

KEY AMENDMENTS TO FFCRA & CALIFORNIA'S NEW COVID-19 SICK LEAVE REQUIREMENTS

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March 2021 brought a variety of legislative changes impacting California employers. On March 11, 2021 President Joe Biden signed the American Rescue Plan Act of 2021 (the Act). Among other things, including the widely publicized \$1,400 stimulus payments, the Act extends the \$300.00 federal unemployment benefit and the availability of the payroll tax credits to employers through September 30, 2021. Additionally, for those employers who opt to continue to provide Families First Coronavirus Response Act (FFCRA)-type leave, the Act makes several significant changes to how the FFCRA is to be implemented with regard to both Paid Sick Leave and Emergency Family and Medical Leave (EFML).

Then, on March 19, 2021, California Governor Gavin Newsom signed Senate Bill 95 (SB 95), providing a new form of COVID-19 related paid sick leave for many California workers. The new law, among other things, extends protections to employees who are teleworking and expands the qualifying reasons for COVID-19 sick leave.

We provide below a summary of the key amendments to FFCRA and highlight the requirements under the newly promulgated California COVID-19 supplemental paid sick leave.

Key Amendments Under The American Rescue Plan Act Of 2021

By way of review, employer obligations to provide paid sick and family leave under the FFCRA ended on December 31, 2020 and became optional as of January 1, 2021. This meant that covered employers were not required to participate, but if they did, they would continue to receive tax credits for the payments made to employees on leave for covered reasons. On December 27, 2020, Donald Trump signed the Consolidated Appropriations Act of 2021 (CAA), extending the payroll tax credits available to employers who voluntarily decided to continue to provide FFCRA-type leave through March 31, 2021. President Biden signed the Act on March 11, 2021, which extended FFCRA deadlines and protections to September 30, 2021, with a few key changes.

Changes To Emergency Family And Medical Leave

The Act eliminates the requirement that the first two weeks of EFML be unpaid. Now, if an employee qualifies for EFML, the employee is eligible for a full 12 weeks of paid leave (assuming the employee has not previously used any EFML or other leave under the Family and Medical Leave Act (FMLA)).

The Act also expands the qualifying reasons to use EFML. Presently, employees can only use EFML if they need time off to care for a child whose school or daycare is closed due to COVID-19 related reasons. However, under the Act, EFML can be used for any of the qualifying reasons found under FFCRA's Paid Sick Leave (see below). This means, if an employee qualifies for Paid Sick Leave and requires leave beyond the 10-day entitlement for Paid Sick Leave, the employee could potentially take up to an additional 12 weeks of EFML. The impact is that, after April 1, 2021, an employee could potentially take up to a total of 14 weeks of paid FFCRA leave.

The Act also contains non-discrimination language for both Paid Sick Leave and EFML. If an employer opts to voluntarily provide FFCRA leave and discriminates with respect to leave: (1) in favor of highly compensated employees; (2) in favor of full-time employees; or (3) on the basis of employment tenure, the employer will not be able to obtain tax credits for any leave paid under the FFCRA. In essence, employers can be penalized by losing the tax credit option.

Changes To Paid Sick Leave

The Act also resets the 10-day/80-hour limit for Paid Sick Leave starting on April 1, 2021. This means, if employees have previously exhausted their entitlement to FFCRA Paid Sick Leave, they now have another 10-days/80-hours of Paid Sick Leave. The Act also adds three additional qualifying reasons for Paid Sick Leave, providing such leave to employees who are unable to work because they are:

- obtaining a COVID-19 vaccine;
- recovering from any illness, injury, or condition related to such vaccine; or
- seeking or waiting for the results of a diagnostic test or awaiting a medical diagnosis.

While opting in to FFCRA is voluntary under the Act, providing paid sick leave is mandatory in California under the state's supplemental paid sick leave law discussed below.

California's New COVID-19 Supplemental Paid Sick Leave

SB 95 provides a new form of COVID-19 related paid sick leave for many California workers. This new law is broader than California's prior COVID-19 paid sick leave law and, unlike prior legislation, it covers employees who are in telework status.

What Are The Applicable Time Periods?

The new sick leave entitlement becomes effective on March 29, 2021. The requirement to provide COVID-19 sick leave applies retroactively to January 1, 2021 and extends to September 30, 2021.

The retroactive payment must be paid on or before the payday for the next full pay period after the oral or written request of the covered employee.

Who Must Provide Supplemental Paid Sick Leave (“Covered Employer”)?

SB 95 covers all employers with more than 25 employees. Small businesses employing 25 or fewer employees are exempt from SB 95 but are still entitled to the federal tax credit if they offer supplemental sick leave.

