SUPPLEMENTAL PAID SICK LEAVE PURSUANT TO LABOR CODE SECTION 248 AND 248.1

FROM THE FAQ'S ON THE DEPARTMENT OF INDUSTRIAL RELATIONS WEBSITE (10/13/2020)

1. **What COVID-19 Supplemental Paid Sick Leave is available under California law for food sector workers?**
   The Executive Order N-51-20 provides supplemental paid sick leave ("COVID-19 Supplemental Paid Sick Leave") to food sector workers who work for a hiring entity that has 500 or more employees nationwide under certain circumstances related to the COVID-19 pandemic. The Legislature codified the Executive Order in Labor Code Section 248. This means the Executive Order and the new Labor Code Section impose the same obligations on certain employers to provide paid sick leave related to COVID-19 to food sector workers. The type of food sector workers covered ranges from farmworkers to those food-sector workers who work in the retail food supply chain, including pick-up, delivery, supply, packaging, retail, or preparation. Eligible workers include, for example, grocery workers, restaurant or fast food workers, workers at warehouses where food is stored, and workers who pick-up or deliver any food items.

   The Legislature also extended the right to COVID-19 Supplemental Paid Sick Leave to other non-food sector employees in newly enacted Labor Code section 248.1.

2. **Are employers required to provide COVID-19 Supplemental Paid Sick Leave to non-food sector employees?**
   Yes. COVID-19 Supplemental Paid Sick Leave must be provided to all employees who leave their homes or place of residence to perform work and who work for employers that have 500 or more employees nationwide under the new law (Labor Code section 248.1). This means that all employees who work for employers who have 500 or more employees nationwide can receive COVID-19 related supplemental paid sick leave under California law. The new Labor Code provision also extends COVID-19 Supplemental Paid Sick Leave to health care employees and emergency responders who were not extended paid sick leave by their employers under the federal Families First Coronavirus Response Act, without regard to the size of their employer.

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3. **When must a hiring entity begin providing COVID-19 Supplemental Paid Sick Leave?**
   Hiring entities were required to provide COVID-19 Supplemental Paid Sick Leave for food sector workers starting on April 16, 2020. The Governor signed the new law extending COVID-19 Supplemental Paid Sick Leave to non-food sector employees on September 9, 2020. Employers of these non-food sector employees have a 10-day grace period to begin providing COVID-19 Supplemental Paid Sick Leave. This means employers are required to provide COVID-19 Supplemental Paid Sick Leave to non-food sector employees starting September 19, 2020 at the latest.
   COVID-19 Supplemental Paid Sick Leave remains in effect for food sector workers and non-food sector employees until December 31, 2020, the same date that the federal law that provides supplemental paid sick leave is set to expire.

However, if the federal law is extended, then COVID-19 Supplemental Paid Sick Leave under California law will be extended to the same end date as the federal law. If the law expires while a worker is taking COVID-19 Supplemental Paid Sick Leave,the worker can finish taking the amount of leave they are entitled to receive.

4. **What are the circumstances that allow a worker who works for a business that has 500 or more employees nationwide to take COVID-19 Supplemental Paid Sick Leave?**
   The worker must be unable to work due to one of the following reasons:
   1. The worker is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
   2. The worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19
   3. The worker is prohibited from working by the worker's hiring entity due to health concerns related to the potential transmission of COVID-19

5. **Is a worker eligible for COVID-19 Supplemental Paid Sick Leave if someone with whom the worker lives is exposed, experiences symptoms, or is diagnosed with COVID-19?**
   A worker is eligible for COVID-19 Supplemental Paid Sick Leave if a quarantine order, isolation order, or a medical professional recommends that a worker stay home, or if a hiring entity requires the worker to stay home.

6. **Does being subject to a general stay-at-home order mean that a worker is "subject to a Federal, State, or local quarantine or isolation order related to COVID-19"?**
   No. Essential critical infrastructure workers, including food sector workers, are permitted to continue to work under the state's stay-at-home order. When the Executive Order or the Labor Code refers to a "quarantine or isolation order," this means a quarantine or isolation order that is specific to the worker's circumstances, not a general stay-at-home order. For example, an order that directs individuals who live with someone who has COVID-19 to quarantine themselves would satisfy the eligibility requirement for taking COVID-19 Supplemental Paid Sick Leave.

