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COVID-19 SUPPLEMENTAL PAID SICK LEAVE FOR ALL CALIFORNIA EMPLOYEES

On September 9, 2020, Governor Newsom signed Assembly Bill 1867 ("AB 1867"), expanding Supplemental Paid Sick Leave coverage for COVID-19 related absences to all California employees effectively closing the gaps left behind by the Families First Coronavirus Response Act ("FFCRA"). AB 1867 establishes the following:

1) codifies existing COVID-19 supplemental paid sick leave requirements for certain food sector workers;
2) adds COVID-19 supplemental paid sick leave requirements for other employers not previously covered;
3) creates a small-employer family mediation pilot program;
4) codifies existing COVID-19 hand washing requirements; and
5) amends enforcement provisions in California's pre-COVID paid sick leave law, the Healthy Workplace Healthy Family Act of 2014 ("HWHFA").

AB 1867 and its provisions become effective on ***September 19, 2020*** and expire on December 31, 2020, or upon the expiration of any federal extension of FFCRA, whichever is later.

Which Employers Are Covered?

AB 1867 requires private businesses with 500 or more employees nationwide to provide their California employees with COVID-19 related supplemental paid sick leave. It also expands coverage to employers of first responders and health care employees who were excluded from emergency paid sick leave available under the FFCRA.

When is the Employee Entitled to Paid Sick Leave?

Under AB 1867, employees who perform work for or through the covered employer outside of their home or place of residence must satisfy one of the following to qualify for supplemental paid sick leave:

1) the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
2) the employee is advised by a healthcare provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
3) the employee is prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

How Much Paid Sick Time is the Employee Entitled to?

An employee is entitled to 80 hours of COVID-19 supplemental paid sick leave if (i) the employee is considered "full time" by the employer, or (ii) the employee worked or was scheduled to work,

on average, at least 40 hours per week for the employer in the two weeks before the employee received supplemental paid sick leave. All other employees are eligible for variable leave amounts based on the amount of hours worked.

AB 1867 allows the employee to determine how many hours of COVID-19 supplemental paid sick leave to use and requires the employer to make the leave available for immediate use upon the employee's oral or written request to take the leave.

COVID-19 supplemental paid sick leave is provided to the employee in addition to any other paid sick leave that the employee is eligible for under the HWHFA, Labor Code Section 246. ***Additionally, the law prohibits an employer from requiring the employee to use any other paid leave, unpaid leave, paid time off or vacation time prior to using COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave.***

If AB 1867 expires while an employee is on COVID-19 supplemental paid sick leave, the employee is still entitled to take the full amount of leave to which he or she is entitled to.

What Is The Hourly Rate Of Pay for The New COVID-19 Leave?

Employees using COVID-19 supplemental paid sick leave are compensated based upon the *highest* of: (i) the employee's regular rate of pay for their last pay period, (ii) the state minimum wage, or (iii) the local minimum wage to which the employee is entitled. However, the amount of paid leave to the employee for COVID-19 supplemental sick pay is capped at $511 per day and $5,110 total.

What If The Employer Already Provided COVID-19 Related Sick Leave Prior to AB 1867?

If an employer previously provided supplemental sick leave for the reasons described above, but did not pay the employee at the rate required by AB 1867, then the employer must retroactively provide supplemental pay to the employee in an amount equal to or greater than what is required by AB 1867. However, the employer does not need to provide the employee with any additional time off.

What Else Is Required Of The Employer Under AB 1867?

AB 1867 also requires employers to provide notice on their employees' wage statements of available COVID-19 supplemental paid sick leave each pay period (or a separate writing on the employees' actual pay day). Failure to do so could subject the employer to liability.

Employers should also include any applicable offset for supplemental paid sick leave already granted to the employee for a reason covered by the new law. Employers must provide such notice on the pay period immediately following the September 9, 2020 enactment of AB 1867.

Additionally, employers must display a poster explaining the nature of COVID-19 supplemental paid sick leave, pursuant to Labor Code Section 247. If employees are working remotely or do not frequent the area where the poster is displayed, then the employer may disseminate the notice electronically, such as by e-mail.

