CLIENT ALERTS & INSIGHTS

West Coast COVID-19 Leave Snapshot: California and Oregon Institute Updates to General and COVID-19 Sick Leave Laws

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States continue to take action to fill in the gaps left by federal legislation providing leave for reasons related to the ongoing COVID-19 pandemic. California and Oregon have taken such action in recent months by expanding the availability and use of COVID-19 leave under state law.

California COVID-19 Supplemental Paid Sick Leave

On September 9, 2020, California's Governor Gavin Newsom signed AB 1867, providing supplemental COVID-19 paid sick leave to three groups of California employees: (1) all employees of hiring entities employing **500 or more** employees nationwide; (2) health care and emergency responder employees who work for employers that elected to exclude the employees from emergency paid sick leave under the Families First Coronavirus Response Act ("FFCRA"), without respect to employer size; and (3) food sector employees of hiring entities employing 500 or more employees nationwide (thereby codifying emergency executive orders that previously provided paid leave to such food sector workers).

The qualifying reasons for an employee to use this supplemental paid sick leave are largely similar to the qualifying reasons for paid sick leave under the FFCRA. The California supplemental leave is available to all covered employees who (1) are subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or (3) are prohibited from working by the worker's hiring entity due to health concerns related to the potential transmission of COVID-19. A covered employer *may not* deny an employee COVID-19 supplemental paid sick leave based solely on a lack of certification from a health care provider. Employees taking the COVID-19 supplemental paid sick leave are entitled to the greater of the employee's regular rate of pay during the last pay period, the state minimum wage, or the applicable local minimum wage. Covered employers are not required to pay an employee more than $511 per day, or $5,110 in the aggregate, for COVID-19 supplemental paid sick leave.

With respect to the amount of leave available to an employee, an employee is entitled to 80 hours of leave if the employee qualifies as full-time or has worked, on average, at least 40 hours per week in the two weeks preceding the period of leave. If the employee is not full-time and has a normal weekly schedule, the employee is entitled to leave amounting to the number of hours the employee is normally scheduled to work in a two-week period. If the employee works a variable number of hours week-to-week, the employee is entitled to leave amounting to fourteen times an employee's average daily scheduled hours over the preceding six-month period. If the employee has worked for

the employer for a period of fewer than six months but more than 14 days, the employer must instead calculate the employee's average daily hours over the entire period the employee has worked for the employer. If the employee has worked for the employer for a period of 14 days or less, the employee is entitled to leave amounting to the total number of hours the employee has worked for the employer.

Further, the statute precludes hiring entities from requiring covered employees to use "any other paid or unpaid leave, paid time off, or vacation time provided by the hiring entity" either before the employee uses this supplemental paid sick leave or in lieu of this supplemental paid sick leave. To that end, the statute also notes that all supplemental sick leave to which employees are entitled under the new law is in addition to any paid sick leave that employees are ordinarily entitled to under Labor Code Section 246 or otherwise. Importantly, however, the legislation allows employers who already provided supplemental sick leave for reasons authorized under AB 1867- such as leave taken under the FFCRA-to count those hours towards the 80 hours to which employees are entitled under AB 1867.

Finally, the new laws contain a notice requirement obligating employers to conspicuously display applicable posters in the workplace in order to inform employees about COVID-19 supplemental paid sick leave. California's Labor Commissioner has promulgated model notices for both food sector employee leave and non-food sector employee leave.

Oregon's Expansion of Oregon Family Leave Act

Oregon's Bureau of Labor and Industries ("BOLI") issued a permanent administrative order that became effective on September 14, 2020 and amended the permissible purposes for taking leave under the Oregon Family Leave Act ("OFLA"). Specifically, the OFLA now notes that "[s]ick child leave includes absence to care for an employee's child whose school or child care provider has been closed in conjunction with a statewide public health emergency declared by a public health official." This administrative rule codifies a previously temporary order that had permitted Oregon employees to use OFLA leave for school closures.

In addition, the BOLI enacted corresponding temporary amendments to the OFLA, effective from September 14, 2020 through March 12, 2021. The temporary amendments (1) added broad definitions of the terms "child care provider" and "closure" to include a place of care or a person who cares for a child, including a paid sitter, au pair, nanny, or unpaid caregiver such as a family member; (2) broadened the definition of "intermittent leave" to include leave relating to recurring closures of a child's school or child care provider because of a public health emergency; and (3) provided clarification regarding an employer's ability to request verification for an employee's need to take sick child leave. The verification only needs to include the name of the child, the name of the child care provider that has become unavailable, a statement from the employee that no other family member of the child is willing and able to provide care, and, for children older than 14 years of age, a statement that special circumstances exist requiring the employee to provide care during daylight hours.

As a reminder, the OFLA is applicable to employers with 25 or more employees. The requirements for an employee's eligibility to use OFLA continue to apply to the expanded use detailed above. These requirements include 180 consecutive days of service and an average of 25 hours per week worked in the 180 days prior to leave.

Employers should seek legal counsel to ensure compliance with current state and federal employment laws. For more information, please contact a member of Benesch's Labor & Employment Practice Group.

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