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7. **In the absence of any information that a worker is not requesting COVID-19 Supplemental Paid Sick Leave for a valid purpose, can a hiring entity require certification from a health care provider before allowing a worker to take the leave?**
   No. A hiring entity may not deny a worker COVID-19 Supplemental Paid Sick Leave based solely on a lack of certification from a health care provider. A worker is entitled to take COVID-19 Supplemental Paid Sick Leave immediately upon the worker's oral or written request. The leave is not conditioned on medical certification.

   Although a hiring entity cannot deny COVID-19 Supplemental Paid Sick Leave solely for lack of a medical certification, it may be reasonable in certain circumstances to ask for documentation before paying the sick leave when the hiring entity has other information indicating that the worker is not requesting COVID-19 Supplemental Paid Sick leave for a valid purpose.

In any such claim, the reasonableness of the parties' actions will undoubtedly come into play. For example, if a worker informs a hiring entity that the worker is subject to a local quarantine order, has to stay home, and qualifies for COVID-19 supplemental paid sick leave, but the hiring entity subsequently learns that the worker was at a park, the hiring entity could reasonably request documentation.

8. **Do only food sector workers who are employees of the hiring entities have a right to COVID-19 Supplemental Paid Sick Leave?**
   No. If a hiring entity has 500 or more employees nationwide, then the Executive Order and Labor Code section 248 apply to all food sector workers who perform work for or through the hiring entity, regardless of whether the workers are deemed employees or independent contractors.

9. **Does COVID-19 Supplemental Paid Sick Leave for non-food sector workers apply to independent contractors?**
   No. Unlike COVID-19 Supplemental Paid Sick Leave for food sector workers, COVID-19 Supplemental Paid Sick Leave for non-food sector workers does not apply to independent contractors. However, any worker who has been misclassified as an independent contractor but is in fact an employee, and otherwise qualifies under the new law, is entitled to COVID19 Supplemental Paid Sick Leave.

10. **Doesn't the federal Families First Coronavirus Response Act provide paid sick leave to workers who work for businesses with 500 or more employees for certain COVID-19 related reasons?**
    No. The federal Families First Coronavirus Response Act does not cover all workers, nor does it cover businesses with 500 or more employees. The Executive Order and the new Labor Code sections are intended to help fill the gap.

11. **Which food sector workers qualify for COVID-19 Supplemental Paid Sick Leave under the Executive Order and Labor Code section 248?**
    To qualify for COVID-19 Supplemental Paid Sick Leave, the food sector worker must perform work for or through a hiring entity with 500 or more employees nationwide and:

    1. Perform work for the business outside the home, and
    2. Satisfy one of the following:
       a. Work in one of the industries or occupations defined in Industrial Welfare Commission ("IWC") Wage Order 3-2001 § 2(B) (the canning, freezing, and preserving industry); IWC Wage Order 8-2001 § 2(H) (industries processing agricultural products after har vest); IWC Wage Order 13-2001 § 2(H) (facilities on a farm that prepare products for market); or IWC Wage Order 14-2001 § 2(D) (general agricultural occupations)
       b. Work for a business that runs a food facility, which includes grocery stores, fast-food restaurants, and distribution centers
       c. Deliver food from a food facility for or through a hiring entity

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Note that under the Executive Order, the food sector worker was required to be exempt from the Stay at Home Order (EO N-33-20) in order to be eligible for Supplemental Paid Sick Leave, but this is not a requirement under Labor Code section 248.

12. How do I know if a hiring entity has 500 or more employees nationwide?

A business will count employees the same way as in the federal Families First Coronavirus Response Act pursuant to the federal regulations, which can be read at 29 C.F.R. section 826.40.

13. Are public employers required to provide Supplemental Paid Sick Leave under California law?

No. The federal law already covers public employers, except those public entities that employed health care providers and emergency responders and elected to exclude such employees from he federal act.

