2022 CALIFORNIA LEGAL UPDATE:
CA COVID-19 Supplemental Paid Sick Leave, PAGA, Arbitration and CAL/OSHA ETS

CA COVID-19 Supplemental Paid Sick Leave

In response to California's 2021 COVID-19 Supplemental Paid Sick Leave (***"SPSL"***) law's expiration on September 30, 2021, California Governor Gavin Newsom signed into law SB 114 on February 9, 2022, which creates California Labor Code Section 248.6 and provides a new bank of SPSL for use by employees in 2022.

Since the 2021 SPSL law's expiration, workers in California were unable to secure paid sick leave for qualifying COVID-19-related reasons, with the exception of exclusion pay where required by the Cal/OSHA Emergency Temporary Standard and paid sick leave available through the California Healthy Workplaces, Healthy Families Act for preventive care, diagnosis, care, or treatment of an existing health condition, among other purposes.

The new 2022 SPSL law seeks to replace this expired state benefit, with notable distinctions, including two 40-hour banks of paid leave (one if the employee tests positive for or is caring for a family member with COVID-19; and another for other covered reasons, *e.g.*, quarantine or isolation, vaccine appointments, or recovery), and mandatory notice/poster requirements. While the new law takes effect immediately and is retroactive through January 1, 2022, employer obligations to provide COVID-19 supplemental California paid sick leave went into effect ten 10 days after signature, on February 19, 2022.

Because the 2022 SPSL law does not pre-empt local ordinances, employers may have additional compliance obligations under similar local, supplemental paid sick leave ordinances throughout California.

The following overview provides an in-depth assessment of the 2022 SPSL law.

Effective Date: Goes into effect February 19, 2022; applies retroactively to January 1, 2022 and will be in effect through September 30, 2022 (however, an employee taking leave as of that expiration date shall be permitted to take their full amount of leave). Legislature could also vote to extend SPSL even further. See more information below on retroactive application.

Applies To: Employers with more than 25 employees.

How Much Leave: Provides up to 80 hours for full-time employees. However, this time, the leave entitlement is broken up into two "buckets" of up to 40 hours of leave for different purposes and with different requirements (see below):

- **Up to 40 Hours for COVID-19 Qualifying Reasons:** These reasons generally correspond to the qualifying reasons applied under the prior law. Up to 40 hours of leave must be provided if the employee is unable to work or telework for any of the following reasons:

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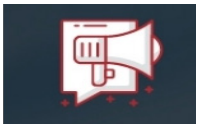

- Employee is subject to quarantine or isolation period related to COVID-19 as defined by an order or guidance of the State Department of Public Health, the CDC or a local public health officer who has jurisdiction over the workplace.
- The employee has been advised by a healthcare provider to isolate or quarantine due to COVID-19.
- The employee is attending an appointment for themselves or a family member to receive a vaccine or a vaccine booster for protection against COVID-19.
- The employee is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or vaccine booster that prevent the employee from being able to work or telework.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for a family member who is subject to an order or guidance described above or who has been advised to isolate or quarantine, as described above.
- The employee is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.
- ***NOTE:*** **For leave related to vaccines and boosters, an employer may limit the total leave to three (3) days or 24 hours (including time used to obtain the vaccine or booster and symptoms). If more leave is requested by the employee, the employer may require that an employee provide verification from a health care provider that the employee or their family member is continuing to experience symptoms related to a COVID-19 vaccine or vaccine booster.**

- **Up to 40 Hours for Positive COVID-19 Tests:** Up to 40 hours of leave must be provided if the employee tests positive for COVID-19, or a family member for whom the employee is providing care tests positive for COVID-19.
  - ***NOTE:*** **Employers are authorized to require proof of a positive test in the following situations (and if employee refuses to supply upon request, no obligation to provide SPSL):**
    - If employee tested positive, an employer may require employee to submit to a diagnostic test on or after the fifth day after the initial test was taken and provide documentation of those results. The employer should make such a test available at no cost to the employee.
    - If the employee requests to use additional leave because a family member for whom they are providing care tests positive for COVID-19, the employer may require that the employee provide documentation of that family member's test results before paying the additional leave.
- **Part-Time and Variable Schedules:** The following method should be used to calculate the amount of eligible leave *per bucket* for employees who work part-time or have variable schedules (same as prior methodology):
    - If an employee has a normal weekly schedule, their eligible leave is the total number of hours the employee is normally scheduled to work for the employer over one week.
    - If the employee works a variable number of hours, they are entitled to seven times the average number of hours the employee worked each day for the employer in the six months preceding the date the covered employee took COVID-19 supplemental paid sick leave. If

the employee has worked for the employer over a period of fewer than six months but more than seven days, the calculation shall instead be made over the entire period the employee has worked for the employer.

