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California Reinstates COVID-19 Supplemental Paid Sick Leave

On February 9, 2022, California reinstated COVID-19 Supplemental Paid Sick Leave, which took effect on February 19, 2022, but will apply retroactively from January 1, 2022 through September 30, 2022. SB 114, the 2022 COVID-19 Supplemental Paid Sick Leave (2022 CSPSL) law, codified as California Labor Code section 248.6, provides up to 80 hours of supplemental sick leave to certain employees who are unable to work due to COVID-19-related reasons. The 2022 CSPSL contains significantly different requirements than the 2021 COVID-19 Supplemental Paid Sick Leave (2021 CSPSL) law which expired on September 30, 2021. The California Department of Industrial Relations has published FAQs to assist employers with compliance obligations. This alert will provide a description of significant provisions of the law but will not address provisions related to firefighters or providers of in-home supportive services.

Covered employers and employees

Employers: The 2022 CSPSL applies to all employers, public or private, with 26 or more employees, including those with collective bargaining agreements.

Employees: Covered employees are defined as an employee who is unable to work or telework for an employer due to a covered reason. Part-time and full-time employees are covered, but the law does not apply to independent contractors.

Requests for leave

An employer's obligation to make 2022 CSPSL leave available to an employee occurs only upon an oral or written request given by the employee to the employer after February 19, 2022. An employer is required to post a notice in

each workplace regarding the 2022 CSPSL law. Employers may disseminate the notice to employees through electronic means.

Covered reasons and use of 2022 CSPSL

SB 114 creates “two separate banks of leave,” each of up to 40 hours. The first leave bank (leave bank one) under the 2022 CSPSL law provides up to 40 hours of leave to covered employees who are unable to work or telework due to:

Quarantine or isolation reasons:

The employee is caring for themselves or a family member due to a quarantine or isolation period pursuant to an order or guidance of a) the California Department of Public Health, b) the federal Centers for Disease Control and Prevention or c) a local public health officer with jurisdiction over the workplace;

The employee or a family member the employee cares for has been advised by a healthcare provider to quarantine due to COVID-19;

Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or

Employee is caring for a child whose school or place of care is closed due to the presence of COVID-19 on the premises.

Vaccine-related reasons: The employee is attending a COVID-19 vaccine or booster appointment for themselves or a family member or is recovering from or caring for a family member who is recovering from vaccine-related symptoms.

“Family member” defined: The 2022 CSPSL expands the definition of family member to include a child (biological, adopted, foster, step-child, legal ward or child to whom the employee stands in loco parentis); parent (biological, adoptive, foster, step-parent or legal guardian of the employee or the employee’s spouse or registered domestic partner, or person who stood in loco parentis when the employee was a minor child); registered domestic partner; grandparent; grandchild or sibling.

The second leave bank (leave bank two) provides up to an additional 40 hours of leave to covered employees for the following reasons:

Positive COVID-19 test: The employee tests positive for COVID-19 or is caring for a family member who tests positive for COVID-19.

Retroactivity requirement and requests for 2022 CSPSL

While employers received a grace period until February 19, 2022 to begin providing 2022 CSPSL, the leave requirement is retroactive to January 1, 2022. Consequently, any covered employee who took qualifying leave between January 1, 2022 through February 19, 2022 may request payment for leave equal to the amount of payment required under the 2022 CSPSL law. Employers are obligated to pay retroactive leave to covered employees only if the oral or written request for retroactive 2022 CSPSL is made on or after February 19, 2022. Employers have until the payday for the next full pay period to pay retroactive 2022 CSPSL.

Calculation of employee's hours of leave

An employee who is considered full-time or who worked or was scheduled to work an average of at least 40 hours per week in the two weeks prior to taking 2022 CSPSL leave is entitled to 40 hours of leave under the first leave bank.

