

Alert | Labor & Employment



March 2021

Statewide COVID-19 Paid Sick Leave Returns to California

On March 19, 2021, Gov. Gavin Newsom signed **SB 95** into law, once again requiring employers to provide California employees with paid sick leave in connection with COVID-19. Under SB 95, employees may be entitled to up to 80 hours of this supplemental paid sick leave. The new law, codified at Labor Code § 248.2, is similar to the 2020 COVID-19 supplemental paid sick leave laws for food sector and non-food sector workers, but it significantly expands benefits to employees, and will impact hundreds, if not thousands, more employers than last year's laws.

This GT Alert provides a summary of SB 95, the new COVID-19 supplemental paid sick leave law, taking into account the recently-issued "**2021 COVID-19 Supplemental Paid Sick Leave FAQs**" issued by the DLSE (FAQs).

When and for how long is the law effective? The law goes into effect immediately and is retroactive to Jan. 1, 2021 (as explained in further detail below), but it provides a grace period until March 29 – in other words, employers do not need to begin providing COVID-19 supplemental paid sick leave until after March 29. The law expires on Sept. 30 (but paid leave may extend into early October 2021 as long as the employee *starts* leave on or before Sept. 30).

Which employers are covered? The new law applies to employers (*other than* in-home supportive services providers, who are instead subject to Labor Code § 248.3¹) with more than 25 employees, but it does not specify whether all of those employees must be based in California.

What are reasons for which employees can use COVID-19 supplemental paid sick leave?

Employees are eligible for paid leave if they are unable to either (1) work or (2) telework for any of the following reasons:

- They are subject to, or must care for a family member who is subject to, a quarantine or isolation period related to COVID-19, as defined by an order or guidelines of the State Department of Public Health, CDC, or a local health officer with jurisdiction over the workplace.
- They have been advised by a health care provider to self-quarantine due to COVID-19-related concerns, or they need to care for a family member who has been so advised.
- To attend an appointment to receive a COVID-19 vaccine.
- They are experiencing symptoms after receiving the COVID-19 vaccine.
- They are experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- They are 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 paid leave are employees entitled to? The entitlement depends on the employee's classification and, in some cases, work schedule and length of service with the employer.

The 80-hour entitlement is available for employees considered full-time by their employer or who worked (or were scheduled to work) an average of at least 40 hours per week in the two weeks prior to the date they started taking COVID-19 supplemental paid sick leave.

For employees who do not meet that criteria, the entitlements vary as follows:

- employees with a *normal* weekly schedule are entitled to an amount equal to the total number of hours the employee is normally scheduled to work for that employer in a two-week period.
- employees with a *variable* weekly schedule are entitled to an amount that varies by their length of service:
 - those who have worked for the employer for 14 days or fewer are entitled to an amount of leave equal to the total number of hours they have worked for the employer. For example, an employee on her fourteenth day of employment who has worked 20 aggregate hours to that point is entitled to 20 hours of leave.
 - those who have worked for the employer for more than 14 days but less than six months are entitled to 14 times the average number of hours worked each day for the duration of their employment. For example, an employee having completed 115 days of employment who has worked 250 aggregate hours is entitled to 30.38 hours of leave. (250 hours / 115 days = 2.17 hours; 2.17 x 14 = 30.38 hours of leave.)

¹ The law applicable to in-home supportive services providers is not discussed in this GT Alert, although many of its provisions are identical or similar to those of SB 95.

- those who have worked for the employer for at least six months are entitled to 14 times the average number of hours worked each day in the six months preceding the date they started taking leave. For example, an employee who worked 520 hours in the preceding six months (in this example, 182 days), is entitled to 40 hours of leave. (520 hours / 182 days = 2.857 hours; 2.857 hours x 14 = 40 hours.) See FAQ No. 14.

Employees have the right to determine how many hours of COVID-19 supplemental paid sick leave to use (up to the maximum amount to which they are entitled).

What about employees who took/take leave for one of the covered reasons between Jan. 1 and March 28? This is a confusing area of the new law, but fortunately one that the DLSE has attempted to clarify – at least somewhat – in its FAQs. The law indicates that employees who took leave without pay between Jan. 1 and March 28 are entitled to receive retroactive pay for that leave. Per the FAQs, retroactive pay is *only* required if an employee makes an oral or written request to be compensated, and if the employee’s absence was for a qualifying reason. This retroactive pay must be provided on or before the payday for the next full pay period after the employee’s request, and it must be reflected on the wage statement for that pay period. The FAQs state that if an employer paid an employee for leave taken for a qualifying reason, but at a rate that was less than what is required under the new law, that employer can voluntarily (i.e., in the absence of an employee’s oral or written request) make a retroactive payment to make up the difference between what was paid and what is required under law, and then adjust the employee’s COVID-19 supplemental paid sick leave balance accordingly.