- If the employee works a variable number of hours and has worked for the employer over a period of seven days or fewer, the employee is entitled to the total number of hours the covered employee has worked for that employer.

Calculating Regular Rate of Pay: The calculation for the regular rate of pay has changed a bit from the last iteration of the law. Under the prior law, employers had to utilize the *highest* of several different calculations. Under the new law, just like with regular paid sick leave law, the employer is allowed to choose among methods

- **For Non-Exempt (Hourly) Employees:** The regular rate of pay is determined by one of the following:
  - Calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek; *or*
  - Calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total non-overtime hours worked in the fully pay periods occurring within the prior 90 days of employment; provided that, for non-exempt employees paid by piece rate, commission, or other method that uses all hours to determine the regular rate of pay, total wages, not including overtime premium pay, shall be divided by all hours, to determine the correct amount of COVID-19 supplemental paid sick leave.
- **For Exempt (Salaried) Employees:** The regular rate of pay is calculated in the same manner as the employer calculates wages for other forms of paid leave time.

The amount of leave required to be paid is again capped at $511 per day and $5,110 in the aggregate.

Retroactive Requirements: If an employee took leave dating back to January 1, 2022 for one of the qualifying reasons that was either unpaid or not paid at the same level, the employee may make an oral or written request for retroactive payments. In that case, retroactive payments must be paid on or before the pay date for the next full pay period after the request is made.

- **NOTE: This is the same process as before. This means that an employer does not have an affirmative obligation to go back and find out whether SPSL is owed prior to February 19, 2022 and to pay it. Rather, an employer just needs to be prepared to comply with any employee request for retroactive SPSL.**
- **Note, however, that employers are required to post a notice about SPSL.** The Labor Commissioner published a model notice on February 16, 2022, available online at https://www.dir.ca.gov/dlse/COVID19resources/2022-COVID-19-SPSL-Poster.pdf. If employees do not frequent a workplace, the employer may provide the notice through electronic means, such as by e-mail.
- An employer may require an employee to provide documentation of a positive test if the employee requests retroactive leave for a positive test or caring for a family member with a positive test.

SPSL and Exclusion Pay: One unfortunate aspect of the law, that is different than the last iteration, is that employers can no longer utilize SPSL to satisfy their exclusion pay obligations under the Cal/OSHA ETS. Meaning, if exclusion pay is owed to an employee under the ETS that happens to also be for a covered SPSL reason, the employer cannot require the employee to first exhaust their SPSL.

SPSL and Local SPSL: Unlike exclusion pay under the ETS, where a local SPSL applies to an employee, leave taken under a local ordinance will also count toward an employer's obligation under the state SPSL, as long as the leave was provided for the same reasons and compensates the employee in an amount equal to or greater than the amount of compensation for SPSL.

Paystubs: The wage statement requirements are also slightly different than last time. Rather than list the available hours of SPSL on employee wage statements, the employer must list the amount of SPSL the employee has used through the applicable pay period. If the employee has not used any SPSL, the employer can list zero hours. (This is better for employers, particularly those with variable hour employees.) The used SPSL hours should be listed separately from regular paid sick days.

CA Arbitration Agreements – PAGA Claims & Pending Litigation

The Fate of PAGA in 2022

California's Private Attorneys General Act ***("PAGA")*** passed in 2004 in an effort to provide employees an avenue to pursue penalties on behalf of similarly aggrieved employees and the state for alleged violations of California labor laws through the creation of a private right of action to pursue civil penalties on a representative basis for additional violations that affected other employees with the same employer. PAGA claims carry default penalties and the opportunity to recover reasonable attorneys' fees and costs.

Since the U.S. Supreme Court's decision in AT&T Mobility LLC v. Concepcion, that the Federal Arbitration Act ***("FAA")*** requires enforcement of class action waivers and preempts state law rules that interfere with parties' ability to choose bi-lateral arbitration, employees have turned away from filing traditional class action suits to filing representative actions under California's PAGA. Encouraging the trend of PAGA actions, the California Supreme Court has since held that arbitration agreements containing PAGA representative action waivers are unenforceable and in violation of public policy, and that the FAA does not preempt this rule. The California Supreme Court reasoned that PAGA representative actions are a type of "qui tam" action and that the FAA applies solely to arbitration of claims for private parties.

