

What Employers Need to Know About California's New COVID-19 Supplemental Paid Sick Leave Law

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On September 19, 2020, California's new law requiring large employers to provide employees with COVID-19 supplemental paid sick leave ("CPSL") becomes effective. The new CPSL requirement will be codified as Labor Code section 248.1 and was enacted via [Assembly Bill \(AB\) 1867](#), which Governor Newsom signed into law on September 9, 2020. In addition to addressing other leave and COVID-19 related items, AB 1867 also codified the existing CPSL requirements for certain food sector workers under [Executive Order N-51-20](#) as new Labor Code section 248. In an effort to get employers up to speed on both section 248 and 248.1, the Division of Labor Standards Enforcement ("DLSE") published its [responses to frequently asked questions](#) on the new requirement to provide CPSL. This article briefly summarizes the key requirements of the new CPSL law for non-food sector workers and identifies specific issues that employers in California should attend to as they hastily roll out the leave to employees.

Key Requirements of Labor Code Section 248.1

- **Applicable Employers:** Section 248.1 is California's attempt to make extended paid sick leave available to employees who were ineligible for such leave under the federal [Families First Coronavirus Response Act](#) ("FFCRA"). Thus, the new law applies to private "hiring entities" with 500 or more employees nationwide. It also covers certain health care providers and emergency responders who were not required to provide leave under the FFCRA, regardless of the size of the employer.
- **Eligible Employees:** Although section 248.1 covers all persons employed by the hiring entity, CPSL is only available if an employee "leaves the person's home or other place of residence to perform work for the person's hiring entity." In other words, CPSL is not available to employees who exclusively work remotely. The DLSE did not provide any additional guidance on whether requiring an employee to come into the office for paperwork or on some other limited basis qualifies an employee for CPSL. However, if an employee must leave their home to perform any work for the employer on September 19, 2020 or later,

it is presumable the employee is eligible for CSPSL. Additionally, the DLSE has advised that, unlike CSPSL for food sector workers, CSPSL for non-food sector workers does not apply to independent contractors.

- **Effective Date:** Employers must provide CSPSL to eligible employees as of September 19, 2020. Because California intended the new law to complement the FFCRA, it also is set to expire on December 31, 2020. However, if the federal government extends the coverage date for the FFCRA, then California's CSPSL will be extended to the same end date. Notably, if the law expires while an employee is taking CSPSL, the employee can finish taking the amount of leave they are entitled to receive.
- **Covered Reasons:** CSPSL is only available to employees who 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 Company due to health concerns related to the potential transmission of COVID-19.

Therefore, CSPSL is only available in connection with an employee's own health or exposure. Unlike the FFCRA or many local supplemental paid sick leave ordinances, CSPSL is not available to employees who must care for children whose schools or childcare close for COVID-19 related reasons.

- **Available Amount of Leave:** An employee is entitled to 80 hours of CSPSL if considered "full time" or if the employee worked or was scheduled to work, on average, at least 40 hours per week in the 2 weeks preceding the leave. Part-time employees with a regular weekly schedule are entitled to CSPSL equal to the total number of hours they are normally scheduled to work over 2 weeks. However, if a part-time employee's scheduled hours vary, the employee is entitled to 14 times the average number of hours the employee worked each day in the 6 months preceding the leave. If a part-time employee who works variable hours has worked fewer than 6 months but more than 14 days, the employee is eligible for CSPSL in the amount of 14 times the average number of hours for the same period. Employees who have worked for 14 days or fewer are entitled to CSPSL equal to the number of hours worked.
- **Rate of Pay:** Employers must pay CSPSL at the regular rate of pay for the employee's last pay period (including any collectively bargained pay rate), or the state or local minimum wage, whichever rate is highest. However, employers are not required to pay more than \$511 per day or \$5,110 in the aggregate.
- **Offset:** The new law allows employers to offset their obligation to provide CSPSL hours with previously provided COVID-19 related supplemental paid sick leave if (1) the leave was provided for the same reasons covered by section 248.1, and (2) the compensation was equal or greater than the amount of CSPSL compensation available. As discussed further below, the lack of uniformity across CSPSL and local supplemental paid sick leave ("LSPSL") ordinances may be problematic for some employers. Additionally, employers may

not require employees to use other forms of paid or unpaid leave prior to using CSPSL.

