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**ORANGE COUNTY BAR ASSOCIATION**

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Latest COVID-19 Employment Issues: 2021 Supplemental Sick  
Leave, Vaccination, and Return to Work



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# Latest COVID-19 Employment Issues: 2021 Supplemental Sick Leave, Vaccination, and Return to Work

Gina L. Miller  
Dawn Knepper

OCBA Labor & Employment Law Section

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# Agenda

- California COVID-19 Supplemental Sick Leave Pay
- Vaccinations
- Return to Work
- Continuing The Remote Work Force
  - Labor Code section 2802
  - Uncompensated Time
  - Meal/Rest Break

# Supplemental Paid Sick Leave – CA Senate Bill No. 95

- Provides a new bank of supplemental paid sick leave (“SPSL”) for certain COVID-19 related reasons *upon verbal or written request from employee*
- Went into effect March 29, 2021
- Is retroactive to January 1, 2021
- Applies to employers with more than 25 employees

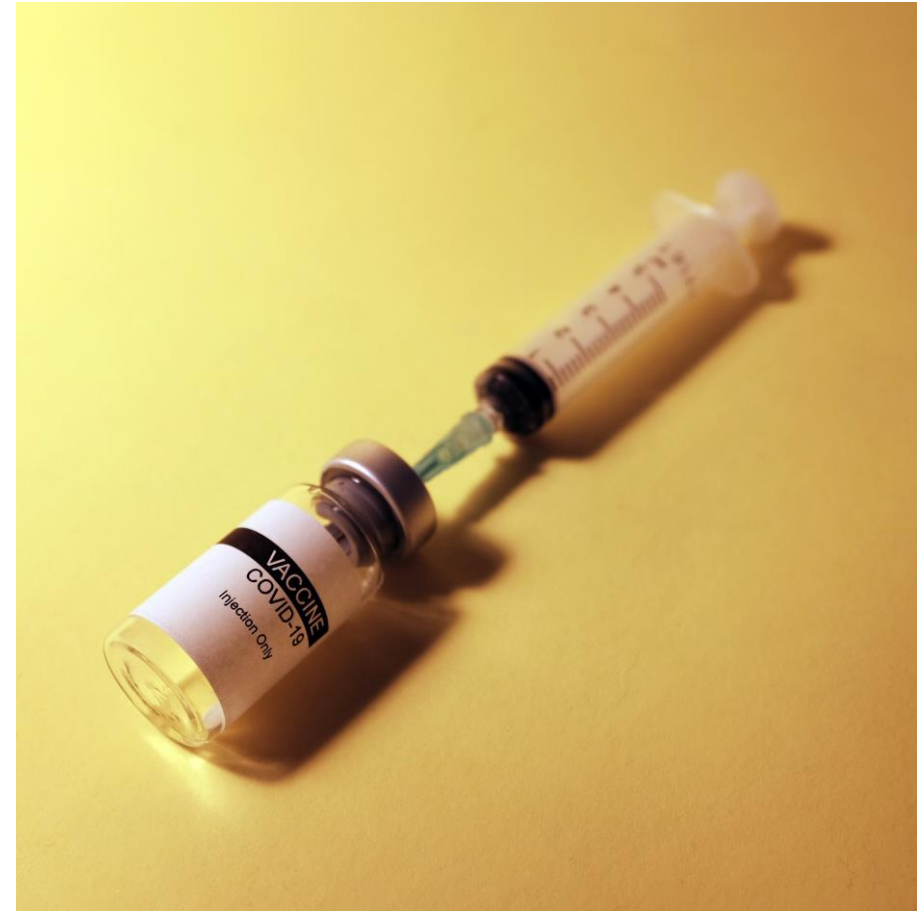
# How Can It Be Triggered?

A covered employee *who is unable to work or telework* is entitled to SPSL if:

- **Caring for Yourself:**
  - The employee:
    - Is subject to a quarantine or isolation period
    - Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
    - Is experiencing symptoms of COVID-19 and seeking a medical diagnosis

# How Can It Be Triggered? (cont.)

- **Caring for a Family Member:**
  - The employee is caring for a:
    - Family member who is subject to a quarantine or isolation period or who has been advised to self-quarantine
    - Child, whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises
- **Vaccine Related:**
  - The employee is attending an appointment to receive a vaccine for protection against contracting COVID-19



# How Much Sick Leave Am I Obligated to Provide?

- Full-time workers = 80 hours
- Part-time workers = Entitled to varying leave amounts to be determined based on the hours worked
  - Does the employee have a “normal” weekly schedule? Employee is entitled to the total number of hours the employee is normally scheduled to work
  - If variable, employee is entitled to 14 times the average number of hours the covered employee worked each day for the employer in the six months preceding the date the employee took COVID-19 leave
  - Has employee worked less than six months, but more than 14 days? The amount of pay is calculated over the entire period the employee has worked for the employer
  - Has employee worked 14 days or fewer? Entitled to the total number of hours the employee has worked for the employer