Currently, pursuant to the California Supreme Court's decision, PAGA claims still cannot be included in arbitration agreements. However, on December 15, 2022, the U.S. Supreme Court granted certiorari in Viking River Cruises, Inc. v. Moriana, where the Court will finally address whether the FAA preempts the California Supreme Court's ruling that arbitration agreements waiving the right to bring representative actions under PAGA are unenforceable under state law. This anticipated ruling provides a glimmer of hope for California employers who are constantly under threat of getting hit with a PAGA representative action. Currently, our team is not expecting a decision from the Court until mid-2022, but are actively monitoring this case should a decision be issued sooner.

Separate from the anticipated Supreme Court decision, a potentially bigger blow to PAGA may be on the horizon. A ballot measure is underway in California to repeal PAGA in its entirety, to be replaced with enhanced administrative enforcement. Proponents of the measure will need to gather a sufficient number of signatures before June 6, 2022, in order to qualify for the November 2022 ballot.

Status of Mandatory Arbitration Agreements in California

Employers should also be aware that California attempted to prohibit employers from requiring employees to arbitrate claims arising under the California Fair Employment and Housing Act (***"FEHA"***) and related employment statutes via Assembly Bill 51. A coalition of business organizations subsequently filed suit and obtained a temporary restraining order from a federal district court barring AB 51 from going into effect on February 7, 2020. The State of California then appealed this decision. In September 2021, a divided Ninth Circuit panel reversed, in part, the district court's order and vacated the preliminary injunction precluding enforcement of AB-51 with

respect to arbitration agreements governed by the FAA. The lead plaintiff has now petitioned for *en banc* review by the Ninth Circuit. While this petition is pending, the district court's injunction against AB-51 remains in effect. Should the Ninth Circuit deny the petition, the likely next steps would be a petition for review by the U.S. Supreme Court. The lead plaintiff also may move to stay the Ninth Circuit's decision becoming effective pending review by the U.S. Supreme Court.

During the pendency of said litigation, the most conservative approach is to utilize a voluntary agreement with a class/collective action waiver included. However, employers may also choose to continue to use mandatory arbitration agreements and/or opt-out agreements until the district court's injunction is officially lifted or until the fate of mandatory arbitration agreements in California becomes more certain. Employers should be cognizant of and monitor the petition for *en banc* review by the Ninth Circuit and any further developments in the litigation referenced above.

Cal/OSHA Updates

Despite the withdrawal of the Federal OSHA Emergency Temporary Standard (***"ETS"***), which would have mandated vaccination or testing programs for employers with 100 or more employees, Cal/OSHA just re-adopted its own ETS for the second time on January 14, 2022. The Cal/OSHA ETS applies to all employers in California, excluding those locations that only have one (1) employee who is isolated from others and employees who are working remote from home or at another location of choice.

The Cal/OSHA ETS requires the creation and implementation of a written COVID Prevention Plan ("CPP"), investigating and responding to infections within the workplace, distributing written notice to employees of a possible exposure, and training and offering testing to those employees with close contact to an infected individual within the workplace. The latest version also introduces new requirements for the return to work and handling of close contacts. For example, until now, a 10-day quarantine period was mandated for any employee with close contacts to a COVID-19-positive individual who did not develop symptoms, and individuals fully-vaccinated or recently recovered from COVID-19 were exempt from quarantine obligations.

Under the new Cal/OSHA ETS, however, unvaccinated individuals and those who have yet obtained a booster when booster eligible are required to quarantine for no more than 5 days if symptoms are not present and a diagnostic specimen collected on day 5 or later tests negative. If unable to test or the employee chooses not to test, then quarantine can end after day 10, if they remain asymptomatic. If the employee returns earlier than 10 days, they must wear a well-fitted mask around others for a total of ten days, especially in indoor settings. Note, Home Care Organizations, as well as Home Health and Hospices have until March 1, 2022 to get all booster eligible employees boosted. After that, workers not yet eligible for boosters must be in compliance no later than 15 days after the recommended timeframe for receiving the booster dose.

Notably, Cal/OSHA provides an exception to quarantine for persons who have recovered from COVID-19 and are exposed within the workplace, provided recovery is not more than 90 days from the onset of symptoms or a positive test, and the employee keeps six feet of social distancing and wears a face covering around others for 14 days following close contact.

Under the Cal/OSHA ETS, employees who test positive for COVID-19 are subject to identical isolation and return to work requirements, regardless of vaccination/booster status or prior infection (the ETS requires they stay home for at least 5 days, provided symptoms are not present after day 5 or are resolving, and they test negative).

Spearheaded by Will Vail and Alex Polishuk, our team has developed a suite of materials for California employers seeking to comply with the latest California ETS. We would be happy to answer questions or further discuss this suite of materials.