- **No Collective Bargaining Exemption**: Employers with unionized employees should note that section 248.1 does not contain a collective bargaining exemption. This represents a departure from California's paid sick leave under the Healthy Workplace and Healthy Families Act ("HWHFA") and numerous LSPSL ordinances. Consequently, any employers who already agreed to separate paid sick leave provisions in collective bargaining agreements, including provisions that exempted the employer from LSPSL ordinances, will need to comply with section 248.1 and also provide employees with CSPSL.
- **Notice Posting Requirement**: Section 248.1 requires employers to post the Labor Commissioner Office's [model notice](#) in the workplace so that it is available for all employees to view. Further, the law states that employers should disseminate the notice electronically, e.g., by email, if workers do not frequent the workplace.
- **Wage Statement Requirement**: Like the wage statement requirement for California paid sick leave, employers must also provide employees with written notice concerning the amount of CSPSL available on either an itemized wage statement or in a separate writing provided on designated pay dates. This requirement is effective for the "next full pay period following the date of enactment" of AB 1867. Any employers who utilize a third party payroll provider should communicate with their payroll provider immediately if they have not done so already to ensure the company's wage statements are compliant with this requirement. Additionally, section 248.1 incorporates by reference the HWHFA's recordkeeping requirement for paid sick leave, and therefore requires employers to retain records for at least three years documenting hours worked, the amount of CSPSL provided, and any CSPSL used by an employee.

Potential Issues That Employers May Need to Address

In addition to the requirements outlined above, employers should also review their COVID-19 leave policies and procedures to identify whether any of the following issues are present.

- **Complications With Offsetting**: As mentioned above, differences between the covered reasons for COVID-19 related leave, amount of part-time leave available, and calculation of the rate of pay between CSPSL and the various LSPSL ordinances throughout California may be problematic for some employers, especially employers with employees throughout the state.
 - **Covered Reasons**: CSPSL clearly covers an employee who receives a governmental order or instructions from a health care provider to self-isolate or quarantine. Presumably, employees are also eligible for CSPSL if exposed to a member of the same household who has a confirmed case or exhibits COVID-19 symptoms because the employer will prohibit the employee from coming into work. However, numerous LSPSL ordinances cover employees who must care for a child whose school or childcare provider is closed. Because section 248.1 states that an employer may only offset LSPSL as CSPSL if the LSPSL covers the 3 reasons identified above, an employee who already received LSPSL for a school or childcare closure could conceivably receive CSPSL as well. Further, some employees may try to distinguish previously provided leave as not covered. Thus, employers should ensure they

document internally the reasons that leave was provided previously and going forward. Additionally, the language in most LSPSL ordinances states that any other supplemental paid leave provided to an employee for the LSPSL's qualifying reasons offsets the LSPSL. Therefore, an employee who receives CSPSL first will no longer be eligible for LSPSL under most ordinances.

- **Amount of Leave/Rate of Pay:** After determining whether previously provided leave is covered, employers must then assess the leave provided. Employers should compare the amount of leave available for any part-time employees under any applicable LSPSL ordinances. If the LSPSL ordinance provides for less paid leave than section 248.1, then the employer will need to provide additional CSPSL leave. Likewise, the rate of pay for LSPSL must be equal to or greater than the amount of leave paid through CSPSL. If the LSPSL previously paid to the employee was not commensurate with CSPSL, the employer may want to retroactively provide supplemental pay to the employee to satisfy the compensation requirements of section 248.1 so that the employer can then count those hours towards an employees' CSPSL entitlement.
- **Accurate Wage Statement Compliance:** The complications with offsetting also may impact an employer's compliance with providing employees with an accurate wage statement. Section 248.1 requires employers to provide employees with written notice concerning the amount of CSPSL available on either an itemized wage statement or in a separate writing provided on designated pay dates. Consequently, employers would be wise to immediately review any previously provided COVID-19 supplemental paid sick leave to ensure that each employee's wage statement accurately reflects any offset and the current amount of CSPSL available.
- **Requesting Supporting Documentation:** The DLSE's FAQ page instructs that CSPSL must be available immediately upon the employee's oral or written request and cannot be conditional upon providing a medical certification. The DLSE further advises that while an employer cannot deny CSPSL for lack of certification, it may be reasonable in certain circumstances to ask for documentation before paying CSPSL when the employer has other information that indicates the employee is not requesting sick leave for a valid purpose. For example, the DLSE states that if an employee is subject to a local quarantine order and the employer subsequently learns that the worker was at a park, a request for documentation would be reasonable. Thus, employers should review their current policies on requesting documentation from employees in connection with COVID-19 related leave to ensure they comply with the DLSE's guidance.

Takeaway

The lack of a ramp-up period in advance of California's new CSPSL requirements becoming effective may catch some large employers by surprise. Large employers with employees in California should review the new requirements under Section 248.1 immediately to ensure their policies and payroll procedures are compliant. Moreover, employers should consult the DLSE's [chart of available COVID-19 leave](#) to ensure they are providing all available leave that may cover any of their California employees affected by COVID-19. Additionally, employers should confirm that they are satisfying any requirement to keep their employees informed of the leave available to them. Employers with any questions or concerns about the provision of CSPSL or other leave related to COVID-19 should

consult with experienced employment counsel to ensure they are compliant with the evolving laws and local ordinances.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance, but instead represents our interpretation of where things currently and generally stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

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