Engage PEO Client Alert:

CALIFORNIA CREATES COVID-19 SUPPLEMENTAL PAID SICK LEAVE

The California Governor and several Mayors enacted law requiring certain employers, exempt from the federal Families First Coronavirus Response Act (FFCRA), to provide supplemental paid sick leave to eligible employees.

The following is a detailed review of laws for the State plus Los Angeles, San José and San Francisco.

If you have any questions, as always, please contact your Engage HR Consultant.

State of California

On April 16, 2020, Governor Gavin Newsom signed an Executive Order (EO), granting essential, food sector employees with **supplemental paid sick leave (CA-SPSL)**, and increasing consumer protection by requiring employees at food facilities to wash their hands every 30 minutes and additionally as needed.

Covered Employers

Per the EO, a "hiring entity" with 500 or more employees in the U.S. **and** which qualifies as one of the following entities must provide CA-SPSL to eligible food sector workers:

- A private sole proprietorship, or
- Any kind of private entity including but not limited to the following:
  - Any kind of corporation, partnership, limited liability company,
  - Limited liability partnership,
  - Any other kind of business enterprise,
  - Any Delivery Network Company (as defined in California Revenue and Taxation Code section 6041.5(b)), and
  - Any Transportation Network Company (as defined in California Public Utilities Code section 5431(c)).

Covered Employees

A worker is eligible for CA-SPSL if the individual meets the criteria outlined below:

- Is exempt, as an Essential Critical Infrastructure Worker, from the requirements imposed by the current statewide stay-at-home order, or any other statewide stay-at-home order;
- Leaves home or other place of residence to perform work for or through the hiring entity; and

- The worker satisfies one of the following criteria:
  a. Works in one of the following industries or occupations:
     i. ***Canning, Freezing, and Preserving Industry*** [Industrial Welfare Commission [("IWC") Wage Order 3-2001 § 2(B)];
     ii. ***Industries Handling Products After Harvest*** [IWC Wage Order 8-2001 § 2(H)];
     iii. ***Industries Preparing Agricultural Products for Market, on the Farm*** [IWC Wage Order 13-2001 § 2(H)]; or
     iv. ***Agricultural Occupations*** [IWC Wage Order 14-2001 § 2(D)];
  b. Works for a hiring entity that operates a food facility, as defined in California Health and Safety Code section 113789(a)-(b); or
  c. Delivers food from a food facility, as defined in California Health and Safety Code section 113789(a)-(b), for or through a hiring entity.

Amount of CA-SPSL

Hiring entities must provide **up to 80 hours** of CA-SPSL to food sector workers (1) considered full-time, or (2) who worked or was scheduled to work, on average, at least 40 hours per week for the hiring entity in the two weeks prior to the date the worker took CA-SPSL.

Hiring entities must provide **non-full-time** food sector workers with CA-SPSL as described below:

- For food sector employees with **variable weekly schedules *and* who have worked for the hiring entity for at least six months**, the hiring entity must provide CA-SPSL in the amount of 14 times the average number of hours the worker worked each day in the six months preceding the date the worker takes CA-SPSL; and
- For food sector employees with **variable weekly schedules *and* who have worked for the hiring entity for fewer than six months**, the hiring entity must provide CA-SPSL in the amount of 14 times the average number of hours the worker worked during the entire period of employment.

CA-SPSL is **in addition** to state and local, mandated paid sick leave, and hiring entities cannot force workers to use other available paid or unpaid leave **before** or **in lieu** of using CA-SPSL.

Use of CA-SPSL

Eligible workers may use CA-SPSL for any of the following reasons:

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 hiring entity** due to health concerns related to the potential transmission of COVID-19.

Payment for CA-SPSL

Hiring entities must pay CA-SPSL at the higher of the following: (1) the worker's regular rate of pay for the last pay period, (2) the state minimum wage, or (3) the local minimum wage. CA-SPSL pay cannot exceed $511 per day or $5,110 in the aggregate.

Expiration

CA-SPSL will remain in effect for the duration of California's stay-at-home order. However, if a worker is on CA-SPSL when the statewide stay-at-home order expires, the worker will be permitted to take the full amount of CA-SPSL to which the employee is entitled per the EO.

