

CALIFORNIA STRIKES AGAIN: New Retroactive COVID-19 Supplemental Paid Sick Leave Laws for Employers

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To no one's surprise, the California Legislature implemented yet another set of laws and legal obligations extending and expanding requirements for California employers related to the global pandemic. On March 19, 2021, Governor Gavin Newsom signed a new law, Senate Bill 95 ("SB 95"), which expands and resets COVID-19-related supplemental paid sick leave. SB 95, which created new Labor Code section 248.2, provides employees with supplemental paid sick leave (SPSL) for various COVID-related absences *in addition* to paid time off benefits employees already receive by law or policy (i.e., California paid sick leave law or an employer's vacation policy).

SB 95 even allows employees to take COVID-19 supplemental sick leave for new purposes, including for vaccination appointments or side effects from receiving the COVID vaccine. SB 95 also created Labor Code Section 248.3, which mandates those providers of in-home supportive and/or waiver personal care services receive SPSL. To make things even more complicated, the new law applies retroactively to January 1, 2021, and will remain in effect through September 30, 2021. However, if an employee is already in the middle of using the supplemental paid sick leave benefits at the time the law expires, the employee is permitted to continue using available SPSL to take the full amount of leave allotted, if necessary.

SB 95 is a significant expansion of the prior COVID-19 sick leave legislation impacting a much wider range of employers. Now, any California employer with 26 or more employees is required to provide the supplemental paid sick leave benefits to its employees. The new law is much more encompassing than the previous 2020 COVID-19 supplemental paid sick leave law (Labor Code section 248.1), which applied to employers with 500 or more U.S. employees. Unlike the Families First Coronavirus Response Act ("FFCRA") (which expired on December 31, 2020), SB 95 does not exempt health care providers. It also applies to several public entities that were not covered under the 2020 version of the law.

Regardless of whether an employee took COVID-19 related sick leave in 2020, SB 95 essentially resets the 2020 COVID-19 supplemental sick leave and FFCRA. This means qualifying employees have an additional bank of available paid sick leave in 2021 until the law expires. SB 95 provides COVID-19 supplemental paid sick leave for covered employees who are unable to work or telework due to wider range of reasons than the 2020 version of the law. A covered employee is any employee who works or teleworks for a covered employer. Section 248.2 covers all employees and allows employees to use leave to care for family members. *Family member* is defined to include a child (minor or adult), grandchild, grandparent, parent, sibling, spouse, or domestic partner. Qualifying reasons include:

- The employee is subject to a quarantine or isolation period related to COVID-19 as defined by federal, state, or local orders or guidelines;

- The employee is advised by a health care provider to self-quarantine or isolate due to concerns related to COVID-19;
- The employee is attending an appointment to receive a COVID-19 vaccine;
- The employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework;
- The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis;
- The employee is caring for a family member who is subject to a quarantine or isolation order or guideline or who has been advised to self-quarantine by a health care provider due to concerns related to COVID-19;
- The employee is caring for a child (regardless of age) whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

Unlike the FFCRA and the various local ordinances that all became effective prior to the mass distribution of COVID-19 vaccines, SB 95 allows employees to choose to use their COVID-19 supplemental paid sick leave benefits for vaccination related reasons such as attending appointments or recovering from the vaccine's side-effects.

The burden to receiving this leave is overall low for the employee. An employer cannot deny supplemental paid sick leave based on lack of medical certification or verification. The employee simply must make an oral or written request to use leave. If the employer has reason to believe that the leave is not being used for a valid purpose, the employer can ask for supporting documentation. Even then, in most situations, the employer should err on the side of caution and *not demand* these documents.

While only the employee can determine how many hours of COVID-19 supplemental paid sick leave to use, the employee is capped at up to 80 hours depending on the hours worked by the employee. More specifically, the amount of leave a covered employee may take depends on whether the employee is considered "full time" or "part time." A full-time employee (working at least 40 hours per week) is allotted a total of 80 hours of supplemental paid sick leave. On the other hand, a part-time employee with a normal weekly schedule receives the total number of hours he or she is normally scheduled to work over two weeks. Employees who work a variable number of hours, whose tenure is six months or more, receive 14 times the average number of hours they worked each day in the six months preceding their leave date. If they worked only between 15 days and six months, the same calculation is used but over their entire period of employment. Employees who worked 14 days or fewer receive leave hours equal to their total number of hours worked.

SB 95 calculates the amount of pay at the employee's "regular rate," but it does not require an employer to pay out more than \$511.00 per day or \$5,110.00 in the aggregate to an employee in supplemental paid sick leave benefits.

California employers are required to provide notice to employees of their rights to use SPSL. Employers can provide electronic notice to employees who are teleworking. An important reminder for covered employers is to make sure to list any supplemental paid sick leave payment as a separate line item on wage statements and list all available supplemental paid sick leave hours separate from other paid leave. Further, an employee cannot require an employee to use other paid or unpaid leave before using SPSL or in lieu of SPSL. The COVID-19 supplemental paid sick leave is in addition to any

paid sick leave available to employees pursuant to Labor Code section 246 (California paid sick leave law).

The retroactive nature of the law applying it back to January 1, 2021 (despite enactment on March 29, 2021) means that if an employee took leave on or after January 1, 2021 for a reason that otherwise would have qualified the employee for SPSL, the employer shall provide the employee with retroactive compensation upon the oral or written request of the employee (assuming the employer did not provide other paid leave or compensation at the required amount to the covered employee). The retroactive payment should be paid on or before the payment for the next full pay period once the employee makes an oral or written request for the retroactive payment. The number of hours of leave that corresponds to the retroactive payment amount will count towards the total number of hours of SPSL leave available to the covered employee. Employers may not credit paid leave they provided employees for COVID-19 related reasons in 2020.

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