
SB 95 – COVID-19 Supplemental Paid Sick Leave

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On March 19, 2021, Governor Gavin Newsom signed Senate Bill (SB) 95 into law. SB 95 provides COVID-19 supplemental paid sick leave (COVID-19 SPSL) to covered employees until September 30, 2021. The new sick leave is in addition to any existing sick leave granted under California or federal law, and any other sick leave offered by employers, including under any collective bargaining agreement.

SB 95 is a response to the continued impacts of COVID-19 on the workforce subsequent to the federal paid sick leave provided under the Families First Coronavirus Response Act (FFCRA), which expired on December 31, 2020. This new COVID-19 SPSL is expressly retroactive to January 1, 2021, in order to protect covered employees who took leave for COVID-19 reasons on or after that date. (For more information on FFCRA please see our [2020 Client News Brief Number 17.](#))

The bill goes into effect on March 29, 2021, as Labor Code section 248.2, and will be enforced by the Labor Commissioner.

Covered Employees and Employers

Employers are required to provide COVID-19 SPSL if they have 26 or more employees. An employer includes any person employing another under any appointment or contract of hire, and includes the state, political subdivisions of the state, and municipalities. This includes public school districts.

A “covered employee” is an employee who is unable to work *or telework* because the employee is or was:

- subject to a quarantine or isolation period related to COVID-19;
- advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- attending an appointment to receive a vaccine for protection against contracting COVID-19;
- experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework;
- experiencing symptoms of COVID-19 and seeking a medical diagnosis;

- caring for a family member who is subject to an order or guidelines or who has been advised to self-quarantine; or
- caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

Previously, under FFCRA, employees were not granted paid sick leave to attend vaccine appointments or when experiencing symptoms due to a COVID-19 vaccine. Additionally, FFCRA did not expressly state that employees were permitted to use COVID-19 SPSL for caring for a child whose school is closed or otherwise unavailable due to COVID-19.

Calculating Employee's COVID-19 SPSL Hours

A "covered employee" (as defined above) will be entitled to a maximum of 80 hours of COVID-19 SPSL, depending on the employee's work schedule and/or number of hours worked within the two weeks before using the COVID-19 SPSL.

An employee is entitled to the maximum 80 hours of COVID-19 SPSL if:

- (1) The employer considers the employee a full-time employee; *or*
- (2) The employee has worked an average of at least 40 hours per week in the two weeks before taking (as opposed to requesting) the COVID-19 supplemental paid sick leave.

If neither of the above requirements are satisfied, then the employee is entitled to COVID-19 SPSL based on the amount of hours worked as follows:

- (1) If the employee has a normal weekly schedule, the total number of hours the employee is normally scheduled to work for the employer over a two week period.
- (2) If the employee works a variable number of hours, then the employee is entitled to fourteen times the average number of hours the employee worked each day in the six months before using COVID-19 SPSL. However, if the employee has worked for the employer less than six months but more than fourteen days, then the calculation of leave should be fourteen times the average number of hours the employee has worked per day, for the entire period of employment.
- (3) If the employee works a variable number of hours and has worked for 14 days or less, then the employee is entitled to COVID-19 SPSL based on the total number of hours s/he has worked for that employer.

Employees typically exempt from overtime (e.g., administrators and management employees) are also entitled to receive COVID-19 SPSL. SB 95 provides a different calculation of the amount of COVID-19 SPSL hours firefighters are entitled to. Consult with your legal counsel to ensure the calculation of COVID-19 SPSL for firefighters follows the new statute.

Employees wanting to use COVID-19 SPSL must make an oral or written request to their employer, and have the right to determine how many hours of COVID-19 SPSL they would like to use.

Compensated Rate of COVID-19 SPSL

Similar to FFCRA, an employer is not required to pay more than \$511 per day and \$5,110 in the aggregate to an employee for COVID-19 SPSL unless there is a federal change in legislation that increases the amounts established under FFCRA. The rate of pay for COVID-19 SPSL is determined by the highest rate of the following:

- (1) The regular rate of pay for the workweek in which the employee uses COVID-19 SPSL, whether or not employee actually works overtime during that week;
- (2) The rate calculated by Dividing the employee's total wages, not including overtime pay, by the employee's total hours worked during the full pay periods of the prior 90 days of employment;
- (3) The state minimum wage; or
- (4) The local minimum wage.

This calculation is for nonexempt employees. If an employee is exempt, then COVID-19 SPSL must be calculated in the same way other forms of paid leave time are calculated.

Due to the work schedule for firefighters, the rate of compensation is calculated differently for COVID-19 SPSL hours. Consult with your legal counsel to ensure your calculation is suitable for firefighters.

Applying COVID-19 SPSL and Retroactive Status

As stated above, the COVID-19 SPSL is retroactive to January 1, 2021. Employers are prohibited from requiring an employee to use other paid leave before using COVID-19 SPSL. However, if an employee is excluded from the workplace due to COVID-19 exposure as provided under the Cal-OSHA COVID-19 Emergency Temporary Standards, then an employer may require an employee to first exhaust COVID-19 SPSL before any other paid leave is used.

Employers must ensure COVID-19 SPSL is separate from paid sick days. Employers must also provide employees with notices, pursuant to Labor Code section 246, subdivision (i), that includes the amount of COVID-19 SPSL an employee has available on the next full pay period following March 29, 2021.

Additionally, if an employee used another supplemental benefit for leave under a federal or local law on or after January 1, 2021 for any reason permitted to use COVID-19 SPSL, then the employer may count the hours of other paid benefit or leave towards the total number of hours of COVID-19 SPSL that the employer is required to provide. If COVID-19 SPSL is applied retroactively and the rate of compensation does not meet the calculation requirements discussed above, then an employee may request orally or in writing for the difference from the employer.

Notice Requirements to Employees

Employers are required to post notice of COVID-19 SPSL at the workplace. If employees do not frequent a workplace, then the employer may disseminate notice through electronic means, such as E-mail.

Takeaways

SB 95 provides for a similar type of paid sick leave previously provided under FFCRA with a few exceptions and notable expansions. Nonetheless, employers should expect to use similar procedures to administer and process COVID-19 SPSL as they did under FFCRA.

Additionally, under SB 95, the Legislature does not provide express guidance for employers to verify the accuracy of an employee's request for COVID-19 SPSL. Employers should continue to use best practices when verifying an employee's request and apply these best practices equally and consistently when an employee requests to take COVID-19 SPSL.

Although an employee may exhaust his or her COVID-19 SPSL, the employee may use other paid leave for COVID-19 related purposes as well. Employers should continue to document an employee's use of other paid leave in the event that SB 95 is extended past September 30, 2021 and to account for any retroactive leave and payment that could be owed to the employee.

If you have any questions about SB 95, paid sick leave, or for any labor and employment issues, please contact one of the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.