AB1867 also authorizes the Labor Commissioner to enforce violations of its provisions. If an employer unlawfully withholds paid sick leave under this law, the employer may be subject to an

administrative penalty of at least $250 per day, but not to exceed $4,000 in the aggregate, and liable for other legal or equitable relief in a civil action brought by the Labor Commissioner or the Attorney General.

COVID-19 laws continue to evolve and change on a regular basis for California employers. Navigating through federal, state and local laws related to COVID-19 can certainly present significant challenges. Thus, besides being familiar with the California Department of Public Health's ("CDPH") recent resource entitled "COVID-19 Employer Playbook For a Safe Reopening," it is important to consult your PBW employment law attorney for guidance, if and when an employee tests positive for COVID-19.

THE AB5 FIGHT CONTINUES

On Friday, September 4, 2020, Governor Newsom signed Assembly Bill 2257 ("AB 2257") into law, which modifies and expands Assembly Bill 5 ("AB "5), creating additional exemptions for various professions and occupations to be classified as independent contractors. AB 2257 was an urgency bill so it becomes effective immediately.

The purpose of AB 2257 is to amend certain exceptions to the stringent "ABC" test codified by AB 5 for worker classification purposes. The list of professionals and industries impacted by AB 2257 is a random, yet direct result of opponents lobbying against AB 5 since it took effect on January 1, 2020.

Some of the professions added to the list of AB 2257 exemptions include:

- freelance writers, translators, editors, advisors, producers, illustrators;
- certain occupations involved in the creation, marketing, promotion and distribution of sound recordings and musical composition;
- musicians, vocalists and other performance artists;
- composers, songwriters and lyricists;
- musical engineers and mixers;
- data aggregators;
- real estate appraisers and home inspectors;

Additionally, AB 2257 carves out a "business-to-business exemption" for individual businesspersons who contract with one another "for purposes of providing services at the location of a single-engagement event," provided that certain criteria are met, including but not limited to not being subjected to one another's control and direction and operating their businesses independently.

The entities and professionals that qualify for exemptions under AB 2257 must satisfy all of the criteria outlined in the bill. Otherwise, they must adhere to the default ABC test when classifying their workers.

Of note, AB 2257 expands the former public enforcement provision by allowing any district attorney, along with the state attorney general or a city attorney to prosecute an action for injunctive relief to prevent continued misclassification of workers.

What Does The Future Hold For AB 5?

While AB 2257 significantly modifies AB 5 and provides relief for certain professionals and industries, the employee/independent contractor dichotomy remains in flux. Many businesses, particularly gig-economy companies, still strongly oppose AB 5 and demand more change.

For example, Uber and Lyft, arguably the strongest adversaries of AB 5, insist that their drivers should be classified as independent contractors, not employees. However, a California state judge recently ordered Uber and Lyft to reclassify their California drivers as employees, holding that their drivers "do not perform work that is 'outside the usual course' of their business." As a result of this ruling, Uber and Lyft threatened to leave California, claiming their drivers do not want to be classified as employees. On August 20, 2020, a California appeals court stayed that order and allowed Uber and Lyft to continue operating while the appeal is pending. If Uber and Lyft lose the appeal, then they will have to comply with the prior order and reclassify their drivers as employees. Notably, Uber, Lyft, and other gig-economy companies have spent over $181 million to back a November 2020 ballot initiative, Proposition 22, to add app-based drivers to the list of occupations exempt from AB5.

Many professionals and businesses are hopeful that AB 2257 is the precursor for additional legislature to combat AB 5. Indeed, the law is constantly changing with regard to independent contractor status and navigating worker classification in California is complicated. Accordingly, if your business has been impacted by AB 5 and/or AB 2257, Pearlman Brown & Wax is here to help ensure compliance and provide guidance on the employee versus independent contractor issue.

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NOTE: Governor Newsom signed SB 1159 and AB 685 into law today as part of his worker protection package. Both of these extend additional obligations and requirements to employers, among others, in connection with COVID-19. In short, SB 1159 expands access to workers' compensation benefits and mandates reporting requirements for all employers who have an employee test positive for COVID-19. AB 685 requires timely notification to employees and local and state public health officials of COVID-19 cases at work. A more detailed blast and update from PBW on these new laws will follow.