
Employment and Labor Law Alert

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California's Senate Bill 95 and the Federal American Rescue Plan Act (ARPA): COVID-19 Supplemental Paid Sick Leave Obligations and Federal Payroll Tax Credits

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As the COVID-19 pandemic continues, both the California Legislature and United States Congress have recently passed legislation to address the impacts of COVID-19 in the workplace. California's Senate Bill 95 (SB 95) requires employers to provide up to an additional 80 hours of supplemental paid sick leave for COVID-19 related reasons from January 1, 2021 through September 30, 2021.

At the federal level, Congress passed the American Rescue Plan Act (ARPA) COVID-19 stimulus bill. ARPA provides payroll tax credits for employers who voluntarily provide COVID-19 related paid sick leave from April 1, 2021 through September 30, 2021 – some of these tax credits can be used for the mandatory supplemental paid sick leave provided by SB 95. In addition, ARPA also requires employers to provide a 100% subsidy for an employee's COBRA/Cal-COBRA health insurance continuation costs for certain qualifying reasons between April 1, 2021 and September 30, 2021.

Below is a summary of these new laws and their impacts on California employers.

SB 95 COVID-19 Supplemental Paid Sick Leave

Effective March 29, 2021, SB 95 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 between January 1, 2021 and September 30, 2021. (Labor Code § 248.2.) SB 95 applies to all employers with more than 25 employees, and there are *no exemptions* for employees who are health care providers or emergency responders.

Qualifying Reasons for COVID-19 Supplemental Paid Sick Leave

Employees can use COVID-19 supplemental paid sick leave for the following reasons when they are unable to work or telework between January 1, 2021 and September 30, 2021. These reasons are largely consistent with the Families First Coronavirus Response Act (FFCRA), with some notable differences highlighted below in **bold text**:

1. 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. If more than one order or guideline applies, the employee is permitted to use COVID-19 supplemental paid sick leave for the longest minimum quarantine or isolation period provided.

- “**Guidelines**” from CDPH, CDC or other local health officers now provide a basis for use of this paid leave – including the longest period provided where such guidelines contradict. For example, while the current CDPH guidelines recommend that individuals who return from travelling to other states or countries should self-quarantine for 10 days¹, the CDC guidelines recommend a 10-day quarantine following any “travel” without a more specific definition of that term.² Employers will need to monitor changes in these guidelines to ensure compliance.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 3. **The employee is attending an appointment to receive a vaccine for protection against contracting COVID-19.**
 4. **The employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.**
 5. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 6. The employee is caring for a family member (child, parent, parent-in-law, spouse, registered domestic partner, grandparent, grandchild, or sibling) 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.**
 - SB 95 adds the additional qualifier “**on the premises**”. Although not entirely clear, this appears to indicate that the reason for the closure is based on COVID-19 being present at the school or child care – as would be in the case of an on-site exposure.

Employees Determine Use of COVID-19 Supplemental Sick Leave

SB 95 gives employees discretion to determine how many hours of COVID-19 supplemental paid sick leave 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.

¹ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Travel-Advisory.aspx>.

² <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html>.

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

For employees who the employer considers to be full-time or who were scheduled to work on average at least 40 hours per week in the two weeks preceding the date COVID-19 supplemental paid sick is taken, SB 95 provides up to 80 hours of COVID-19 supplemental paid sick leave.

For employees who are less than full-time, the total amount of COVID-19 supplemental paid sick leave hours provided is determined by one of the following:

1. The total number of hours the employee is normally scheduled to work during a two week period; OR
2. Where the employee's scheduled hours vary from week to week, the total number of leave hours are calculated as follows:
 - a. Employed for Six Months or More: 14 times the average number of hours worked each day in the six months preceding the use of supplemental paid sick leave
 - b. Employed Less Than Six Months, But At Least 14 Days: 14 times the average number of hours worked each in entire time period employed.
 - c. Employed Less Than 14 Days: The total number of hours worked for the employer.

The number of supplemental paid sick leave hours available to firefighters under SB 95 is calculated based on the number of scheduled work hours over a two-week period preceding the use of supplemental paid sick leave.

SB 95's COVID-19 supplemental paid sick leave hours are in addition to any other paid sick leave, vacation, or paid time off already provided to the employee. Therefore, an employer cannot generally use an employee's existing paid sick leave, vacation, or paid time off accruals to satisfy SB 95's COVID-19 supplemental paid sick leave obligation.

However, an employee's entitlement is reduced by any **separate** supplemental paid leave benefits provided on or after January 1, 2021, for one of the qualifying reasons under SB 95. This includes supplemental paid sick leave provided to employees excluded from the workplace due to COVID-19 exposure under Cal/OSHA's Emergency Temporary Standards Regulations or provided under the voluntary extension of FFCRA benefits through March 31, 2021.

Employee Wage Statements and COVID-19 Supplemental Sick Leave

Commencing on the first full pay period after March 29, 2021, SB 95 also requires that the employee's available COVID-19 supplemental paid sick leave hours be noted on the employee's itemized wage statement separately from other paid sick leave. Where an employee's hours vary due to a variable schedule, an employer can provide an initial calculation of hours to note on the itemized wage statement with the notation "*(variable)*" and then update the calculation later.

