

Labor and Employment Alert

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New California COVID-19 Employment Laws Require Attention

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Key Points

- California has implemented a broad supplemental sick leave law requiring employers with 500 or more employees (and health care employers with fewer than 500 employees) to provide their California workers with up to 80 hours of paid COVID-19-related sick leave, effective immediately.
- Another new California law creates a presumption that employees' COVID-19-related illnesses or deaths are covered injuries for purposes of workers' compensation, under certain circumstances.
- Effective January 1, 2021, California employers will also be subject to new notice and recordkeeping requirements with respect to COVID-19 cases in the workplace.

This month, California Gov. Gavin Newsom signed a trio of new COVID-19-related employment laws. Together, they: (1) require employers with 500 or more employees, and health care employers with fewer than 500 employees, to provide their California employees with up to 80 hours of COVID-19-related supplemental paid sick leave; (2) create a presumption that employees' COVID-19-related illnesses or deaths are covered injuries for purposes of workers' compensation under certain circumstances; and (3) create new notice and recordkeeping requirements with respect to COVID-19 cases in the workplace. Each of these new laws is discussed below.

Supplemental Paid Sick Leave (AB 1867)

AB 1867 (codified as Cal. Labor Code §§ 248, 248.1) requires employers to provide their California employees with up to 80 hours of COVID-19-related supplemental paid sick leave (CSPSL). This leave is available to employees not covered under the federal Families First Coronavirus Response Act (FFCRA)¹ or California Executive Order N-51-20 (EO N-51-20).²

For nonfood sector employers, AB 1867's requirements went into effect September 19, 2020.³ This law terminates on December 31, 2020, or the expiration of any federal extension of the FFCRA, whichever is later.

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Who Is Covered by the New CSPSL Law?

All California employers with 500 or more employees in the United States are subject to the new CSPSL requirements. AB 1867 also covers public and private entities with fewer than 500 employees that employ health care providers or emergency responders and chose to exclude such employees from emergency paid sick leave under the FFCRA.

Who Qualifies for CSPSL?

All California employees working for a covered employer qualify for CSPSL if they are unable to work due to 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 health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
- The employee is prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

CSPSL must be made available to a qualifying employee immediately upon the employee's written or oral request.

How Much Leave Must Be Provided?

The amount of CSPSL an employee can take depends on how much the employee works. Full-time employees are entitled to 80 hours of CSPSL, the maximum amount of leave under the law. Other employees earn lesser amounts of CSPSL based on the hours they work. The following table explains how to calculate the amount of CSPSL employees can take.

View the table [here](#).

How Much Must Employees Be Paid for CSPSL?

The employee determines how many hours of CSPSL he or she needs to use for a qualifying reason, up to the maximum allowed. The employer is not allowed to require the employee to use any other paid or unpaid leave, paid time off or vacation time before, or in lieu of, the CSPSL. CSPSL is in addition to "ordinary" paid sick leave available to the employees under Labor Code Section 246. However, if the employer already provided an employee with supplemental paid leave for any of the reasons listed above⁴ (other than paid sick leave available to the employee under Section 246), then the employer may count the hours of the other paid leave towards CSPSL. Additionally, if this other paid leave was provided between March 4, 2020 and this law's effective date (described above) but did not compensate the employee in an amount equal to or greater than the amount required for CSPSL (described below), the employer may retroactively pay the difference and apply that leave towards its CSPSL obligations.

The rate of pay for CSPSL is equal to the highest of the following:

- The employee's regular rate of pay for the last pay period;
- The state minimum wage; or

- The local minimum wage.

Notwithstanding the above, an employer is not required to pay more than \$511 per day and \$5,110 in the aggregate to an individual employee for CSPSL.

Other Requirements

Wage Statements: Covered employers are required to provide written notice of the amount of available CSPSL on employees' itemized wage statements or in a separate writing on each designated pay date. (NOTE: This provision does not apply to food sector workers.)

Notice: Covered employers are required to post a notice about the law in a conspicuous place in the workplace. If employees do not frequent a workplace, an employer may disseminate the notice electronically, e.g., by email. (The food sector notice is available [HERE](#) and the nonfood sector notice is available [HERE](#).)

Recordkeeping: For at least three years, a covered employer must retain records documenting hours worked, leave accrued and leave used by employees.

COVID-19-Related Workers' Compensation (SB 1159)

SB 1159 (codified as Cal. Labor Code §§ 3212.86, 3212.88) creates a new framework for COVID-19-related workers' compensation claims. This law became effective on September 17, 2020, as an urgency statute and remains in effect until January 1, 2023.

SB 1159 creates a presumption that an illness or death resulting from COVID-19 arises out of and in the course of employment, and is thus covered by workers' compensation, for employers with five or more employees if:

- The employee tested positive or was diagnosed with COVID-19 within 14 days after a day that the employee worked at their place of employment⁵ at their employer's direction, on or after July 6, 2020; and
- The employee's positive test or diagnosis was during an "outbreak" at the employee's place of employment.

An "outbreak" exists if, within 14 calendar days, one of the following occurs at a specific place of employment:

- If the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19;
- If the employer has more than 100 employees at a specific place of employment, four percent of the number of employees who reported to the specific place of employment test positive for COVID-19; or
- A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health or a school superintendent due to a risk of infection with COVID-19.

