

AB 1867: COVID-19 Paid Leave Overview and Frequently Asked Questions

AB 1867 Relating to COVID-19 & Paid Leave

On September 9, 2020, California Governor Gavin Newsom signed AB 1867 which establishes new COVID-19 supplemental paid sick leave requirements for large employers not covered by the federal Families First Coronavirus Response Act (FFCRA). The bill becomes effective on September 19, 2020. As previously reported, the measure was amended in the final hours before the amendment deadline, ensuring no changes could be made due to the state's constitutional 72 hours in print rule for bills. The vehicle used was a budget trailer bill allowing the language to be buried as a budget item. As a budget implementation measure, the Governor had no choice but to sign it. The lack of public discourse and the willful removal of opportunity to debate and influence the bill was horrific.

As we have received many questions regarding the new law, prepared below are FAQ responses regarding AB 1867 provided by legal counsel. Please note that the FAQ is intended to provide guidance information only. If you have a company specific questions concerning AB 1867, always check with your own attorney or human resources professional.

FREQUENTLY ASKED QUESTIONS REGARDING AB 1867:

Which Employers Are Covered by AB 1867?

All California employers with 500 or more employees nationwide are covered by AB 1867.

When Are Employees Entitled to COVID-19 Supplemental Sick Leave Payments?

Employees who must leave their home to perform work are entitled to COVID-19 supplemental paid sick leave if they are unable to work when they are:

1. Subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
3. Prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

What constitutes being "advised" by a health care provider to self-quarantine or self-isolate?

An employee who does not meet the requirements listed above for COVID-19 Supplemental Sick Leave Payments is not entitled to receive them. However, AB 1867 is clear that an employer's obligation to provide COVID-19 Supplemental Sick Leave is triggered "upon the oral or written" request of the employee. This means that employers may not require a doctor's note or other certification from a health care provider.

How Many Hours of COVID-19 Supplemental Sick Leave Payments Are Employees Entitled to Receive?

The number of hours of COVID-19 Supplemental Sick Leave Payments depends upon the employee's schedule:

1. Employees who the employer considers to work "full time" or who were scheduled to work or did work on average at least 40 hours per week in the two weeks preceding the date of taking this leave are entitled to 80 hours of COVID-19 Supplemental Sick Leave Payments;
2. Employees with a normal weekly schedule are entitled to COVID-19 Supplemental Sick Leave Payment hours equal to the total number of hours the employee is normally scheduled to work over two weeks;
3. If an employee works a variable number of hours, the employee is entitled to COVID-19 Supplemental Sick Leave Payment hours equal 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 (or, if the employee has worked less than six months but more than 14 days, the average hours worked each day over the entire employment period);

4. If an employee works a variable number of hours and has worked for a period of 14 or fewer days, the employee is entitled to COVID-19 Supplemental Sick Leave Payment hours equal to the total number of hours the employee has worked for that employer.

What Actions Do Employers Need to Take Relating to Paychecks?

Employers subject to AB 1867 need to take steps to update their paycheck forms. Beginning the next paycheck cycle, paycheck stubs need to identify the amount of COVID-19 Supplemental Sick Leave Pay available. Your payroll department or service should double check that they have updated their paycheck forms to comply with AB 1867.

Instead of providing information regarding COVID-19 Supplemental Sick Leave Pay on paycheck stubs, employers can provide employees with this information in a separate writing furnished to the employees on the employees' designated pay dates.

Who Decides How Many Hours of COVID-19 Supplemental Sick Leave Payments to Use?

Under the new law the employee determines how many hours of COVID-19 Supplemental Sick Leave Payments to use, up to the maximum number of hours authorized by the statute.

Note, however, that COVID-19 Supplemental Sick Leave Pay only is available if the employee is "unable to work" because the employee is:

1. Subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or

Prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

Can Employers Ask Employees to Prove That They Were Advised by A Medical Care Provider to Self-Quarantine?