WHO IS ELIGIBLE FOR SUPPLEMENTAL PAID SICK LEAVE (“COVERED EMPLOYEE”)?

SB 95 applies to all California employees who are unable to work or telework for a covered employer due to any of the following reasons:

- The employee is subject to a COVID-19 quarantine/isolation period required by local, state, or federal order or guideline (the longest minimum period will apply);
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is attending an appointment to receive a COVID-19 vaccination;
- The employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for a family member who is subject to a quarantine/isolation order or guideline or who has been advised to self-quarantine; and
- The employee is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

Notably, the new law extends COVID-19 sick leave entitlements to employees who telework and expands the qualifying reasons for COVID-19 sick leave beyond that permitted under the previous law.

HOW MUCH SUPPLEMENTAL PAID SICK LEAVE IS AN EMPLOYEE ENTITLED TO?

Under the new law, a covered employee is entitled to 80 hours of COVID-19 supplemental paid sick leave if the employee either works full-time or was scheduled to work an average of at least 40 hours per week in the two weeks preceding the date the employee took COVID-19 supplemental paid sick leave.

If an employee works part-time and has a normal weekly schedule, the employee is entitled to leave up to the total number of hours the employee is normally scheduled to work over two weeks. If the employee works a variable number of hours, the employee is entitled to 14 times the average number of hours the employee worked each day in the six months preceding the date the employee took COVID-19 supplemental paid sick leave. If the employee has worked for the employer for a period of fewer than six months but more than 14 days, the sick leave calculation is based on the entire period the employee has worked for the employer. If the employee works a variable number of hours and has worked for the employer over a period of 14 days or fewer, the employee will be entitled to leave based on the total number of hours the employee has worked for the employer. The covered employee determines how many and when to use the available COVID-19 supplemental paid sick leave.

WHAT IS THE APPLICABLE PAY OUT RATE FOR SUPPLEMENTAL PAID SICK LEAVE?

Employees not exempt from overtime requirements must be paid for their use of supplemental paid sick leave at the higher of the following:

- The employee's regular rate of pay for the workweek in which COVID-19 supplemental paid sick leave was taken;
- The employee's total wages, not including overtime premium pay, divided by the employee's total hours worked in the full pay periods of the prior 90 days of employment;
- The California minimum wage; or
- The local minimum wage.

Employees exempt from overtime requirements must be paid for supplemental paid sick leave in the same way as the employer calculates wages for other forms of paid leave time for these employees. Supplemental paid sick leave benefits are capped at \$511.00 per day and \$5,110.00 in the aggregate for each employee.

HOW DOES SUPPLEMENTAL SICK LEAVE INTERACT WITH OTHER LAWS?

Under the Cal-OSHA COVID-19 Emergency Temporary Standards (ETS), employers must maintain an employee's earnings when an employee is excluded from the workplace due to exposure to COVID-19. SB 95 expressly permits an employer to require employees to first exhaust their COVID-19 sick leave before providing exclusion pay under Cal-OSHA's emergency regulations.

However, supplemental paid sick leave under the new law is provided *in addition to* paid sick leave available under Labor Code Section 246 and Assembly Bill 1867. The law prohibits employers from requiring an employee to use any other paid or unpaid leave, paid time off, or vacation time before using supplemental paid sick leave or in lieu of supplemental paid sick leave.

An employer can also offset the new supplemental paid sick leave amount with other supplemental benefits previously provided. Leave taken under Labor Code Section 246 and AB 1867 does not count towards the offset. For the offset to apply, the other supplemental benefits (1) must be payable for the same reasons as those provided under SB 95, and (2) must compensate the employee in an amount equal to or greater than the amount provided under the law. The offset generally includes paid leave provided by the employer pursuant to any federal or local law in effect as of January 1, 2021, such as the FFCRA discussed above.

ARE THERE ANY NOTICE REQUIREMENTS?

Yes. Employers must include notice of the amount of supplemental sick leave available on an employee's wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages. Specifically, wage statements must list any supplemental paid sick leave payment as a separate line item and list all available supplemental paid sick leave hours separate from other paid leave. The wage statement requirement becomes effective on the next full pay period following the enactment date of the law on March 29, 2021.

Employers must also post a notice in the workplace or a notice disseminated by email summarizing the right to supplemental paid sick leave, which can be modeled after the Labor Commissioner's model notice.

What To Do Next?

The Act's provisions related to the FFCRA become effective April 1, 2021 and California's new COVID-19 sick leave requirements take effect on March 29, 2021.

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bcplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bcplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

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