# Retroactive Pay



- Upon request either oral or written, employers are to provide retroactive compensation for any unpaid leave
- Includes paid leave not compensated “equal to or greater than” the required compensation amount
- Retroactive payments will count toward the total allotment employers are obligated to provide and must be paid on or before the payday for the next full pay period after the employee’s request
- Must also reflect the payment in the employee’s wage statement for that pay period



# Notice & Wage Statement Requirements

- The available COVID-19 SPSL must be reflected on employee's wage statements
- Must be a separate line distinct from regularly available sick pay
- Special instructions have been provided for part-time employee's wage statements
- Wage statement requirements are not enforceable until the next full pay period following enactment which was March 19, 2021

# Interactions With Other Leaves and Laws

- Generally, employers are prohibited from requiring that employees use any other unpaid or paid leave, PTO, or vacation time before the employee can use COVID-19
- Employer may credit other supplemental paid leave provided to an employee since January 1, 2021 for the same qualifying reasons
- However, regularly provided paid sick leave under Labor Code section 246 and supplemental paid sick leave under Assembly Bill No. 1867 may not be credited toward COVID-19 SPSL

# What Is the Rate of Pay for the Supplemental Sick Leave?

- Exempt employees – Calculate the same way employer calculated wages for other forms of paid leave time
- Nonexempt employees:
  - The higher of the following:
    - A rate calculated in the same manner as the regular rate of pay for the workweek in which leave is taken
    - Average hourly pay for preceding 90 days (not included overtime pay)
    - The state minimum wage
    - The local minimum wage
    - Not to exceed \$511 per day and \$5110 in total for 2021 COVID-19 Supplemental Sick leave

# Enforcement Mechanisms



- SB 95 will be enforced as if COVID-19 SPSL constitutes “paid sick days,” “paid sick leave,” or “sick leave” under California’s PSL (codified in Labor Code Sections 246 to 248.5)
- The enforcement mechanism is the Unfair Competition Law, CA Business & Professions Code Section 17200
  - Recovery of the employee’s actual economic damages; and/or
  - Injunctive relief or equitable relief to prohibit unfair practices
  - Attorneys’ fees are usually not awarded under the UCL but plaintiffs may seek attorneys’ fees as a “private attorney general” pursuant to Code of Civil Procedure section 1021.5

# Final Thoughts

- Can you require them to use in minimum increments?
- What do you do if a former employee requests paid sick leave?
- Poster Requirement: <https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>
- Labor Commissioner issued FAQ's which can be found: <https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html>

# COVID-19 Vaccinations – Can They Be Mandatory?

- Yes, but notable exceptions include:
  - Disability
  - Religion
  - Potentially employees with an employment agreement
  - Potentially employees governed by a collective bargaining agreement
  - EUA Arguments (?)



# What Is the Current State of the Law?

- The EEOC COVID-19 guidance suggests that mandatory vaccination programs are lawful under EEO laws, subject to employers' reasonable accommodation obligations.
- Mandatory vaccine programs can be supported on grounds under the ADA by showing that an unvaccinated employee poses a direct threat to the health and safety of others in the workplace.
  - This requires an individualized assessment of the following factors to determine if a direct threat of the risk:
    - Duration of the risk
    - Nature and severity of the harm (local severity of the pandemic)
    - Likelihood of potential harm occurring (employee's own health)
    - Imminence of the potential harm (likelihood of worker's being exposed)



# Mandatory Vaccinations



- On March 4, 2021, California finally came out with COVID-19 related guidance.
- The Guidance answers the question: Can employers require their employees to be vaccinated? The short answer is yes as to an FDA-approved vaccine, but employer must comply with FEHA:
  - (1) Can not discriminate or harass employees based on protected characteristics;
  - (2) Must reasonably accommodate employees with disabilities;
  - (3) Employers must reasonably accommodate employees with sincerely held religious beliefs or practices;
  - (4) Employer cannot retaliate;
  - (5) If an employee resists mandatory vaccination absent a disability or a sincerely held religious belief or practice no reasonable accommodation is necessary



# Required COVID-19 Vaccinations – Disability Accommodation



- Required to reasonably accommodate disability – which may include not requiring vaccine
- Engage in interactive process
- Undue hardship defense

# Required COVID-19 Vaccinations – Religious Accommodation

- Religion is a “moral or ethical belief as to what is right and wrong which is sincerely held with the strength of traditional religious views.”
- Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism and Buddhism
- Required to reasonably accommodate sincerely held religious belief or practice – which may include not requiring vaccine
- Engage in interactive process
- Undue hardship defense

