California's COVID-19 Paid Sick Leave Requirements

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With increasing recent frequency in the construction industry, particularly with the holiday season upon us, some larger companies (those with 500+ employees throughout the country) are being caught unprepared in response to a flurry requests from their California employees for an additional 80 hours of supplemental paid COVID-19-related leave before the end of the year, and some of those requests are proving to be of dubious legitimacy.

Most larger companies observed in April 2020 that when the federal government enacted the Families First Coronavirus Response Act (FFCRA) authorizing new supplemental paid leave entitlement for certain COVID-19-related absences, the new federal law was expressly limited to companies employing less than 500 employees and did not apply to them.

While that is true, what some of those same companies apparently did not recognize (most frequently those based outside of California) is that the California legislature filled the coverage gap in the FFCRA for most employees in California with the passage of Assembly Bill Number 1867 several months later.

That new California law, which expires on December 31, 2020 (or upon the expiration of any federal extension of the FFCRA, whichever is later), requires employers with 500 or more employees nationwide to offer up to 80 hours of supplemental paid sick leave (capped at $5,110 per full-time employee) to California employees who leave their homes to perform work (as tends to be the case in the construction industry).

Under the new California law, California employees are entitled to supplemental COViD-19 paid leave if the employee is required to self-quarantine or self-isolate as advised by federal, state or local agency or by a health care provider due to concerns related to COVID-19, ***or if their employer prohibits them from working at all due to health concerns tied to COVID-19 and related policies.***

Unintentionally overbroad employer policies give rise to the potential for abuse of this latter criterion. For example, some companies have enacted imprecise policies in response to COVID-19 that direct employees not to work at all if they have the chills, a cough, shortness of breath, muscle aches, loss of taste, etc. Arguably, an employee could invoke paid leave entitlement under the new California law simply by reporting a common symptom.

Such policies should be revisited and appropriately narrowed and clarified where possible so as to disincentivize exploitation (for example, policies directing symptomatic employees to work off site rather than to forgo all work entirely are preferable, as are policies requiring verification by a healthcare provider).

With the California statute potentially set to expire at the end of December 2020 if the federal government does not extend the FCRAA, a use-it-or-lose-it-before-2021 assessment of the paid sick leave allotment is becoming more common within company workforces. Larger employers are thus encouraged to take a closer look at their COVID-19 protocols with an eye towards discouraging holiday-season manipulation.

But as employers, particularly those employing 500 or more employees, take a closer look at their COVID-19 workplace protocols within the purview of the new California supplemental paid COVID-19-related leave law described above, they should also be mindful that the law includes several additional challenges for employers:

- Employees may decide how much supplemental paid COVID-19-related leave to use and it must be provided upon an employee's oral or written request.
- The employee need only be employed at the time of the supplemental paid COVID-19-related leave request to be eligible (i.e., the employee need not have been employed for any amount of time before becoming eligible to claim supplemental paid leave entitlement).
- The law does not indicate what, if any, supporting documentation may be required to substantiate the need to take the supplemental paid COVID-19-related leave.
- Part-time employees are also eligible to claim supplemental paid COVID-19 leave but at a reduced amount commensurate with their historical hours and pay.
- Paid sick leave already provided by an employer pursuant to another non-COVID-19-specific state or city normal paid sick leave law may not be counted toward the employer's obligation to provide supplemental paid COVID-19-related leave under the new California law.
- But if the employer had previously provided its employees with supplemental paid COVID-19-related leave by way of its own voluntary policy on or after March 4, 2020, that already-provided paid leave may be applied to and counted against employee's allotment under the new California law.
- And the new California law requires that posting of a notice of the law at the workplace or electronically.

As such, failure to assess COVID-19 safety protocols within the framework of the new California supplemental paid COVID-19-related leave law threatens to derail companies hoping to staff and advance their projects between now and the end of the year. You've been warned (happy holidays!). Δ