14. How much COVID-19 Supplemental Paid Sick Leave is a full-time worker entitled\ to receive?

A worker 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 before the leave is taken is entitled to 80 hours of COVID-19 Supplemental Paid Sick Leave.

15. If I am a firefighter, am I limited to 80 hours of COVID-19 Supplemental Paid Sick Leave?

No. Under California law, firefighters who were scheduled to work more than 80 hours in the previous two weeks, can take as many hours as they were scheduled, but California law limits the amount paid to the maximum of $511 per day or $5,110 in total.

16. How do you calculate the leave entitlement for a part-time worker who does not have a set schedule?

Below are the two methods to calculate the entitlement for part-time workers.

Part-Time Workers with Variable Schedules Who Have Worked For or Through a Hiring Entity Over a Period of More Than 14 Days. For such a part-time worker who works variable hours, the worker may take fourteen times the average number of hours the worker worked each day for or through the hiring entity in the six months preceding the date the food sector worker took COVID-19 Supplemental Paid Sick Leave. If the part-time worker has worked for the hiring entity for fewer than six months, this calculation would be done over the entire period that the worker has worked for the hiring entity. If the variable schedule calculation results in an average work schedule of at least 40 hours per week, the variable-scheduled worker would be considered full time and entitled to 80 hours of leave because the laws require the hiring entity to pay 80 hours of COVID-19 Supplemental Paid Sick Leave to a worker it properly considers full time, but does not require payment for more than 80 hours.

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In calculating the average number of hours worked by a part-time worker with a variable schedule over the past six months, the figure is determined based on the total number of days in the 6-month period, not just the number of days worked. Below is an example using a 6-month period that contains a total of 182 days (26 weeks):

Total Number of Hours Worked During 6-Month Period	520 hours
Total Number of Days in 6-Month Period	182 days
Average Number of Hours Worked Each Day in 6-Month Period	520 hours ÷ 182 days = 2.857 hours
COVID-19 Supplemental Paid Sick Leave Entitlement	2.857 x 14 = 40 hours

Part-Time Workers with Variable Schedules Who Have Worked For or Through a Hiring Entity Over a Period of 14 Days or Fewer. A worker who is newly working for or through a hiring entity (i.e., connected to the hiring entity for 14 days or fewer) and works variable hours will be entitled to the number of COVID-19 Supplemental Paid Sick Leave hours that they have worked in the preceding two weeks.

Below is an example of the calculation where such a new worker has worked for a total of two days—one day for 1 hour and a second day for 6 hours over the past two weeks:

Total Number of Hours Worked During the Two Week Period	7 hours
Total Number of Days in a Two-Week Period	14 days
Average Number of Hours Worked Each Day in the Two-Week Period	7 hours ÷ 14 days = .5 hours
COVID-19 Supplemental Paid Sick Leave Entitlement	.5 hours x 14 = 7 hours

17. How much does a worker who qualifies for the COVID-19 Supplemental Paid Sick Leave get paid?

The worker is entitled to the highest of the following:

- The worker's regular rate of pay for the last pay period
- The State minimum wage
- The local minimum wage

A hiring entity is not required to pay more than $511 per day and $5,110 in the aggregate to a worker for COVID-19 Supplemental Paid Sick Leave taken by the worker.

18. Where can a worker file a claim if the worker was not allowed to use or was not paid for COVID-19 Supplemental Paid Sick Leave?

The worker may file a claim or a report of a labor law violation with the Labor Commissioner's Office, the state agency charged with enforcement.

19. What if a worker has been denied emergency paid sick leave provided under the federal Families First Coronavirus Response Act?

The worker should file a claim with the United States Department of Labor, a federal agency.

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20. What rights does a worker have if the worker suffers retaliation, like getting fired, for using paid sick leave under local, state or federal law?