# Required COVID-19 Vaccinations – Can an Employer Require Proof of a Protected Disability or a Protected Religion?



- Employers can require confirmation from a health care provider that an employee has a protected disability (without disclosing what it is) and needs to be accommodated
- Employers with a “bona fide doubt” about the religious basis of the request may inquire about the basis and make a **limited** inquiry into the relevant circumstances, as to whether a belief or practice is religious and sincerely held

# Required COVID-19 Vaccinations – Accommodations to Consider

- When a disabled employee or one with a sincerely held religious belief requests not to be subject to a vaccine mandate, consider:
  - Allowing employee to work remotely
  - Implementing robust safety protocols
  - Modifying schedules
  - Modifying duties to avoid/limit interaction with others
  - Taking paid or unpaid leave
  - Requiring employee to determine whether a different vaccine may be safe for the employee
  - Do not automatically terminate!



# Required COVID-19 Vaccinations – Pay and Reimbursement Requirements

- If vaccination is required must pay for:
  - Time it takes for the vaccination, including travel time
  - The cost of the vaccination
  - Necessary expenses incurred to travel to and from the vaccination location



# Alternatives to Mandating Vaccines

- Education and encouragement
- Incentives

# COVID-19 Vaccinations – Proof of Vaccination



- Can an employer request proof of a COVID-19 vaccination?
  - Yes
  - Caution – subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability
  - Do not ask for a copy of the vaccine card

# Tips When Requiring Employees to Return to the Workplace

- Require vaccinations?
- COVID-19 Preparedness Plan
  - Train employees on symptoms and prevention measures
  - Consider using wellness certificates
  - Consider doing temperature checks
  - Consider doing end-of-day tracking
  - Protocols if employee experiences symptoms (at work or home)





# Tips When Requiring Employees to Return to the Workplace (*cont.*)

- Plan for COVID-19-positive test results
  - Interview employee(s)
  - Contact tracing
  - Notification of others; notify workers' compensation carrier if required
  - Clean and disinfect
  - Quarantine per CDC guidelines
  - Notify government if required
- Travel and self-quarantine policy



# Tips When Requiring Employees to Return to the Workplace (*cont.*)



- Consider continued COVID-19 safety protocols and requirements even for those who have been vaccinated and / or who have already had COVID-19 (Do not ask if someone has had COVID-19, but you can listen!)
  - Still required under Cal-OSHA

# Continuation of Remote Working: What Are the Pitfalls? Expense Reimbursement

- FLSA has no direct reimbursement requirement
- The FLSA is implicated if an employee's unreimbursed business expenses pull the employee below minimum wage
- California and Illinois have very strict reimbursement requirements.
- Currently 10 jurisdictions that have statutes or case law specifically addressing an employer's requirement to reimburse business expenses: California, Iowa, Illinois, Massachusetts, Montana, New Hampshire, North Dakota, South Dakota, District of Columbia, and Seattle, Washington.
- Several other require employer to reimburse if that is what is stated in their written policies.

# Remote Working and Expense Reimbursement (*cont.*)

## Cal. Labor Code § 2802:

- (a) An employer shall indemnify his or her employee for all **necessary** expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying directions, believed them to be unlawful.
- (b) All awards . . . shall carry interest
- (c) “necessary expenditures or losses” shall include all **reasonable** costs, including, but not limited to, attorney’s fees incurred by the employee enforcing the rights granted by this section.
- (d) The Commissioner may issue a citation

# California – Is It Reasonable and Necessary? Is It a Direct Consequence of Discharging Employees Duties?

- WiFi
- Furniture
- Cell phone
- Printing paper
- Printer
- Computer/Headset
- Software
- Room with a door for confidentiality
- Locking file cabinets
- Web-cam
- Mileage
  - Going from home to actual office
  - Going to be tested for COVID-19
  - Going to get COVID-19 vaccine

# Properly Paying Employees for All Hours Worked

- Must pay for all work time
- Tracking time when you cannot see employees come and go
- Time spent related to COVID-19 screening:
  - Temperature screening/screening machines
  - Daily Wellness checklist
  - End-of-day tracking
  - Time to be tested



# Properly Paying Employees For All Hours Worked

- Required recording of time worked – how?
- No exemption to record-keeping obligations merely because work from home
- Additional work time
  - Late-night emails and text messages
  - Weekend work
  - Sporadic work



# Meal/Rest Breaks

- Must provide a 30-minute unpaid meal break
- Must have the meal break recorded
- Must not have any interruptions
- Considerations:
  - Set schedule
  - Use out of office
  - Clear policies

- Rest Breaks
  - Must provide a 10-minute paid break for every 4-hours worked or major portion thereof
  - Must be uninterrupted





# Thank you

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## Gina L. Miller

Partner, Snell & Wilmer  
714.427.7406  
gmiller@swlaw.com



## Dawn Knepper

Founder & President, Knepper Law PC  
949.416.2020  
dknepper@knepper.law