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COVID-19 Advisory



Update: Supplemental Paid Sick Leave Under Senate Bill 95

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SB 95: California's 2021 COVID-19 Supplemental Paid Sick Leave Law

The following Advisory provides an overview of Senate Bill 95 (SB 95), California's 2021 COVID-19 supplemental paid sick leave law, and frequently asked questions (FAQs) regarding the implementation of SB 95.

What is SB 95?

The federal Families First Coronavirus Response Act (FFCRA), which required COVID-19-related paid sick leave for employers with fewer than 500 employees and public employers, expired on December 31, 2020. AB 1867, the California law that provided COVID-19-related paid sick leave for certain food service workers, healthcare workers, and emergency responders, and for workers at private employers with 500 or more employees, also expired on December 31, 2020. In response to the expiration of these laws, on March 19, 2021, California passed [SB 95](#), which provides COVID-19 Supplemental Paid Sick Leave (SPSL) to covered employees, which includes employees of public entities.

When is SB 95 effective?

SB 95 went into effect on March 29, 2021, is retroactive to January 1, 2021, and expires on September 30, 2021. SB 95 creates new Labor Code section 248.2.

Which employers are subject to SB 95?

SB 95 applies to all employers, including public entities, with more than 25 employees.

What are the reasons covered employees can take SPSL?

Covered employees are entitled to SPSL when they cannot work or telework for one of the following reasons:

- Caring for Yourself:
 - The employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidance from the California Department of Public Health (CDPH), the federal Centers for Disease Control and Prevention (CDC), or a local public health officer.
 - The employee has been advised by a health care provider to self-quarantine due to COVID-19.
 - The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- Vaccine-Related:
 - The employee is attending an appointment to receive the COVID-19 vaccine.
 - The employee is experiencing symptoms related to the COVID-19 vaccine that prevent the employee from being able to work or telework.
- Caring for a Family Member:
 - The employee is caring for a family member who is subject to a quarantine or isolation period related to COVID-19 or has been advised by a health care provider to self-quarantine due to COVID-19.
 - "Family member" is defined (under Labor Code section 245.5) to include the employee's child, parent, spouse, registered domestic partner, grandparent, grandchild, and sibling; or the parent/guardian of the employee's spouse or registered domestic partner.
 - "Child" is defined (under Labor Code section 245.5) to include the biological, adopted, or foster child, stepchild, legal ward, or child to whom the employee stands in loco parentis, regardless of the child's age or dependency status.

- The employee 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*.
 - Note that childcare leave under SPSL is narrower than the former childcare leave under FFCRA. Per the language of SB 95, an employee is only permitted to take SPSL leave to care for their child because the child's school has closed due to COVID-19 on the premises, e.g., school closure due to COVID-19 outbreak, or child's classroom closed due to quarantine.

How many SPSL hours are covered employees entitled to?

- For full-time employees (e.g., work 40 hours per week), they are entitled to 80 hours of SPSL.
- For part-time employees with a regular weekly schedule, they are entitled to the number of SPSL hours equal to the number of hours the employee is normally scheduled to work over two weeks.
- For part-time employees with variable schedules and who have worked for the employer for more than 14 days, they are entitled to the number of SPSL hours equal to 14 times the average number of hours worked per day over the past 6 months.
- For part-time employees with variable schedules and who have worked for the employer for 14 days or less, they are entitled to the number of SPSL hours equal to 14 times the average number of hours worked per day over the preceding two weeks.

For an illustration on how to calculate a part-time employee's SPSL leave entitlement, please see the SPSL FAQs at [DIR FAQs](#).

How does a covered employee request SPSL leave from the employer?

The covered employee may make either an *oral* or *written* request for SPSL leave to their employer, and upon such request, the employer shall make such leave available immediately to the employee for use. The covered employee determines how many hours of SPSL they will use, up to their maximum entitlement.

