FREQUENTLY ASKED QUESTIONS REGARDING AB 1867

On September 9, 2020, California Governor Gavin Newsom signed Assembly Bill (AB) 1867. The Bill became effective on September 19, 2020. Among other things, AB 1867 establishes a small employer family leave mediation pilot program, codifies existing COVID-19 handwashing requirements, and creates new COVID-19 Supplemental Paid Sick Leave (SPSL) requirements for large employers not covered by the Families First Coronavirus Response Act (FFCRA).

For most United Contractors members, the paid sick leave requirements of AB 1867 are the provisions that are of greatest concern.

1. Which employers are covered by AB 1867?

Employers with 500 or more employees nationwide are covered by AB 1867. In other words, the employers not covered by the Families First Coronavirus Response Act (FFCRA) are covered by AB 1867.

2. When are employees entitled to COVID-19 Supplemental Paid Sick Leave payments?

Employees who must leave their home to perform work are entitled to COVID-19 SPSL if they are unable to work when they are:
   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 employer due to health concerns related to the potential transmission of COVID-19.

Unfortunately, AB 1867 does not define:
   • What constitutes being “advised” by a health care provider to self-quarantine or self-isolate?
   • What constitute “concerns” or “health concerns” related to COVID-19 or the potential transmission of COVID-19?

An employee who does not meet the requirements for COVID-19 SPSL payments is not entitled to receive them. Nevertheless, AB 1867 is clear that an employer’s obligation to provide COVID-19 SPSL is triggered “upon the oral or written” request of the employee. This means that employers may not require a doctor’s note or other certification from a health care provider.
3. **How many hours of COVID-19 SPSL payments are employees entitled to receive?**

The number of hours of COVID-19 SPSL payments depends upon the employee’s schedule:

1. Employees who the employer considers to work “full time” or who were scheduled to work or did work on average at least 40 hours per week in the two weeks preceding the date of taking this leave are entitled to 80 hours of COVID-19 SPSL payments;
2. Employees with a normal weekly schedule are entitled to COVID-19 SPSL hours equal to the total number of hours the employee is normally scheduled to work over two weeks;
3. If an employee works a variable number of hours, the employee is entitled to COVID-19 SPSL payment hours equal to 14 times the average number of hours the employee worked each day in the six months preceding the date the employee took COVID-19 SPSL (or, if the employee has worked less than six months but more than 14 days, the average hours worked each day over the entire employment period);
4. If an employee works a variable number of hours and has worked for a period of 14 or fewer days, the employee is entitled to COVID-19 SPSL payment hours equal to the total number of hours the employee has worked for that employer.

4. **What actions do employers need to take with regard to paychecks?**

Employers subject to AB 1867 need to take steps to update their paycheck forms. Beginning at the next paycheck cycle after the law took effect, paycheck stubs need to identify the amount of COVID-19 SPSL available. Your payroll department or service should double check that they have updated their paycheck forms to comply with AB 1867. An employer who is entitled to an offset or credit under AB 1867 (see Question #10 below) should ensure that the paycheck stubs reflect such offsets.

Instead of providing information regarding COVID-19 SPSL on paycheck stubs, employers can provide employees with this information in a separate writing furnished to the employees on the employees’ designated pay dates.

5. **Who decides how many hours of COVID-19 SPSL to use?**

Under Labor Code Section 248.1(b)(2)(E), added by AB 1867, the employee determines how many hours of COVID-19 SPSL to use, up to the maximum number of hours authorized by the statute. As stated above, the employee merely needs to make an oral or written request for SPSL.

Note, however, that COVID-19 Supplemental Sick Leave Pay only is available if the employee is “unable to work” because the employee is:

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 employer due to health concerns related to the potential transmission of COVID-19.

6. **Can employers ask employees to prove that they were advised by a medical care provider to self-quarantine?**

The employee is entitled to COVID-19 SPSL pay so long as the employee is unable to work for one of the reasons listed in AB 1867. The new law does not require that the employee be advised by a health care provider in writing to self-quarantine or self-isolate. Therefore, an employer is not allowed to ask for a doctor’s note or other evidence that an employee is unable to work or that the employee has been advised to self-quarantine or self-isolate.

Technically, if the employee could actually work and was not advised to self-isolate, the employee would not be entitled to COVID-19 SPSL payments. From a practical perspective, however, it would be risky to deny benefits under AB 1867 because if the employee was entitled to paid sick leave, the employer would potentially be subject to penalties.

7. **Can employers require employees to use other paid or unpaid leave before taking SPSL?**

No. AB 1867 prohibits an employer from requiring an employee to use any other paid or unpaid leave, paid time off, or vacation time before the employee uses COVID-19 SPSL.
8. What rate should be used for COVID-19 SPSL payments?

Each hour of COVID-19 SPSL is to be paid at the highest of the following:
   1. The worker’s regular rate of pay for the last pay period, including pursuant to any collective bargaining agreement that applies
   2. The state minimum wage
   3. The local minimum wage

However, an employer is not required to pay more than five hundred eleven dollars ($511) per day and five thousand one hundred ten dollars ($5,110) in the aggregate for COVID-19 SPSL payments to an employee who is entitled to receive COVID-19 SPSL.

9. Does the hourly rate for COVID-19 SPSL payments include benefits?

Probably not.

In the wage and hour context, the California Labor Commissioner has stated that the “rate of pay” does not include contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employee. Unlike the FFCRA, AB 1867 does not appear to require the continuation of medical benefits or any other fringe benefit contributions.

