
Here We Go Again – California Legislature Mandates Another Round of COVID-19 Supplemental Paid Sick Leave

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Employers hoping for relief from COVID-19 cost burdens will be disappointed yet again. Today, Governor Newsom signed SB 114 requiring employers with 26 or more employees to provide another round of COVID-19 supplemental paid sick leave (“COVID SPSL”). This round is retroactive to January 1, 2022 and extends through September 30, 2022. Unfortunately, with this round employers do not benefit from overlapping federal employment tax credits to offset the cost of COVID SPSL.¹

COVID-19 Supplemental Paid Sick Leave

Effective January 1, 2022, SB 114 provides up to 80 hours of supplemental paid sick leave to employees who are unable to work or telework because of qualifying COVID-19 related reasons through September 30, 2022. (Labor Code § 248.6.) SB 114 applies to all employers with 26 or more employees. Unlike prior rounds of COVID SPSL, this time there are **no exemptions** for employees who are health care providers or emergency responders.

Qualifying Reasons for COVID-19 Supplemental Paid Sick Leave

When unable to work or telework between January 1, 2022 and September 30, 2022, employees can use COVID SPSL for the following qualifying reasons.² While similar to earlier COVID-19 supplemental paid sick leave, this round contains some key distinctions, noted in bold below.

1. The employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidance of the California Department of Public Health (“CDPH”), or a local public health officer who has jurisdiction over the workplace. If more than one order or guidance applies, the employee is permitted to use COVID SPSL for the longest minimum quarantine or isolation period provided.

- **NOTE:** Absent more restrictive quarantine orders from local jurisdictions, CDPH guidance currently controls the quarantine period for the workplace under the Cal/OSHA ETS.

¹ Pursuant to SB 113, the legislature separately reinstated some business tax deductions to help defray the cost to employers. For more information, contact your CPA or Boutin Jones tax attorneys.

² If an employee is using COVID SPSL at the time it expires on September 30, 2022, the employee must be permitted to take the full amount to which they would have otherwise been entitled.

2. The employee has been advised by a health care provider to isolate or quarantine due to COVID-19.

3. The employee is attending an appointment for themselves **or a family member**³ to receive a vaccine or a vaccine booster.

4. The employee is experiencing symptoms **or caring for a family member who is experiencing symptoms** related to a COVID-19 vaccine or vaccine booster.

- **NOTE:** An employer may limit COVID SPSL to three (3) days or 24 hours for each vaccination or booster, unless the employee provides verification from a health care provider that the employee or their family member is continuing to experience symptoms related to a COVID-19 vaccine or booster. This limitation includes the time taken to obtain the vaccine or booster.

5. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

6. The employee is caring for a family member who is subject to a quarantine or isolation period as described in Reasons #1 and #2 above.

7. 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 (i.e., an on-site exposure or outbreak which results in closure or lack of availability).

Total Hours of COVID-19 Supplemental Paid Sick Leave Available to Employees

While employees may be entitled to up to 80 hours of COVID SPSL for this round, that total is split into two potential installments. For example, the law requires employers to provide 40 hours to full-time employees for the reasons identified above. However, a full-time employee who tests positive or who has a family member who tests positive is entitled to use up to another 40 hours of COVID SPSL, subject to certain documentation requirements discussed in more detail below.

Full-Time Employees

Full-time employees are entitled to 40 hours of COVID SPSL. SB 114 defines the following employees as full-time:

1. Those whom the employer considered to be full-time; or
2. Those who were scheduled to work, on average, at least 40 hours per week in the two (2) weeks preceding the date the COVID SPSL is taken.

³ “Family member” is defined as the employee’s child (biological, adoptive, foster, stepchild, legal ward or child to whom the employee stands in loco parentis), regardless of age or dependency status; parent (biological, adoptive, foster, stepparent, legal guardian, or person who stood in loco parentis) of the employee, their spouse, or registered domestic partner; spouse/registered domestic partner; grandparent; grandchild; sibling.

Part-Time Employees

Employees who do not meet the definition of “full-time” above are entitled to COVID SPSL in an amount determined by their schedules:

1. If the employee has a set weekly schedule, the total number of hours the employee is normally scheduled to work for the employer ***for one (1) week***.
2. If employee’s scheduled hours vary from week to week, the employee is entitled to the following amount of COVID SPSL:
 - a. *Employees employed for six (6) months or more*: seven (7) times the average number of hours worked each day in the six (6) months preceding the use of COVID SPSL.
 - b. *Employees employed for less than six (6) months, but more than seven (7) days*: seven (7) times the average number of hours worked during their entire employment.
 - c. *Employees employed for fewer than seven (7) days*: the total number of hours worked for the employer.

NOTE: This calculation could result in some part-time employees being entitled to more COVID SPSL than full-time employees initially. However, the overall cap of 80 hours applies equally to all employees.

Firefighters⁴

Firefighters may be eligible for more than 40 initial hours of COVID SPSL in some circumstances. A firefighter scheduled to work more than 40 hours in the workweek immediately before using COVID SPSL is entitled to an amount of COVID SPSL equal to the total number of hours the firefighter was scheduled to work in that workweek.

For example, if a firefighter was scheduled to work 56 hours one week and requested COVID SPSL the following week, that firefighter is entitled to 56 hours of COVID SPSL.

Additional COVID SPSL for Employees or Family Members Who Test Positive

As noted above, an employee is entitled to additional COVID SPSL where: (i) an employee tests positive for COVID-19; or (ii) the employee’s family member for whom the employee is providing care tests positive for COVID-19. This second installment of COVID SPSL is equal to the amount to which the employee was initially entitled.

