

California Enacts New COVID-19 Supplemental Paid Sick Leave Requirements With Retroactive Application

SB 95, recently signed into law by Governor Newsom, provides immediate COVID-19 paid sick leave protections for many California employees. The new law continues and expands the requirements for COVID-19-related sick pay as mandated previously by the federal Families First Coronavirus Response Act (FFCRA) and California's AB 1867, both of which expired on December 31, 2020.

SB 95, which adds Section 248.2 to the California Labor Code, now requires all California employers with more than 25 employees to provide up to 80 hours of COVID-19 supplemental paid sick leave (SPSL) to covered employees unable to work or telework due to certain reasons related to COVID-19, including that the employee has been advised by a health care provider to quarantine or isolate, or the employee needs time to receive or recover from symptoms related to a COVID-19 vaccination.

The new law applies retroactively to January 1, 2021, and it will expire on September 30, 2021, unless extended. However, employees taking COVID-19 SPSL at the time of expiration, may take the full amount of leave they would otherwise be entitled to under SB 95. The Labor Commissioner's office has published an FAQ regarding the requirements of the new law.

Covered Employers

A covered employer is any public or private employer in California that employs more than 25 employees, including those with collective bargaining agreements. The threshold of 25 employees does not mean that there must be 25 employees in California. If an employer has more than 25 employees in total, with one employee located in California, the employer is subject to SB 95 as to any of its California employees.

SB 95 also adds Labor Code section 248.3, which states that a provider of in-home supportive services or waiver personal care services under the Welfare and Institutions Code is also entitled to COVID-19 SPSL. This provision applies regardless of the number of employees.

Covered Employees and Reasons for Leave

A covered employee is one who is unable to work or telework because of any of the enumerated reasons for leave described below and includes full-time, part-time, and variable-hour employees. Independent contractors are not covered by the new law. A covered employee:

- is subject to a COVID-19 quarantine or isolation period per order or guideline of the California Department of Public Health, the CDC, or a local health officer;
- has been advised by a health care provider to self-quarantine due to COVID-19;
- is attending a COVID-19 vaccine appointment or cannot work or telework due to vaccine-related symptoms;
- is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- is caring for a family member who is subject to a quarantine isolation order or guideline, as described above, or who has been advised to quarantine by a health care provider due to COVID-19 [A family member is defined as a child (regardless of age or dependency); parent, stepparent, or legal guardian of the employee, or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a child; a spouse; a registered domestic partner; a grandparent; a grandchild; or a sibling.]; or
- 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.



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Employees or their covered family members who are subject to a general stay-at-home order are not entitled to SPSL; the order or guideline must be specific to the employee or family member's circumstance. If an employee or family member is subject to more than one order or guideline, the employee must receive COVID-19 SPSL for the longest minimum quarantine or isolation period provided by the applicable orders/guidelines.

Documentation or Certification of the Need For Leave

Pursuant to guidance issued by the California Labor Commissioner, an employer may not deny COVID-19 SPSL based solely on a lack of certification from a health care provider. Rather, a covered employee is entitled to take COVID-19 SPSL immediately upon oral or written request, and the leave may not be conditioned on medical certification. If, however, the employer has reason to doubt that the employee is not requesting COVID-19 SPSL for a valid purpose, it may be reasonable in certain circumstances to ask for documentation before paying the sick leave. This is likely to be a very fact specific inquiry to be assessed on a case-by-case basis, as the Labor Commissioner has stated the reasonableness of the parties' actions will undoubtedly come into play.

Amount of Leave, Rate of Pay, and Caps

Covered employees who are considered "full time" by their employers or who work (or were scheduled to work), on average, at least 40 hours per week in the two weeks preceding the date for SPSL, are entitled to up to 80 hours of COVID-19 SPSL.

Part-time employees with regular work schedules are entitled to receive COVID-19 SPSL up to the total number of hours they are normally scheduled to work over a two-week period.

Part-time employees with variable schedules are entitled to the average number of hours worked for the employer in the six months preceding the COVID-19 SPSL leave date or, if they have worked less than six months, the average number of hours worked during the period the employee has worked for the employer. If, however, the employee has worked for 14 days or less, the employee is entitled to COVID-19 SPSL equal to the number of hours they have worked for the employer.

Nonexempt employees must be paid COVID-19 SPSL at the **highest** of:

- The employee's regular rate for the workweek in which leave is taken (whether or not the employee actually worked overtime in that workweek);
- The employee's total wages, not including overtime premium pay, divided by the employee's total hours worked in the full pay periods of the prior 90 days of employment;
- The California minimum wage; or
- The local minimum wage.

For exempt employees, COVID-19 SPSL is calculated in the same manner as the employer calculates other forms of paid leave.

COVID-19 SPSL is subject to a cap of \$511 per day and \$5,110 in the aggregate per employee.