Los Angeles

On March 27, 2020, the Los Angeles City Council passed an ordinance to provide supplemental paid sick leave (LA-SPSL) to workers impacted by COVID-19 and employed by larger employers. On April 7, 2020, Los Angeles Mayor Eric Garcetti issued an emergency order regarding LA-SPSL for employees, and on April 11, 2020, the Office of Wage Standards issued clarifying rules.

Covered Employers

Employers with 500 or more employees in the City of Los Angeles (LA), **or** 2,000 or more employees in the U.S. must provide LA-SPSL. An employer may use its previous calendar year's average employee size to determine its business size, which must include full- and part-time employees, temporary and seasonal employees, and workers supplied by temporary employment agencies. For employers with 2,000 or more employees in the U.S., only employees working in LA are eligible for LA-SPSL.

The LA-SPSL ordinance ***exempts*** the following employers:

1. **New businesses** that commenced operations in LA or relocated from outside of LA on or after September 4, 2019 to March 4, 2020 and could not have been a business in LA during the 2018 tax year;
2. **Government agencies** whose employees are working in the course and scope of their public service employment;
3. **Closed businesses and organizations** closed or are not operating for a period of 14 or more days due to a city official's state of emergency because of the COVID-19 pandemic or provided at least 14 days of leave.
4. **Employers with a generous leave policy** providing at least 160 hours paid leave annually.
5. **Employers of Emergency Personnel** who are defined as:
    a. First responders, gang and crisis intervention workers, public health workers, emergency management personnel, emergency dispatchers, law enforcement personnel, and related contractors and others working for emergency services providers.
6. **Employers of Health Care Worker** who is defined as:
    a. An individual holding either a physician's and surgeon's certificate issued pursuant to Article 4

(commencing with Section 2080) of Chapter 5 of Division 2 of the California Business and Professions Code,

b. An osteopathic physician's and surgeon's certificate issued pursuant to Article 4.5 (commencing with Section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code,

c. An individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition, or

d. An individual, including a contract worker, working at a health facility licensed under California Health & Safety Code section 125.

7. **Employers of Critical Parcel Delivery**, who are defined as employees providing global parcel delivery services.

Covered Employees

A covered employee is an individual working for the same employer in the geographic boundaries of LA from February 3, 2020 to March 4, 2020 and who is unable to work or telework. A worker is presumed to be an employee, and the employer bears the burden of demonstrating that a worker is an independent contractor and not an employee. Classifying a worker as an independent contract will not suffice.

Amount of LA-SPSL

An eligible, full-time employee, who works **more than** 40 hours per week, is entitled to up to 80 hours of LA-SPSL, and an eligible part-time employee, who works **less than** 40 hours per week, is eligible for up to the average of two-week's pay, excluding overtime premiums, over the time period from February 3, 2020 to March 4, 2020. Employees may use LA-SPSL consecutively or intermittently, but intermittent usage is only permitted until an employee exhausts the total available amount of LA-SPSL.

LA-SPSL is **in addition** to existing non-COVID-19 California and Los Angeles-mandated paid sick leave. However, a covered employer's obligation to provide LA-SPSL can be reduced by every hour the employer allowed a covered employee to take paid leave in an amount equal to or greater than required under the ordinance on or after March 4, 2020 for the reasons described below in the "**Use of LA-SPSL"** section, or in response to the employee's inability to work due to COVID-19.

Use of LA-SPSL

A covered employer must provide LA-SPSL to a covered employee for one of the following reasons if the employee is unable to work or telework:

1. To take time off due to COVID-19 infection or because a public health official or healthcare provider requires or recommends the employee to isolate or self-quarantine to prevent the spread of COVID-19;

2. To take time off work because the employee is at least 65 years old or has a health condition (e.g., heart disease, asthma, lung disease, diabetes, kidney disease, or weakened immune system);

3. To take time off work to care for a family member who is not sick but who public health officials or healthcare providers have required or recommended isolation or self-quarantine; or
4. Time off work to provide care for a family member whose senior care provider or whose school or childcare provider caring for a child under the age of 18 temporarily ceases operations in response to a public health or other public official's recommendation. **This provision only applies to a covered employee who is unable to secure a reasonable alternative caregiver**.

Requests for LA-SPSL

Covered employees can request LA-SPSL orally or in writing. Although employers can require employees to provide the reasons for taking leave, employers cannot (1) require a doctor's note or other documentation, (2) inquire into or require an employee to provide a description or explanation of the condition or illness requiring the leave, or (3) ask the employee to waive LA-SPSL rights via an agreement.