If the covered employee has a normal weekly schedule but does not meet the 40-hour requirement described above, the employee is entitled to the total number of hours the employee is normally scheduled to work over a one-week period. There are multiple methods for calculating the amount of leave available to part-time employees who work a variable schedule, depending on the duration of employment. Generally, part-time employees are entitled leave in an amount equal to seven times the average number of daily hours worked. For example, part-time employees who have worked for the employer for at least six months on a variable schedule are entitled to take leave in the amount of seven times the average number of hours worked each day for the employer in the six months preceding the date of the CSPSL.

Covered employees are entitled to additional leave under bank two in an amount not to exceed the amount of leave to which the employee is entitled under bank one. The leave periods taken from leave banks one and two do not need to be taken consecutively.

Limitations on payment of CSPSL and employer credits

Limitation on duration of CSPSL for vaccine-related reasons: An employer is permitted to limit an employee's 2022 CSPSL leave period to a period of three days or 24 hours for a single vaccine appointment and recovery from any side effects experienced by the employee or a family member cared for by the employee. Medical verification from a healthcare provider can be required for employees who experience prolonged side effects in excess of the 24-hour or three-day leave period.

Credit for retroactive payment of CSPSL or other supplemental benefits: If during 2022, CSPSL is provided by the employer retroactively, or payment of another supplemental benefit for COVID-19-related sick leave is provided by the employer, then the amount of leave may be deducted against the total amount of 2022 CSPSL the employer is obligated to provide, so long as: 1) the leave was taken

before enactment of the 2022 CSPSL law on February 19, 2022; 2) leave was taken for a qualifying reason under the 2022 CSPSL and 3) the amount paid to the employee is at least equal to or greater than the amount required under the 2022 CSPSL law. To obtain a credit for leave provided under an “other supplemental benefit” an employer must not require the covered employee to use any other paid leave under a policy not specific to COVID-19 or vacation time.

Credit for leave provided under local ordinances or for other types of leave: Leave provided under local ordinance or under a separate leave bank provided by the employer may be credited toward the employer’s obligations under the 2022 CSPSL law so long as the leave was provided for a qualifying reason and at a rate of pay equal to or greater than the amount required under the 2022 CSPSL law.

Denial of pay for leave related to positive COVID-19 test results:

An employer can require medical documentation supporting requests for 2022 CSPSL only in limited circumstances. The 2022 CSPSL provides an employer with the right to require medical documentation prior to payment of leave if the employer has information that reasonably indicates the employee’s request for 2022 CSPSL is not for a valid purpose.

If a positive COVID-19 test is the basis for requesting 2022 CSPSL, employers may require employees to provide documentation verifying the employee’s or family member’s positive COVID-19 test result. Failure of the employee to provide the requested documentation can result in denial of pay for any leave taken.

Employers can require an employee to take a diagnostic COVID-19 test on or after the fifth day after the employee tested positive for COVID-19, so long as the employer makes the test available to the employee and at no cost to the employee. Failure of the employee to take a test that is made available to the employee as required under the 2022 CSPSL law may result in the denial of pay for *any leave taken after the time the employer provides the test*. (Italics added.)

Maximum pay available for 2022 CSPSL: The maximum amount of 2022 CSPSL available to all employees is limited to \$5,110 in total or \$511 per day for the period of January 1, 2022 through September 30, 2022.

Wage statement requirements: Employers must provide employees with notice on an itemized wage statement or other writing of the number of 2022 CSPSL hours that the employee has used through that pay period, including if the employee has used zero CSPSL. CSPSL must be listed separately from regular paid sick leave.

What you need to know

Employers should 1) review the FAQs provided by the California Department of Industrial Relations for additional information related to the 2022 CSPSL and updates to the FAQs and 2) adjust their leave practices, policies and procedures accordingly. Undoubtedly, questions regarding leave from specific leave banks may pose difficult allocation questions.

Contact Us

If you have questions about compliance with federal and state regulations and laws regarding COVID-19 and your workplace, contact Jennifer Hinds, Tracey O'Brien, or your Husch Blackwell attorney.