

**SPECIAL ALERT: CALIFORNIA REINSTATES COVID-19 SUPPLEMENTAL PAID SICK LEAVE**  
**February 9, 2022**

Today California Governor Gavin Newsom will sign a budget bill (SB114) creating a new entitlement to supplemental paid sick leave (SPSL) for reasons related to COVID-19. The new law is similar to the prior SPSL law (AB84/SB95), which expired on September 30, 2021. (WTK's Special Update on the 2021 law can be found [here](#).) The bill will take effect in ten days – on **February 19, 2022**, but will apply retroactively to **January 1, 2022**, and will be effective through **September 30, 2022**.

This update only covers California's new state-wide COVID-19 SPSL. Employers should be sure to check for any other applicable local ordinances or regulations.

**Employers Required to Provide COVID-19 SPSL**

Like the 2021 law, the new law applies to California employers (as defined in Labor Code section 245.5(b)) who employ more than 25 employees.

**Employees Eligible for COVID-19 SPSL**

As with the 2021 SPSL law, this new law applies to any employee "who is unable to work or telework" for any of the specified qualifying reasons (discussed below). Notably, COVID-19 SPSL is immediately available to any eligible employee, whether they work remotely from home or work in the employer's place of business. Unlike the generally applicable statewide Paid Sick Leave law (Labor Code section 245), the employee need not have worked for 30 calendar days and need not wait 90 days before using COVID-19 SPSL.

**Reasons for Which COVID-19 SPSL May Be Used**

Employers must provide COVID-19 SPSL upon the oral or written request of the employee when an employee is unable to work or telework for any of seven specified reasons. These reasons largely parallel the 2021 law, with several changes underlined below:

- (A) The covered employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guideline of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer who has jurisdiction over the workplace (and if more than one of these applies, the employee is entitled to use the COVID-19 SPSL for the minimum quarantine or isolation period under the order or guidance that provides the longest such minimum period).
- (B) The covered employee has been advised by a health care provider to isolate or quarantine due to COVID-19.
- (C) The covered employee is attending an appointment for themselves or a family member (as defined under the statewide Paid Sick Leave law [Labor Code section 245.5]) to receive a vaccine or a vaccine booster for protection against contracting COVID-19, subject to limitation discussed in Paragraph D below. (This qualifying reason is broader than the 2021 law, as it now allows covered employees to take SPSL to attend vaccine appointments for family members and specifies that booster appointments are also covered.)

- (D) The covered employee is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine that prevent the employee from being able to work or telework.
- For each vaccination or booster, an employer may limit the total COVID-19 SPSL to 24 hours of leave 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 24-hour leave period includes both the time used to get the vaccine or booster and time experiencing symptoms from the vaccine.
  - *(This qualifying reason is broader than the 2021 law because it allows covered employees to take SPSL to care for a family member experiencing symptoms but also potentially narrower, because it imposes a new limit on the maximum amount of vaccine-related leave.)*
- (E) The covered employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (F) The covered employee is caring for a family member who is subject to an order or guidelines described in subparagraph (A) above or who has been advised to quarantine, as described in subparagraph (B).
- (G) The covered employee is caring for a child (as defined under the statewide Paid Sick Leave law [Labor Code section 245.5(c)]) whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

#### **Amount of COVID-19 SPSL Available to Employees**

While the 2021 law essentially provided two weeks of SPSL to covered employees, the new law basically provides one week of SPSL to all covered employees and a second “additional” week to employees who test positive for COVID-19 or provide care for a family member who tests positive.

First, all covered employees are entitled to an initial amount of COVID-19 SPSL, which essentially covers one week of work. As under the prior law, the specific amount of leave depends on whether the employee is full-time or works a different schedule:

- Covered employees are entitled to 40 hours of COVID-19 SPSL if (a) the employer considers the covered employee to work “full time,” or (b) the covered employee worked or was scheduled to work, on average, at least 40 hours per week for the employer in the two weeks preceding the date the worker took COVID-19 SPSL.
- *Other* covered employees are entitled to differing amounts of COVID-19 SPSL depending on the type of schedules they work and/or their length of service with the employer:
  - Covered employees with a normal weekly schedule are entitled to the total number of hours the covered worker is normally scheduled to work for the employer over a one-week period.
  - Employees with variable schedules are entitled to 7 times the average number of hours the employee worked each day for the employer in the six months preceding the date the worker took COVID-19 SPSL.

- For employees with variable schedules who have worked less than six months but more than 7 days, this calculation is made over the entire period the employee has worked for the employer.
- If the employee works a variable number of hours and has worked for the employer for 7 or fewer days, the employee will be entitled to the total number of hours worked for the employer.

Second, covered employees are entitled to **additional** COVID-19 SPSL in an amount not to exceed the amount discussed above (e.g., 40 hours for a full-time employee or the calculated amount for a part-time or variable-schedule employees) if the covered employee, or a family member for whom the covered employee is providing care, tests positive for COVID-19. An employer may require documentation of the positive test result before providing this additional leave; and an employer may require the employee to submit to a second diagnostic test five days after the employee's first positive test at no cost to the employee.

The employee **does not need to exhaust** the initial, generally applicable COVID-19 SPSL to which they are entitled before using **additional** leave provided in connection with positive test.

The **total maximum amount** of COVID-19 SPSL for each covered employee shall not exceed 80 hours for the period between January 1, 2022 and September 30, 2022 (except for certain firefighters).

Moreover, as under the prior law, **employees** determine how many hours of COVID-19 SPSL to use (up to their total entitlement), and employers must make the leave available upon oral or written request.

