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New California COVID-19 Supplemental Paid Sick Leave

California's legislature has just approved new supplemental paid sick leave relating to COVID-19, Senate Bill 95 ("SB"), and Governor Newsom is expected to sign the bill into law in the coming days. SB 95 seeks to bridge the gap between the various supplemental sick leave benefits enacted last year in response to COVID-19, the main ones which expired December 31, 2020. In reality, the new law overly extends the expired supplemental sick leave laws applying **retroactively** to more employers and for broader qualifying reasons. We are summarizing some of the most important information about SB 95, the full text of which can be read [here](#).

Do I have to comply if I run a small business?

Yes, employers with **25 or more employees** are covered by SB 95. California's last supplemental paid sick leave law only applied to companies with more than 500 employees in the US. This is a huge expansion.

What reasons qualify an employee for leave under this law?

While many employers will be familiar with the reasons for leave under last year's laws, this new bill expands the qualifying reasons for leave. An employee who is unable to work *or telework* for an employer is entitled to leave under this new law for any of the following reasons:

1. The employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guideline of the California Department of Health (CDPH) ([COVID-19 Quarantine \(ca.gov\)](#)), Centers for Disease Control and Prevention (CDC) ([COVID-19: When to Quarantine | CDC](#)), or a local health officer with jurisdiction over the workplace.
2. The employee is 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 against COVID-19.
4. The employee is experiencing symptoms related to the COVID-19 vaccine that prevents the employee from being able to work.
5. The employee is experiencing COVID-19 symptoms *and is seeking a medical diagnosis*.
6. The employee is caring for a family member who is subject to quarantine or isolation order or guideline of the CDPH, CDC, local health officer or health care provider. Family member includes: spouse; registered domestic partner; grandparent; grandchild; sibling; child regardless of age or dependency status including biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis; and a parent, including biological,

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adoptive, foster parent, stepparent, or legal guardian of an employee or employee's spouse or domestic partner, or person who stood in loco parentis when the employee was a minor child.

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.

How much leave is available?

Employees that are considered "full time" or employees who worked or were scheduled to work on average, at least 40 hours per week during the two weeks preceding the date the employee began leave are entitled to **80 hours of COVID-19 supplemental paid sick leave**.

Employees who did not qualify for the full 80 hours are still entitled to leave in a **pro rata** amount to be determined using various calculations based upon the number of hours worked. An employee who has a normal weekly schedule is entitled to paid leave hours equaling the total number of hours they are normally scheduled to work over two weeks. An employee who works a variable number of hours is eligible for leave time equal to 14 times the average number of hours the employee worked each day in the six months before the leave date, or if having worked less than six months, using average hours worked each day over the entire period of employment.

Employees who used supplemental COVID-19 sick leave last year are entitled to a full new allotment of supplemental paid sick leave for 2021 under SB 95.

At what rate is the leave paid?

For exempt employees, supplemental paid sick leave should be calculated in the same manner as the employer calculates wages for other forms of paid leave time. For non-exempt employees, the paid sick leave shall be paid at the highest of the following rates:

1. The regular rate of pay for the workweek in which the employee uses COVID-19 supplemental paid sick leave, whether or not the employee actually works overtime in that workweek;
2. The rate calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment;
3. The state minimum wage; or
4. The local minimum wage.

This supplemental paid sick leave is capped at \$511.00 per day and \$5,110.00 in the aggregate unless federal legislation increases these amounts.

The leave bank must be shown on the check stub, separate and apart from regular paid sick days. This requirements starts on the next full pay period after the law takes effect. If the pay is based on variable hours or part-time hours, the employer can initially note that by indicating "variable" on the check stub. But, when an employee requests to use leave, the employer must update the calculation.

What about other paid sick time or Cal/OSHA exclusion pay?

An employer shall not require a covered employee to use any other paid or unpaid leave, paid time off, or vacation time provided by the employer to the covered employee before the covered employee uses COVID-19 supplemental paid sick leave, or in lieu of COVID-19 supplemental paid sick leave. However, employees who are excluded from the workplace due to COVID-19 exposure under the Cal/OSHA COVID-19 Emergency Temporary Standards may be required to exhaust their COVID-19 supplemental paid sick leave under this new law prior to receiving any exclusion pay.

If an employer pays employees another supplemental benefit (such as leave under a local ordinance, the ETS, or federal law) for leave payable for the same qualifying reasons under this law which is equal to or greater than the amount owed under this law, then the employer may count the hours of paid benefit or leave toward the total number of hours the employee would have been entitled to under this law. Note that there are qualifying reasons under this new law that were not qualifying reasons under the ETS, so you may have to go back and reconsider where such leave should be paid under this law.

For what period of time does COVID-19 supplemental paid sick leave apply?

While this law does not take effect until 10 days after it is signed by the Governor, once enacted, it has a retroactive reach. The law will apply retroactively to January 1, 2021 and will expire September 20, 2021.

An employee may request (either orally or in writing) and be paid retroactive payment for qualifying leave taken between January 1, 2021 and effective date of this law, that was not compensated by the employer in an amount equal to or greater than required by this law. The number of hours paid retroactively count toward the total number of hours available to the employee.

Obviously, this creates an extreme burden on employers who did not meticulously track the reason for every employee absence since January 1, 2021. Expect that many employees will be asking for retroactive pay, and that you will have to try to determine if they are eligible or not. In light of the fact that plaintiff's attorneys will be looking to file lawsuits over this issue, it will be better to err on the side of caution in this issue.

The new law is set to expire by its own terms on September 30, 2021, but an employee who is out on paid leave as of that date is entitled to continued pay until the end of the leave.

What This Means for Employers:

Supplemental paid sick leave will become available to employees 10 days following the enactment of the law, which is expected in the coming days. Just like last year, employees must request to use their COVID-19 sick leave, either orally or in writing. Employers should have a policy in place for employees to request use of their COVID-19 supplemental paid sick leave. Employers should familiarize themselves with the new qualifying reasons for leave. Employers should also ensure that they update their payroll

software to include on the paystub the COVID-19 supplemental paid sick leave separately from regular paid sick days.

Once enacted, employers are required to post a notice to employees of the law and the availability of supplemental paid sick leave in a conspicuous place, we recommend the same location as your other required postings such as a breakroom or handwashing station. The Labor Commissioner will make a model notice available shortly after the law is enacted.

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.