The employee is entitled to COVID-19 Supplemental Sick Leave Pay so long as the employee is unable to work for one of the three reasons listed in AB 1867. The new law does not require that the employee be advised by a health care provider in writing to self-quarantine or self-isolate. AB 1867 therefore does not allow an employer to ask for a doctor's note or other evidence that an employee is unable to work or that the employee has been advised to self-quarantine or self-isolate. Technically, if the employee could actually work and was not advised to self-isolate, the employee would not be entitled to COVID-19 Supplemental Sick Leave Payments. From a practical perspective, however, it would be risky to deny benefits under AB 1867 because if the employee were entitled to paid sick leave, the employer would potentially be subject to penalties.

Can Employers Require Employees to Use Other Paid or Unpaid Leave Before Taking Supplemental Sick Leave?

No. AB 1867 prohibits an employer from requiring an employee to use any other paid or unpaid leave, paid time off, or vacation time before the employee uses COVID-19 Supplemental Sick Leave Payments.

What Rate is Used for COVID-19 Supplemental Sick Leave Payments?

Each hour of COVID-19 Supplemental Sick Leave is to be paid at the highest of the following:

1. The worker's regular rate of pay for the last pay period, including pursuant to any collective bargaining agreement that applies.

2. The state minimum wage.
3. The local minimum wage.

However, an employer is not required to pay more than five hundred eleven dollars (\$511) per day and five thousand one hundred ten dollars (\$5,110) in the aggregate for COVID-19 Supplemental Sick Pay to an eligible employee.

Does the Hourly Rate for COVID-19 Supplemental Sick Leave Payments Include Benefits?

No. In the wage and hour context, the California Labor Commissioner has stated that the “rate of pay” does not include contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing retirement, life, accident, or health insurance or similar benefits for employee. Unlike the FFCRA, AB 1867 does not require the continuation of medical benefits or any other fringe benefit contributions.

What Notice Must Employers Give?

AB 1867 requires employers to display a poster in a conspicuous place that provides notice of COVID-19 Supplemental Sick Leave Pay.

1. AB 1867 requires the Labor Commissioner to create a standard template poster and to make the template available to employers.
2. If employees do not go to a workplace, the employer may satisfy this requirement by giving notice through electronic means

How is AB 1867 Enforced?

AB 1867 authorizes the Labor Commissioner to impose civil penalties. For example, the Labor Commissioner can recover:

1. A penalty of up to \$100 per offense for a willful violation of the poster requirement;
2. An administrative penalty equal to the dollar amount of leave withheld multiplied by three or \$250 (whichever amount is greater) up to a \$4,000 aggregate penalty;
3. Where failure to comply results in other harm or a violation of rights, a sum of \$50 for each day or portion thereof that the violation occurred or continued, not to exceed a \$4,000 in aggregate; and
4. Investigation and enforcement costs of not more than \$50 for each day or portion of a day a violation occurs or continues for each employee or other person whose rights were violated.

These penalty provisions are cumulative and do not preclude other remedies under applicable law; however, penalties for paid leave paystub violations are in lieu of the penalties for a violation of the general paystub statute, Labor Code Section 226.

Can the Requirements of AB 1867 Be Waived Through Collective Bargaining?

No, AB 1867 did not provide authorization to exempt employers signatory to a collective bargaining agreement from having to provide the Supplemental Paid Sick Leave via a waiver in a collective bargaining agreement.

Do Collective Bargaining Agreement Grievance and Arbitration Procedures Apply?

Depending on the specific language of an applicable collective bargaining agreement, individual claims for Supplemental COVID-19 Paid Sick Leave Payments may be subject to the grievance and arbitration procedures. Not all collective bargaining agreements have the same language with regard to use of the

grievance procedure for statutory claims. Claims brought by the Labor Commissioner may also be subject to the grievance and arbitration procedures of the applicable labor agreement.