While the law and FAQs are silent on how employers should proceed in the case of any employee who took leave and used paid sick leave, vacation, or PTO, presumptively those hours would be reinstated, with the hours taken instead from the employee’s COVID-19 supplemental paid sick leave balance.

How does this new law interact with...

- *California’s 2020 COVID-19 supplemental paid sick leave laws?* The new law is in addition to any supplemental paid sick leave provided in other 2020 paid sick leave entitlements. In other words, employees who received 80 hours of COVID-19 supplemental paid sick leave in 2020 and qualify for leave under the new law are entitled to up to 80 hours *again*.
- *California’s non-COVID (“standard”) paid sick leave law?* An employee is entitled to both COVID-19 supplemental paid sick leave and standard paid sick leave. However, as described above, employers may have an obligation to reinstate paid sick leave (or PTO provided to comply with the sick leave law) that employees used between Jan. 1 and March 28, if those employees are entitled to retroactive COVID-19 supplemental paid sick leave for that period.
- *local COVID-19 paid sick leave entitlements and/or company-paid leaves?* If an employer (1) provides employees with paid leave (either pursuant to company policy or any federal or local law in effect or that went into effect on or after Jan. 1, 2021) for a reason that is also a covered/qualifying reason for leave under the new law, and (2) pays out that leave at a rate that is at least as much as the employee would be entitled to under the new law, those hours will satisfy (or “offset”) the employer’s state law obligation. Otherwise, the employer would either need to provide additional leave or supplement the employee’s pay to an amount that complies with the new law.
- *the Cal-OSHA Emergency Temporary standards requiring employers to “maintain an employee’s earnings” when an employee is excluded from the workplace due to COVID-19 exposure?* When an employee is excluded from the workplace under these standards, employers may require an employee

to exhaust COVID-19 supplemental paid sick leave before the employer must pay to “maintain” the employee’s earnings.

Can employers require advance notice of requested leave or documentation to prove the employee’s eligibility? Generally, no. Employers must make COVID-19 supplemental paid sick leave available for immediate use upon the employee’s oral or written request, and there is no provision in the law addressing an employer’s right to request or require documentation. The FAQs do, however, state that “it may be reasonable in certain circumstances to ask for documentation before paying the sick leave when the employer has other information indicating that the covered employee is not requesting 2021 COVID-19 Supplemental Paid Sick leave for a valid purpose,” noting that the “reasonableness of the parties’ actions” will be relevant. For example, the FAQs suggest an employer may reasonably request documentation when an employee requests leave to comply with a local quarantine order or recommendation, and the employer later learns the employee was out at a park during the quarantine period.

What is the rate of pay? Non-exempt employees must be paid at the highest of four possible rates:

1. the employee’s regular rate of pay for the workweek in which COVID-19 supplemental paid sick leave is used (whether or not the employee actually works overtime in that workweek);
2. a rate calculated by taking the employee’s total wages, not including overtime premium pay, and dividing it 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. any applicable local minimum wage.

For exempt employees, paid leave is calculated at the same rate that the employer uses to calculate wages for other forms of paid leave time.

Additionally, an important provision for employers (that did not exist with the 2020 laws) is the maximum per-employee payments of \$511 per day and \$5,110 in the aggregate (unless federal legislation is enacted that increases these amounts, in which case they will be increased to align with federal law).

Is there a wage statement requirement? Similar to the 2020 law for non-food sector workers, the new law requires employers to state employees’ COVID-19 supplemental paid sick leave balance on wage statements, much like they are already doing for standard paid sick leave. The wage statement obligation will apply starting with the full pay period after the law’s effective date (March 19).

How do employers comply with the wage statement requirement for variable schedule employees (whose entitlement is subject to change)? The wage statement requirement in the 2020 law caused challenges for employers of variable schedule employees, since it seemed to require a recalculation of the available leave each pay period. Fortunately, the new law codifies prior Division of Labor Standards Enforcement (DLSE) guidance by providing that employers can calculate and report the employee’s initial entitlement on the wage statement and place the word “variable” next to it. Employers must still re-calculate the amount of leave available when the employee requests leave or access to relevant records under Labor Code § 247.5.

Are there notice or posting requirements for the new law? Yes. Employers are required to display [the state's model notice](#) in the workplace, and they can satisfy this requirement as to employees who do not frequent the workplace (e.g., employees working remotely) by providing an electronic copy of the notice.

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As with any new law, there will be new questions. The DLSE may continue to update its guidance, and it is of course possible that litigation over SB 95 may provide further answers.

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