



# New Law Would Grant Supplemental Paid Sick Leave to California Workers Impacted by COVID-19

Insights

8.31.20

The California Legislature is expected to pass legislation today that would provide up to 80 hours of supplemental paid sick leave to millions of California workers for reasons related to COVID-19. Mirror Senate and Assembly bills, [SB 822](#) and [AB 1867](#), achieve this goal, in part, by codifying the supplemental paid sick leave previously provided to “food sector” employees earlier this year via [Executive Order N-51-20](#). In addition, the bills would expand this supplemental paid sick leave to all employees working for certain private companies and all health care providers and emergency response workers not already provided sick leave through the Families First Coronavirus Response Act (FFCRA). It is unclear at this point which bill the Legislature will pass, however, the effect of passing either SB 822 or AB 1867 will be the same for California employers.

**[Ed. Note: As expected, the Legislature passed AB 1867 on August 31. The Bill is awaiting Governor Newsom’s signature.]**

**[Ed. Governor Newsom signed AB 1867 on September 9, 2020.]**

## Who Must Provide Leave?

SB 822 or AB 1867 would be wide-sweeping. Either bill would provide for COVID-19 supplemental paid sick leave for all employees who work for qualifying “Hiring Entities.” The bills define a Hiring Entity as any private entity that employs 500 or more employees in the United States. The term Hiring Entity also includes any entity, including public entities, that employs health care providers and emergency responders as defined by FFCRA. The legislation provides supplemental leave for public health providers and emergency responders who work for Hiring Entities that elected to exclude them from the emergency paid sick leave available under the FFCRA.

## Who Qualifies for the Leave?

Employees who perform work for or through any of the Hiring Entities described above would be entitled to COVID-19 supplemental paid sick leave. To qualify for the leave, the employee must leave the home or place of residence to perform work and satisfy one of the following three conditions:

1. the worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. the worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or

3. the worker is prohibited from working due to health concerns related to the transmission of COVID-19.

SB 822/AB 1867 would require that employers make COVID-19 supplemental paid sick leave available for immediate use upon an oral or written request from an employee.

### **How Much Leave Is Available?**

A worker considered to be “full-time” by the employer would be entitled to 80 hours of COVID-19 supplemental paid sick leave. An employee who worked or was scheduled to work, on average, at least 40 hours per week in the two weeks before the employee received supplemental paid sick leave would be entitled to 80 hours of leave.

Part-time employees would be eligible for variable leave amounts based upon hours worked. A worker who has a normal weekly schedule would be entitled to paid leave hours equaling the total number of hours they are scheduled to work over two weeks. An individual who works a variable number of hours would be eligible for leave time equal to 14 times the average number of hours the individual worked each day in the six months before the leave date. The calculation for a worker employed less than six months would be made over the entire period of employment.

SB 822/AB 1867 includes a provision specific to active firefighters. A covered worker who is also an active firefighter who was scheduled to work more than 80 hours for the employer in the two weeks before the employee took COVID-19 supplemental paid sick leave would be entitled to leave equal to the total number of hours they were scheduled to work in the preceding two weeks.

### **What Is the Hourly Rate for the Leave?**

COVID-19 supplemental paid sick leave would be calculated based upon the **highest** of the employee’s regular pay rate for the last pay period; the state minimum wage rate; or the applicable local minimum wage. The amount of COVID-19 supplemental paid sick leave is capped at \$511 per day and \$5,110 total per worker.

### **Are There Any Exceptions?**

Workers who have already taken supplemental paid sick leave under Executive Order N-51-20 would not be entitled to additional leave. Additionally, employers that have already provided some form of COVID-19-specific paid sick leave may not be required to provide COVID-19 supplemental paid sick leave if, as of March 4, 2020, they provided a comparable supplemental benefit. The supplemental paid leave provided by the employer must have been equal to or greater than the amount the employee would have been entitled to under SB 822/AB 1867. If the previous leave provided to the employee was not commensurate with COVID-19 supplemental paid sick leave, the employer may retroactively provide supplemental pay to the employee to satisfy the compensation requirements of SB 822/AB 1867, in which case those hours can count towards the COVID-19 supplemental paid sick leave entitlement.

The option to supplement previously granted leave does not apply to food sector employers if the previous supplemental benefit did not meet the legislation's compensation requirements. Therefore, supplemental leave that was extended prior to the enactment of SB 822/AB 1867 that did not meet its compensation and leave requirements may not satisfy the employer's COVID-19 supplemental paid sick leave obligations.

### **How Does COVID-19 Leave Affect Other Leave?**

An employer may not require that a worker use other paid or unpaid leave before the worker uses COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave. COVID-19 supplemental paid sick leave will be in addition to any paid sick leave that may be available to the worker under Labor Code section 246.

### **Does the Legislation Include Any Enforcement Provisions?**

The Labor Commissioner would be authorized to enforce COVID-19 supplemental paid sick leave. The leave constitutes "paid sick days" under Labor Code sections 246(i) & (n), 246.5(b)-(c), 247, 247.5 and 248.5. Under the legislation, an employee can file a complaint with the Commissioner pursuant to Labor Code section 98 or 98.7. The Commissioner will be required to issue a model notice under Labor Section 247 within seven days after the effective date of the legislation. The Labor Commissioner's jurisdiction over violations of SB 822/AB 1867 will be in addition to other remedies provided by state or local laws, including Business & Professions Code section 17200.

For all sectors except those previously defined as "food sector" in [Executive Order N-51-20](#), the requirement to provide written notice of sick leave pursuant to Labor Code 246(i) will not be enforceable until the pay period after enactment of the legislation. Employers can disseminate notice of COVID-19 supplemental paid sick leave pursuant to Labor Code section 247(a) via email if the employer's covered employees do not frequent the workplace.

### **When Will the Legislation Take Effect?**

For all non-food sector employers, the requirement to provide COVID-19 supplemental paid leave would take effect no later than 10 days after the Governor signs either SB 822 or AB 1867. COVID-19 supplemental paid sick leave has been in effect for the food sector since the Governor's April 16, 2020 Executive Order.

Supplemental leave provided under this legislation would expire on December 31, 2020 or when any federal extension of the Emergency Paid Sick Leave Act under FFCRA expires, whichever is later. However, employers should note that an employee taking leave when COVID-19 supplemental leave expires would be entitled to take the full amount of leave despite the leave's expiration.

### **Conclusion**

The Legislature is expected to pass either SB 822 or AB 1867 today, and Governor Newsom is expected to sign it shortly thereafter. As a budget "trailer" bill, the Bill will go into effect immediately when signed, but the paid sick leave provisions will take effect "not later than 10 days" after enactment. Employers who may be covered by this pending legislation should consult legal

counsel now to discuss plans to implement the paid sick leave requirements in the short amount of time provided by the Bill.

We will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in [our California offices](#), or any [member of our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center for Employers](#), maintained by our Taskforce.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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