

**California Enacts Legislation Retroactively Expanding  
Supplemental COVID-19 Paid Sick Leave**

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On March 19, 2021, California passed [Senate Bill 95](#) (“SB 95”), which mandates that employers expand supplemental paid sick leave for covered employees’ COVID-19-related absences (hereinafter “Supplemental COVID-19 Paid Sick Leave”). SB 95, which became effective on March 29, 2021, applies retroactively to applicable leave taken on or after January 1, 2021, and remains in effect until September 30, 2021. Thus, covered employers must provide Supplemental COVID-19 Paid Sick Leave beginning on March 29, 2021, and covered employees who took qualifying leave between January 1 and March 28 may request retroactive payment for leave taken during that period.

**Applicability**

SB 95 applies to all employers, public or private, that have more than 25 employees with at least one in California, including those with collective bargaining agreements.

Employees covered under SB 95 include California employees who cannot work or telework due to any of the following circumstances:

- the employee is subject to a quarantine or isolation period related to COVID-19;
- the employee has been advised by a health care provider to quarantine due to concerns related to COVID-19;
- the employee is experiencing COVID-19 symptoms and seeking a medical diagnosis;
- the employee is attending a vaccine appointment;
- the employee is experiencing vaccine-related symptoms that prevent the employee from working or teleworking;
- the employee is caring for a covered 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 quarantine due to COVID-19; and/or

- the employee is caring for a child whose school or place of care is closed or unavailable due to COVID-19 on the premises.

### **Amount of Leave**

The amount of leave available to a covered employee represents how much leave the employee may use between March 29, 2021, and September 30, 2021. In addition, any retroactive payments count towards the total number of hours an employer is required to provide.

- **Full-Time Employees:** Employees who are full-time or who worked or were scheduled to work at least 40 hours per week in the two weeks before leave is taken are entitled to take up to 80 hours of Supplemental COVID-19 Paid Sick Leave. Full-time firefighters may be entitled to as many hours as they were scheduled to work, subject to the maximum benefit amounts discussed below.
- **Part-Time Employees:**
  - Normal Weekly Schedule. Part-time employees with a normal weekly schedule are entitled to take up to the total number of hours the employee would have worked for the employer over two weeks.
  - Variable Schedule; Tenure of Six Months or More. Part-time employees with a variable schedule and a tenure of six months or more are entitled to receive up to an amount equal to 14 times the average number of hours they worked each day in the preceding six months. Employers may initially comply with the wage statement requirement (discussed further below) for employees with a variable schedule by making a preliminary calculation and indicating “(variable)” on the employee’s wage statement.
  - Variable Schedule; Tenure More Than 14 Days and Less Than Six Months. Part-time employees with a variable schedule and a tenure of more than 14 days but less than six months are entitled to receive up to an amount equal to 14 times the average number of hours they worked each day over their entire period of employment.
  - Variable Schedule; Tenure of 14 or Fewer Days. Part-time employees with a variable schedule and a tenure of 14 or fewer days are entitled to receive leave hours equal to the total number of hours the employee has worked for the employer.

### **Calculating Pay for Supplemental COVID-19 Paid Sick Leave**

Each hour of Supplemental COVID-19 Paid Sick Leave must be paid at the employee’s regular rate of pay for the workweek in which the leave is taken, unless the State minimum wage, local minimum wage, or statutory calculation provides for a higher payment. The rate provided for in the statute is calculated by dividing the covered employee’s total

wages (not including any overtime premium pay) by the employee's total hours worked in the full pay period or the prior 90 days of employment.

The maximum amount that an employer is required to pay a covered employee is \$511 per day, or \$5,110 in the aggregate. The maximum benefit amounts will automatically increase if federal legislation is passed that provides for payments at amounts that exceed the benefit payable under the Families First Coronavirus Response Act ("FFCRA"), which expired on December 31, 2020.