This presumption is rebuttable. Evidence relevant to rebutting the presumption may include, but is not limited to, evidence of measures in place to reduce potential

transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection.

Gov. Newsom's Executive Order (EO N-62-20) created a similar rebuttable presumption that was in effect from March 19, 2020 to July 5, 2020. AB 685 codified EO N-62-20, in addition to extending its provisions past July 5, 2020.

SB 1159 also imposes reporting requirements. When the employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer shall report all of the following to its claims administrator in writing via electronic mail or facsimile within three business days:

- That an employee has tested positive;
- The date that the employee tests positive;
- The address(es) of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test; and
- The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

COVID-19 Infection Prevention Requirements (AB 685)

AB 685 (codified as Cal. Labor Code §§ 6325, 6409.6, 64320) creates new notice and recordkeeping requirements regarding COVID-19 cases in the workplace. It also makes related changes to Cal/OSHA. These requirements go into effect January 1, 2021, and remain in effect until January 1, 2023.

Notice Requirements

Within one business day of a "notice of potential exposure to COVID-19"⁶ in the workplace, an employer must:

- I. Provide a "written notice"⁷ to all employees, their exclusive representative (if any) and the employers of subcontracted employees who were on the premises at the same worksite as a "qualifying individual" (i.e. an individual with COVID-19)⁸ that they may have been exposed to COVID-19;
- II. Provide all employees who may have been exposed and their exclusive representative (if any) with information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state or local laws, including, but not limited to, workers' compensation, and options for exposed employees, including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave or negotiated leave provisions, as well as anti-retaliation and anti-discrimination protections of the employee; and
- III. Notify all employees, their exclusive representative (if any) and the employers of subcontracted employees on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control

"Employers" include both private and public employers. "Employees" for purposes of notice *excludes* workers "who, as part of their duties, conduct COVID-19 testing or screening or provide direct patient care or treatment to individuals who are known to have tested positive for COVID-19, are persons under investigation or are in

quarantine or isolation related to COVID-19, unless the qualifying individual is an employee at the same worksite.”

Further, if an employer⁹ is notified of the number of cases that meet the definition of a COVID-19 “outbreak,”¹⁰ within 48 hours the employer shall notify the local public health agency in the jurisdiction of the worksite of the names, number, occupation and worksite of employees who meet the definition of a qualifying individual. An employer shall also report the business address and NAICS code of the worksite where the qualifying individuals work. An employer that has such an outbreak shall continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

Recordkeeping Requirements

An employer shall maintain records of the above written notifications to employees, their exclusive representatives, and the employers of subcontracted employees for a period of at least three years. This recordkeeping requirement does not apply to the notices to local public health agencies.

Changes to Cal/OSHA

AB 685 also modifies California OSHA law to (1) include potential exposure to COVID-19 as an “imminent hazard” that permits the Cal/OSHA to issue an Order Prohibiting Use (OPU) prohibiting entry to or use of a place of business; and (2) streamlines the process—by cutting pre-citation notice and the rebuttal-at-hearing process for employers—for Cal/OSHA to issue “serious violation” citations to workplaces where COVID-19 creates a health hazard. A detailed discussion of these changes is outside the scope of this alert.

¹ The FFCRA (enacted in March 2020) does not apply to employers that employ 500 or more employees. Further, public or private employers of health care providers or emergency responders could elect to exclude these employees from emergency paid sick leave under the FFCRA.

² EO N-51-20 (signed by Gov. Newsom on April 16, 2020) already provided CSPSL to “Food Sector Workers.”

³ For food sector employers, who were already subject to EO N-51-20, the law became effective immediately on September 9, 2020, and codified EO N-51-20 retroactively to April 16, 2020.

⁴ For example, leave already provided under EO N-51-20, or pursuant to a voluntary policy.

⁵ This does not include the employee’s home, unless the employee provides home health care services to another individual at the employee’s home or residence.

⁶ “Notice of potential exposure” means any of the following: (1) notification to the employer or representative from a public health official or licensed medical provider that an employee was exposed to a qualifying individual at the worksite; (2) notification to the employer or representative from an employee, or their emergency contact, that the employee is a qualifying individual; (3) notification through the testing protocol of the employer that the employee is a qualifying individual; or (4) notification to an employer or representative from a subcontracted employer that a qualifying individual was on the worksite of the employer receiving notification.

⁷ “Written notice” may include, but is not limited to, personal service, email or text message if it can reasonably be anticipated to be received by the employee within one business day of sending and shall be in both English and the language understood by the majority of the employees.

⁸ Specifically, “qualifying individual” means any person who has any of the following: (1) a laboratory-confirmed case of COVID-19, as defined by the State Department of Public Health; (2) a positive COVID-19 diagnosis from a licensed health care provider; (3) a COVID-19-related order to isolate provided by a public health official; or (4) died due to COVID-19, in the determination of a county public health department or per inclusion in the COVID-19 statistics of a county.

⁹ Except for “health facilities,” as defined in Section 1250 of the Health and Safety Code.

¹⁰ “Outbreak” is as defined by the California Department of Public Health. The California Department of Public Health currently defines an outbreak in non-health care or nonresidential congregate setting workplaces as three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period.

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