United Contractors is currently negotiating MOUs with its union partners concerning what fringe benefits will need to be paid, if any, in connection with COVID-19 SPSL payments. The following chart shows the current status. Please check with Labor & Member Services if you have questions on this issue.

### Requirements for Union Fringe Benefit Payments

**NORTHERN CALIFORNIA**

<table>
<thead>
<tr>
<th>UNION</th>
<th>CALIFORNIA COVID-19 SPSL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carpenters/Pile Drivers</td>
<td>H&amp;W payments only – 8 hrs/day up to a maximum of 80 hrs through 12/31/20</td>
</tr>
<tr>
<td>Cement Masons</td>
<td>Not specified – UCON is in active conversations with the Union.</td>
</tr>
<tr>
<td>Iron Workers</td>
<td>Not specified – UCON is in active conversations with the Union.</td>
</tr>
<tr>
<td>Laborers</td>
<td>Not specified – UCON is in active conversations with the Union.</td>
</tr>
<tr>
<td>OE3</td>
<td>No fringe benefits are owed per Trust Fund instructions.</td>
</tr>
<tr>
<td>Teamsters</td>
<td>UCON’s position is that this is covered by our May 7, 2020 MOU – “Only as required under the government ordinance or mandate” – in this case, no fringe benefits.</td>
</tr>
</tbody>
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**SOUTHERN CALIFORNIA**

<table>
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<tr>
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<th>CALIFORNIA COVID-19 SPSL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carpenters/Pile Drivers</td>
<td>Union has confirmed that the April 10, 2020 MOU applies – No fringe benefits are owed.</td>
</tr>
<tr>
<td>Cement Masons</td>
<td>No fringe benefits are owed per the September 10, 2020 MOU.</td>
</tr>
<tr>
<td>Iron Workers</td>
<td>Not specified – UCON is in active conversations with the Union.</td>
</tr>
<tr>
<td>Laborers</td>
<td>Not specified – UCON is in active conversations with the Union.</td>
</tr>
<tr>
<td>OE12</td>
<td>Not specified – UCON is in active conversations with the Union.</td>
</tr>
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10. What offsets/credits can employers take for leave that they have provided or payments they have made pursuant to AB 1867?

In some circumstances, AB 1867 allows an employer to receive a credit or offset for supplemental benefits that were used to provide paid leave for the same reasons that employees could take COVID-19 SPSL. Offsets or credits are not available, however, for paid sick leave that Labor Code Section 246 requires employers to provide. (This refers to California Paid Sick Leave - the Healthy Workplaces, Healthy Families Act of 2014 – for which all of UCON’s CBAs contain waivers.)

The provisions of AB 1867 relating to offsets and credits are unclear and confusing. United Contractors therefore cannot at this time offer guidance on issues relating to offsets and credits. If the Department of Industrial Relations/Labor Commissioner offers clarification regarding these provisions, we may be able to provide better
information at a later date. If you have specific questions regarding offsets and credits, you will want to check with your attorney and/or human resources professional.

11. What Notice Must Employers Give?
AB 1867 requires employers, outside of the food sector, to display a poster in a conspicuous place that provides notice of COVID 19 Supplemental Sick Leave Pay.
1. The Labor Commissioner has created a standard template poster, which is available in several languages on this page, along with additional FAQ on COVID-19 SPSL. Make sure you use the posters for Non-Food Sector Employees and review the FAQ related to non-food sector situations.
2. If employees do not go to a workplace, the employer may satisfy this requirement by giving notice through electronic means.

12. How will AB 1867 be enforced?
AB 1867 authorizes the Labor Commissioner to impose civil penalties. For example, the Labor Commissioner can recover:
- A penalty of up to $100 per offense for a willful violation of the poster requirement;
- An administrative penalty equal to the dollar amount of leave withheld multiplied by three or $250 (whichever amount is greater) up to a $4,000 aggregate penalty;
- Where failure to comply results in other harm or a violation of rights, a sum of $50 for each day or portion thereof that the violation occurred or continued, not to exceed a $4,000 in aggregate; and
- Investigation and enforcement costs of not more than $50 for each day or portion of a day a violation occurs or continues for each employee or other person whose rights were violated.

These penalty provisions are cumulative and do not preclude other remedies under applicable law; however, penalties for paid leave paystub violations are in lieu of the penalties for a violation of the general paystub statute, Labor Code Section 226.

In addition to the penalties imposed by the Labor Commissioner, the requirements of AB 1867 can be enforced through California’s unfair competition laws and through other statutes in much the same way as the requirements of the Healthy Workplace, Healthy Families Act of 2014, which provides for paid sick leave, can be enforced.

13. Can the requirements of AB 1867 be waived through collective bargaining?
No, AB 1867 does not allow a collective bargaining agreement waiver for COVID-19 SPSL.

14. Do collective bargaining agreement (CBA) grievance and arbitration procedures apply?
Depending on the specific language of any applicable CBA, individual claims for COVID-19 SPSL payments may be subject to the grievance and arbitration procedures. Not all CBAs have the same language with regard to use of the grievance procedure for statutory claims. Claims brought by the Labor Commissioner may also be subject to the grievance and arbitration procedures of the applicable master labor agreement.

You should contact United Contractors Labor & Member Services if you have questions about whether an individual’s claim for COVID-19 SPSL payments is subject to the grievance procedures under the particular CBA.