Paying LA-SPSL

Although the ordinance does not explain how to calculate pay for LA-SPSL leave, it notes that the amount paid to eligible employees shall not exceed $511 per day and $5,110 in the aggregate.

Recordkeeping

Covered employers must retain LA-SPSL documentation, including the requesting employee's name, date(s) for which leave is requested, the category or reason for the leave, whether the leave was requested, and if leave is denied, and the reason for denial. Additionally, employers must retain documentation confirming any applicable exemption (e.g., documentation of new business filing, or documentation verifying employer's policy of 160 hours of paid leave to employees).

Prohibitions

Covered employers are prohibited from discharging, reducing compensation, or otherwise discriminating against a covered employee for (1) opposing any practice pursuant to the LA-SPSL ordinance, (2) requesting to use or actually using LA-SPSL, (3) participating in proceedings related to the LA-SPSL ordinance, (4) seeking to enforce LA-SPSL rights, or (5) otherwise asserting LA-SPSL rights.

Noncompliance Penalties

If a covered employer violates an employee's LA-SPSL rights, the employee may file a lawsuit in the Superior Court of the State of California and seek the following remedies:

1. Reinstatement to the position from which the employee was discharged;
2. Backpay and LA-SPSL withheld, calculated at the employee's average rate of pay; and
3. Other legal or equitable relief the court deems appropriate.

If the employee prevails against the employer, the court also can award attorneys' fees and costs.

Expiration of LA-SPSL

The LA-SPSL ordinance will remain in effect until 2 calendar weeks after the local emergency period ends.

No Tax Credits

Unlike with the FFCRA, covered employers will receive no tax credits for providing LA-SPSL.

San José

On April 7, 2020, San José's City Council unanimously passed its COVID-19 paid sick leave (SJ-PSL) ordinance, which will remain in effect from April 7, 2020 through December 31, 2020.

Covered Employers

Covered employers include employers which are subject to San José's Business License Tax **or** maintains a facility within the City of San José and are not required to provide paid sick leave under the FFCRA.

The SJ-PSL ordinance does not apply to a covered employer that provides, in some combination, paid leave that equals the mandatory SJ-PSL **on the effective date of the ordinance.** If the employer provides less than the mandatory SJ-PSL, the employer must comply with the SJ-PSL ordinance.

Further, an employer that operates a hospital is exempt from providing SJ-PSL, if the employer provides, in some combination, paid leave equal to the mandatory SJ-PSL **within two weeks of the effective date of the ordinance**. If the employer provides a combination of less than the mandatory SJ-PSL, the employer must comply with the SJ-PSL ordinance.

Covered Employees

Covered employees are employees who have worked for a covered employer **at least 2 hours** within the geographic boundaries of the City of San José, and who leave their residence to perform **essential work**, which means the workers are lawfully permitted to leave their residence to perform work per the "shelter in place" order of the Health Officer of the County of Santa Clara (link here). Per California Labor Code section 2750.3, a worker is presumed to be an employee unless the hiring entity demonstrates otherwise for purposes of SJ-PSL.

Amount of Leave

Eligible full-time employees are entitled up to 80 hours of paid sick leave. **Part-time employees** are entitled up the number of hours the employee worked on average over a two-week period, calculated by using the hours the employee worked per week between October 8, 2019 and April 7, 2020. If a covered employee worked for less than six months, the employer should use the average hours the employer expected the employee to work at the time of hire.

Use of Leave

If an employee is unable to work or telework, the employee may use SJ-PSL if the individual:

1. Is subject to quarantine or isolation by federal, state **or** local order or is caring for someone who is quarantined or isolated;
2. Advised by a healthcare provider advised to self-quarantine **or** the employee is caring for someone who has been advised to quarantine;
3. Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or
4. Is caring for a child under the age of 18 because a school or daycare is closed due to COVID-19.

Paying SJ-PSL

Eligible employees will receive paid sick leave at their regular rate of pay if they use the leave **for personal reasons** ($511 per day and an aggregate of $5,100), and will receive two-thirds of their regular rate of pay (maximum of $200 per day and in aggregate of $2,000) **to care for another person.** At separation of employment, employers are not required to pay departing employees for unused expanded sick leave.

