

COVID-19 Workplace Concerns Prompt New Employer Obligations in California

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California has just enacted a slew of employment changes prompted by COVID-19, including expanded sick leave, family leave and workers' compensation rights, as well as new employer reporting obligations, of which businesses operating in California need to be aware.

New Employee Leave Entitlements

A.B. 1867: This law mandates state-wide emergency supplemental paid sick leave (ESPSL) for COVID-19-related reasons. It applies to food sector workers (codifying the Governor's prior executive order) as well as employees of companies with 500 or more employees in the United States. Certain health care providers and first responders also are covered. However, only employees who leave home to perform their job duties are eligible for ESPSL.

- **Amount of leave.** Full-time employees generally are eligible for 80 hours of supplemental paid sick leave for reasons related to COVID-19. Pro-rated leave is available for part-time employees; the method of calculation is based on whether the employee works a regular or variable schedule.
- **Amount of pay.** Pay is at the employee's regular rate, unless local or state minimum wage is higher, with a cap of \$511 per day and \$5,110 total.

- **Use of leave.** ESPSL is in addition to the employee's sick leave entitlement under California's regular mandatory paid sick leave requirements, and an employee may take ESPSL before taking any other kind of leave. If the employer previously provided paid supplemental sick leave for the same COVID-19-related reasons as provided in this law and at the same or higher rate of pay, that prior leave can offset the employer's obligations under this new law. If prior leave was paid at a lower rate, the employer has the option to back pay the difference and to count that leave against this new entitlement.
- **Employer actions.** A key action item for employers is to ensure that employee pay stubs reflect the amount of ESPSL available to the employee. There is also a notice that employers must post or distribute to employees about this new leave.
- **Effective date.** This new leave requirement took effect September 19. The law remains in effect until at least the end of 2020, but will continue beyond that if the comparable provisions under the Families First Coronavirus Relief Act (FFCRA) are extended.

S.B. 1383: Beginning January 1, 2021, the California Family Rights Act will apply to employers with five or more employees. Eligible employees are entitled to up to 12 weeks of job-protected family care and medical leave. The reasons for leave now include a "qualifying exigency" due to the active duty or call to active duty of the employee's spouse, domestic partner, child, or parent. In addition to covering smaller employers outside the scope of the federal FMLA, this law also creates issues for employers of any size because it exceeds federal protections by defining "family member" to include siblings, grandparents, grandchildren, children of a domestic partner, and adult children. These differences increase the potential that leaves will not run concurrently under federal and state law, meaning that an employee could take 12 weeks of leave under state law and still be eligible for an additional 12 weeks of leave under federal law.

Workers' Compensation Protections

S.B. 1159: Employees who test positive for COVID-19 and believe they contracted it in the workplace may file a claim for workers' compensation benefits. This bill, codifying an executive order, creates a rebuttable presumption that certain instances of COVID-19 resulting in employee illness or death were contracted in the workplace, making it easier for employees to qualify for benefits. The law applies to health care workers, first responders, and to employees in any workplace that experiences a COVID-19 outbreak. (An "outbreak" occurs when, within a 14-calendar day period, there are four cases of COVID-19 in a workplace with up to 100 people, or when 4% of the total number of employees at a workplace with more than 100 people test positive for COVID-19, or if the workplace is ordered to close by a health authority). The employer may try to rebut the presumption by, for example, showing what measures the employer took to prevent COVID-19 transmission in the workplace or the employee's non-occupational risks for catching COVID-19. Any paid sick leave benefits available to the employee "in response to COVID-19" must be used before the employee receives temporary disability benefits. Employers must report information to their claims

administrator when an employee tests positive for COVID-19. S.B. 1159 is effective immediately and is retroactive to July 2020. It remains in effect until January 1, 2023.

Additional Reporting Requirements for Employers

A.B. 685: This law imposes strict notification requirements on employers when there are instances of COVID-19 in the workplace.

- **Employees.** Within one day after an employer is notified of a potential COVID-19 exposure, it must notify employees (and employees of subcontractors) who were at the same worksite during the infectious period, as well as the employees' union representative. (Note: depending on the workplace configuration, the worksite may not include the entire facility.) Notification must be provided in English and any other language understood by a majority of the employees, in the manner the employer normally uses to communicate with employees (such as personal service, email or text). Employees who may have been exposed (and their union representative, if applicable) also must receive information regarding COVID-19-related benefits under federal, state and local law (i.e., workers' compensation, emergency paid sick leave, etc.) and applicable anti-discrimination and anti-retaliation protections. All employees, employees of subcontractors, and the employees' union representative must be notified of the disinfection and safety plan the employer intends to implement in accordance with CDC guidelines.
- **Health authorities.** Employers must notify local public health authorities of a COVID-19 outbreak in the workplace within 48 hours. (Note that the definition of "outbreak" for purposes of this law is based on how the California Department of Public Health defines that term, which currently is different from the definition codified in S.B. 1159.) These notice requirements are in addition to other required notifications.
- **Key issue.** In making these disclosures, employers need to remain mindful of employee privacy concerns, in particular, the identity of infected employee(s).
- This law confirms that Cal-OSHA may shut down a workplace when it finds that the risk of exposure to COVID-19 presents an "imminent hazard." Cal-OSHA also can dispense with certain notice requirements for issuing a citation for a "serious violation" if the violation is related to COVID-19.
- **Effective date.** This law takes effect January 1, 2021.

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