$511 per day and \$5,110 overall.

Is there a paystub requirement? Yes. The amount of available CSPSL must be available on the employee's itemized wage statement or in a separate writing provided on designated pay dates. Failure to comply with this requirement can subject the employer to penalties under Labor Code section 226.

Is there a posting requirement? Yes, employers must display a poster containing information about CSPSL "in a conspicuous place." If workers do not frequent a workplace, a business can disseminate notice electronically, e.g., by email. A model poster will be provided by the California Labor Commissioner within seven days after the law's effective date.

When Does The Requirement To Provide CSPSL Expire? The obligations under AB 1867 expire on December 31, 2020, or upon the expiration of any extension of the federal Emergency Paid Sick Leave Act under the FFCRA, whichever is later. Regardless, a covered worker taking CSPSL at the time the requirements of the law expire shall be permitted to take the full amount of the CSPSL to which they

otherwise would have been entitled.

If you need help drafting a notice to post in the time between when the law becomes effective and when the Labor Commissioner issues the model notice, or have any other questions regarding the new CSPSL requirements, please contact Jeffrey Dinkin or Jared Speier for assistance (contact information at end of this Alert).

DEPARTMENT OF LABOR PROVIDES ADDITIONAL GUIDANCE ON CORONAVIRUS-RELATED CHILD CARE LEAVE

On August 27, 2020, the United States Department of Labor released additional questions and answers relating to school schedules and paid leave under the Families First Coronavirus Response Act ("FFCRA"). The FFCRA requires employers with fewer than 500 employees to provide up to 80 hours of sick leave and an additional 10 weeks of paid family leave—paid at two-thirds the employee's regular rate—when employees are unable to work because they need to care for a child whose school or child care provider is closed or unavailable for COVID-19-related reasons.

These Q&As provide guidance on three different scenarios for employees with children in school and whether they will still be eligible for FFCRA leave. These examples are:

1. If the child's school is operating on "alternate day" schedules, then the employee is eligible to take FFCRA leave on the days when the child is not permitted to attend school in person, as long as the employee has no other suitable person to take care of the child on those days;
2. If the school provides the option of attending school remotely or in person, then the employee will not be eligible for FFCRA leave because the school is not "closed" for purposes of the FFCRA; and
3. If the school begins the year with remote operations but announces that it may open at a later date, the employee is still eligible to take FFCRA leave until the school reopens for in

person attendance.

Additionally, the DOL issued a letter expanding the eligibility of caregivers for Pandemic Unemployment Assistance (PUA). The letter states that any individual who 1) is ineligible for regular unemployment, extended benefits, or pandemic emergency unemployment compensation; and 2) is unemployed, partially unemployed, or unable to work because “a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work” may be eligible for PUA.

However, if such an individual is able to work remotely or is receiving other paid sick leave or other paid leave benefits, then they will not be eligible for PUA under this expanded guidance.

The DOL Q&As may be found [here](#), and the DOL Letter may be found [here](#).

EEOC PROVIDES ADDITIONAL GUIDANCE ON COVID-19 TOPICS

On September 8, 2020, the EEOC updated its COVID-19 guidance, adding 18 new Q&As clarifying various topics including administration of COVID-19 tests before permitting employees to enter the workplace and disability accommodations.

With respect to testing employees, employers should ensure that the tests are considered accurate and reliable. For example, employers may review information from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Additionally, a negative test does not mean the employee will not acquire the virus later (for example being tested five days after exposure does not mean the employee will not acquire the virus within the 14 day incubation period). Employers should still require—to the greatest extent possible—that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

The EEOC also provided additional guidance on questions an employer may ask an employee. A few highlights are excerpted below:

1. An employer may ask all employees whether they have tested positive for COVID-19 if the employees are physically entering the work place;
2. If an employer wishes to ask only a particular employee whether they have tested positive, or to have their temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease;
3. An employer may not ask an employee whether they have family members who have contracted COVID-19. The Genetic Information Nondiscrimination Act (“GINA”) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease;
4. If an employee returns to work from traveling, an employer may ask where that person has traveled to determine whether that person should be able to come into work. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

These, and the other Q&As may be found [here](#).

IRS Guidance Regarding Deferring Collection of Social Security Taxes Until 2021

On August 28, 2020, the IRS issued Notice 2020-65, allowing employers to suspend withholding and paying to the IRS eligible employees' Social Security payroll taxes, as part of COVID-19 relief. The Notice provides brief guidance on the President's August 8, 2020, memorandum to the Treasury Department to defer collection of the employee portion of Social

Security Taxes from September 1 to the end of 2020.

While the guidance is not clear, deferring payment of Social Security appears to be voluntary as the Notice does not include any penalties for noncompliance. Thus, it remains up to the employer whether they want to allow their employees to defer payments.

Importantly, this Notice allows deferral of payments, not forgiveness. Any deferred amounts must be repaid by the employee beginning on January 1, 2020 and must be paid back in full by April 30, 2020. Failure to repay in full may result in employees incurring penalties and interest charges.

The IRS has also revised Form 941 to aid employers who want to allow their employees to defer Social Security withholding. The Form now includes a space to input any deferred amounts.

The IRS Notice can be found [here](#).

Stradling Has Resources To Help You Stay Compliant

To assist California employers in complying with federal, state, and local regulations, Stradling has materials available to help businesses conduct their comprehensive risk assessments and create their worksite specific protection plans to stay in compliance with legal requirements and reduce risks. We encourage you to reach out if you are in the process of reopening or you have been conducting business and want to make sure you are in compliance with the applicable industry guidelines.

We are available to assist

Please do not hesitate to reach out to us for assistance in dealing with the effects of the COVID-19 pandemic on your company.

Labor and Employment Practice Group

Jeff Dinkin

805.730.6820

jdinkin@sycr.com

Jared Speier

805.730.6804

jspeier@sycr.com

Intellectual Property Practice Group

Steven Hanle

949.725.4126

shanle@sycr.com

Corporate and Securities Practice Group

Ryan Wilkins

949.725.4115

rwilkins@sycr.com

Public Finance Practice Group

David Casnocha

415.283.2241

dcasnocha@sycr.com

Brian Forbath

949.725.4193

bforbath@sycr.com

Litigation Practice Group

Jason de Bretteville

949.725.4094

jdebretteville@sycr.com