

LABOR LAW

California enacts new COVID-19 supplemental paid sick leave

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Senate Bill (SB) 95 is California's most recent response to the COVID-19 pandemic's continuing impact on California employees. SB 95 provides for COVID-19 supplemental paid sick leave (SPSL), filling what otherwise would be a coverage gap, given the December 31, 2020, expiration of the SPSL provisions of Assembly Bill 1867. Approved by the governor on March 19, 2021, SB 95 takes effect immediately. The requirement to provide SPSL applies retroactively to January 1, 2021, and sunsets on September 30, 2021.

Coverage and Requirements

SB 95 covers public- and private-sector employers that employ more than 25 employees. It requires covered employers to provide up to 80 hours of paid sick leave to qualifying employees who are unable to work or telework because of specified reasons related to COVID-19. Employees can make their request orally or in writing.

The Act doesn't require employees to exhaust other paid or unpaid leave before using SPSL, although there are exceptions. For instance, if an employee is excluded from work because of a COVID-19 workplace exposure, the employer may require her to exhaust SPSL before providing "exclusion pay," as required by the California Division of Occupational Safety and Health's (Cal/OSHA) COVID-19 Emergency Temporary Standards.

Qualifying reasons for SPSL

SB 95 covers employees who are unable to work or telework because of any of these seven qualifying reasons:

- The employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the California Department of Public Health (CDPH), the federal Centers for Disease Control and Prevention (CDC), or a local health officer who has jurisdiction over the workplace.
- The employee has been advised by a

healthcare provider to self-quarantine because of concerns related to COVID-19.

- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- The employee is attending an appointment to receive a vaccine for protection against contracting COVID-19
- The employee is experiencing symptoms related to a COVID-19 vaccine that prevent him from being able to work or telework. The employee is caring for a family member who is subject to a quarantine or isolation order or guidelines or who has been advised to self-quarantine by a healthcare provider, as described above.
- 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.

SPSL under SB 95 doesn't extend to employees who are seeking or awaiting the results of a diagnostic test or medical diagnosis after exposure to COVID-19. As discussed below, however, employers choosing to extend coverage to such employees may qualify for tax credits under federal law.

Paid leave calculations, maximum leave entitlements

Qualifying employees are entitled to be paid for each hour of SPSL at their regular rate of pay for the workweek. The maximum amount of SPSL is \$511 per day or \$5,110 in the aggregate. This is a significant threshold—employees making under \$64 per hour (roughly \$133,000 annually for nonsafety personnel) won't hit that maximum. To avoid pay loss, employees who have reached the maximum amounts will need to use their paid leave balance, if available.

The 80-hour entitlement applies to full-time employees—i.e., those designated as full-time and worked or were scheduled to work an average of 40 hours per week in the preceding two weeks. Maximum hours for part-time employees are essentially prorated. Part-timers with set schedules max out at the number of hours they are

normally scheduled to work for two weeks.

More complex is a formula for part-timers with variable schedules. Their maximum entitlement to SPSL is 14 times the average hours worked on a daily basis in the six months before taking SPSL. Finally, a special formula for firefighters provides a parallel benefit, adjusted for their longer workweek.

Retroactivity

COVID-19-related leaves dating from January 1, 2021, qualify for retroactive payments. Additionally, if the employer granted leave for reasons covered by the Act after January 1 but compensated the employee with less than what the Act requires, it must provide a retroactive payment covering the unpaid portion of

compensation to which the employee is entitled. The number of hours of leave corresponding to the amount of the retroactive payment will count toward the total number of hours of SPSL the employer is required to provide.

Importantly, the employer doesn't have an affirmative duty to conduct the retroactive accounting except for employees who request retroactive payment, either orally or in writing. In that event, payment is due on or before the payday for the next full pay period after the request.

Required administrative actions under SB 95

Employers must provide written notice of the amount of SPSL available to covered employees, either on an itemized wage statement or in a separate writing, on designated pay dates. The notice must state how many SPSL hours remain available to the employee, which must be reflected as a separate line item in the employee's wage statement or writing. In other words, the document must differentiate between regular paid sick leave and SPSL. This is a significant administrative burden on employers. As of this writing, options for potential workarounds are under debate.

Notice of covered employees' entitlement to SPSL must be displayed in a conspicuous place in the

workplace. Employers should use the labor commissioner's model notice, which is available at the Department of Industrial Relations website (<https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>). If covered employees don't frequent a worksite, employers can send the notice to them electronically.

ARPA Implications

Employers should also be mindful of two recently enacted federal laws that offer tax credits for employers providing COVID-19-related paid sick leave: (1) the Consolidated Appropriations Act of 2021 (CAA) and (2) the American Rescue Plan Act of 2021 (ARPA). Notably, the mandate under the Families First Coronavirus Response Act (FFCRA) to provide paid sick leave expired on December 31, 2020, and wasn't extended.

Passed on December 27, 2020, the CAA gives employers who were covered under the FFCRA the option to continue to provide paid sick leave (presumably under the same reasons and same conditions that existed when the FFCRA was in effect and thus receive a tax credit for those payments through March 31, 2021. Specifically, employers can claim tax credits for leave taken up to March 31, 2021, if (1) the employee still has a remaining FFCRA leave balance available for use and (2) the employer voluntarily allows the employee to use that balance.

The ARPA again extends tax credits to covered employers that provide paid sick leave for a qualifying reason between April 1 and September 30, 2021. The ARPA is broader than the FFCRA in that it provides three additional reasons under which an employee could qualify for COVID-19-related paid sick leave, including waiting for the results of a diagnostic test or medical diagnosis relating to the virus.

Since the ARPA didn't take effect until April 1, 2021, and SPSL requirements under SB 95 apply retroactively to January 1, 2021, there is a misalignment of federal and state leave laws. Accordingly, employers may not be able to claim tax credits for all COVID-19-related leave taken from January 1, 2021, to March 31, 2021.

Bottom Line

You should review and, as needed, adjust your sick leave policies and payroll practices to address these new leave requirements. You also should assess your eligibility for tax credits under the applicable federal laws. The Department of Industrial Relations hasn't issued regulations governing this new leave entitlement. Stay tuned!

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