Recordkeeping

Employers must maintain the following documentation reflecting the following information: (1) name and employee requesting SJ-PSL; (2) date(s) for which leave is requested; (3) reason for leave; and (4) statement from the employee that the employee is unable to work because of the stated reason.

Prohibition

Employers are prohibited from requiring eligible employees from finding a replacement worker as a condition of using SJ-PSL.

Noncompliance Penalty

An employee can file a wage claim with San José's Office of Equality Assurance if a covered employer does not provide SJ-PSL.

Expiration of Additional Sick Leave

As with the FFCRA, the SJ-PSL ordinance will expire on December 31, 2020.

No Tax Credits

Employers will receive **no** tax credits for providing the additional sick leave.

San Francisco

On April 7, 2020, the San Francisco Board of Supervisors (BOS) adopted the Public Health Emergency Leave Ordinance Public Health Emergency Leave Ordinance (PHELO), and a week later on April 14th, BOS passed a revised version of PHELO, which included slight revisions. On April 17, 2020, PHELO took effect and will remain in effect until June 17, 2020 unless reenacted by BOS or upon termination of the COVID-19 Public Health Emergency, whichever occurs first.

Covered Employers

PHELO applies to private employers with 500 or more **employees worldwide**, except the following entities:

1. Private employers at San Francisco International Airport;
2. Private employers located at the "federal enclaves" (e.g., the Presidio, Fort Mason and the Golden Gate National Recreation Area); and
3. Individually owned franchises where the number of employees across all businesses owned by the franchise owner is **fewer than** 500 employees.

Covered Employees

PHELO applies to **any person** providing labor or services for remuneration in San Francisco, and the worker is presumed an employee under California statutory law (Cal. Lab. Code section 2750.3(a)). Covered employees include full- and part-time employees, temporary employees, workers employed through the "Work-to-Work Programs," and employees performing limited work in San Francisco but who are considered employees pursuant to San Francisco's regular Paid Sick Leave Ordinance (PSLO). Notably, PHELO applies to all employees who work in San Francisco **regardless of whether they are legally authorized to work in the U.S. and regardless of the length of their employment.**

As with the FFCRA, employers of an employee who is a **"health care provider" or "emergency responder"** can exclude such employee from PHELO leave. PHELO adopts the U.S. Department of Labor's definition of "health care provider" and "emergency responder."

Amount of PHELO Leave

Covered employers must provide up to 80 hours to an employee who was a full-time employee as of February 25, 2020.

For employees who were part-time as of February 25, 2020, covered employers must provide PHELO leave equal to the average number of work hours over a two-week period that the employee was scheduled over the previous six months ending on February 25, 2020, including any leave hours taken by the employee.

For employees hired after February 25, 2020, covered employers must provide PHELO leave equal to the number of hours that the employee worked, on average, over a two-week period between the date of hire and the date upon which the leave is taken, including any leave hours taken by the employee.

PHELO leave is **in addition** to San Francisco's regular PSLO, and employees may opt to use other available, accrued PTO before using PHELO leave. Of importance, and unlike with emergency paid sick leave (EPSL) pursuant to the FFCRA, covered employers must provide PHELO leave to covered employees **regardless of whether or when the covered employees is scheduled to work,** provided that the total number of hours of leave an employee takes in a week does not exceed the average number of hours over a one-week period that the employee was scheduled over the previous six months ending on February 25, 2020, including leave hours taken by the employee.

Employers may offset employee's available PHELO leave by deducting any paid leave or paid time off (PTO) provided in response to the COVID-19 pandemic, **including** CA-SPSL provided **but excluding** previously accrued hours or hours accrued pursuant to the PSLO on or after February 25, 2020.

Covered employers cannot reduce its non-mandated PTO policy in response to enactment of PHELO.

Use of PHELO Leave

Similar to EPSL under the FFCRA, to qualify for PHELO leave, an employee must be unable to work or telework and meet one of the following criteria:

1. Is subject to an i**ndividual or general** federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine;
3. Is experiencing symptoms associated with COVID-19 and seeking a medical diagnosis;
4. Is caring for a family member— ***child,[1] parent,[2] legal guardian or ward, sibling, grandparent, grandchild, spouse, registered domestic partner under any state or local law,*** or ***designated person***[3]—who is subject to an order described in (1) above, has been advised described in (2) above, or is experiencing symptoms described in (3) above;
5. Is caring for a family member **if** the school or place of care of the family member has been closed, or the care provider of such family member is unavailable, due to the COVID-19 pandemic; and
6. Is experiencing any other substantially similar condition specified by the Local Health Officer, or under Section 5102(a)(6) of the FFCRA for EPSL, by the United States Secretary of Health and Human Services.