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 95 requires that COVID-19 supplemental paid sick 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-19 supplemental paid sick leave in the same manner as the employer calculates wages for other forms of paid leave.

Employers may cap the COVID-19 supplemental paid sick leave at \$511/day and no more than \$5,110 collectively for each employee.

Retroactive Application to Covered Leave Taken on or After January 1, 2021

SB 95 applies retroactively to January 1, 2021. Thus, if an employee took leave for a qualifying reason from January 1, 2021, and the employer did not already provide them with COVID-19 supplemental sick leave, the employer must make a retroactive payment on request of the employee. That amount of leave counts towards the employee's overall COVID-19 supplemental paid sick leave entitlement.

Employee Notice Requirement

Employers are also required to provide an updated notice, which will be provided by the Labor Commissioner by March 26, 2021. The notice should be posted with other workplace notices or emailed to employees working remotely.

ARPA COVID-19 Payroll Tax Credits for Employer Provided Paid Leave and COBRA/Cal-COBRA Subsidies

Effective April 1, 2021 through September 30, 2021, ARPA extends and expands payroll tax credits for providing paid leave for certain COVID-19 related reasons and provides qualified individuals a COBRA/Cal-COBRA subsidy to cover health insurance premiums.

Expansion and Continuation of Tax Credits for Voluntarily Providing FFCRA Paid Leave

ARPA extends the ability for employers to receive federal payroll tax credits **for voluntarily providing EPSL and EFMLA paid leave** from April 1, 2021 through September 30, 2021 in the following manner:

- Resets payroll tax credits for up to an additional 80 hours of EPSL and up to 12 weeks of EFMLA used by an employee during this time period;
- The use of EPSL and EFMLA by an employee now applies to all of the previous six EPSL reasons under the FFCRA and for the following three new reasons:
 1. Seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and such employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis;
 2. Obtaining immunization related to COVID-19; or
 3. Recovering from any injury, disability, illness, or condition related to such immunization
- The payroll tax credit for EPSL is still limited to an employee's regular rate of pay up to \$511/day (\$5,110 total) for an employee's own illness or quarantine, and 2/3 of an employee's regular rate of pay up to \$200/day (\$2,000 total) for use of leave to care for others. Under EFMLA, the maximum amount of wages that can be claimed for the payroll tax credit is \$12,000.
- The payroll tax credits for the voluntarily providing EPSL/EFMLA paid leave under ARPA is now applicable to state and local government public employers.
- The payroll tax credits **will not** be provided to an employer who discriminates in favor of highly compensated employees, full-time employees, or on the basis of tenure in determining how to voluntarily provide EPSL/EFMLA.

These ARPA payroll tax credits for COVID-19 may therefore apply to COVID-19 supplemental paid sick leave provided to employees under California's new SB 95 law. Employers should consult with their tax professionals for further guidance in this regard.

New Temporary COBRA Health Insurance Subsidy for Qualified Individuals

ARPA also provides a temporary 100% subsidy for COBRA/Cal-COBRA health insurance premiums from April 1, 2021 through September 30, 2021 for qualified individuals who are eligible for COBRA/Cal-COBRA coverage based on an involuntary termination of employment or reduction in hours. A qualified individual no longer is eligible for this temporary subsidy upon obtaining other group health coverage, or in the case of voluntary termination of employment.

This subsidy does not otherwise extend an individual's overall COBRA eligibility timeline. Qualified individuals – including those who previously declined or dropped COBRA coverage prior to April 1, 2021 – will have a new 60-day election period beginning April 1, 2021 to elect COBRA/Cal-COBRA coverage.

Employers will receive a corresponding federal payroll tax credit to cover the cost of the subsidy. This subsidy applies to a wide variety of health plans subject to COBRA/Cal-COBRA health insurance continuation benefits, including insured plans, self-funded plans, multi-employer plans and governmental employer plans, though requirements may vary by type of plan. ARPA also requires updated COBRA notices be provided to qualified individuals no later than May 31, 2021, and model notices should be issued by the Department of Labor (DOL) in the near future. Employers should contact their health insurance providers and any applicable third party administrators to ensure compliance with ARPA's temporary COBRA/Cal-COBRA subsidy.

Takeaways for Employers from SB 95 and ARPA

- Review existing practices and policies to ensure that SB 95's new COVID-19 supplemental paid sick leave is provided beginning on March 29, 2021.
- Audit leave of absence use by employees between January 1, 2021 and March 28, 2021 for qualifying COVID-19 reasons to prepare for any potential retroactive payments or to credit such use towards the supplemental paid sick leave requirement, where applicable.
- Update itemized wage statements to include COVID-19 supplemental paid sick leave.
- Provide the COVID-19 supplemental paid sick leave notice to employees by March 29, 2021.
- Consult with tax professionals regarding the application of federal payroll tax credits under ARPA.
- Review COBRA/Cal-COBRA notices and consult with health insurance providers and applicable third party administrators regarding ARPA's COBRA/Cal-COBRA subsidy.

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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