Application of Other Paid Leave

COVID-19 SPSL is in addition to any regular paid sick leave that may be available to employees under California paid sick leave law or applicable local paid sick leave ordinances and is in addition to any FFCRA or AB 1867 paid leave provided by the employer in 2020. Employers cannot require employees to first use other paid or unpaid leave, paid time off, or vacation time before the employee may use COVID-19 SPSL, nor can they require employees to use accrued or available time off in lieu of COVID-19 SPSL. However, employers can first require employees to use COVID-19 SPSL before they are entitled to receive "exclusion pay" under the Cal/OSHA Emergency Temporary Standard due to a work-related case of COVID-19 or work-related close contact.

Employers cannot require covered employees to use Disability Insurance (SDI) or Paid Family Leave (PFL) benefits before or in lieu of 2021 COVID-19 SPSL. Employees may, however, apply for SDI and PFL after receiving their paid leave entitlement under SB 95.

Retroactive Application to January 1, 2021

SB 95 applies retroactively to January 1, 2021. If an employee took leave for a covered reason on or after January 1, 2021, and was not compensated in an amount equal to or greater than the amount of compensation for COVID-19 SPSL, then **upon the oral or written request of the employee**, the employer must retroactively compensate employees for the difference in rate and/or replenish paid leave used by the employee, so that the prior leave time may be used to offset any current requirement to pay SPSL. For example, if an employee used PTO in 2021 to take care of a family member with COVID-19 and the employee requests retroactive application of SB 95, the employer would need to credit the employee's PTO bank with the amount of PTO used for the covered reason and would have to pay the employee any difference between the rate paid out for PTO and the rate of pay required by SB 95.

If, in 2021, an employer voluntarily paid employees for leave for a covered reason, or if the employer was subject to a local supplemental sick pay ordinance requiring paid leave, the employer may receive a credit towards its SB 95 requirement, so long as the prior payment meets the requirements of the new law. If the amount paid was less than what is required by SB 95, the employer would have to make up the difference in order for the prior leave to count against the employee's 2021 COVID-19 SPSL entitlement.

Retroactive payments must be paid on or before the payday for the next full pay period after the employee's request.

The law only addresses employer offsets for voluntary COVID-19 supplemental sick pay, or COVID-related pay mandated by local law. Neither SB 95 nor the Labor Commissioner's FAQs address whether employers can offset COVID-19 SPSL with SDI or PFL benefits already paid to an employee by the EDD for COVID-19 related leave from January 1, 2021 – March 28, 2021.

Wage Statements and Notice Requirements

An employer must identify the amount of an employee's available COVID-19 SPSL on the employee's wage statements. This must be separate from any other available time off, including paid sick time under California law. This provision takes effect the first full pay period after the statute's effective date (March 29, 2021).

If an employee makes a retroactive payment of COVID-19 SPSL, as discussed above, such payment must be identified on the employee's wage statement for that period, and the statement must list the hours available, rate of pay, and corresponding COVID-19 SPSL wages.

Covered employers must post a notice of the COVID-19 SPSL requirements in a conspicuous place in the workplace. If an employer's covered employees do not frequent a workplace, the employer may satisfy the notice requirement by disseminating notice through electronic means, such as email. The Labor Commissioner has developed a sample notice, which can be found [here](#).

Special Rules for Firefighters

Note that SB 95 implements special rules for firefighters. If a covered employee who is a firefighter was scheduled to work more than 80 hours for the employer in the two weeks preceding the need for leave, the employee is entitled to an amount of COVID-19 SPSL equal to the total number of hours the employee was scheduled to work in those two preceding weeks. However, firefighters are still subject to the daily and total aggregate cap of \$511 per day or \$5,110 in total.

Enforcement of SB 95

SB 95 authorizes the California Labor Commissioner to enforce its requirements as it enforces California paid sick leave law. Accordingly, employers who do not provide paid leave to a covered employee in accordance with SB 95, or who do not retroactively compensate employees who already have taken leave in 2021 for a COVID-19 SPSL reason, may be subject to administrative penalties, and the Labor Commissioner or California attorney general could bring a civil action for relief, including reinstatement, back pay, the payment of sick days unlawfully withheld, and penalties.

Compliance Steps for Employers

SB 95 is yet another installment in the growing number of new laws that have been passed at the federal, state, and local levels in response to the pandemic. Employers will need to be mindful of the requirements to provide COVID-19 SPSL to covered employees through September 30, 2021, while also contending with the potential repayment or replenishment for time off already taken by employees in 2021 for a COVID-19 related reason covered by SB 95. Employers must also comply with the notice requirement of the new law and should update their payroll records so that COVID-19 SPSL and retroactive SPSL are separately identified on the detachable portion of an employee's wage statement. Finally, some local ordinances (e.g., Los Angeles, Oakland, San Jose) continue to mandate COVID-19 supplemental sick pay and employers subject to those local laws and to SB 95 will need to make sure their policies are in compliance with both state and local requirements.
