

BARSAMIAN & MOODY

A Professional Corporation

Attorneys at Law

1141 West Shaw Avenue, Suite 104

Fresno, California 93711-3704

Tel: (559) 248-2360

E-mail: laborlaw@theemployerslawfirm.com

Fax: (559) 248-2370

California 2022 COVID-19 Supplemental Paid Sick Leave Formally Enacted

On February 9, 2022 Governor Newsom signed the new 2022 COVID-19 Supplemental Paid Sick Leave (“SPSL”) in to law. The full text of the legislation, referred to as SB 114, which is a mirror version of AB 84 which we previously reported on, can be found [here](#). The new law becomes **effective February 19, 2022**, 10 days after enactment. Employee leave entitlement is **retroactive to January 1, 2022** and is set to **expire September 30, 2022**.

As we previously reported, the new law provides for COVID-19 supplemental paid sick leave for covered employees who are unable to work or telework due to certain reasons related to COVID-19. The new law applies to all employee who work in California for employers with 26 or more employees. The available leave comes in two different banks of leave: an initial bank of up to 40 hours for various qualifying COVID-19 reasons and a second bank of up to 40 hours for positive COVID-19 cases.

Up to 40 hours of SPSL is available when the employee is unable to report to the worksite or telework because:

- The employee is subject to quarantine or isolation related to COVID-19 as defined by an order or guidance of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local public health officer who has jurisdiction over the workplace;
- A health care provider has advised the employee to isolate or quarantine due to COVID-19;
- The employee is attending an appointment for their own, or a covered family member’s, vaccine appointment, including a booster vaccine;
- The employee is absent due to COVID-19 symptoms related to a vaccine or booster or to care for a family member experiencing symptoms related to a COVID-19 vaccine or booster;
- The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis;
- The employee is needed to care for a family member who is subject to an order, guidance, or advised to isolate or quarantine; **or**,
- The employee is needed to care for a child whose school or childcare facility is closed or unavailable due to COVID-19 on the premises.

For vaccine and booster related leave, an employer may limit the total SPSL to 3 days or 24 hours, including the time to receive the vaccine or booster, unless the employee provides verification from a health care provider that the covered employee or their family member is continuing to experience symptoms related to a COVID-19 vaccine or booster. This limit applies to each vaccine or booster related leave.

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Employees who test positive for COVID-19 or who are caring for a family member who tested positive for COVID-19 are eligible for additional SPSL, equal to the amount of leave entitlement they had for the initial bank of SPSL, up to 40 hours. The initial bank of leave does not have to be exhausted before an employee is entitled to use the additional bank of leave.

Under the SPSL law, a qualifying family member includes a child (biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis, regardless of age or dependency status), parent (biological, adoptive, foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child), spouse, registered domestic partner, grandparent, grandchild, or sibling.

In order to calculate the leave entitlement, employers must look at the employees status as full-time or part-time employment and the hours worked. Full-time employees, or those who have worked or were scheduled to work, on average at least 40 hours per week during the preceding two weeks, are entitled to 40 hours of SPSL. Part-time employees are entitled to SPSL based on the total number of hours the employee is normally scheduled to work during one week, or if that number varies, then seven times the average number of hours worked each day for the employer in the six months preceding the first date of leave. If the employee works a variable number of hours per week and has worked seven days or less for the employer, then the employee is entitled to 2022 SPSL for the same number of hours worked for the employer. The maximum available SPSL is 80 hours.

A common question we receive is how the SPSL will interact with the Cal/OSHA Emergency Temporary Standard ("ETS") Exclusion Pay. The ETS requires employers to pay exclusion pay under certain circumstances where an employee is excluded from work due to a workplace COVID-19 exposure. Previously, employers could require exhaustion of SPSL before paying exclusion pay. Under the new law, employers may not require exhaustion of SPSL before paying exclusion pay. This means that employees may be excluded for the duration of the exclusion period with pay and maintain their full entitlement to SPSL.

Employers must make the SPSL available to employees immediately upon request, however, under certain circumstances documentation may be requested to determine eligibility for leave. This includes employee requesting retroactive payment of SPSL. Employers may request documentation under the following circumstances:

- First category of leave:
 - If the employee requires more than 3 days or 24 hours for recovery, their own or a family member they are caring for, from post-vaccine and booster symptoms, **the employee must provide verification from a health care provider that the covered employee or their family member is**

continuing to experience symptoms related to a COVID-19 vaccine or vaccine booster beyond that time.

- Second category of leave:
 - If the employee tested positive, the employer **may require the employee to submit to a diagnostic test**, at no cost to the employee, on or after the fifth day after the initial positive test was taken **and provide documentation of those results**.
 - If the family member tested positive, the employer may require that the employee provide documentation of that family member's test results before paying the additional leave.
 - **NOTE:** The employer has no obligation to provide additional SPSL under the second category of leave for an employee who refuses to provide documentation of the results of the initial positive test upon the request of the employer.

Employers should be preparing their payroll department to be able to determine the correct compensation rate for SPSL. For exempt employees, it is calculated the same as "wages for other forms of paid leave time." For non-exempt employees, the SPSL is calculated either: (1) in the same manner as the regular rate of pay for the workweek that the employee uses sick time; or (2) by dividing the employee's total wages, not including overtime premium pay, by the employee's total non-overtime hours worked in the full pay periods occurring within the prior 90 days of employment. If the employee is paid by piece-rate or commission, then the total wages, not including overtime premium pay, should be divided by all hours worked. Just like the prior SPSL, the law provides for a cap of \$511 per day and \$5,110 in the aggregate to a covered employee.

Likewise, payroll systems will need to be updated to ensure compliance with the paystub requirements, including a line item showing the number of used SPSL hours. Thus, if an employee has not yet used any leave, their statement must list "zero." SPSL should not be combined with regular paid sick leave benefits. Finally, the actual SPSL paid for a pay period, should be listed as a separate line item from the regular hours paid to an employee during a pay period. These paystub requirements take effect the next full pay period following February 19.

What This Means for Employers:

Prepare your personnel to address SPSL questions and SPSL pay requests next week. Employers should monitor the Labor Commissioner's website for the model notice which the Labor Commissioner is required to release this week and to answers to Frequently Asked Questions (FAQ) for the 2022 SPSL. Employers should also complete an audit to determine if any pay for previous absences this year were for reasons that qualify under the new law, as again, the law is retroactive. Further, if you paid COVID-19 sick leave for prior absences this year, that may well partially or wholly satisfy the SPSL obligations; i.e., city or county ordinances for paid COVID-19 sick or vaccine leave, or company policy that provided COVID-19 sick leave. Keeping in mind that the pay must

have been *supplemental*, so the regular 3 days / 24 hours of paid sick leave under California's Healthy Workplaces, Healthy Families Act does not satisfy this requirement. In fact, employers may receive requests that if paid sick leave was used to cover a qualifying absence, that the employer apply SPSL to that absence and that the paid sick leave time be credited back.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.