Covered employers may limit an employee's use of PHELO leave if the employee is "health care provider" or "emergency responder" unless the employee is unable to work or telework because either:

1. The employee has been advised by a health care provider, as defined by the U.S. Department of Labor's regulations (29 C.F.R. section 825.102), to self-quarantine; or
2. The employee is experiencing COVID-19 symptoms, seeking medical diagnosis, and does not meet the Centers for Disease Control and Prevention guidance for criteria to return to work for healthcare personnel with confirmed or suspected COVID-19.

Employers cannot force employees to use PHELO leave in increments of more than one hour.

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[1] The term "child" includes a child of domestic partner and a child of a person standing in loco parentis.
[2] The term "parent" includes a person who stood in loco parentis when the employee was a minor child, and a person who is a biological, adoptive, foster parent or guardian of the employee's spouse or registered domestic partner.
[3] Per San Francisco Administrative Law, designation of a person occurs when an "employee has no spouse or registered domestic partner, [and thus,] the employee may designate one person as to whom the employee may use paid sick leave to aid or care for the person." S.F. Admin. Code Sec. 12W.4(a)(4).

Request for PHELO Leave

Employers must permit employees to use **reasonable notice** procedures in requesting PHELO leave, but only in circumstances when the need for PHELO leave is foreseeable. Although employers may request information (e.g., the reason for taking PHELO leave), employers must refrain from requiring employees to disclose health information or other documentation, including a doctor's note, or letter from a childcare facility.

Payment for PHELO Leave

Employers must pay for PHELO Leave as described below:

- **For Nonexempt employees**, employers have two options: (1) pay at the employee's regular rate of pay for the workweek in which the employee uses PHELO leave, despite whether the employee worked overtime in that workweek, or (2) divide the employee's total wages, excluding overtime pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
- **For exempt employees**, employers must pay the employees in the same manner as the employer calculates wages for exempt employees for other forms of paid leave.
- Employers must pay PHELO leave in an amount no less than San Francisco's minimum wage and no later than the payday for the next regular payroll period after the employee takes PHELO leave. At separation of employment, employers are **not** required to pay departing employees for unused PHELO leave.

Notice & Posting Requirements

Within three (3) days after the San Francisco Office of Labor Standards Enforcement published and made available the PHELO notice, employers must post the notice in one of the following manners:

1. A conspicuous place at the workplace,
2. Via electronic communication, and/or
3. In a conspicuous s place in the employer's web-based or app-based platform.

The PHELO notice must be posted in **English, Spanish, Chinese** and any language spoken by at least 5% of the employees, who are, or were prior to the public health emergency were, at the workplace or job site.

The notice (in multiple languages) is available here.

Wage Statement Requirements

To the extent feasible, employers must provide covered employees with notice of their available PHELO leave on their wage statements. If an employer provides unlimited PTO, the employer can satisfy the wage statement requirement by indicating on employees' wage statements **"unlimited."**

Recording Retention Requirement

Covered employers must retain PHELO records—documentation of work schedules, hours worked and PHELO leave taken by employees—for at least 4 years even if the employee stops working in San

Francisco and even if there is a separation of employment. Additionally, for exempt employees, employers only must maintain records of work schedules and days worked but not actual hours worked.

No Tax Credits

Unlike with FFCRA leaves, covered employers will receive **no** tax credits for providing PHELO leave.

Prohibitions

Per the PHELO, employers are **prohibited** from doing the following:

1. Requiring, as a condition of use of PHELO, that an employee search for or find a replacement worker to cover the hours during the employee's PHELO leave;
2. Interfering with, restraining, or denial of an employee's exercise of or attempt to exercise PHELO leave rights;
3. Discharging, threatening to discharge, demoting, suspending, reducing an employee's benefits, **or** in any manner discriminating or taking adverse action against an employee in retaliation for exercising PHELO leave rights;
4. Implementing a policy that counts an employee's use of PHELO leave as absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action.