Cooley

End-of-Year Employer Reminders Regarding COVID-19 Paid Sick Leave, Reporting Obligations in California

December 9, 2020

With legislative activity around COVID-19 is continuing at a steady pace, it is easy to lose track of the myriad requirements applicable to employers, especially those requirements applicable to employees reporting into a worksite. This alert summarizes recently enacted requirements applicable to California employers regarding sick pay and reporting positive COVID-19 cases.

Paid sick leave

AB 1867, which took effect on September 19, 2020, provides for paid sick leave, in addition to paid sick leave already required by California law, for employees of employers who were not otherwise covered by the Families First Coronavirus Response Act (FFCRA).

Specifically, AB 1867 provides that private employers with 500 or more employees in the United States must provide additional paid sick leave to their employees for specific COVID-19-related reasons. This bill further codified a previous executive order providing supplemental paid sick leave for COVID-19-related reasons for certain employees in the food sector, adding Labor Code Section 248 to the Labor Code.

AB 1867 will remain in effect until the later of (i) December 31, 2020, or (ii) the expiration of the Emergency Paid Sick Leave Act established by the FFCRA. The Emergency Paid Sick Leave Act is also currently set to expire as of December 31, 2020.

Which employers are covered by Labor Code Section 248.1?

All private employers that employ 500 or more employees in the United States are covered by Labor Code 248.1 and must provide supplemental paid sick leave for certain COVID-19-related reasons to its employees.

Which employees are covered by Labor Code Section 248.1?

A "covered worker" is any person who is employed by a covered employer and is also required to *leave their home or other place of residence to perform work* for the covered employer. In other words, an employee who is not working from home and is employed by a covered employer is eligible for sick leave under this new law.

For what reason can an individual take supplemental paid sick leave?

A covered worker of a covered employer is entitled to supplemental paid leave if the covered worker is unable to work due to any of the following reasons:

1. The covered worker is subject to federal, state, or local quarantine or isolation order related to COVID-19
2. The covered worker is advised by a healthcare provider to self-quarantine or self-isolate due to concerns related to COVID-19
3. The covered worker is prohibited from working by the covered worker's covered employer due to health concerns related to the potential transmission of COVID-19

How much supplemental paid sick leave does a covered worker receive?

Covered workers considered full-time or who are scheduled to work, on average, at least 40 hours per week in the two weeks preceding the date that supplemental paid sick leave was taken by the covered employer, are entitled to 80 hours of supplemental paid sick leave. Special rules apply for the calculation of pay to part-time workers.

The total number of hours of COVID-19 supplemental paid sick leave to which a covered worker is entitled *is in addition to any paid sick leave that may be available under state or local law.* A covered employer cannot require a covered worker to use any other paid leave or unpaid leave, paid time off or vacation time provided by the covered employer before allowing them to use COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave.

Are employees compensated for supplemental paid sick leave in the same manner as regular paid sick leave?

No. Covered workers are compensated in a similar manner as under the Emergency Paid Sick Leave Act under the FFCRA. Thus, each hour of COVID-19 supplemental paid sick leave must be compensated at the highest of:

- The covered worker's regular rate of pay for their last pay period, including pursuant to any collective bargaining agreement that may apply;
- The state minimum wage; or
- The local minimum wage to which the covered worker is entitled.

Notwithstanding the above, *a covered employer is not required to pay more than $511 per day or $5,110 in the aggregate to a covered worker for supplemental paid sick leave*.

In addition, the law also provides some relief for covered employers that already provided covered workers with a supplemental sick leave benefit for reasons covered by Labor Code Section 248.1. Covered employers that provided additional paid time off in excess of regular paid sick leave and compensated covered workers at an amount equal to or greater than what Labor Code Section 248.1 requires (as described above), may count the hours of the other paid benefit or supplemental leave toward the total number of hours of COVID-19 supplemental paid sick leave for the covered worker. Alternatively, if the covered employer did not compensate a covered worker in an amount equal to or greater than the compensation required under Labor Code Section 248.1 during the prior supplemental leave, the covered employer can retroactively provide the supplemental pay to satisfy the compensation requirement and then count those hours toward the covered worker's supplemental paid sick leave entitlement. Any sick leave provided to which the covered worker was already entitled to by law is excluded from this reprieve.

Do employers have to provide notice of this supplemental paid sick leave law?

Yes, pursuant to Labor Code Section 247, covered employers must display a poster explaining the nature of the supplemental paid sick leave law. If employees do not frequent a physical workplace, the notice may be disseminated to employees electronically.

In addition, as with regular paid sick leave, covered employers must also provide notice in the covered worker's wage statement showing the amount of available COVID-19 supplemental paid sick leave each pay period. This must be a separate line item from regular paid sick leave on the wage statement.

Workers compensation reporting

In May 2020, Governor Gavin Newsom signed Executive Order N-62-20, which created a disputable presumption that any COVID-19-related illness of an employee who worked outside of their homes arose out of and in the course of employment for the purposes of awarding workers compensation benefits, if certain requirements are met. SB 1159, which went into effect on September 17, 2020, codifies and supersedes that previous executive order and adds additional reporting requirements. SB 1159 will expire on January 1, 2023, or the date that it is repealed.

SB 1159 applies to employees who test positive during an "outbreak" at the employee's "specific place of employment" and whose employer has five or more employees. A "specific place of employment" refers to a "building, store, facility, or agricultural field where an employee performs work at the employee's direction." *This does not include the employee's home or residence, except for those who provide home healthcare services to another individual*.

Disputable presumption for COVID-19 cases

SB 1159 creates a disputable presumption that a COVID-19-related "injury" suffered by an employee arose out of and in the course of employment and is therefore covered by workers' compensation.