⁴ This applies to firefighters working for a city, county, city and county, district, or other public or municipal corporation or political subdivision, the University of California and California State University, Department of Forestry and Fire Protection, a county forestry or firefighting department or unit, fire department serving a U.S. Department of Defense installation, a National Aeronautics and Space Administration installation, a commercial airport, and fire and rescue services coordinators working for the Office of Emergency Services.

For example, a full-time employee entitled to 40 hours of COVID SPSL would, upon testing positive for COVID-19, be entitled to another 40 hours, up to a maximum of 80 hours.

This second installment is subject to the following conditions:

1. An employer may (i) require the employee to take a diagnostic test on or after the 5th day after the date the initial positive test was taken; (ii) and provide documentation of those results. The test shall be at no cost to the employee;
2. An employer may require documentation of the family member's test results before paying the additional leave;
3. An employee does not have to exhaust the leave to which they are otherwise entitled before using this additional leave; and
4. Employers are not required to provide more than 80 hours of COVID SPSL between January 1, 2022 and September 30, 2022. However, there is no such cap for firefighters where the firefighter was scheduled to work more than 40 hours in the workweek preceding the use of COVID SPSL.

NOTE: An employer has no obligation to provide this additional equivalent amount of COVID SPSL if an employee refuses to take a COVID-19 diagnostic test or provide the results upon request when the test is both required to end quarantine and provided by the employer at no cost to the employee.

SB 114's COVID SPSL hours are in addition to leave required by California's paid sick leave law. Employers **cannot** satisfy their COVID SPSL obligations with any existing paid sick leave, vacation, or PTO accruals. Similarly, employers **cannot** require employees to first exhaust COVID SPSL before receiving paid leave under the Cal/OSHA ETS for workplace exposures.

Determining the Amount of COVID-19 Supplemental Paid Sick Leave Wages

The amount of COVID SPSL wages is similar to that provided last year, and depends upon the employee's status as an exempt or non-exempt employee, subject to a cap.

Non-Exempt Employees

Each hour of COVID SPSL must be paid at one of the following rates:

1. Employee's regular rate of pay for the workweek in which the leave is used; OR
2. By dividing the employee's total non-overtime wages by the total non-overtime hours worked in full pay periods of the prior 90 days of employment, **except** if the employee is paid by piece, commission, or other method that uses all hours to determine the regular rate of pay, the non-overtime wages (i.e., excluding overtime premium) shall be divided by all hours.

Exempt Employees

COVID SPSL shall be calculated for exempt employees in the same manner as the employer calculates wages for other forms of paid leave time (e.g., sick, vacation, PTO).

Cap on COVID SPSL Wages

Employers may cap the COVID SPSL at \$511/day and no more than \$5,110 collectively for each employee, unless federal legislation is enacted which increases this amount.

Employee Wage Statements and COVID-19 Supplemental Paid Sick Leave

Effective for the first full pay period after February 19, 2022, SB 114 also requires employers to include the amount of COVID SPSL hours each employee has used in the applicable pay period on the employee's itemized wage statement.⁵ If the employee has used no COVID SPSL, the statement must list zero (0) hours.

NOTE: This is different from the original COVID supplemental sick leave law, which required employers to include the balance of leave available.

Employees Determine Use of COVID-19 Supplemental Paid Sick Leave

SB 114 gives employees discretion to determine how many hours of COVID SPSL to use, and an employer must make it available for immediate use upon oral or written request. An employer may not, therefore, require verification of the need for leave. However, there are limited exceptions, such as when documentation is required to substantiate COVID SPSL in connection with a positive test for the employee or the employee's family member or when an employee requests retroactive COVID SPSL, as discussed below.

Determining the Amount of COVID-19 Supplemental Paid Sick Leave Wages

Similar to last year's state and federal COVID-19 supplemental paid sick leave laws, SB 114 requires that COVID SPSL be paid to non-exempt employees at the highest wage rate of the following:

- Employee's regular rate of pay for the workweek in which the leave is used;
- By dividing the employee's total wages (not including overtime premium pay) by the total hours worked in full pay periods of the prior 90 days of employment; OR
- The applicable state or local minimum wage.

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

⁵ As with existing paid sick leave notice obligations, employers can satisfy this requirement either by including COVID SPSL on an employee's wage statement or by providing a separate writing on the same date regular wages are paid.

Employers may cap the COVID SPSL at \$511/day and no more than \$5,110 collectively for each employee.

Retroactive Application to Covered Leave Taken on or after January 1, 2022

SB 114 applies retroactively to January 1, 2022. Thus, if an employee was absent for a qualifying reason from January 1, 2022, the employer must make a retroactive payment on request of the employee. That amount of leave counts towards the employee's overall entitlement of this round of COVID SPSL.

Employers may require documentation of a positive COVID-19 diagnostic test if an employee requests retroactive payment of the COVID SPSL under the requirement to provide additional amounts of COVID SPSL when an employee has exhausted all available COVID SPSL and is seeking the additional benefits because of a positive COVID-19 test.

Credit Available for Employers Who Provided Supplemental COVID-19 Benefits

Employers who (i) provided paid time off for COVID-19 reasons as a supplemental benefit (i.e., **not** under existing sick leave, vacation, PTO, or Cal/OSHA ETS exclusion pay) from January 1, 2022 through the effective date of February 19, 2022; and (ii) provided it at a value equivalent to or greater than the \$511/day cap above, can count the hours of this benefit toward the number of hours of COVID SPSL the employer is required to provide.

Employee Notice Requirement

Employers are also required to provide an updated notice, which will be provided by the Labor Commissioner by February 26, 2022. The notice should be posted with other workplace notices or provided electronically.

Boutin Jones attorneys are available to assist employers on compliance with, and to answer any other questions regarding these new laws or other related COVID-19 employment laws. Please contact an attorney in our Employment Law Group by phone at (916) 321-4444 or via email:

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