#### **Pay Rate for COVID-19 SPSL**

The new law provides standards for establishing the COVID-19 SPSL pay rate that are simpler than the 2021 law:

- Nonexempt employees: employer shall pay the SPSL at one of the following two rates:
  - Calculated in the same manner as the *regular rate of pay* for the workweek in which the covered employee uses COVID-19 SPSL, regardless of whether the employee worked overtime in that workweek, or
  - Calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's non-overtime hours worked in the full pay periods of the prior 90 days of employment, provided that for nonexempt employees paid by piece rate, commission, or another method that uses all hours to determine the regular rate of pay, total wages, not including overtime premium pay, shall be divided by all hours.
- Exempt employees: employer shall calculate the SPSL pay rate in the same manner as the employer calculates wages for other forms of paid leave time.

As with the prior laws, an employer need not pay more than **\$511 per day** and **\$5,110 in the aggregate** for each employee's COVID-19 SPSL usage. There are two caveats: First, these caps (which were originally copied from the federal Families First Coronavirus Response Act [FFCRA]) will automatically be raised to any new levels identified in federal legislation amending the FFCRA as of the date any such federal amendments take effect. Second, a covered employee who has reached the maximum dollar amount allowed under this law may utilize other available paid leave to fully compensate for leave taken.

### **Notice Requirements**

California's general Paid Sick Leave law requires that employers post in a conspicuous place specific information about the Healthy Workplace, Health Families Act. The new law—like prior SPSL laws—requires the Labor Commissioner to develop an updated model notice within seven days of the date the law is enacted and authorizes employers to provide this notice through electronic means, including email, for employees who do not frequent the workplace.

Furthermore, employers must provide **notice of the amount of COVID-19 SPSL an employee has used** within the employee's wage statement or a separate writing each pay period and must set forth COVID-19 SPSL separately from other paid sick days. The employer shall list zero hours used if an employee has not used any COVID-19 SPSL. This requirement will be enforceable the next full pay period following February 19, 2022, the date this law takes effect. *(This requirement is intended to be simpler than the 2021 rule, which required employers to calculate the amount of COVID-19 SPSL remaining rather than the amount used. Employers may wish to state "0 hours used" to reduce employee confusion.)*

### **Retroactivity of the New COVID-SPSL Entitlement**

The new COVID-19 SPSL law take effect on February 19, 2022, and applies retroactively to January 1, 2022.

If an employer paid a covered employee a supplemental benefit for leave taken after January 1, 2022 in an amount equal to or greater than that required under this new law for a reason that would qualify under this new law, then the employer may count the hours of the other benefit towards the total number of COVID-19-SPSL otherwise required under this new law. As under prior SPSL laws, this can include paid leave the employer provided pursuant to any federal or local law in effect or that became effective on or after January 1, 2022 if the leave was provided for one of qualifying reasons set forth in the law. However, the employer cannot take a credit for paid sick leave provided under California's generally applicable paid sick leave law.

If an employee took time off for a qualifying reason after January 1, 2022, and the employer did **not** compensate the employee in an amount at least equal to the amount required under this new law, then the employer must make a **retroactive payment upon the employee's oral or written request**, provided that the employer may require documentation of a positive test if the employee requests retroactive payment of the *additional* COVID-19 SPSL available when an employee or family member tests positive. The hours of leave corresponding to the amount of the retroactive payment shall count toward the hours of COVID-19 SPSL the employer is required to provide the covered employee.

Any retroactive payment must be made on or before the payday for the next full pay period after the employee's oral or written request and must be reflected on the itemized wage statement or other statement reflecting the amount of COVID-19 SPSL used.

### **Interaction with Other Paid Time Off**

As with prior SPSL laws, the employer cannot require the worker to use other paid or unpaid leave, paid time off or vacation provided by the employer before or in lieu of the worker using COVID-19 SPSL.

Furthermore (and different from the prior law), **employers may not require covered employees to first exhaust COVID-19 SPSL before satisfying any requirement to provide paid leave under the Cal-OSHA ETS or Cal-OSHA Aerosol Transmissible Diseases Standard**. The new COVID-19 SPSL law **does not limit** an employer's duties to comply with the Cal-OSHA COVID-19 Emergency Temporary Standards.

As noted above, this “supplemental” paid sick leave is *in addition to* the amount of paid sick leave provided under California’s currently existing statewide Paid Sick Leave law. Further, this new law allows employees to use the full amount of COVID-19 SPSL to which they are entitled in 2022, regardless of how much they may have used under prior laws in 2020 or 2021.

**End Date for New COVID-19 SPSL**

This new statewide law will remain in effect through September 30, 2022. However, as with prior SPSL laws, any employee who is taking COVID-19 SPSL when this law expires will be permitted to take the full amount of COVID-19 SPSL to which they otherwise would be entitled.

**Enforcement**

The remedies available to enforce “any unlawful business practice” are available to help enforce these new provisions. The Labor Commissioner is also authorized to enforce this new law as if COVID-19 SPSL constitutes “paid sick days,” “paid sick leave” or “sick leave” under various enumerated Labor Code sections governing the statewide Paid Sick Leave law (e.g., sections 246, 246.5, 247, 247.5 and 248.5),

**COVID-19 SPSL for “Firefighters” and In-Home Support Services Workers**

As with prior SPSL laws, this new law also enumerates slightly different amounts and guidelines applicable to “firefighters,” as defined. These firefighter-specific requirements are stated in the new Labor Code section 248.6, which also sets forth the more broadly applicable COVID-19 SPSL rules discussed above. Furthermore, the new law adds Labor Code section 248.7, which sets forth SPSL requirements applicable to “in home supportive services” workers, as defined. These industry-specific requirements are beyond the scope of this Alert but are mentioned here in case any of the readers may be interested in consulting the statute for further questions.

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