Can a covered employee request "retroactive" SPSL for leave taken for SPSL reasons between January 1, 2021 and March 28, 2021?

Yes, if the covered employee took leave during this time period for one of the SPSL qualifying reasons and was not paid for this leave by the employer in the amount required by SPSL, then the covered employee has the right to request that the employer make a "retroactive" payment equal to the amount required.

Employers are required to make "retroactive" SPSL payments to covered employees only under the following circumstances:

- The employee must make an oral or written request to the employer to receive such "retroactive" SPSL payment.
- The employee's request must be made on or after March 29, 2021.
- The leave taken prior to March 29, 2021 must be for a qualifying reason under SPSL.

Employers must do the following after receiving an employee's valid "retroactive" payment request:

- The employer has until the payday for the next full pay period to pay the "retroactive" SPSL leave to the employee.
- On that payday, the employer must provide accurate notice to the employee on their wage statement regarding how many remaining SPSL hours are available to the employee.

How much compensation for SPSL will covered employees receive?

Non-exempt covered employees are entitled to SPSL compensation at a rate equal to the highest of:

- Employee's regular rate of pay for the workweek in which the SPSL is taken.
- Rate calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
- State minimum wage
- Local minimum wage

Exempt covered employees are entitled to SPSL compensation in the same manner that the employer calculates wages for other forms of paid leave.

SPSL compensation shall not exceed \$511 per day and \$5,110 in total, unless the federal government enacts subsequent legislation that increases these caps. Covered employees who earn more than these caps may choose to utilize other paid leave they have available in order to fully compensate them for leave taken.

Can the employer request documentation from the covered employee as a condition of providing SPSL?

No. A covered employee is entitled to take SPSL immediately upon their oral or written request to the employer, and such leave is not conditioned on medical certification or any other documentation.

Although an employer cannot deny SPSL to an employee solely for lack of documentation, it may however be *reasonable* in certain circumstances to ask for documentation before *paying* the sick leave when the employer has other information indicating that the covered employee has not requested SPSL for a valid purpose. For example, if a covered employee informs an employer that the covered employee is subject to a local quarantine order or recommendation, has to stay home, and qualifies for SPSL, but the employer subsequently learns that the covered employee was out at a park, the employer could reasonably request documentation from the employee before paying the SPSL leave.

Does the employer have to give notice to employees regarding SPSL?

Yes. The Labor Commissioner has issued a [model notice](#) regarding SPSL for posting by employers. If employees “do not frequent a worksite,” especially now during COVID-19, the employer may satisfy the notice requirement by disseminating the notice to employees through electronic means.

Are employers required to inform employees of their SPSL leave balances?

Yes, SPSL is in addition to an employee’s regular paid sick leave entitlement, and employers must provide employees with an itemized wage statement or separate writing that specifies how many SPSL hours are available to employees. Specifically, SPSL must be itemized separately from other paid sick leave on the employee’s wage statement or separate writing. Records of accrued and used SPSL must be maintained for three years and must be made available to the employee or Labor Commissioner upon request.

Can an employer require a covered employee to first use their own accrued paid time off (e.g., accrued sick days or vacation time) before the covered employee uses SPSL?

No. SB 95 expressly states that an employer shall not require a covered employee to use any other paid or unpaid leave, paid time off, or vacation time provided by the employer to the covered employee before the covered employee uses SPSL or in lieu of SPSL.

Is SPSL separate from COVID-19-related paid sick leave provided under the FFCRA or other California laws?

Yes, mandatory COVID-19-related paid sick leave under the FFCRA or AB 1867 expired on December 31, 2020. SPSL allows covered employees to take up to an additional 80 hours (for full-time employees) of COVID-19-related sick leave during the period of January 1, 2021 through September 30, 2021.

What if an employer voluntarily offered employees COVID-19-related sick leave during the period of January 1, 2021 through March 28, 2021?

