

New California COVID-19 Supplemental Paid Sick Leave Law

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On March 19, 2021, Governor Newsom signed legislation ensuring new supplemental paid sick leave (SPSL) for eligible workers impacted by the COVID-19 pandemic. The bill, SB 95, provides up to 80 hours of paid leave for employees who are forced to miss work for qualifying reasons. The SPSL covers many more employers than previous legislation, and allows workers to use the leave for more reasons. The law is codified in new California Labor Code sections 248.2 and 248.3, the text of which can be found [here](#). The Labor Commissioner has also issued FAQs, found [here](#), to help employers navigate their new obligations. Below are some of the key aspects of the new law and some of the items addressed in the FAQs.

Coverage

All employers, whether public or private with at least 25 employees are required to offer the SPSL. This represents a significant expansion of California's previous pandemic-related sick leave law, which only applied to employers with more than 500 employees.

The new paid sick leave is available to all employees who cannot work or telework for qualifying reasons. Employees who may not be able to report in person to work, but who may still perform their job duties remotely, will not be eligible for SPSL. Covered employees are entitled to the new SPSL in addition to any paid sick leave that was provided under previous laws that expired on December 31, 2020. This means any employee who used paid sick leave under the federal Families First Coronavirus Response Act (FFCRA) in 2020 will be eligible for up to 80 hours of new SPSL under the California law.

Qualifying Reasons for Taking Leave

In addition to reaching more employees, the SPSL is available for more qualifying reasons than were found in the FFCRA, including the need to care for family members and the need to miss work to be vaccinated or because of side effects associated with being vaccinated. Specifically, anyone who is unable to work or telework for the below reasons may take the leave:

- The employee is subject to a quarantine or isolation period (as determined by federal, state, or local health agency guidelines) for reasons related to COVID-19;
- The employee is caring for a family member who is subject to a quarantine or isolation period (as determined by federal, state, or local health agency guidelines) for reasons related to COVID-19;
- The employee is attending a vaccine appointment or cannot work or telework due to vaccine-related symptoms.

Notably, under the FAQs, it is not enough that an employee merely lives with someone who has tested positive, experiences symptoms, or has been exposed. Rather, the employee must be

actually caring for a family member who meets the above criteria. In addition, it is not enough that the employee is subject to a general stay-at-home order. Rather, the inability to work or telework must be specific to the employee's own situation.

Start and End Dates of New SPSL Law

While SB-95 was signed into law on March 19, it does not take effect until March 29, 2021. Once it takes effect, however, the law will apply retroactively to January 1, 2021. This means that any employees who took unpaid leave for qualifying reasons between January 1, 2021 and March 28, 2021 will be entitled to request pay for the leave.

SB 95 also prohibits employers from requiring employees to first use any vacation, PTO, or standard California sick leave (24 hours per year) before enacting their right to the new SPSL. This means that employers will have to replenish any vacation/PTO or sick leave banks that were used earlier in 2021 for absences that would have qualified for the new SPSL.

The Labor Commissioner's FAQs uses an example of an employee who missed work to get vaccinated in February 2021. Such an employee would be entitled to be paid for that missed time if it was previously unpaid, and would be entitled to have any vacation or standard sick leave used that day to be placed back in the employee's available bank.

The new SPSL expires on September 30, 2021. However, any employees who have started their leave by that date will be entitled to the full available leave even if providing it extends the employee's leave beyond September 30.

Amount of Leave Available

Employees who the employer considers full-time, or who was scheduled to work an average of at least 40 hours per week in the two weeks preceding the leave, is eligible to take up to 80 hours of SPSL.

Part-time employees with routine schedules are entitled to take up to the total number of hours they are routinely scheduled to work over the previous two weeks. Part-time employees with variable schedules are entitled to 14 times the daily average hours they worked over the previous 6 months. If an employee with a varying schedule has worked for the employer for less than 6 months, the employee is eligible to receive 14 times the daily average hours worked over the course of the employee's employment. Any employee with a varying schedule who has been employed less than 14 days is entitled to up to the total amount of hours they have worked to date.

Rate of Pay

For each of hour of SPSL that a non-exempt employee is entitled to receive, the employee must be paid at the highest of the following amounts:

- The employee's regular rate of pay for the workweek in which the leave is taken;
- A rate calculated by dividing the employee's total wages, not including overtime premium, by the employee's total hours worked in the full pay periods of the prior 90 days of employment
- State or local minimum wage

For exempt employees, employers must compensate SPSL in the same manner that the employer compensates other forms of paid leave time.

Under no circumstances, however, must an employer pay a covered employee more than \$511 per day for SPSL or \$5,110 in the aggregate. Employees who earn more than that may be able to utilize other forms of paid leave, such as vacation or standard paid sick leave, to supplement the difference.

Employees Must Request the Leave

Employees must request the new SPSL, either orally or in writing, to receive it. However, employers are required to conspicuously display a poster, found [here](#), notifying employees of their right to SPSL.

Employer Right to Offset Other Leave Provided

Under the new law, if an employer provides an employee with other paid leave in 2021 that is payable for the qualifying reasons that SPSL is payable, the employer may count those hours toward meeting its SPSL obligations. The employer may only do so, however, if it pays the other leave in at least the same amount that the employee would otherwise be entitled to under the new law.

For example, while federal COVID-19 leave under the FFCRA expired at the end of 2020, employers are able to voluntarily offer FFCRA leave—and take advantage of its tax credit provisions—through September 30, 2021. Employers who choose to continue offering FFCRA leave will simultaneously satisfy their new California SPSL obligations as long as the employee receives the same amount of pay he or she would get under the SPSL law. California employers would be wise to continue offering the FFCRA leave in lieu of the new California SPSL, because only the former affords employers the right to seek tax reimbursements for the payments.

Employers may also offset any qualifying pandemic-related paid leave made available to employees pursuant to local laws.

Record-Keeping and Paystubs

The new SPSL law also requires to list the amount of leave available as a separate line item on employee paystubs. Because the SPSL is in addition to regular paid sick leave, the two items

must be separately listed on an employee's paystub. For example, if an employee has 80 hours of SPSL available and 16 hours of regular paid sick leave available, the employee's wage statement must separately reflect both totals rather than merely list 96 total hours of available sick leave. Like records pertaining to regular paid sick leave, employers must maintain records pertaining to employees' used and available SPSL for a three-year period.

California employers with any questions about their rights and obligations under the new California Supplemental Paid Sick Leave Law should reach out to the Weintraub Tobin Labor & Employment team.