### **Employer Credit for COVID-19-Specific Leave Previously Provided**

Many local jurisdictions in California have enacted ordinances related to COVID-19 paid sick leave, and some employers have voluntarily provided supplemental COVID-19-related sick leave benefits, including under the voluntary provisions of the FFCRA. SB 95 includes an offset provision allowing an employer to receive credit for benefits previously provided where the employee would also qualify for Supplemental COVID-19 Paid Sick Leave. For example, if in February 2021, a full-time employee received 40 hours of supplemental paid sick leave pursuant to a city or county ordinance, then the employer may credit the 40 hours previously provided toward the employer's 80-hour Supplemental COVID-19 Paid Sick Leave obligation. If the payment was made at a rate lower than what is required under SB 95, then to receive credit, the employer must make a retroactive payment to make up the difference. The employer *must* make this retroactive payment of the difference if a covered employee requests it in writing or orally.

Because Supplemental COVID-19 Paid Sick Leave is available to covered employees *in addition to* other paid or unpaid leave, paid time off, or vacation, an employer may not require the employee to use or exhaust any other leave benefits before the covered employee may use Supplemental COVID-19 Paid Sick Leave or use other leave benefits in lieu of Supplemental COVID-19 Paid Sick Leave.

Employers should also note that the law gives employees the right to determine how many hours of Supplemental COVID-19 Paid Sick Leave to use, and the Department of Labor Standards Enforcement ("DLSE") has opined that employers may not require medical certification as a precondition of granting leave. However, if employers have information that a covered employee is not requesting leave for a valid purpose, an employer may require medical certification. See [DLSE FAQ #11](#).

### **Mandates Related to Payment Timing, Notice, and Wage Statements**

For any Supplemental COVID-19 Paid Sick Leave taken on or after March 29, 2021, the employer must provide payment no later than the payday for the next regular payroll period after the sick leave was taken.

For retroactive payments related to leave taken between January 1 and March 28, 2021, employees must make a written or oral request to be paid retroactively for Supplemental COVID-19 Paid Sick Leave. After the employee makes the request, then the employer must pay the retroactive leave by the payday for the next full pay period. For example, if an employee who is paid on the 15th and last day of each month makes a retroactive

request on March 29, 2021, for leave taken in February to care for a child whose daycare closed due to COVID-19 on the premises, then the employer must include the payment in the employee's April 15 paycheck.

Employers must also provide accurate notice on the employee's itemized wage statement (paystub) of how many hours of Supplemental COVID-19 Paid Sick Leave remain for the employee. The employee's wage statement must differentiate between other paid sick leave and Supplemental COVID-19 Paid Sick Leave.

By March 29, 2021, the effective date of SB 95, employers are required to display the "2021 COVID-19 Supplemental Paid Sick Leave" [model poster](#) in a conspicuous place in the workplace. Disseminating notice electronically when an employer's covered employees do not frequent a workplace will also satisfy this requirement.

### **Interaction with Cal/OSHA Pay Continuation Requirement**

As a reminder, California employers are still obligated under the California Division of Occupational Safety and Health ("Cal/OSHA") Emergency Temporary Standards to continue employees' pay for certain COVID-19 workplace exclusions. (For more information, please see our previous *Act Now Advisory* [here](#).) The DLSE has confirmed that Supplemental COVID-19 Paid Sick Leave may be used toward this obligation ([DLSE FAQ #26](#)). Consequently, if an employer provided employees with Cal/OSHA exclusion pay during 2021 (that was not covered by other pay, such as vacation, the previous California Supplemental COVID-19 Paid Sick Leave law, or other sick leave), there may be an offset available toward the Supplemental COVID-19 Paid Sick Leave obligation.

### **What California Employers Should Do Now**

- Assess policies, payroll practices, and records to ensure readiness for compliance as of March 29, 2021.
- Prepare standards and processes for calculating, processing, and timely paying Supplemental COVID-19 Paid Sick Leave.
- Prepare for the wage statement obligation by determining how much Supplemental COVID-19 Paid Sick Leave employees have available, taking into account their schedules and any offsets for previously provided COVID-19-specific paid sick leave.

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