After the expiration of FFCRA and AB 1867 on December 31, 2020 and before SPSL was effective on March 29, 2021, employers may have voluntarily offered their employees additional paid COVID-19-related sick leave, e.g., voluntarily extended FFCRA benefits through March 2021 (“voluntary COVID-19-related sick leave”). Moreover, employers may have been subject to a local law or ordinance that required additional COVID-19-related sick leave for employees starting on January 1, 2021 and beyond for the same qualifying reasons as SPSL (“local ordinance COVID-19-related sick leave”).

In these situations, the employer may receive credit for those voluntary or local ordinance COVID-19-related sick leave hours provided to employees towards the requirements of SPSL under the following circumstances:

- The reasons for the voluntary or local ordinance COVID-19-related sick leave must have been for one of the qualifying reasons under SPSL.
- The voluntary or local ordinance COVID-19-related sick leave was an additional benefit paid entirely by the employer, and the employee was not required to use their own accrued paid time off during this period of time (e.g., accrued sick days, vacation days, personal necessity, etc.)
- The employer paid for the voluntary or local ordinance COVID-19-related sick leave at a rate that is equal to or greater than what is required under SPSL.

For example, if the employer voluntarily offered employees 40 hours of COVID-19-related sick leave for the same reasons as SPSL prior to March 29, 2021, employees who utilized such voluntary COVID-19-related sick leave will have those hours reduced from their SPSL entitlement.

What is the relationship between “exclusion pay” under OSHA ETS and SPSL?

Under the OSHA Emergency Temporary Standards (OSHA ETS), if the employee is able and available to work, the employer must continue to provide the employee’s pay and benefits during the period of time an employee is excluded from work due to a work-related COVID-19 exposure (“exclusion pay”). An employer *may* require the employee to first exhaust *paid sick leave benefits* before providing “exclusion pay,” to the extent permitted by law, and may offset payments by the amount an employee receives in other benefit payments. SB 95 expressly permits employers to require employees, who are excluded due to COVID-19 exposure in the workplace, to use SPSL before providing exclusion pay.

Can employers require employees to use paid sick leave (other than SPSL) when they are excluded due to COVID-19 exposure in the workplace under the OSHA ETS?

Yes, employers that provide a paid leave policy that is *separate and in addition* to the paid sick leave policy required by Labor Code section 246 (e.g., paid sick leave of 3 or more days each year for employees who work at least 30 or more days with the same employer) may require their employees to use that separate sick leave as permitted by law during the period of exclusion. An employer, however, cannot require the employee to use the standard paid sick leave mandated under Labor Code section 246, even when there has been a workplace exposure and the employer is required to exclude employees under the OSHA ETS. For more information regarding exclusion pay under the OSHA ETA, please see [OSHA ETS FAQs](#).

Does a general stay-at-home order qualify as a basis for SPSL?

No. According to the DIR FAQs, “the order or guidelines must be specific to the covered employee’s circumstances” in order for the employee to be entitled to SPSL. While a general stay-at-home order would not qualify, an order or guidance from a local health officer that, for example, “directs individuals who live with someone who has COVID-19 to quarantine themselves” would qualify as a basis for SPSL.

Can an employee take a vacation out of state and then qualify for SPSL upon their return because they are subject to a quarantine or isolation order?

An employee who travels out of state and then is subject to a federal, state, or local order or guidance to quarantine or isolate upon their return would be entitled to SPSL if they are unable to work or telework while quarantining.

If you have questions about the 2021 COVID-19 Supplemental Paid Sick Leave or other related issues, please do not hesitate to contact any member of DWK’s [Labor, Employment and Personnel](#) (LEAP) practice group. DWK will continue to provide guidance as information becomes available. For more information regarding the impact of COVID-19 on your district’s operations, please visit our [COVID-19 Resources page](https://www.dwkesq.com/covid-19-resources-page/) at <https://www.dwkesq.com/covid-19-resources-page/>.