An "injury" is defined as an "illness or death resulting from COVID-19 if *all* of the following apply: (1) the employee tested positive or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services *at the employee's place of employment at the employer's direction*; (2) the day in which the employee performed labor or services at the employee's place of employment was on or after July 6, 2020, and the date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction prior to the positive test; and (3) the employee's positive test occurred during a period of an "outbreak" at the employee's specific place of employment.

An outbreak exists if any of the following applies within a period of 14 calendar days: (1) if the employer has 100 employees or less at a specific place of employment, four employees test positive for COVID-19; (2) if the employer has more than 100 employees at a specific place of employment, 4% of the number of employees who reported to the specific place of employment test positive for COVID-19; or (3) 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.

An employer can rebut this presumption by providing evidence, such as measures the employer put in place to reduce potential transmission of COVID-19 and evidence of the employee's nonoccupational risks of COVID-19 infection.

Reporting requirements

Under SB 1159, if an employer "knows or reasonably should know that an employee has tested positive for COVID-19," then the employer must within three business days report to its claims administrator, via email or facsimile, the following information: (1) an employee has tested positive; (2) the date the employee tested positive (date the specimen was collected for testing); (3) specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test; and (4) 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 Exposure Notification Requirements

AB 685, which goes into effect on January 1, 2021, imposes certain reporting and notification requirements to both employees and to the local public health department. This expires on January 1, 2023. AB 685 applies to both private and public employers, except it does not apply to employees who as part of their job 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 under investigation, or in quarantine or isolated related to COVID-19, unless the "qualifying individual" is an employee at the same worksite.

Employee notification requirements

If an employer in California receives notice of a potential exposure of COVID-19, then, within *one business day*, the employer must provide all of the following:

- Provide written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the "qualifying individual" within the "infectious period" (the time period that a COVID-19 positive individual is infectious, as determined by the State Department of Public Health), that they may have been exposed to COVID-19. The notice must be provided in the same manner as they would normally communicate employment-related information. The notice must be sent in both English and the language understood by a majority of employees.
- Provide the exposed employees with information regarding COVID-19-related benefits that the employee may be entitled to under applicable federal, state or local laws (e.g., workers' compensation, sick leave, etc.) as well as anti-retaliation and anti-discrimination protections.
- Notify the employees about the disinfection and safety plan that the employer plans to implement and complete per CDC guidelines.

"Qualifying individual" refers to any person: (1) with a laboratory confirmed case of COVID-19, as defined by the State Department of Public Health; (2) with a positive COVID-19 diagnosis from a licensed healthcare provider; (3) with a COVID-19-related order to isolate provided by a public health official; or (4) who has died due to COVID-19, based on the determination of a county public health department or per inclusion in the COVID-19 statistics of a county.

An employer is considered to have received notice of potential exposure if the employer receives notice through the following sources: (1) public health official or licensed medical provider that an employee was exposed to a qualifying individual at the worksite; (2) employee or the employee's emergency contact, that the employee is a "qualifying individual"; (3) the employer's testing protocol that the employee is a "qualifying individual"; or (4) subcontracted employer that the "qualifying individual" was on the worksite of the employer.

These notices must be maintained by the employer for at least three years.

Notification to local public health agency of COVID-19 outbreaks

If an employer is notified of a COVID-19 outbreak in its workforce, then within 48 hours the employer must notify the local public health agency in the jurisdiction of the worksite of the following: (1) names, number, occupation and worksite of employees who are a "qualifying individual"; (2) business address; and (3) NAICS code of the worksite where the qualifying individuals work. The employer must continue to notify the local health department of any subsequent COVID-19 cases in the workplace.

COVID-19 outbreak is defined by the California State Department of Public Health, which currently defines this is as "[a]t least three probable or confirmed COVID-19 cases within a 14-day period in people who are epidemiologically-linked in the setting, are from different households, and are not defined as close contacts of each other in any other case investigation."

This requirement does not apply to health facilities as defined under Section 1250 of the California Health and Safety Code.

Suspension of operations by Cal-OSHA and citations for serious violations

In addition to the notice requirements, AB 685 provides that if the California Division of Occupational Safety and Health (Cal-OSHA) determines that a "place of employment, operation, or process, or any part thereof" exposes workers to COVID-19 such that it would constitute an imminent hazard to employees, then Cal-OSHA may prohibit the performance of the operation or process.

Such prohibition would apply only to the immediate area in which the imminent hazard exists and *not* to any portions of the operation that does not pose a risk to employees. If Cal-OSHA prohibits such operations, it shall issue a notice to the employer, which must be placed in a conspicuous place at the worksite. The notice cannot be removed except by a representative of Cal-OSHA, or until the place of employment, operation, or process is made safe or the required safeguards or safety appliances or devices are provided. Entry is allowed for the purposes of eliminating the dangerous conditions and with the knowledge and permission of Cal-OSHA.

AB 685 also changes the procedures whereby Cal-OSHA issues "serious violations." Specifically, under current law, before Cal-OSHA can issue a citation to an employer for a serious violation, the agency must first provide the employer a "notice of intent to issue a serious violation" setting forth the violations and conditions warranting the citation as well as requesting certain information. The employer can respond to the notice within 15 days. AB 685 eliminates this initial notice of intent prior to issuing a citation related to COVID-19.

Disclosure of medical information and anti-retaliation

AB 685 also makes it clear that nothing in the bill would require employees to disclose medical information unless required by law.

Additionally, under AB 685, employers are prohibited from retaliating against an employee for disclosing his or her positive COVID-19 test or diagnosis or order to quarantine or isolate. Employees who believe they have been retaliated against may file a complaint with the California Division of Labor Standards Enforcement.

If you have any questions about these requirements, please reach out to a member of the Cooley employment team.

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