California Provides COVID-19 Supplemental Paid Sick Leave to Essential Food Sector Workers

Friday, May 1, 2020

Following a series of local city ordinances aimed at closing the gap left by the Families First Coronavirus Response Act (“FFCRA”), on April 16, 2020, California Governor Gavin Newsom signed into law Executive Order N-51-20, mandating that certain Hiring Entities offer up to 80 hours of “COVID-19 Supplemental Paid Sick Leave” to essential Food Sector Workers, including farm workers, grocery workers, and food delivery workers, who perform work for or through the Hiring Entity. Here are answers to key questions regarding the new law:

Which hiring entities must offer COVID-19 Supplemental Paid Sick Leave?

A covered “Hiring Entity” is defined as a private entity, including delivery network companies and transportation network companies, with 500 or more employees nationwide.

In determining whether they meet the employee threshold, hiring entities must count full-time employees, part-time employees, employees on leave, temporary employees who are jointly employed by the hiring entity and another employer, day laborers supplied by a temporary placement agency, and all common employees of
joint employers or employees of integrated employers. Although independent contractors should not be counted, contractors may be entitled to leave under the new law (see below). Finally, employees who have been laid off or furloughed and not subsequently reemployed should not be counted.

Who is eligible to take COVID-19 Supplemental Paid Sick Leave?

For an individual to be an eligible “Food Sector Worker” they must:

- **Satisfy one of the following three criteria:**
  - Works in one of the industries or occupations defined in Industrial Welfare Commission ("IWC") Wage Orders 3 (Canning, Freezing, and Preserving Industry), 8 (Industries Handling Products After Harvest), 13 (Industries Preparing Agricultural Products for Market, on the Farm) or 14 (Agricultural Occupations); or
  - Works for a Hiring Entity that operates a “food facility,” as defined in Health & Safety Code § 113789(a)-(b) (e.g., restaurants and grocery stores); or
  - Delivers food from a food facility for a Hiring Entity.

AND

- **Be an Essential Critical Infrastructure Worker**, and therefore, exempt from Executive Order N-33-20 or other statewide stay-at-home orders.

AND

- **Leave their residence to perform work for the Hiring Entity**.

**NOTE:** The new law appears to apply not just to employees but also contractors and “gig economy” workers. The law conspicuously avoids the use of the terms “employer” and “employee,” and specifically provides that for purposes of all applicable Labor Code sections, all Food Sector Workers shall be considered “employees” and any Hiring Entity shall be considered an “employer.”

What are the qualifying reasons for taking COVID-19 Supplemental Paid Sick Leave?

To take COVID-19 Supplemental Paid Sick Leave, a Food Sector Worker must experience one of the following qualifying events:

- The Food Sector Worker is subject to a Federal, State or local quarantine or isolation order related to COVID-19; or

- The Food Sector Worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or

- The Food Sector Worker is prohibited from working by the Hiring Entity due to health concerns related to the potential transmission of COVID-19.

Hiring Entities must immediately grant leave upon the oral or written request of an
eligible Food Sector Worker.

**How much sick leave must be provided to eligible Food Sector Workers under the new law?**

- **Full-time Food Sector Workers** can take up to 80 hours of paid sick leave, including workers who worked or were scheduled to work, on average, at least 40 hours per week in the two weeks preceding the date they take the leave;

- **Part-time Food Sector Workers with a normal weekly schedule** can take up to the total number of hours they are normally scheduled to work in a two week span;

- **Part-time Food Sector Workers with a variable schedule** can take up to 14 times the average number of hours worked each day in the six (6) months preceding the date the worker takes the leave. If the worker has worked less than six (6) months, the calculation should be based on the entire period the individual worked for or through the Hiring Entity.

COVID-19 Supplemental Paid Sick Leave should be paid out at a rate equal to the highest of the worker’s: (1) regular rate of pay for their last pay period; (2) the state minimum wage; or (3) the local minimum wage. The total amount paid per day is capped at $511 and no more than $5,110 in the aggregate.

**When is the program effective?**

The law is effective as of April 16, 2020 and will be effective during the pendency of any statewide stay-at-home orders issued by the State Public Health Officer. However, if a Food Sector Worker is taking COVID-19 Supplemental Paid Sick Leave at the time of the expiration of all applicable orders, the worker may still take their full amount of leave.

**How does this program interact with the FFCRA and other forms of leave?**

It does not interact with the FFCRA. This ordinance only impacts Hiring Entities with greater than 500 workers in aggregate. The FFCRA only applies to employers with fewer than 500 workers in aggregate. Regardless, the two leaves would run concurrently.

However, COVID-19 Supplemental Paid Sick Leave is in addition to any paid sick leave available under California’s paid sick leave law set forth in Labor Code section 246. Moreover, a Hiring Entity may not require a Food Sector Worker to use any other paid or unpaid leave, paid time off or vacation time before the worker uses their COVID-19 Supplemental Paid Sick Leave.

**Is a Hiring Entity exempt if it already provides paid leave for these same reasons?**

A Hiring Entity is **not** required to provide a Food Sector Worker with COVID-19 Supplemental Paid Sick Leave if, **as of April 16, 2020**, the Hiring Entity provides the worker with a “supplemental benefit,” such as paid leave, for the same reasons and in an equal or greater amount as that afforded under the new law.
**What happens if a Hiring Entity does not comply with the new law?**

The new law expressly authorizes the Labor Commissioner to enforce the COVID-19 Supplemental Paid Sick Leave, leave which shall be considered “paid sick days” and enforced accordingly under Labor Code sections 246(n), 246.5(b)-(c), 247, 247.5 and 248.5. Any Food Sector Worker denied COVID-19 Supplemental Paid Sick Leave can file a claim with the Labor Commissioner pursuant to Labor Code sections 98 or 98.7.

A Food Sector Worker can also pursue any other remedies provided by state or local laws, including Business & Professions Code section 17200.

**Do covered entities need to provide notice of the new law?**

Yes, Hiring Entities must display a poster in a conspicuous place regarding the rights afforded under the new law, in compliance with Labor Code section 247. The Labor Commissioner has made available a [model notice](https://www.natlawreview.com/article/california-provides-covid-19-supplemental-paid-sick-leave-to-essential-food-sector) for purposes of complying with this obligation. If a Hiring Entity's Food Sector Workers do not frequent a physical workplace, the Hiring Entity may disseminate notice through e-mail or other electronic means.

**Are there any other requirements under the new law?**

In addition to the paid sick leave requirements discussed above, the Executive Order expressly provides that Food Sector Workers working in any food facility shall be permitted to wash their hands every 30 minutes and additionally as needed. This requirement is to be enforced pursuant to applicable provisions of the Retail Food Code.

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