Workers using or attempting to exercise their rights to COVID-19 Supplemental Paid Sick Leave, including both the right to paid leave and other rights such as timely payment and written notice of available leave, are protected from retaliation under Labor Code section 246.5(c). In addition, other labor laws enforced by the Labor Commissioner may protect workers from retaliation in this situation. Workers using or attempting to exercise their rights to FFCRA sick leave are protected from retaliation under Labor Code section 1102.5(b) if they have disclosed information or complained about their employer's noncompliance with the FFCRA to a government agency, a supervisor, or an employee with authority to address the issue, or if they have cooperated with an investigation, hearing, or inquiry related to their employer's noncompliance with the FFCRA. Workers should seek assistance from the Labor Commissioner's Office if they have questions about retaliation or want to file a retaliation complaint.

21. When does a hiring entity have to make the COVID-19 Supplemental Paid Sick Leave available to a worker?

Immediately upon the oral or written request of the worker to the hiring entity.

22. If a hiring entity already provides COVID-19 related paid sick leave, may it receive a credit toward providing COVID-19 Supplemental Paid Sick Leave under California law?

To receive a credit, a food-sector hiring entity must have had an existing supplemental paid benefit program as of April 16, 2020 that paid a worker at a rate equal to or greater than what the worker is entitled to under California law. Such a supplemental paid leave program includes those that provided supplemental paid sick leave pursuant to the Executive Order. Policies that do not meet the requirements of the Executive Order—including those that partially, but do not fully, replace a worker's pay (up to $511 per day); which provide fewer hours of leave than the Executive Order; or that do not provide a paid benefit for COVID-19-related reasons-do not meet the criteria to receive a credit. Employers may of course provide greater benefits to their workers.

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For non-food sector employers, the hiring entity must have had an existing supplemental paid benefit program as described above as of September 19, 2020.

23. Can a hiring entity count the COVID-19-related supplemental paid sick leave provided pursuant to a local paid sick leave ordinance toward COVID-19 Supplemental Paid Sick Leave under California law?

Yes. For example, if a hiring entity provides a full-time worker 40 hours of COVID-19-related supplemental paid sick leave pursuant to a local ordinance, those 40 hours would count toward the hiring entity's obligations under California law so long as the leave provided is for a reason listed under California law and is at least at the same rate of pay as California law requires.

24. If a local law requires COVID-19 supplemental paid sick leave to be paid at a rate different from that required under California law, which rate must a hiring entity use?

Immediately upon the oral or written request of the worker to the hiring entity.

25. Can a hiring entity use state disability insurance (SDI) to meet its obligation to provide COVID-19 Supplemental Paid Sick Leave?

No. Hiring entities subject to the COVID-19 Supplemental Paid Sick Leave under California law cannot require workers to use SDI before or in lieu of COVID-19 Supplemental Paid Sick Leave. A worker may apply, however, for SDI after taking the COVID-19 Supplemental Paid Sick Leave to which the worker is entitled. The Employment Development Department administers SDI, which provides benefits that are approximately 60-70 percent of wages for eligible employees who are unable to work because they are sick or subject to an isolation or quarantine order.

26. What notice must hiring entities provide to workers about COVID-19 Supplemental Paid Sick Leave under California law?

Under California law, hiring entities are required to display the applicable poster(s), in a con spicuous place that contains information about COVID-19 Supplemental Paid Sick Leave. Employers will need to select the appropriate notice(s) to post. One notice applies to hiring entities with 500 or more employees with food sector workers. Note that the new law (Labor Code section 248) no longer requires that a food sector worker be a critical infrastructure worker, and the food-sector notice has been revised to reflect that change in the law. This means that if your business is not a critical infrastructure business but has food sector workers, you are now required to post this food-sector notice.

The other notice applies to (1) employers that have 500 or more employees nationwide or (2) public or private employers of health care providers and emergency responders that have fewer than 500 employees nationwide if the employer excluded those employees from cover age under the federal Families First Coronavirus Response Act. If a hiring entity's covered workers do not frequent a workplace, the hiring entity may satisfy the notice requirement by disseminating notice through electronic means.

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27. What rights do food sector employees have to wash their hands?

Any operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level must permit employees working with food, food equipment or utensils, or food-contact surfaces to wash their hands every 30 minutes and additionally as needed. This will be enforced by local public health agencies. However, if you are retaliated against for exercising your right to wash your hands, you may file a retaliation complaint with the Labor Commissioner.