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Governor Newsom Signs SB 95 (Skinner) **Expanding California Supplemental Paid Sick Leave**

Governor Gavin Newsom recently signed SB 95 (Skinner), which adds sections 248.2 and 248.3 to the California Labor Code and extends and expands the California COVID-19 supplemental paid sick leave statute that expired on December 31, 2020. The bill will apply retroactively to January 1, 2021 and expires on September 30, 2021. The expansion to existing law takes effect in California on March 29, 2021 and will exist in addition to paid sick leave that employers must provide, and to which covered employees and providers are already entitled under Labor Code Section 246 (the Healthy Workplaces, Healthy Families Act of 2014).

The law applies to employers with over 25 employees and requires that employers provide supplemental paid sick leave (“COVID-19 SPSL”) to covered employees and providers of in-home supported services who are unable to work or telework because of COVID-19 related reasons. This provision applies to any employee or provider who:

1. Is subject to a quarantine or isolation period 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;
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Is attending an appointment to receive a vaccine for protection against contracting COVID-19;
4. Is experiencing symptoms related to a COVID-19 vaccine that prevents the employee from being able to work or telework;
5. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
6. Is caring for a family member who is subject to a quarantine or isolation period 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, or who has been advised to self-quarantine;

7. Is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

Full-time employees are entitled to 80 hours of COVID-19 SPSL, while part-time employees are entitled to an amount of COVID-19 SPSL equal to the number of hours the employee regularly works over a two week span.

An eligible employee is considered full time and entitled to 80 hours of COVID-19 SPSL if: (1) “[t]he employer considers the covered employee to work full time”; or (2) “[t]he 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 covered employee took COVID-19 supplemental paid sick leave.”

A covered employee who does not meet the definition of a full-time employee (and who is not a “firefighter,” as defined by the law) is entitled to COVID-19 SPSL as follows:

1. If the covered employee has a normal weekly schedule, the total number of hours the covered employee is normally scheduled to work for the employer over two weeks.
2. If the covered employee works a variable number of hours, 14 times the average number of hours the covered employee worked each day for the employer in the six months preceding the date the covered employee took COVID-19 supplemental paid sick leave. If the covered employee has worked for the employer over a period of fewer than six months but more than 14 days, this calculation shall instead be made over the entire period the covered employee has worked for the employer.
3. If the covered employee works a variable number of hours and has worked for the employer over a period of 14 days or fewer, the total number of hours the covered employee has worked for that employer.

The new law makes COVID-19 SPSL retroactive to January 1, 2021. In other words, an employee can use COVID-19 SPSL for any absence since January 1, 2021, so long as that absence falls within a covered reason. California employers must therefore also provide retroactive payment for qualifying leave taken since January 1, 2021 once an employee makes an oral or written request for qualifying payment. An employer must make payment on or before the payday for the next full pay period after the employee makes the oral or written request and the employee’s wage statement must separately list the payment and reflect the hours available, rate of pay, and corresponding COVID-19 SPSL wages.

Excluding regular mandated paid sick leave, the law allows employers to credit hours of other paid leave provided to employees on or after January 1, 2021 for absences taken for reasons now covered by COVID-19 SPSL. Notably, however, pursuant to Labor Code section 248.3, for in-home supportive services providers, the amount of COVID-19 SPSL provided “is in addition to any unused

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sick leave benefits put in place by the federal Family First Coronavirus Response Act (Public Law 116-127), which a provider may still use until March 31, 2021.”

The new law implements special rules for firefighters. “[A] covered employee who is a firefighter who was scheduled to work more than 80 hours for the employer in the two weeks preceding the date the covered employee took COVID-19 supplemental paid sick leave is entitled to an amount of COVID-19 supplemental paid sick leave equal to the total number of hours that the covered employee was scheduled to work for the employer in those two preceding weeks.”

The law sets forth how employers should calculate COVID-19 SPSL wages for nonexempt covered employees. Employers must pay each hour of COVID-19 SPSL for nonexempt employees at the higher of the:

1. Employee’s regular rate of pay for the workweek in which COVID-19 SPSL was taken, regardless of whether the employee worked overtime in that workweek;
2. Covered employee's total wages, not including overtime premium pay, [divided] by the employee’s total hours worked in the full pay periods of the prior 90 days of employment;
3. California minimum wage; or
4. Local minimum wage.

The law mandates that employers calculate COVID-19 SPSL for exempt covered employees in the same fashion as wages are calculated for other forms of paid leave time for exempt employees. The law caps COVID-19 SPSL wages at \$511 per day and \$5,110 in the aggregate for each covered employee.

An employer may not force covered employees to use any other form of paid or unpaid leave or time off, including employer provided sick leave, vacation, or paid time off utilized prior to using COVID-19 SPSL. Rather, the law authorizes employees to choose the amount and timing of COVID-19 SPSL use. An employer may, however, require that an employee exhaust COVID-19 SPSL before the employer pays exclusion pay under the California Division of Occupational Safety and Health COVID-19 Emergency Temporary Standards. Currently, employers must pay exclusion pay if they exclude an employee who tests positive during the infectious period or an employee who has close contact with a positive individual and either situation is work-related.

An employer must list the amount of available COVID-19 SPSL on each employee’s wage statement separately from any other available paid sick leave or paid time off. The wage statement requirement becomes effective the first full pay period after March 29, 2021.

Employers must post a notice of the COVID-19 SPSL requirements in a conspicuous place in the workplace. The Labor Commissioner has already issued this required notice (<https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>), which must be posted in a place employees will see it.

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However, “[i]f an employer’s covered employees do not frequent a workplace, the employer may satisfy the notice requirement . . . by disseminating notice through electronic means.” The law requires the Labor Commissioner to enforce COVID-19 SPSL in the same manner in which it enforces “paid sick days,” “paid sick leave,” or “sick leave” under current California law.

There are numerous steps employers in California will want to take prior to the law’s effective date. These steps include:

1. Educate and train human resources, payroll employees, and managers about COVID-19 SPSL.
2. Create or reinstate a separate COVID-19 SPSL designation on wage statements.
3. Post and/or electronically distribute the COVID-19 SPSL model notice prepared by the Labor Commissioner.
<https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>

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