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California Expands Expired COVID-19 Sick Leave Protections Into 2021

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On March 19, 2021, SB95 was signed into law requiring California employers with 25 or more employees to provide 80 hours of supplemental paid sick leave to full time employees who averaged at least 40 hours a week in the 2 weeks preceding the date the employee takes leave due to COVID-19.

The new legislation significantly expands upon a 2020 Executive Order and legislation that applied to employers with 500 or more food sector employees nationwide. Under the new bill, the expanded supplemental paid sick leave applies to all public and private employers with more than 25 employees.

When does the new law go into effect and for how long?
The bill is retroactive to January 1, 2021 and goes into effect March 29, 2021. The new rules are set to expire on September 30, 2021 but could be extended should the legislature take future action.

Which Employees Qualify?
Not all employees qualify for the enhanced supplemental paid leave. Part-time employees are excluded, and only employees who have worked at least 40 hours a week in the 2 weeks preceding the date of the leave potentially qualify for the additional paid time off. In addition to working the requisite number of hours, employees only qualify for the supplemental paid leave under the bill if they are:

- Subject to a quarantine or isolation due to COVID-19
- Receiving a COVID-19 vaccine
- Experiencing symptoms from a COVID-19 vaccine that prevents them from being able to work or telework
- Experiencing COVID-19 symptoms and seek a medical diagnosis
- Caring for a family member suffering from COVID-19 or ordered to self-quarantine caring for a child whose school or childcare is closed for COVID-19 related reasons.

In the past, COVID-19 sick pay focused predominantly on employees physically working at the employer's worksite. Now, employees working remotely who meet other eligibility requirements qualify for the supplement sick leave pay.

Can Employers Require Employee to Use Sick or Vacation time first?
Employers may not require employees to use other paid or unpaid leave, paid time off, or vacation time provided by the employer before the COVID-19 supplemental paid leave unless the employer provides some other supplemental benefit for leave for COVID-19.

How to Calculate the Supplemental Sick Pay for Employees?
Covered non-exempt employees must be paid the higher of the employees' regular rate of pay for the pay period in which the supplemental paid sick leave is taken, the state minimum wage, or the local minimum wage. Exempt employees supplemental paid sick leave will be calculated based on their regular rate of pay.

Employees may determine the number of hours of COVID-19 supplemental paid sick leave to use, up to the total number of 80 hours, and employers must make the supplemental sick leave available for immediate use by the employee upon request. Employees taking COVID-19 supplemental paid sick leave at the time of expiration may take up to the full amount of COVID-19 supplemental paid sick leave provided.

What is an Employer's Responsibility to Provide Retroactive Pay?
Upon the oral or written request of an employee, employers must provide retroactive payment to any qualifying employee who took unpaid leave for COVID-19-related reasons going back to January 1, 2021.

Special Provisions for Firefighters and In-Home Supportive Services (IHSS) Employees
IHSS Providers are subject to the mandated supplemental sick leave. The Department of Social Services and the State Department of Health Care Services will implement and interpret the bill for this industry.

Firefighters scheduled to work more than 80 hours in the two weeks preceding COVID-19 supplemental paid sick leave, are entitled to the amount of supplemental paid sick leave equal to the total number of scheduled work hours in those preceding two weeks.

What are the Employer's Obligations to Provide Notice to Employees of the Supplemental Paid Sick Leave?
The Labor Commissioner will provide updated model notices for purposes of informing employees of supplemental paid sick time. Notices should be posted in the workplace and made available electronically for employees working remotely.

Take-Aways

- The newly enacted bill imposes significant financial responsibilities on struggling businesses. As of April 1, 2021, federal law provides that employers who voluntarily provide COVID-19 sick leave may be eligible for federal payroll tax breaks, however, it is currently unclear if retroactive pay between January 1, 2021 and March 29, 2021 qualifies.
- Small employers (those employing less than 25 employees) should closely monitor their workforce to assure compliance with the new rules if the number of employees exceeds 25 any time between January 1, 2021 and September 30, 2021.
- Large employers should immediately review and supplement their current leave policies to comply with the new law and reach out to legal counsel for assistance for assistance interpreting the new rules and drafting mandated notices to employees.
- While employers may be feeling overwhelmed with the numerous compliance challenges brought about in 2021, the experienced Labor and Employment attorneys at Kaufman Dolowich & Voluck are available to assist. For more information, please contact an experienced member of KD's Labor and Employment Law Practice Group.

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